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LABOUR MANAGEMENT RELATIONS

*Bushan Tilak Kaul**

I INTRODUCTION

SURVEYED ARE the reported decisions of the Supreme Court in the area of industrial relation law in the year 2019. As in the previous years, this year as well collective disputes are few in number. There are only two cases which have great bearing on important rights of the workers and they have been identified as collective disputes for the purposes of this survey, though technically these may not be said to be falling within the definition of the term 'industrial dispute' under section 2(k) of the Industrial Disputes Act, 1947 (ID Act).Through a representative petition a registered trade union of workers canvassed before the Supreme Court that it can enforce the claim of outstanding dues of its members under the Insolvency and Bankruptcy Code, 2016 (hereinafter 'Insolvency Code') against their employer company, which legislation, *inter alia*, provides an additional expeditious forum for enforcing the rights of workers there under with all attendant consequences.[1] The court, through a landmark decision, adopted purposive construction of the relevant provisions of the said 'Insolvency Code' and the Trade Unions Act, 1926 and by a well-reasoned judgment expressed it's complete agreement with the submissions of the registered trade union. In other case of collective dispute, the court ordered that the date of regularisation of workers would relate back to the date of their actual appointment in the work charged establishment and not from the date of their regularization, for the purposes of determining their entitlement to the pensionary benefits.[2] The case related to a large number of workers. The court, on scanning through the records of their cases and on lifting the veil, found these workers were victims of unfair labour practice resorted to by the management to deprive them of the benefits, including pensionary benefits, under the labour laws. Both these judgments show the sensitivity of judges towards the human rights of the workers and deserve to be appreciated.

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1 *JK Jute Mill Mazdoor Morcha* v. *Juggilal Kamlapat Jute Mills Company Ltd.,* (2019) 11 SCC 332.

2 *Prem Singh* v. *State of U.P.* (2019) 10 SCC 516.

The court has mainly dealt with 'deemed industrial disputes' under the ID Act, more specifically, cases relating to 'retrenchment' and removal from service. The court has also had an occasion to clarify the scope and nature of the enquiry to be made by the labour court or industrial tribunal in respect of an application of the management under section 33(2) (b) under the ID Act for grant of approval of its action taken to 'dismiss' or 'remove' a workman for a misconduct unconnected with a pending dispute before it in which such workman was a party.[3] Further, the court has also had an occasion to explain once again the scope of section 33C (2) under the ID Act.

The issue of right of the worker to be represented by a legal practitioner of his choice, which at present is not available except with the consent of the parties to the proceedings and with the leave of the labour court or industrial tribunal, has once again come to be agitated before the Supreme Court and the constitutional validity of section 36 (4) of the ID Act is likely to be considered by a Constitution Bench of the court.[4] The issue of applicability of the principle of *res judicata* has also come up for discussion before the court.[5]As usual, there are only two cases reported under the Trade Unions Act, 1926 and none under the Industrial Employment (Standing Orders) Act, 1946.

II INDUSTRIAL DISPUTES ACT, 1947

Disciplinary action

In *Punjab Urban Planning and Development Authority* v. *Karamjit Singh,*[6] the Supreme Court made a distinction between a wrongful appointment and *void ab initio* appointment. This distinction became necessary as the entire case of the respondent was that cancellation of his appointment as a class IV employee in the office of the appellant on regular basis in terms of the scheme framed by the state government without affording him a reasonable opportunity of being heard was illegal. On the other hand, the case of the appellant was that the appointment of the respondent was *void ab initio* and, therefore, he was not entitled to be given any opportunity of being heard since he was not even eligible for being considered for regularisation under the said scheme as he had ceased to be an employee much before the scheme became operational. Further, the respondent had got his name interpolated in the final list of selected candidates in connivance with some employees of the authority which rendered his appointment as *void ab initio*. To appreciate the ratio of this decision in the face of the above rival contentions, it is necessary to refer to the material facts of the case which are as under:

> The respondent was working as a *chowkidar* on daily wages with the appellant authority prior to March, 1997. In January, 2001, the

3 *John D'Souza* v. *Karnataka State Road Transport Corporation* (2019) 18 SCC 47.

4 *Thyssen Krupp Industries India Private Ltd.* v. *Suresh Maruti Chougule* (2019) SCC OnLine 1343 (SC).

5 *Chairman and Managing Director, Fertilizers and Chemicals Travancore Ltd.* v. *General Secretary* (2019) 11 SCC 323.

6 (2019) 16 SCC 782.

> Government of Punjab revised the policy for regularization of work charged/ daily wage and other categories of employees. In terms of the revised policy, all departments under the Government of Punjab were directed to prepare lists of work charged employees/daily wagers and other similar categories of employees, who had completed three years of service as on January, 2001. From such lists, employees would be absorbed/ regularized against regular posts existing in each department, in order of their seniority. On the basis of such policy, the appellant authority issued an order regularizing the services of 102 daily wagers. The respondent's name was included in the office order issued by the appellant authority. Consequently, his services came to be regularized, w.e.f. November, 2001.

Subsequently, some employees of the appellant authority challenged this office order in a writ petition before the high court. It was alleged that serious irregularities had been committed in the regularization of certain employees including that of the respondent. The high court directed the appellant authority to treat the writ petition as a representation on behalf of the petitioners therein and pass a speaking order within four months.

Pursuant to these directions, the appellant authority scrutinized the list of employees who were regularized. The Executive Engineer (Projects) was appointed as the authority to conduct the scrutiny and submit the report. The report revealed that the respondent had not completed the requisite three years before January, 2001.

The appellant authority issued a show cause notice to the respondent, directing him to appear before its chief administrator for a personal hearing on a specified date. On that date, the respondent appeared before the said authority but failed to furnish any evidence, documentary or otherwise or any satisfactory proof of having served the appellant authority for at least three years prior to January, 2001. In view of this, the chief administrator issued an order annulling the regularization of the service of the respondent being *de hors* the revised government policy.

The respondent challenged this order before the High Court of Punjab and Haryana which dismissed his writ petition. However, it gave liberty to the respondent to approach the labour court for the redressal of his grievances. The respondent, accordingly, raised an industrial dispute which became the subject matter of reference to the industrial tribunal. He alleged the violation of sections 25 F, G and 25 H of the ID Act. The appellant authority submitted before the industrial tribunal that the respondent had put in only six months of service, prior to March, 1997and after which, he was never employed even as a daily wager by it. It was further stated that his name was not included in the original list forwarded by the Divisional Engineer, Mohali to the superior authority. His name, however, came to be included in the final list recommended for regularization through his connivance with some officials of the appellant authority. The industrial tribunal held in its award that the entry of the respondent in the service was through wrongful means and, therefore, his services were rightly terminated.

Feeling aggrieved by this, the respondent challenged it before a single judge of the high court in a writ petition which set it aside. The single judge held that "rightly or wrongly", the services of the respondent were regularized under the revised policy of the state government which conferred on him permanent status. It was, therefore, necessary for the appellant authority to have issued a charge sheet against him, conducted an inquiry before terminating or dismissing him from services. The appellant authority, having failed to do so, the order of termination was bad and so was the award of the industrial tribunal. The single judge granted liberty to the appellant authority to take necessary action against the respondent under the statutory regulations and pass the final order after conducting the disciplinary enquiry against the respondent. It further directed that the respondent shall be deemed to be on suspension from the date on which his services were terminated till the date of passing of the final order by the appellant authority. The appellant authority was further directed to calculate and disburse subsistence allowance to the respondent from the date of termination onwards and continue to disburse the same till the conclusion of disciplinary proceedings against him. It filed the intra-court appeal against the judgment of the single judge of the high court.

The division bench of the high court affirmed the order passed by the single judge and held that Punjab Urban Planning and Development Authority Employees (punishment under appeal) Regulations, 1997 contained provisions for initiation of regular departmental inquiry before dismissal or termination of a regular employee. It held that the termination of the services of the respondent by the mere issuance of show cause notice was not only *de hors* the regulations but also contrary to the principles of natural justice.

The appellant authority challenged this judgment before the Supreme Court. It argued that the respondent workman had worked with the appellant authority as daily wager only for six months prior to March, 1997 and was not in service thereafter. Therefore, the question of his eligibility for regularization under the revised policy of the government did not arise as it required an employee to have completed three years of service prior to January 2001 so as to be eligible for regularization. Further, it had conducted a disciplinary enquiry against the officials who had recommended the name of the respondent for regularization. In the said enquiry, it was found that four officials had supplied wrong information with regard to the regularization of the respondent and also in respect of some other daily wagers. Further, fraud and collusion had been established as a result of which the regularization of the respondent was declared as void. Before the Supreme Court, the appellant authority filed a copy of the original list of the recommended candidates, prepared by the Divisional Engineer, Mohali, which did not include the name of the respondent. However, in the final list forwarded to the appellant authority, the name of the respondent was interpolated. Such officials were punished by the appellant authority.

The Supreme Court, after considering the facts and the rival contentions, observed that it is a well settled legal position in *Devendra Kumar* v. *State of Uttaranchal*[7] that an order of regularization obtained by misrepresentation of facts or

7. (2013) 9 SCC 363.

by playing fraud upon the competent authority cannot be sustained in the eyes of law. Further, in *Rajasthan Tourism Development Corporation Ltd.* v. *Intejam Ali Zafri*,[8] it was held that if the initial appointment was itself void then the protection of the provisions of the ID Act was not applicable in the case of termination of the services of such a workman.

The court held that in the present case the respondent was not even a daily wage employee as his services were not continued after March 1997. His engagement on regular basis from November 2001 was *void ab initio*, and he was neither entitled to the protection of article 311 of the Constitution or service regulation as he had ceased to be an employee in March, 1997. The court here made a clear distinction between a wrongful appointment and an appointment which was *void ab initio*.

In the course of discussion of this case, the court has also referred to *ECIL* v. *B. Karunakar*.[9] It seriously erred when it observed that the principles laid down in *ECIL* were applicable only to employees of the government departments. In *ECIL*, a constitution bench of the court had held that providing a copy of the enquiry report to the delinquent employee was a part of the principles of natural justice. It further ruled that if non-supply of it caused prejudice to the delinquent workman, disciplinary action of the management was liable to be set aside. Apart from this, the court also held in specific terms that this principle as laid down in this case applied with equal force to the disciplinary proceedings both in the public and the private employments.

Order under section 17B is independent of the outcome of the pending proceedings

Section 17B was inserted in the Act by the Industrial Disputes (Amendment) Act, 1982. It provides that where in any case, a labour court or industrial tribunal or national labour tribunal by its award directs reinstatement of any workman and the employer prefers to challenge such award in a high court or the Supreme Court, the employer shall be liable to pay such workman, during the pendency of such proceedings in the high court or Supreme Court, full wages last drawn by him if the workman has not been employed in any establishment during that period.

In *Dilip Mani Dubey* v. *Siel Limited*,[10] the Supreme Court held that the proceedings under section 17B are independent proceedings in nature and are not dependent upon the final order passed in the main proceedings. It held that if the high court or the Supreme Court eventually upholds the termination order as being legal against the workman, yet the employer will have no right to recover the amount already paid to the delinquent workman pursuant to the order passed under section 17B of the Act, during the pendency of such proceedings.[11]

8 (2006) 6 SCC 275.

9 (1993) 4 SCC 727.

10 (2019) 4 SCC 534.

11 *Dena Bank* v. *Kirti kumar T. Patel,* (1999) 2 SCC 106; *Dena Bank* v. *Ghanshyam* (2001) 5 SCC 169 and *Rajeshwar Mahto* v. *Birla Corporation Ltd*., (2018) 4 SCC 341.

Retrenchment

Violation of section 25 F: Compensation in lieu of reinstatement as a normal rule in the case of daily wage workers

In *Dharamraj Nivrutti Kasture* v. *Chief Executive Officer*,[12] the appellant was appointed as a peon in Zila Parishad on daily-wage basis and his services were discontinued after nearly four years. He filed a complaint before the labour court under section 28 (1) of the Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. He also alleged violation of section 25F of the ID Act and sought relief of reinstatement and back wages with continuity of service.

The labour court set aside the order of termination and directed reinstatement of the appellant with continuity of service. It, however, refused back wages on the ground that by an interim order, the respondent was earlier directed to pay 75% of the last drawn wages to the appellant for about 12 years without work. The revision application of the management was dismissed by the industrial tribunal.

The management preferred a writ petition in the high court which set aside the order of the labour court as affirmed by the industrial tribunal. The high court held that there could not be any direction for reinstatement on permanent basis when the entry to the service itself was in violation of the rules and there was no public participation at the time his appointment was made. It held that the labour court had not recorded any finding in respect of the allegation of the appellant that he had been kept on purely temporary basis to deprive him of permanency. The high court taking notice of the facts that there was a stay against his reinstatement since 2002, that he was out of employment all these years and he had been paid 75% of his last drawn wages for 12 years, awarded a sum of Rs.50,000 as compensation to the appellant in lieu of reinstatement and in full settlement of all claims. Feeling aggrieved by this order, the workman filed the present special leave petition in the Supreme Court.

The apex court on consideration of the totality of the circumstances of the case and also the fact that the appellant-workman had been out of employment for more than three decades, did not find it appropriate to interfere with the order of the high court declining reinstatement. However, it enhanced the compensation amount from Rs.50,000 as ordered by the high court to Rs.1,50,000/-. Since the management had already paid Rs.50,000/- to the workman, the court ordered the management to pay the remaining amount of Rs,1,00,000/-within a period of eight weeks from the date of the judgment.

In *State of Uttarakhand* v. *Raj Kumar*,[13] an important question regarding termination, reinstatement and back wages of a worker came for the consideration of the Supreme Court. The respondent worked as *beldar* in the state PWD at Haridwar as a daily wager for about one year from June 1986 to May 1987. Thereafter, his services were brought to an end by the state government without following the due

12 (2019) 11 SCC 289.

13 (2019) 14 SCC 353.

procedure prescribed in law. After almost 25 years, the respondent raised an industrial dispute regarding his alleged illegal termination in violation of section 25F of the Act. The labour court awarded a monetary compensation of Rs.30,000/- in full and final settlement of his claim of reinstatement and all consequential benefits arising there from. The respondent filed a writ petition in the high court which modified the award of the labour court and instead directed reinstatement of the respondent in the state service but without back wages.

The state government challenged the correctness of the order and judgment of high court in the Supreme Court. Relying on its earlier decisions in *Bharat Sanchar Nigam Ltd.* v. *Bhurumal*[14] and *District Development Officer* v. *Satish Kantilal Amrelia*,[15] the Supreme Court allowed the appeal in part and modified the order of the high court by granting compensation of Rs 1,00,000/- in favour of the workman in lieu of reinstatement. Referring to the *Bharat Sanchar Nigam Ltd.*,[16] the court held that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal cannot be applied mechanically in all cases. Such a relief may be granted where services of a regular/ permanent workman are terminated illegally and/ or by *mala fide* and / or by way of victimization or as an unfair labour practice, *etc*. However, when it comes to the case of termination of a daily wage worker and where the termination is found to be illegal because of a procedural defect, namely, in violation of section 25F of the Act, it is the consistent view of the court that in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. The court observed that there was a rationale for shifting in this direction which was obvious.

In *Deputy Executive Engineer* v. *Kuberbhai Kanjbhai*,[17] the issue related to the termination of service of a workman in violation of section 25F of the Act.

He was engaged on daily wage basis for a number of years. Here, the workman raised an industrial dispute relating to his termination nearly after 15 years. It is important to state here that under the Act, there is no time limit within which a workman is expected to raise an industrial dispute but the judiciary has, while moulding the relief, taken this as an important factor for awarding compensation in lieu of reinstatement. In the present case, the labour court on reference had awarded reinstatement without back wages which award was upheld by the high court when challenged by the state in a writ petition.

The Supreme Court, relying upon the judgments in *Bharat Sanchar Nigam Ltd.,*[18] and *Satish Kantilal Amrelia*,[19] held that in the case of daily waged workers, reinstatement is not the appropriate relief to be granted by the labour court. It

14 (2014) 7 SCC 177.
15 (2018) 12 SCC 298.
16 *Supra* note 14.
17 (2019) 4 SCC 307.
18 *Supra* note 14.
19 *Supra* note 15.

accordingly granted compensation of Rs.1,00,000/- in lieu of reinstatement in favour of the workman. One of the reasons given by the Supreme Court for denying reinstatement was that a workman working on daily wage basis even if reinstated, has no right to seek regularization.[20] Therefore, no useful purpose would be served in reinstating such a workman. He can be given monetary compensation by the court itself inasmuch as, if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and one month's wage in lieu of notice. In such a situation giving relief of reinstatement, that too after a long gap, would not serve any purpose.

Lifting of veil principle: its application in matters of employer-employee relations in the matter of retrenchment, etc

In *Globe Ground India Employees Union* v. *Lufthansa German Airlines*,[21] respondent no. 2, *i.e.,* Globe Ground India Pvt. Ltd., a subsidiary of respondent no. 1, *i.e.*, Lufthansa German Airlines, was providing ground handling and other ancillary services to the first respondent at Indira Gandhi International Airport, New Delhi and other important airports in India. Respondent no. 1, a German airline, operates its own aircrafts for passenger and air cargo around the world. It had a subsidiary, named Globe Ground Deutschland for ground handling work. Respondent no. 2 was a joint venture formed by Globe Ground Deutschland and Bird Group with 51 and 49 % share, respectively. In December 2008, the Bird Group floated another company, Bird World Flight Service Ltd., to provide ground handling and ancillary services to international airlines. This new company had started providing ground handling service from January 2009, utilizing the same equipment and vehicles which belonged to respondent no. 2. The workmen of respondent no. 2 were deployed by the new company to operate the said equipment and provide ground handling and ancillary services. On December 9, 2009, respondent no. 2 stopped operating the handling services at the international airport at Delhi and these were transferred to Bird World Flight Ltd., as a result of which it closed down operations and terminated the services of 106 workmen.

The appellant union alleged that the termination notices were in violation of sections 25 F, G, O, N and other provisions of the ID Act. Further allegation of the appellant union was that respondent no. 1 has not closed or stopped their business in India and it had continued retaining most of its employees except the trade union activists. The union sought reinstatement of all these workers in the service of respondent no.2 by extending the benefit of continuity of service and full wages to them. The union raised the industrial dispute regarding the termination of the services of these employees.

The Central Government referred the dispute of non-employment of the 106 workers by respondent no. 2 to the industrial-cum-labour court for adjudication. Since respondent no. 1 was not a party before the labour tribunal, the union sought its impleadment, as according to it, the presence and appearance of respondent no.1 was required for settling all the questions involved in the controversy.

20 *State of Karnataka* v. *Umadevi* (3) (2006) 4 SCC 1.

21 (2019) 15 SCC 273.

The question that came for consideration of the Supreme Court was whether respondent no. 1, Lufthansa German Airlines, was to be impleaded as a party respondent or not in adjudication proceedings between Management of Globe Ground India Pvt. Ltd., New Delhi, a subsidiary of Lufthansa German Airlines and Globe Ground India Employees Union representing 106 workmen whose services were terminated on closure of its establishment. The question for adjudication was the legality and justifiability of such an action on the part of the management of Globe Ground India Pvt. Ltd.

The Supreme Court, on perusal of the reference, observed that it was clear that the reference which was required to be answered by the industrial tribunal was whether the action of the management of Globe Ground India Pvt Ltd., in closing down its establishment and thereupon retrenching the services of 106 workmen was justified and legal.

The legal position on the scope of reference is stated in section 10(4) of the Act which makes it clear that whenever the appropriate government refers the points of disputes for adjudication, the adjudicatory authority to whom the reference is made is required to confine its adjudication to those points only and matters incidental thereto.

On perusal of section 10 (4) of the Act, the court observed that whenever an application is filed in the adjudication proceedings under the Act for impleadment of a party who is not a party to the proceedings, what is required to be considered is whether the party who is sought to be impleaded is a necessary or proper party to decide the *lis*. The two expressions, namely, necessary or proper, have separate and different connotations. The court brought out the distinction between the two thus:[22]

> …It is fairly well settled that necessary party, is one without whom order cannot be made effectively. Similarly, a proper party is one in whose absence an effective order can be made but whose presence is necessary for complete and final decision on the question involved in the proceedings.

The court observed that it was clear that the Lufthansa German Airlines, respondent no.1, had a subsidiary, namely, Globe Ground Deutschland which was holding 51% shares along with 49% shares held by the Bird group in respondent no. 2, *i.e.,* Globe Ground India Pvt. Ltd. Further, it was clear that the Bird Group floated another company, Bird Worldwide, to provide ground handling and ancillary services, *w.e.f.* the month of January 2009.

It was the allegation of the appellant union that even after the formation of the new company, it was utilizing the same equipment and vehicles belonging to respondent no. 2. Further, it was alleged by the union that after the formation of the new company, it had retained most of the employees except the trade union activists. The petitioner union sought to rely upon the principle of lifting the corporate veil in the present case in support of its contention. It also made it clear that it does not seek employment of alleged retrenched workmen with the respondent no.1.

22 *Id.* at 279.

On the other hand, the respondents, relying upon the judgment of the court in *Balwant Rai Saluja* v. *Air India Ltd.*,[23] contended that the corporate veil can be pierced and the parent company can be held liable for the conduct of its subsidiary, only if it is shown that the corporate form is misused to accomplish certain wrong purpose which was not the case here. As such, the principle of piercing the corporate veil was not applicable in the present case. The respondents also relied upon the judgment in *Kasturi* v. *Iyyamperumal*,[24] where this court had again considered the following tests to be applied while considering the application under Order 1 Rule 10 of the Civil Procedure Code, 1908:

(i) There must be a right to some relief against such party in respect of the controversies involved in the proceedings;

(ii) No effective decree can be passed in its absence.

After considering the principles emanating from the aforesaid judgments referred to by the parties, the court was of the view that even in a subsidiary company which is an independent corporate entity, if any other company is holding shares, that by itself is no ground to order impleadment of the parent company *per se*. In the case at hand, the court held that it was clear that respondent no.2 itself was a company in which the subsidiary of respondent no.1, namely, Globe Ground Deutschland GmbH, was holding 51% shares and 49% shares were held by the Bird Group. As per the case of the appellant, the Bird Group had floated another company and started handling service from January, 2009 by utilizing the same equipment and vehicles belonging to respondent no. 2. Giving due regard to section 10(4) of the Act, the court was of the view that respondent no.1 was neither a necessary nor a proper party. The court accordingly upheld the order of the high court and dismissed the appeal.

Section 25 H: nature and scope

In *Management of the Barara Cooperative Marketing cum Processing Society Ltd.* v. *Workman Pratap Singh,*[25] the respondent was working with the appellant as a peon for nearly 12 years before his services were terminated by the appellant. He sought a reference of his dispute by the state government to the labour court to decide on the legality and correctness of his termination order. The labour on reference held his termination as bad in law and awarded a lump sum compensation of Rs. 12,500 in lieu of reinstatement in service.

The appellant as well as the respondent being aggrieved by the order of the labour court impugned the same in the high court which dismissed both the writ petitions. The respondent then accepted the compensation awarded by the labour court.

In the year 1993, the appellant regularized services of two of its peons *w.e.f.* January 1, 1992. The respondent made a representation stating that in view of these developments of regularization of his juniors in seniority list of peons and *chowkidars* (class IV employees) he ought to have been granted re- employment in its services by

23 (2014) 9 SCC 407.
24 (2005) 6 SCC 733.
25 (2019) 2 SCC 743.

the appellant in terms of section 25 H of the Act in preference to his juniors. This representation did not find favour with the appellant. As a result of which, he sought reference of the dispute to labour court by the state government. The point of reference was whether the respondent was entitled to claim re- employment in the services of the appellant in terms of the section 25 H of the Act.

The labour court held that the respondent was not entitled to claim the benefit of re-employment in terms of section 25 H of the Act. The respondent challenged the award before the single judge of the high court in a writ petition, which set aside the award on the ground that he ought to have been given preference over his juniors in the seniority list of class IV employees when the question of regularization arose in view of creation of new posts.[26] The single judge directed his re-employment on the post of peon in the services of the appellant, stating that it made no difference whether the post was of *chowkidar* or peon as both carried the same or similar functions. The appellant challenged this order before a division bench of the high court. It too dismissed the appeal and upheld the order of the single judge, agreeing with his reasoning in their entirety.[27] The appellant challenged these concurrent findings before the Supreme Court.

The apex court observed that section 25 H of the Act applies to the cases where the employer has proposed to take into his employment any person to fill up the new vacancies. It is at that time that the employer is duty bound to give an opportunity to the "retrenched workman" and offer him re-employment. If such a retrenched workman offers himself for re-employment, he shall be given preference over other persons, who have applied for employment against the vacancy advertised.

The court further observed that the primary object behind enacting section 25 H was to give preference to retrenched workman over other persons in respect of the new vacancies which the employer proposed to fill up.

Rule 79 of the Industrial Disputes (Central) Rules, 1957 contains procedure for implementing the provisions of section 25 H. It provides for issuance of notice to the retrenched workman in the prescribed form. For attracting the provisions of section 25H, it is incumbent on the workman to prove that, *firstly,* he was the retrenched workman and *secondly,* his employer has decided to fill up the vacancies in his establishment and, therefore, he is entitled to claim preference over those persons, who have applied against such vacancies.

The court observed that the respondent was not entitled to invoke the provisions of section 25H to seek re-employment in the services of the appellant, his ex-employer, on the ground that another employee who was already in employment and whose services were only regularised by the appellant on the basis of his service record interms of the rules. In its considered view, a distinction had to be drawn between the

26 *Pratap Singh* v. *Labour Court* 2009 SCC OnLine P and H 11754.

27 *Management of the Barara Cooperative Marketing cum Processing Society Ltd.* v. *Workman Pratap Singh* 2014 SCC OnLine P and H 25098.

expression 're-employment' and 'regularization of the service.' The court brought out the distinction thus:[28]

> The expression 'employment' signifies a fresh employment to fill the vacancies whereas the expression 'regularization of the service' signifies that the employee, who is already in service, his services are regularized as per service regulations.

The Supreme Court further clarified the concept of 'regularization' by stating that by such an act the employer does not offer any fresh employment to any person to fill any vacancy in his establishment but he simply regularizes the services of an employee who is already in service. Such act does not amount to filling of new vacancy.

In view of the above, the court held that the labour court was, therefore, justified in answering the reference in favour of the appellant and against the respondent by rightly holding that section 25 H of the Act had no application to the facts of this case whereas the high court (single judge and the division bench) was not right in allowing the prayer of the respondent by directing the appellant to give him re-employment on the post of peon.

Regularization: issues and reliefs

In *Prem Singh*,[29] the matter was referred by a division bench of the Supreme Court to a larger bench in a batch of special leave petitions involving common question of law, namely, legality or otherwise of the demand of the workers that their regularisation of service has to relate back to their date of appointment as work-charge establishment workers and not from the date of their regularisation.

The court took facts and circumstances of one of the petitions for explaining and deciding the common legal issues involved in these petitions. The facts of the said petition were as under:

> The appellant was appointed as a welder in the year 1965 in a work-charged establishment. He was transferred from one place to another and thereafter his services were regularized in 2002 and was posted as pump operator in the regular establishment. He superannuated in 2007. Thereafter, he filed a writ petition in the high court for a direction to the respondents to count the period spent in the work-charged establishment as qualifying service under the Rules of 1965 for grant of pensionary benefits. The high court directed him to submit a representation. Accordingly, it was filed which met the fate of rejection by the state. Yet another representation was filed which also met with the same fate. His writ petition and the intra-court appeal were dismissed by the high court. Hence the present special leave petition in the Supreme Court.

28 *Supra* note 25 at 746.

29 *Supra* note 2.

> Before the court, the appellant placed reliance upon the decision of the court in *Habib Khan* v. *State of Uttarakhand*[30] in which a division bench of the court considering Regulation 370 of the Civil Service Regulations which had been approved in the State of Uttarakhand, after its bifurcation from the State of Uttar Pradesh, had held that Regulation 370 was *pari materia* provision to the one as contained in Rule 3.17 (ii) of the Punjab Civil Services Rules which had been struck down by a full bench decision of the High Court of Punjab and Haryana in *Kesar Chand* v. *State of Punjab.*[31]The challenge to the said decision of the high court was rejected by the Supreme Court. The court further relied on *Punjab State Electricity Board* v. *Narata Singh* [32] in which it has been observed that the High Court of Punjab and Haryana was perfectly justified in striking down Rule 3.17(ii) of the Punjab Civil Service Rules resulting in obliteration of the distinction made in the said rule between temporary and officiating service and work-charged service. The Supreme Court held that the period of work-charged service should be counted for computation of qualifying service for grant of pension.

It is pertinent to submit that the Supreme Court has followed the aforesaid decision in *Habib Khan*[33]and in *Ram Deo Tiwari* v. *State of Uttar Pradesh*,[34] and given relief to the employees. The court has also dismissed the review application filed in the case of *Habib Khan*.[35]

The court, after a threadbare examination of the whole case, had no difficulty in holding that the appointment of the work-charged employees in question had been made on a monthly salary basis and they were required to cross the efficiency bar also. The court wondered how their services were qualitatively different from the regular employees? No material indicating to the contrary had been pointed out except making bald statements. The appointment was not made for a particular project which is the basic concept of the work charged employees. The court observed that it was a clear case of unfair labour practice to deprive the workers of their legitimate rights when it observed thus:[36]

> Rather, the very concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The work-charged employees had been subjected to transfer from one place to another like regular employees as apparent from documents placed on record….. They were

30 (2019) 10 SCC 542.
31 AIR 1988 P and H 265.
32 (2010) 4 SCC 317.
33 *Supra* note 30.
34 (2019) 10 SCC 546.
35 *Supra* note 30.
36 *Id.* at 540.

> allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees. They served for three to four decades and later on services have been regularized time to time by different orders. However, the services of some of the appellants in few petitions/appeals have not been regularized even though they had served for several decades and ultimately reached the age of superannuation.
>
> In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularised. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment.

The court referred to the note appended to Rule 3(8) of the 1961 Rules which provided for counting of service spent on work charged, contingencies or non-pensionable service, in case, a person has rendered such service in a given period between two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service could be counted as qualifying service for pension in the aforesaid exigencies.

The court stated that the question that arose was whether the imposition of the rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. The court observed that once appointment had been made on vacant posts, it was immaterial whether the employee had served earlier on temporary basis or not. It observed that considering the nature of appointment, which though was not a regular appointment but was made on monthly salary basis, thereafter in the pay scale of work-charged establishment and the employees were also permitted to cross the efficiency bar, it would be highly discriminatory and irrational because of the rider contained in note to Rule 3(8) of 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. It saw no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. It was an impermissible classification made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees the benefit of the qualifying service. Service of work-charged period remains the same for all the employees; once

it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification could not be done on irrational basis and when the respondents were themselves counting the period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity was discriminatory and irrational and created an impermissible classification.

The court ruled that it would be unjust, illegal and impermissible to make the aforesaid classification. To make the Rule 3(8) valid and non-discriminatory, the court read down its provisions and held that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non-pensionable establishment employees shall also be counted towards the qualifying service even if such service was not preceded by temporary or regular appointment in a pensionable establishment.

In view of the note appended to Rule 3(8), which the court read down, the provision contained in Regulation 370 of the Civil Services Regulations had to be struck down as also the instructions contained in paragraph 669 of the Financial Handbook.

The court noticed that there were some employees who had not been regularized in spite of having rendered services for 30-40 or more years whereas they have been superannuated. As they had worked in the work-charged establishment, not against any particular project, their services also ought to have been regularized under the government instructions and even as per the decision of this court in *Umadevi*.[37] The court in *Umadevi* has laid down that in case services have been rendered for more than 10 years without the cover of the court's order, as a onetime measure, the services be regularized of such employees. The court ruled that in the facts of the case, those employees who have worked for 10 years or more should have been regularized. It would not be proper to relegate them for consideration of regularisation as others have been regularised; the court directed that their services also be treated as a regular one. However, it was made clear that they would not be entitled to claim any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. They would, however, be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day, they entered the work-charged establishment were to be counted as qualifying service for purpose of pension.

In view of reading down Rule 3(8) of the Uttar Pradesh Retirement Benefits Rules, 1961, the court held that the services rendered in the work-charged establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The arrears of pension were to be confined to three years only before the date of the order. The court directed that the admissible benefits be paid accordingly within three months. Resultantly, the appeals filed by the employees were allowed and the ones filed by the state were dismissed.

37 *Supra* note 20.

Section 33(2) (b): scope and nature

In *John D'Souza* v. *Karnataka State Road Transport Corporation*,[38] the Supreme Court dealt with the issue of scope and ambit of section 33(2)(b) of the Act. The relevant material facts and circumstances warranting examination of the true scope and ambit of the said provision were as under:

> The appellant, a protected workman, was proceeded against by way of a domestic enquiry for alleged charge of unauthorizedly abstaining from duty on different dates. The enquiry officer held him guilty of the charge on the basis of the evidence led by the corporation. The workman did not lead any evidence in his defence before the enquiry officer. Acting on the findings of the enquiry officer, the respondent corporation decided to dismiss him from the service. There was a proceeding pending before the labour court in which the appellant was a party, therefore, the management moved an application before the labour court under section 33(2)(b) seeking its permission to dismiss him. The labour court formulated the following issues for its consideration:
>
> i. Whether domestic enquiry held against the workman was fair and proper?
>
> ii. Whether the enquiry officer was justified in holding that the charges stood proved?
>
> iii. Whether the disciplinary authority was justified in dismissing the workman?
>
> iv. To what award or order were the parties entitled.

The labour court decided issue no. i in favour of the management holding that the enquiry was fair and proper. The appellant challenged this finding before the high court in a writ petition. During its pendency the labour court held all other issues against the management and in favour of the workman. As a result, the writ petition of the worker before the high court became infructuous. Resultantly, the labour court refused to grant permission to the management to dismiss the appellant.

The management challenged this decision before the high court where the single judge dismissed it. The management preferred an intra-court appeal before the division bench of the high court which allowed the appeal of the management holding that the labour court had to assess whether a case against the workman was made out on the basis of the evidence on record in view of the limited jurisdiction of the labour court under section 33(2)(b). It further held that the labour court could not have permitted the parties to adduce evidence as the scope of enquiry under the said provision was very limited. It set aside the order of the labour court on the ground that it had exceeded its jurisdiction and remanded the matter to the labour court for reconsideration of the matter. Thereafter, the labour court on reconsideration of the matter reiterated its earlier view refusing permission on consideration of the plethora of documents produced by the workman. It held that it could be easily inferred that the appellant had applied for

38 *Supra* note 3.

leave and when he came to resume his duty he was not allowed to do so and instead domestic enquiry was initiated against him.

The aggrieved management assailed this order before a single judge of the high court who declined to interfere. The management once again questioned the order of the single judge in a writ appeal which was allowed by the division bench of the high court, essentially on the premise that the jurisdiction under section 33(2)(b) could not be stretched and expanded to permit the parties to lead their evidence which was never produced in the domestic enquiry. Feeling aggrieved, the appellant workman came by way of a special leave petition before the Supreme Court.

The apex court observed that the scheme underlying the ID Act is to bring resolution of industrial disputes through conciliation and adjudication in a peaceful manner. The legislature has provided a self-contained mechanism through section 10 read with sections 11(3) and 11A of the Act, for adjudication of an 'industrial dispute' stemming out of an order of discharge or dismissal of a workman. Further, the Act provides for prevention of adverse alteration in the conditions of service of a workman when 'conciliation' or 'adjudication' proceedings in respect of an 'industrial dispute' to which such workman is also concerned, are pending before such authorities. The court explained the scheme under section 33 and the checks and balances envisaged therein thus:[39]

> The Legislature, through Section 33(1)(a) and (b) has purposefully prevented the discharge, dismissal or any other punitive action against the workman concerned during pendency of proceedings before the Arbitrator, Labour Court or a Tribunal, even on the basis of proven misconduct, save with the express permission or approval of the Authority before which the proceedings is pending. Sub-section (2) of Section 33 draws its colour from sub-Section (1) and has to be read in conjunction thereto. Sub-section (2), in fact, dilutes the rigours of sub-section (1) to the extent that it enables an employer to discharge, dismiss or otherwise punish a workman for a proved misconduct not connected with the pending dispute; in accordance with Standing Orders applicable to the workman or in absence thereof, as per the terms of contract; provided that such workman has been paid one month wages while passing such order and before moving application before the Authority concerned 'for approval of the action'. In other words, the Authority concerned (Board, Labour Court or Tribunal, etc.) has to satisfy itself while considering the employer's application that the 'misconduct' on the basis of which punitive action has been taken is not the matter sub-judice before it and that the action has been taken in accordance with the standing orders in force or as per terms of the contract. The laudable object behind such preventive measures is to ensure that when some proceedings emanating from the subjects enlisted in Second or Third Schedule of the Act are pending adjudication, the employer should not

39 *Id.* at 59.

> act with vengeance in a manner which may trigger the situation and lead to further industrial unrest.

Deliberating on section 33(2)(b) of the Act, the court observed:[40]

> Section 33(2)(b), thus, in the very nature of things contemplates an enquiry by way of summary proceedings as to whether a proper domestic enquiry has been held to prove the misconduct so attributed to the workmen and whether he has been afforded reasonable opportunity to defend himself in consonance with the principles of natural justice. As a natural corollary thereto, the Labour Court or the Forum concerned will lift the veil to find out that there is no hidden motive to punish the workman or an abortive attempt to punish him for a non-existent misconduct.

The court further observed:[41]

> The Labour Court/Tribunal, nevertheless, while holding enquiry under Section 33(2)(b), would remember that such like summary proceedings are not akin and at par with its jurisdiction to adjudicate an 'industrial dispute' under Section 10(1)(c) and (d) of the Act, nor the former provision clothe it with the power to peep into the quantum of punishment for which it has to revert back to Section 11A of the Act. Where the Labour Court/Tribunal, thus, do not find the domestic enquiry defective and the principles of fair and just play have been adhered to, they will accord the necessary approval to the action taken by the employer, albeit without prejudice to the right of the workman to raise an 'industrial dispute' referable for adjudication under Section 10(1)(c) or (d), as the case may be. It needs pertinent mention that an order of approval granted under Section 33(2)(b) has no binding effect in the proceedings under Section 10(1)(c) and (d) which shall be decided independently while weighing the material adduced by the parties before the Labour Court/Tribunal.

The court after reviewing a catena[42] of decisions explained that the scope of enquiry by the labour court/ industrial tribunal under section 33(2)(b) has to be divided in the following two phases:[43]

> Firstly, the Labour Court/Tribunal will consider as to whether or not a prima facie case for discharge or dismissal is made out on the basis of the domestic enquiry if such enquiry does not suffer from any defect, namely, it has not been held in violation of principles of natural justice and the conclusion arrived at by the employer is bona fide or that there

40 *Id.* at 60.

41 *Ibid*.

42 *Lalla Ram* v. *DCM Chemical Works Ltd.*, (1978) 3 SCC 1; *Mysore Steel Works (P) Ltd.* v. *Jitendra Chandra Kar*, (1971) 1 LLJ 543 (SC) and *Punjab National Bank Ltd.* v *Workmen*, (1960) 1 SCR 806: AIR 1960 SC 160.

43 *Supra* note 3 at 64.

> was no unfair labour practice or victimisation of the workman. This entire exercise has to be undertaken by the Labour Court/Tribunal on examination of the record of enquiry and nothing more. In the event where no defect is detected, the approval must follow. The second stage comes when the Labour Court/Tribunal finds that the domestic enquiry suffers from one or the other legal ailment. In that case, the Labour Court/Tribunal shall permit the parties to adduce their respective evidence and on appraisal thereof the Labour Court/Tribunal shall conclude its enquiry whether the discharge or any other punishment including dismissal was justified.

That is the precise *ratio decidendi* of the decisions of this court in (i) *Punjab National Bank*, (ii) *Mysore Steel Works Pvt. Ltd.* and (iii) *Lalla Ram* cases (*supra*).

The court held that it is a settled legal position that the labour court or the tribunal shall first examine the material led in the domestic enquiry in support or otherwise in respect of the charge/s as a preliminary issue and if it finds that there is either violation of the principles of natural justice or proving of the misconduct is not a plausible conclusion, the parties may, on request, be allowed to adduce evidence for the first time in support of their stand with right of cross-examination to the other party. In the event of producing evidence before the labour court or tribunal it has to be satisfied that the misconduct is established on preponderance of the evidence.

The court observed that in the case at hand all the three forums, labour court, single judge and the division bench of the high court went partly wrong and their respective orders suffered from one or the other infirmity. While the labour court and the single judge of the high court had presumed that no enquiry could be held under section 33(2)(b) without asking the parties to lead their evidence, the division bench of the high court had proceeded on the premise that in a *prima facie* enquiry under section 33(2)(b) no evidence can be adduced or considered by the labour court or industrial tribunal except what is on record of the domestic enquiry. Both these views were contrary to the settled legal position on the subject. The court brought out the distinction in scope of the enquiry under section 33(2)(b) and the adjudicatory powers of the labour court or Industrial tribunal under section 10 read with section 11A thus:[44]

> The Labour Court or Tribunal, therefore, while holding enquiry under Section 33(2)(b) cannot invoke the adjudicatory powers vested in them under Section 10(i)(c) and (d) of the Act nor can they in the process of formation of their prima facie view under Section 33(2)(b), dwell upon the proportionality of punishment, as erroneously done in the instant case, for such a power can be exercised by the Labour Court or Tribunal only under Section 11 - A of the Act.

It is submitted that there cannot be any quarrel on the basic distinction brought out by the court on the scope of powers when the labour court is dealing with an application under section 33(2)(b) and the powers it exercises under section 10 (1)

44 *Id.* at 67.

read with section 11A of the Act. In the former case, the scope is very limited whereas in the latter case, the scope of enquiry is wide. But what the court has not stated is that the legal position is also well settled that when the labour court or industrial tribunal finds as a preliminary issue that the enquiry held under section 33(2)(b) is defective either because there is violation of the principles of natural justice or it is a case of no evidence or where no prima facie case under section 33(2)(b) is made out or it suffers from any inherent defect, the adjudicating authority can, at the request of the management, at the earliest opportunity, allow it to lead evidence to prove the charge against the workman with right to him to cross examine and lead evidence in defence in accordance with principles of natural justice. In such an eventuality, the satisfaction of the employer in respect of proving of the misconduct is replaced by the satisfaction of the labour court or industrial tribunal. But it cannot interfere with the punishment while considering the application under section 33(2)(b) which issue can be raised subsequently in a reference under section 10 read with section 11A only. This was the law laid down by the Supreme Court in *Indian Iron and Steel Company Ltd.* v. *Their Workmen*[45] way back in 1958 and has been consistently followed even thereafter.

Section 11A brought about two material changes in the earlier legal position with respect to the cases of reference under section 10 in the matter of disciplinary actions by way of dismissal and discharge. In respect to the factum of proving of the misconduct, the satisfaction of management has been replaced by the satisfaction of the labour court or industrial tribunal which, unlike earlier, can now act as the appellate authority and can also reappreciate the evidence. Further, the question of deciding the quantum of punishment to be awarded to the delinquent workman which was earlier in the exclusive realm of managerial prerogative has suffered serious inroads. The labour court or the industrial tribunal can in an appropriate case go into the issue of proportionality of punishment and if warranted, can reduce it, if it considers it to be excessive, even if there has been adherence to the principles of natural justice and the evidence of misconduct has been proved to its satisfaction.

Coming back to the case at hand, the Supreme Court remanded it to the labour court to decide the matter within the limit and scope of section 33(2)(b) and not adjudicate it as an 'industrial dispute' under section 10 read with section 11A of the Act. However, the court made it clear that if it came to the conclusion that the domestic enquiry suffered from one of the incurable defects, namely, that there was violation of the principles of natural justice or no *prima facie* case was made out, it could look into evidence adduced by the parties for the purposes of formation of its *prima facie* opinion.

It is submitted that if the labour court is to look into the evidence adduced by the parties before it, then the whole evidence can be reappreciated by it to its satisfaction as per the well settled legal position referred to earlier. Therefore, the question of considering whether a *prima facie* case has been made out or not does not arise. It is further submitted that the finding on misconduct in such a situation should become conclusive even if subsequently a reference is made challenging the said action of

45 AIR 1958 SC 130.

dismissal or discharge. The only question that can survive for consideration in the reference will be whether punishment by way of dismissal was proportionate to the misconduct in the light of power conferred on the labour court under section 11A and if found disproportionate to reduce the same.

The Supreme Court in the instant case also referred to another aspect of the matter. The appellant had superannuated in 2010 and, therefore, the issue of reinstatement was out of question even if he would succeed before the labour court. In these circumstances, the court tried to explore the possibility if mediation between the parties.

The court noted that there were constant allegations of indiscipline against the workman but on no occasion was any allegation of embezzlement or financial irregularity alleged against him. It further noted that when the matter was before the high court there were attempts to get the matter settled through mediation and the parties were required to submit settlement proposals. The appellant had submitted his proposal in which he had demanded 75% of the back wages whereas the management had agreed to pay 50%. The court directed the parties to appear before the mediation centre attached to the High Court of Karnataka and try to settle the difference relating to 25% demanded by the appellant in excess of the offer made to him by the management, to bring the dispute to an end. It stayed the proceedings before the labour court till then. The court directed the mediation centre to send the report to it if the mediation succeeds so that the court could pass appropriate directions in the matter. If the parties failed to arrive at any settlement within the time prescribed, the labour court was required to proceed with the matter and decide the application in terms of the directions of the court.

Section 33 (C) (2): recovery of money due from employer

In *Rai Bhadur Narian Singh Sugar Mills Ltd.* v. *Mangey Ram,*[46] the appellant-sugar mill assailed before the Supreme Court the order of the labour court passed under section 33C(2) of the Act. To appreciate the issues involved it will be pertinent to refer to the genesis of the said dispute which is given hereunder:

> The labour court at the first instance in the proceedings had passed an award and ordered that the termination order passed against the respondent by the appellant was not proper and legal. Accordingly, it ordered reinstatement of the respondent into the service during the up-coming crushing season. As far as payment of back-wages was concerned, it was quantified at Rs. 5,000/-. With regard to the intervening wages during which the writ petition was pending, it was ordered that the respondent herein shall make a representation to the appellant in that regard. The said direction of the labour court attained finality.
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> The respondent-workman instituted a petition under section 33C (2) of the ID Act seeking payment of wages subsequent to the award, since

46 (2019) 9 SCC 365.

the management had failed to reinstate him. The labour court allowed the said application and directed the appellant herein, to pay the wages from the date of award up to the date on which he joined the service.

The contention on behalf of the respondent was that the said amount as ordered by the labour court was payable. The Supreme Court noticed that the appellant herein had approached the High Court of Uttaranchal at Nainital assailing the said award. In the said proceedings, the high court having taken note of the order of the labour court had confirmed the award insofar as the issue of reinstatement was concerned.

In view of that development, the only question for consideration of the Supreme Court was with regard to the validity or otherwise of the order passed by the labour court under section 33C (2) of the ID Act quantifying and directing payment of amount subsequent to the date of the award. In this regard, the court took note of the fact that the matter was pending before the high court subsequent to the award. The high court, while ultimately disposing of the writ petition, had directed that the payment of the wages for the period when the writ petition was pending was a matter to be considered by the employer.

The Supreme Court further took note of the fact that subsequent to the award, the appellant reinstated the respondent by an order dated July 26, 2005 and in terms of the high court order the respondent had made a representation before the appellant claiming wages for the intervening period. By order dated July 26, 2005 the appellant rejected the claim of the respondent for the wages for the intervening period on the principle of 'no work, no pay'.

The court also took note of the fact that the high court had left the issue of payment of wages from 1995 to 2005 to the decision of the employer and was of the view that in these circumstances the payment of wages as ordered by the labour court in the proceedings under section 33C (2) of the Act would not be justified. Relying of the court in *Municipal Corporation of Delhi* v. *Ganesh Razak*,[47] the upon the observations court held that the order of the labour court under section 33 C (2) was, therefore, unsustainable.

The court opined that sufficient time had elapsed in between and to remit the matter to the employer to reconsider the issue of wages during the intervening period served no purpose. It took note of the fact that pursuant to the order passed by the labour court an amount of Rs.10,00,000/- was deposited by the appellant as an interim measure pending consideration on these aspects and the respondent had already withdrawn a sum of Rs.6,00,000/- (Rupees 6 lakhs) out of the same.

47 (1995) 1 SCC 235.

> Therefore, in the interest of justice, it directed that the said amount of Rs.6,00,000/- (Rupees 6 lakhs) withdrawn by the respondent herein would stand in compliance of all wage claims that were payable to the respondent subsequent to the passing of the award by the labour court till actual reinstatement. The remaining amount of Rs.4,00,000/- (rupees 4 lakhs) which was available in deposit was directed to be withdrawn by the appellant herein. Since the deposit before the labour court, was credited in a fixed deposit to enure interest, the entire accrued interest on the deposit was directed to be paid to the respondent and only the amount of Rs.4,00,000/- (Rupees four lakhs) was to be returned to the appellant herein. The court, accordingly, allowed the appeal on the above terms.
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> The court was informed that the appellant had, in the meantime, terminated the services of the workman which was subject matter of an industrial dispute. The court made it clear that the same would be considered and decided separately. The court left all the contentions open to be raised at the appropriate stage and the decision in the case at hand would not be an impediment for consideration of the rights of the parties in the pending industrial dispute.

Constitutional validity of section 36(4)

Section 36(4) of the Act provides that a party to an industrial dispute or a proceeding under the Act before the labour court, tribunal or national labour tribunal, may be represented by a legal practitioner with the consent of the parties to the proceedings and with the leave of the labour court, tribunal or national labour tribunal, as the case may be. The scope of the said provision was examined by the apex court earlier in *Paradip Port Trust* v. *Their Workmen*.[48] In that case, it was argued that an advocate is entitled to practice in all courts including the tribunal as of right. The said submission was dealt with by the court by holding that section 30 of the Advocates Act, 1961 had not come into force, in view of which no right could be claimed by advocates to appear before the labour courts. It was also observed by the court that the ID Act, which is a special piece of legislation, intended to achieve the object of labour welfare and being a special legislation, it would prevail over the Advocates Act, which is a general piece of legislation with regard to the subject matter of appearance of lawyers before all courts, tribunal and other authorities.

In *Thyssen Krupp Industries India Private Ltd.* v. *Suresh Maruti Chougule,*[49] once again the constitutional validity of section 36(4) of the ID Act came to be challenged in special leave petitions and a writ petition before the Supreme Court. The court observed here that it entertained a doubt regarding the correctness of the findings recorded by the court earlier in *Pradip Port Trust* that the Advocates Act is a general piece of legislation. The court was addressed by the parties as to whether this matter should be referred to a larger bench to consider whether the Advocates Act can

48 (1977) 2 SCC 339.

49 2019 SCC OnLine 1343(SC).

be treated as a general piece of legislation in respect of appearance of lawyers before all courts, tribunals and other authorities. The court referred to its earlier judgment in *LIC* v. *D.J. Bahadur*[50] where it had held that the ID Act is a special legislation *vis-a-vis* the Life Insurance Corporation Act, 1956. Krishna Iyer J., speaking for the court, was of the view that in determining whether legislation is a general or a special legislation, focus should be on the principal subject matter and the particular perspective. The court also stated that there could be another perspective to the problem that can arise in a conflict between the provisions of two different statutes which was dealt with in *Ashoka Marketing* v. *Punjab National Bank*.[51]

In *Ashoka Marketing*, the question before the court was whether the Punjab Premises (Eviction of Unauthorized Occupants) Act, was a special legislation *vis-a-vis* the Delhi Rental Control Act, 1958. After examining the object of both the legislations carefully, the court was of the opinion that both the Rent Control Act and the Public Premises Act were special statutes.

It was argued by the appellant and the Bar Council of India before the Supreme Court in the present case that the Advocates Act is a special legislation and the ID Act is a general legislation and therefore section 30 of the Advocates Act, overrides section 34 of the ID Act. However, applying the test laid down by this court in *Ashoka Marketing,* the court in *Thyssen Krupp Industries India Private Ltd* was doubtful as to whether the Advocates Act could be termed as a general piece of legislation in respect of the subject matter in dispute. As the judgment in *Paradip Port Trust* is of a bench of three judges, and taking into account the importance of the issues raised in the cases at hand, the court was of the considered opinion that these matters needed consideration by a larger bench. It accordingly directed that the matter be placed before the Chief Justice of India for his consideration.

Principle of *res judicata*

In *Chairman and Managing Director, Fertilizers and Chemicals Travancore Ltd.*,[52] the appellant, a public sector undertaking, was engaged in the business of manufacture and sale of various kinds of fertilizers and chemicals. It had a factory in Travancore in the State of Kerala. The respondents were the trade unions of the workers working in the manufacturing unit of the appellant at the relevant time.

In January, 1978 the appellant entered into a memorandum of settlement with the respondent unions in which it was agreed between the parties to the settlement that the then existing superannuation age of 60 years would remain unchanged in respect of all the workers working in the appellant's undertaking at the head office, including those who were on the rolls of the undertaking as on the date of the settlement. It was further agreed that those who were recruited on and after the memorandum of the settlement was signed between the parties would retire on attaining the age of 58 years.

50 (1981) 1 SCC 315.

51 (1990) 4 SCC 315.

52 *Supra* note 5.

In May, 1998, the Central Government issued a direction to all the public sector undertakings of the central government, requiring them to increase the age of superannuation from 58 to 60 years. The appellant, accordingly, complied with this circular and made it applicable to their employees increasing their age of superannuation to 60 years.

Since the financial condition of the appellant was going from bad to worse day by day, it had become difficult for it to give effect to the aforesaid decision/ direction of the Central Government. It accordingly brought these facts to the attention of the central government and sought permission to reduce the age of superannuation back to 58. The Central Government advised it to take various measures, which included introducing rationalization of the work and also lowering the age of retirement of the employees. In compliance with the subsequent communication of the Central Government authorizing it to lower the age of superannuation, the appellant issued an order reducing the retirement age of pre-1978 employees from 60 to 58.

This gave rise to the filing of various writ petitions before the High Court of Kerala, challenging therein the legality and correctness of the order of the appellant, reducing the superannuation age. The single judge of the high court upheld the order of the management and dismissed the writ petition on the ground that this measure was necessitated by the economic crisis in the organization and also in the light of the settlement arrived at earlier between the appellant and the unions.

The unions felt aggrieved and took the matter in intra- court appeal before the division bench of the high court which dismissed the appeal and affirmed the order of the single judge. The trade filed a special leave petition before the Supreme Court which too suffered the same fate of dismissal.

The union then raised an industrial dispute on the same subject matter which culminated into a reference by the state government to the labour court, requiring it to examine the justifiability or otherwise of the action of the management in reducing the age of superannuation of pre-1978 workers from 60 to 58 years. The labour court by an award in 2008, answered the reference against the trade unions and in favour of the appellant. It was held that since the question in the reference was already dealt with by the earlier round of litigation by the high court and the Supreme Court and the same having attained finality consequent upon the dismissal of the SLP by the apex court, the reference made by the state was barred by the principle of *res judicata*.

The trade unions challenged this award in the high court. The single judge allowed the writ petition and held that the reference made by the state government to the labour court was not barred by *res judicata*. Further, it directed that 30% of the wages were payable to each of the superannuated employee instead of granting them relief of reinstatement in service. The appellant challenged this order before a division bench which was dismissed by it. Hence the present special leave petition by the appellant.

The Supreme Court observed that the short question to be considered by it was whether the high court was justified in holding that the reference made by the state to the labour was not barred by the principle of *res judicata*.

On perusal of the record and after considering the submission of the parties, the court was of the opinion that the single judge as well as the division bench of the high court were wrong and had completely erred in law and their judgments deserved to be set aside. The court held that in its considered view, the principle of *res judicata*, defined in the Civil Procedure Code, 1908, equally applies to proceedings under the ID Act and this position is very well settled in law. The court referred to the judgment in *R.C. Tiwari* v. *Madhya Pradesh State Cooperative Marketing Federation Ltd.*,[53] where the court had held that the reference to the labour court made by the state under section 10 of the Act was hit by the principle of *res judicata* defined under section 11 of the Civil Procedure Code and therefore, the reference made to the labour court was barred. It was held that the issue of termination in that case was earlier gone into by the deputy registrar on merits under sections 54 and 64 of the Madhya Pradesh Cooperative Society Act, 1960, and the same was answered against the employee. It could not again be gone into in the reference proceedings by the labour court. The court also referred to *Pondicherry Khadi and Village Industries Board* v. *P. Kulothangan*,[54] where the court again clearly stated that section 11 of the Code was applicable including the principle of constructive *res judicata* to the proceedings under the ID Act.

Again, the court referred to the judgment in *State of U.P.* v. *Nawab Hussain*,[55] where it was held that the dismissal of writ petition challenging disciplinary proceedings on the ground that the delinquent officer had not been awarded reasonable opportunity to meet the allegations against him, operated as a *res judicata* in respect of the subsequent suit in which the order of dismissal was challenged on the ground that it was incompetently passed. The court held that no judicial forum, at the instance of any party to the *lis*, has jurisdiction to try issues already decided on their merits. It was barred from trying again by virtue of the principle of *res judicata* contained in section 11 of the Code which is also applicable to industrial and labour proceedings. It observed that the state had no jurisdiction to make the reference to the labour court under section 10 of the Act to re-examine the question of age reduction made by the appellant. A *fortiori*, the labour court had no jurisdiction to adjudicate the question referred to in the reference.

In view of the aforesaid legal provision, the court held that the high court was not justified in setting aside the award of the labour court which had correctly held that it had neither jurisdiction to entertain the reference nor it had the jurisdiction to answer it on merits. The Supreme Court set aside the orders of the high court and restored the award of the labour court.

III TRADE UNIONS ACT, 1926

Registered trade union is an 'operational creditor'

In *JK Jute Mill Mazdoor Morcha*,[56] an important question that arose for the consideration of the Supreme Court was whether a registered trade union could be

53 (1997) 5 SCC 125.

54 (2004) 1 SCC 68.

55 (1977) 2 SCC 806.

56 *Supra note* 1.

said to be an 'operational creditor' for the purpose of the Insolvency and Bankruptcy Code, 2016 ("Code"). This case related to a jute mill which was being closed and reopened several times until finally it was closed for good in 2014. Proceedings under the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA") were pending against it.

In 2017, the appellant union issued a demand notice on behalf of nearly 3000 workers under section 8 of the Code for the outstanding dues of the workers. The respondent replied to the said demand notice. The union approached the National Company Law Tribunal ("NCLT"). The NCLT, after discussing all the antecedent facts and the suits that had been filed by the respondent and also referring to the pending writ petition in the High Court of Delhi, ultimately held that a trade union did not fall within the definition of 'operational creditor' under the Code, dismissed the petition of the trade union. The National Company Law Appellate Tribunal ("NCLAT') also dismissed the appeal filed by the trade union, stating that each worker may file an individual application before NCLT.

In the appeal before the Supreme Court, the appellant union referred to various provisions of the Code and also the Trade Unions Act, 1926 and relied upon a division bench judgment of the High Court of Bombay in *Sanjay Sadanand Varrier* v. *Power Horse (India) (P) Ltd.*[57] to argue that even on a literal construction, the provisions of the Code would lead to the conclusion that a trade union would be an 'operational creditor' within the meaning of the Code. Even otherwise, it was argued by the appellant union that a purposive interpretation ought to be given to the provisions of the Code. It was, therefore, submitted that such an application by a registered trade union would be maintainable as an 'operational creditor.'

On the other hand, it was the case of the respondents before the Supreme Court that as no services are rendered by a trade union to the corporate debtor to claim any dues which can be termed as debts, trade unions will not come within the definition of 'operational creditor.' That apart, it was argued that each claim of every workman is a separate cause of action in law. Therefore, a separate claim for which there are separate dates of default of each debt covers 'workman' in individual capacity as 'operational creditor.' This being so, it was argued that a collective application under the rubric of registered trade union was not maintainable.

The court on a conjoint reading of the definition of 'operational creditor' and 'operational debt' under sections 5 (20) and (21) of the Code, respectively, rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and also the definition of 'trade dispute' in section 2(g) the Trade Unions Act, 1926 and also the provisions relating to registration of trade unions and that on registration a trade union becomes a body corporate, observed that what becomes clear is that a trade union is certainly an entity established under a statute, namely the Trade Unions Act, 1926.It would, therefore, fall within the definition of 'person' under section 3(26) of the Code. It can spend general funds on the objects laid down in section 15

57 (2017) SCC OnLine Bom. 328.

(c) and (d), of the Trade Unions Act which envisage some of the objects on which general funds of the trade unions can be spent. That being so, the court observed that an "operational debt", meaning a claim in respect of enjoyment, could certainly be made by a person duly authorized to make such claim on behalf of a workman. Rule 6, Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 also recognizes the fact that claims may be made not only in an individual capacity, but also conjointly. The court further stated that a trade union registered under the Act can sue and be sued as a body corporate under section 13 of the Act. The court referred to the observations of the High Court of Bombay in *Sanjay Sadanand Varrier*[58] with approval where it stated the legal position emanating from the Act that a trade union performs various statutory duties for the purposes of securing or protecting any right of a trade union or of any member, arising out of his relation with employer or other workers. A registered trade unions can prosecute or defend any legal proceeding to which the union or a member thereof is a party.

The Supreme Court further stated that instead of one consolidated petition by the trade union representing a number of workmen, filing of individual petitions would be burdensome as each workman would have to pay insolvency resolution process costs, costs of interim resolution professional, costs of appointing valuers *etc*. under the provisions of the Insolvency Code read with the relevant regulations. A registered trade union which is formed for the purpose of regulating the relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members. While setting aside the NCLAT judgment[59] and allowing the appeal, the Supreme Court held thus:[60]

> …trade union represents its members who are workers, to whom dues may be owed by the employer, which are certainly debts owed for services rendered by each individual workman, who are collectively represented by the Trade Union. Equally, to state that for each workman there will be a separate cause of action, a separate claim, and a separate date of default would ignore the fact that a joint petition could be filed under Rule 6 read with Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, with authority from several workmen to one of them to file such petition on behalf of all.

Registration of the amendment to the rules: scope of the power of the registrar

In *Delhi State Electricity Workers Union* v. *Govt. (NCT of Delhi),*[61] the petitioner union was a registered trade union representing the rights and interests of the employees working in various electricity supply corporations/ companies. It has been holding regular elections and filing compliance returns in the office of the respondent which

58 *Ibid.*

59 *Mazdoor Morcha* v. *Juggilal Kamlapat Jute Mills Company Ltd.*, 2017 SCC OnLine NCLAT 257.

60 *Supra* note 1at 340.

61 2019 SCC OnLine Del. 10441.

it was obliged to do under the Trade Unions Act, 1926. Pursuant to a public notice, the petitioner union approved certain alterations to the *rules* of its constitution in its general body meeting. Subsequently, these alterations were placed in its general body meeting and, upon being found to be in order, were approved by its general council. Thereafter, the information about the said amendments and its approval by the general counsel was communicated to the respondent. Upon receipt of the said communication, the respondent without seeking any clarification whatsoever from the petitioner, passed the impugned order rejecting the request for registration of the amendment on the ground that the amendments to the rules were not sent within the prescribed time of 15 days under section 28(3) of the Act and that there was no application praying for the registration of the said amendments to the rules.

The petitioner union approached the High Court of Delhi by way of a writ petition seeking quashing of the order passed by the Registrar of Trade Unions, refusing to register the amendments to the rules. It also sought a direction to forthwith register the aforesaid amendments to the rules. It was the case of the union that the respondent had failed to appreciate that section 28 of the Act does not entitle the registrar to decline the registration of amendments even if the request was made belatedly. Section 28(3) prescribes that a copy of every alteration or amendment made in the rules of a registered trade union should be communicated to the registrar within 15 days, which has to be read in conjunction with regulation 9 of the Trade Union Regulation, 1927 (Regulations). It provides that on receiving a copy of the alteration made in the rules of a trade union, the registrar shall register the alteration unless he has reason to believe that it has not been made in the manner provided by the rules of the trade union. The union further submitted that any delay in communicating amendments could not have been treated as fatal. If the registrar was of the opinion that there was any delay on the part of the petitioner to communicate the amendment the same should be registered subject to imposition of penalty under section 31 of the Act. The refusal to register the amendment was not only without jurisdiction but was contrary to the scheme of the Act. The union heavily relied upon the decision of a division bench of the court in *Delhi Hindustani Mercantile Association* v. *Delhi Administration*.[62]

The high court held that a bare perusal of sections 28 and 31 of the Trade Unions Act, 1926 read with Regulation 9 of the Regulations makes it evident that there is no provision in the Act for rejection of the amendments merely on the ground of delay. The court noted that the only ground on which an amendment/ alteration can be rejected is set out in Regulation 9 which provides that the registrar has to be satisfied that alternation /amendment has not been made in the manner prescribed in the rules of the Trade Unions Act. The court noted that in the present case, the impugned order did not disclose any such reason and registration of the amendment has been admittedly refused only on the ground of delay, which is impermissible. The registrar had failed to appreciate that any delay in communicating the factum of such amendment could at the most attract penalty under section 31 of the Act but could not be the sole ground to refuse the registration of the same. The registrar had acted in the most mechanical

62 1990 LLR (Delhi) 234.

manner and, therefore, the order of refusal was wholly unsustainable in law. It accordingly set aside the impugned order passed by the respondent. The high court remanded the matter to the registrar for taking a fresh decision on the request of the petitioner in accordance with law within four weeks.

IV CONCLUSION

In the post-globalization era, more specifically, after the Indian government announced its new economic policy in July, 1991,it not only opened the economy by inviting foreign direct investments but also assured the investors that it was committed to creating a favourable climate for such investments with a view to give much needed boost to the Indian economy. The Supreme Court, on its own admission, changed the gears from a welfare approach to a pragmatic approach,[63]even when it faced severe criticism against it's changing approach both from within and outside.[64] This changing economic climate and the approach of the court seem to have deterred the workforce in India from espousing their collective disputes. They instead preferred to rely on the state help to enhance their individual rights. This change in the approach of the workforce itself needs to be researched with all seriousness. Unfortunately, the state approach led to further dismantling of the organized sector which was already in the miniscule, and led to expansion of the unorganized sector of workforce.[65] The engagement of contract labour and contractual engagement of labour by the employers for doing perennial jobs which used to be frowned upon by the courts in pre-globalization era started slowly, gradually but surely attaining legitimacy from the judicial pronouncements.[66] Surprisingly, this change in the court's approach was discernible even when there was no significant legislative change made by Parliament in the industrial relations law at the central level.

Of late, we are being made to believe is that this time the Central Government is soon going to give effect to it's much professed flexible labour policy by enacting and enforcing four new labour codes, which will subsume in them all the central labour legislations.[67] One can only hope that it will not be old wine in new bottle!

In view of the above, it will be trite to observe that the collective disputes are almost on the vanishing point. This view is buttressed by the fact that litigation reaching the Supreme Court with respect to collective disputes are very few. Predominantly,

63 *U.P. State Brassware Corporation Ltd*. v. *Uday Narian Pandey*, (2006) 1 SCC 479; *T.K. Rangarajan* v. *Government of Tamil Nadu* (2003) 6SCC 581; *BALCO Employees Union (Registered)* v. *Union of India*, (2002) 2 SCC 333; *Bank of India* v. *T.S. Kelawala* (1990) 4 SCC 744.

64 *Harjinder Singh* v. *Punjab State Warehousing Corporation* (2010) 3 SCC 192.

65 Preeti Rastogi, "Informal Employment Statics: Some Issues" *EPW* 7, 2015 Vol. L No. 6, 67 at 68.

66 *State of Rajasthan* v. *Rameshwar Lal Gahlot*, AIR 1996 SC 1001; Also see *Steel Authority of India* v. *National Union of Waterfront Workers* (2000) 7 SCC 1.

67 The Central Government is in the process of enacting of four Codes, namely, Code of Wages, Code on industrial Relations, Code on Social Security and the Code on Occupational Safety, Health and Working Condition which will subsume more than 40 central legislations that govern the said subject matters at present.

most of the issues that have been engaging the attention of the Supreme Court in the last decade or so in the area of industrial relations law are the disputes relating to 'deemed individual disputes.' Even in respect of such disputes, especially in the area of retrenchment law, the court has been following policy of *ad-hocism*. The compensation awarded in cases involving violation of retrenchment law differs from judge to judge or bench to bench which is not a proper approach. The survey of the 'deemed industrial dispute' cases reaching the court in 2019, especially those concerning violation of retrenchment law, shows no consistency in approach. It has repeatedly been argued by the present author that violation of labour rights has to be viewed seriously, decisions in labour matters have to be social justice oriented and at the same time must have a deterrent effect on the management.[68] The compensation to be awarded to the worker must also be based on well-founded principles.

The court has taken pains to explain the true nature and scope of the enquiry to be held by the labour court/industrial tribunal under section 33(2) (b) of the Act.[69] This approach of the court has to be appreciated with a caveat that where the evidence is led before the labour court/ industrial tribunal for the first time, in the case of defective enquiry under section 33C (2)(b) for proving of the misconduct, the adjudicatory authority will exercise the same power *i.e.,* satisfy itself whether the misconduct is proved or not. In this situation, the satisfaction of the employer is replaced by the satisfaction of the adjudicator on the question of fact as to whether the misconduct is proved or not. This finding of the labour court/ industrial tribunal under section 33C (2) (b) of the Act, it is submitted, on the issue of satisfaction of the proving of the misconduct can work as *res judicata* in a subsequent reference under section 10 to the labour court/industrial tribunal. In such a reference the only question that may remain open for the labour court or the industrial tribunal to consider will be confined to the question of punishment alone. The labour court or the industrial tribunal can only consider in such a reference is if the punishment awarded by the management is appropriate or warrants interference.

The two cases decided by the court on the collective rights of the workers are examples of a purposive construction adopted by the court to protect and promote human rights of workers. The court has shown sensitivity towards the rights of the workers in the present scenario when it held that workers can collectively, through registered trade union as well as individually, pursue under the new legislation, the Insolvency Code, expeditious remedy to enforce their claim of outstanding dues against their employers with all attendant consequences.[70] The court has also shown its sensitivity to ensure that the pensionary rights of the workers cannot be allowed to be defeated by camouflages and has considered such attempts as unfair labour practices by the state and its instrumentalities.[71]

68 *People's Union for Democratic Rights* v. *Union of India* (1982) 3 SCC 235 at 248.

69 *Supra* note 3.

70 *Supra* note 1.

71 *Supra* note 2.