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# LABOUR MANAGEMENT RELATIONS

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## I INTRODUCTION

SURVEYED ARE the reported decisions of the Supreme Court in the area of industrial relations law in the year 2021; also surveyed are two decisions of the High Court of Delhi and one decision of the High Court of Bombay [1] of some significance in the said area. Like the previous years, this year also cases on collective bargaining have been negligible. Exclusion of jurisdiction of the civil courts in respect of 'industrial dispute' has once again been dealt with by the apex court although the law on the subject has been well-settled by the court in a catena of decisions.[2] This only shows the ignorance on the part of a section of the bar who continue to approach the civil court for remedy against non-employment, by way of dismissal, discharge, or retrenchment unmindful of the fact that the jurisdiction of the civil courts is ousted by section 9 of the Code of Civil Procedure, 1908 (CPC) in respect of 'industrial dispute' and 'deemed industrial dispute' under the Industrial Disputes Act, 1947 (ID Act).The poor litigant is forced to pursue the remedy in a wrong forum which proves ultimately fatal for him as has happened in *Milkhi Ram* v. *Himachal Pradesh State Electricity Board*.[3]

Most of the cases reported in the year under survey related to the issues as follow: exceptional situations when the writ jurisdiction of the high court under article 226 of the Constitution of India may be invoked by the worker;[4] issues relating to

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1. *Naveen Kumar* v. *Employees State Insurance Corporation* (2021) 1 HCC (Del) 56 (*Naveen Kumar*); *Raj Singh* v. *Labour Commissioner*, 2021 SCC OnLine Del 4715(*Raj Singh*) and *Duncan Engineering Ltd.* v. *Ajay C. Shelke*, 2022 (1) Mh.L.J. 485: 2021 SCC OnLine Bom 889 (*Duncan Engineering Ltd.*).
2. *Premier Automobiles Ltd.* v. *Kamlekar Shantaram Wadke* (1976) 1 SCC 496; *Rajasthan SRTC* v. *Krishna Kant*, (1995) 5 SCC 75 (*Krishna Kant*); *Rajasthan SRTC* v. *Zakir Hussain*, (2005) 7 SCC 447 (*Zakir Hussain*); *Rajasthan SRTC* v. *Khadarmal*,(2006) 1 SCC 59 (*Khadarmal*) and *Rajasthan SRTC* v. *Ugma Ram Choudhry*, (2006) 1 SCC 61 (*Ugma Ram Choudhry*).
3. (2021) 10 SCC 752 (*Milkhi Ram*)
4. *Supra* note 1, *Naveen Kumar*.

victimisation and unfair labour practices and the pragmatic and sensitive judicial approach that is required of judicial and quasi-judicial forums to give quietus to the prolonged litigations, especially in statutory bodies and public sector undertakings where avoidable litigation needs to be curbed to save squandering of public money;[5] unilateral change in service conditions by the employer and the consequences flowing there from;[6] scope of the powers of industrial adjudicator under section 11A of the ID Act in matters of dismissal and discharge;[7]violation of retrenchment law and the remedies available to the aggrieved party;[8] regularisation issues[9] and the scope of section 33(1) and (2) of the ID Act and the consequences for violating the said provisions.[10] There has been no reported decision either under the Trade Unions Act, 1926 or the Industrial Employment (Standing Orders) Act, 1946.

## II INDUSTRIAL DISPUTES ACT, 1947

**Jurisdictional issue: *coram non judice***

In *Milkhi Ram*,[11] the services of the worker were terminated by the respondent Board which action was impugned by him in a suit before the civil court on the ground of violation of the mandatory provisions of section 25F of the ID Act rendering the said action as *non-est* in the eyes of law. He prayed for setting aside of the order of termination, his reinstatement and payment of back wages.

The questions for the consideration of the civil court were: (i) whether it had the jurisdiction to try the suit, and, (ii) whether the petitioner had completed 240 days of uninterrupted service in the last twelve calendar months which would have made it one year of continuous service, one of the conditions precedent for attracting application of section 25F of the ID Act. Both these questions were answered by the civil court in favour of the workman. Accordingly, the suit was decreed and an order of reinstatement with back wages was passed in his favour. The Board challenged the said order decision in an appeal before the district judge on the same ground of lack of jurisdiction of the civil court. The appellate court dismissed the appeal holding

5. *Supra* note 1, *Raj Singh*.
6. *Caparo Engineering India Ltd.* v. *Ummed Singh Lodhi*, 2021 SCC OnLine SC 973 (*Caparo Engineering India Ltd.*).
7. *Standard Chartered Bank* v. *R.C. Srivastava* 2021 SCC OnLine SC 830 (*Standard Chartered Bank*); *Uttar Pradesh State Road Transport Corporation* v. *Gajadhar Nath* (2022) 3 SCC 190 (*Gajadhar Nath*) and *Uttar Pradesh Forest Corporation* v. *Vijay Kumar Yadav* (2022) 1 SCC 113 (*Vijay Kumar Yadav*)
8. *State of Madhya Pradesh* v. *Somdutt Sharma*, (2021) 12 SCC 53 (*Somdutt Sharma*); *K.V. Anil Mithra* v. *Sree Sankaracharya University of Sanskrit* 2021 SCC OnLine SC 982 (*K.V. Anil Mithra*); *Ranbir Singh* v. *Public Works Department*, 2021 SCC OnLine SC 670 (*Ranbir Singh*); *State of Gujarat* v. *Munta Aalamkhan Nurbeg* (2020) 20 SCC 625 (*Munta Aalamkhan Nurbeg*) and *State of Uttarakhand* v. *Sureshwati* (2021) 3 SCC 108 (*Sureshwati*).
9. *Bharat Sanchar Nigam Limited* v. *Teja Singh* (2020) 19 SCC 811 (*Bharat Sanchar Nigam Limited*); *Pandurang Sitaram Jadhav* v. *State of Maharashtra* (2020) 17 SCC 393 (*Pandurang Sitaram Jadhav*);
10. *Dorairaj Spintex* v. *R. Chittibabu* (2021) 12 SCC 38 (*Chittibabu*); *supra* note 1, *Duncan Engineering Ltd.*
11. *Supra* note 3.

that it would not be proper to relegate the plaintiff to the labour court at this belated stage given the fact that the litigation had continued for many years.

After this decision, the workman filed an execution petition before the civil court. The management Board again raised objection about the maintainability of the suit. It stated before the executing court that, in the meantime, the back wages had been paid by the Board to the workman and he was offered the post of LDC on regular basis. He had accepted the said post and given a conditional joining report because of which he was required to re-submit his joining report as per the rules. Therefore, nothing was to be done in execution of the decree proceedings in view of his having accepted appointment as LDC on regular basis for which he was to resubmit his joining report. The executing court, however, negated the Board's objection and it was directed to give effect to the decree.

The order of the executing court was challenged by the Board in a revision petition before the High Court of Himachal Pradesh. The Board heavily relied on various earlier judgments[12] of the apex court to contend that the jurisdiction of the civil courts is ousted under section 9 of the CPC in cases where the rights flow under the ID Act and the reliefs can be granted under the said Act only.

The high court after considering the legal position settled in the aforementioned judgments, held that the civil court, in the present case, lacked inherent jurisdiction to entertain the suit based on the rights flowing under the ID Act and therefore, the judgment and decree passed by the civil court was a nullity. It further observed that the plea that the decree was a nullity could be raised at any stage of the execution proceedings. The high court, accordingly, allowed the revision petition. It, however, on the basis of the equitable principles ordered that the back wages already paid to the workman by the Board be not recovered from him.

The workman challenged this order of the high court before the Supreme Court in a special leave petition. The only issue to be considered by the Supreme Court was whether the suit filed by the workman before the civil court against the order terminating his services in violation of section 25F of the ID Act was maintainable against the Board.

The court observed that the petitioner had clearly founded his claim in the suit on the provisions of the ID Act. In the circumstances, the employer therefore was entitled to raise a jurisdictional objection to the suit of the plaintiff. The court, after referring to the three-judge bench of the court in *Krishna Kant*[13] and a subsequent two-judge bench decision of the court in *Zakir Hussain*,[14] held that in the present case the principle of *coram non judice* applied on all fours and the civil court had no jurisdiction to entertain the suit in the light of section 9 of the CPC, given that the rights claimed were under the ID Act which could be enforced only under the said

12. *Supra* note 2, *Krishna Kant*,*Zakir Hussain*, *Khadarmal* and *Ugma Ram Choudhry*.
13. *Ibid*., See *Krishna Kant*. For a detailed critique of *Krishna Kant*, see Bushan Tilak Kaul, "Labour Management Relations" XXXI *ASIL* 309 at 310 (1995).
14. *Supra* note 2, see *Zakir Hussain*. For a detailed critique of *Zakir Hussain*, see Bushan Tilak Kaul, "Labour Management Relations" XLI *ASIL* 433 at 472 (2005).

Act. Therefore, the decree passed by the civil court was *non-est* in the eyes of law. The apex court, accordingly, upheld the judgment and order passed by the high court and set aside the decree of the civil court as upheld by the appellate court.

**Writ petition under article 226 of the Constitution relating to labour matters: issue of maintainability**

In *Naveen Kumar*,[15] the High Court of Delhi should have at the outset examined the question as to whether the petitioners before it were engaged by the Employees State Insurance Corporation (ESIC) under a contract *of* service as contractual workmen or were they employed under a contract *for* service through a contractor as contract labour. This distinction is very fine in the labour law jurisprudence because the very foundation of labour law is based upon the concept of contract *of* employment, *i.e.,* master and servant relationship.

If the petitioners were employed in the former capacity, they would, no doubt, be workmen even though on contractual basis. Their grievances relating to 'industrial dispute' could then be adjudicated only under the ID Act as that would be the appropriate forum available to them. But, if they fell in the latter category, it is submitted that they had no remedy available under the ID Act as such unless their case was espoused by a trade union of the workers employed by the ESIC which was not likely to happen. This important distinction was required to be addressed by the high court at the very outset but unfortunately it did not do so.

The high court failed to appreciate that the petitioners before it were contract labour employed by the ESIC through a contractor/sub-contractor and subsequently when the contract of the earlier sub-contractor came to an end, it was replaced by a new sub-contractor who refused to re-engage the workers of the former sub-contractor, *i.e.,* the petitioners. It is important to recapitulate the facts of this case; here the ESIC engaged the services of the Uttar Pradesh Rajkiya Nirman Nigam (UPRNN) as the contractor for maintenance of the concerned ESI Hospital, who in turn engaged a sub-contractor under its supervision. The sub-contractor so engaged employed the petitioners for carrying out the maintenance of the hospital of the principal employer, ESIC. The contract of the old sub-contractor having come to an end on May 30, 2020 a new sub-contractor, S.N. Enterprises, was appointed under the supervision of UPRNN with effect from June 1, 2020. The contract labour was informed that their engagement had come to an end. They therefore approached the UPRNN, supervisor of the new sub-contractor, requesting it to require the new sub-contractor to continue their services in the ESI Hospital. On refusal by the new sub-contractor to do so, the contract labour preferred a writ petition under article 226 of the Constitution of India before the High Court of Delhi against the ESIC for a direction to the ESIC to require the UPRNN to direct the new sub-contractor to continue to engage them for carrying out the maintenance of the ESI Hospital as it related to the issue of the livelihood of the petitioners and their families. The factual matrix of the case is conspicuously silent as to whether the ESIC was registered as the principal employer under the Contract

15. *Supra* note 1 (Pratibha Singh, J.)

Labour (Regulation and Abolition) Act, 1970and whether the contractor, *i.e.*, UPRNN had been issued a license under the said Act.

The allegation of the petitioners against the new sub-contractor in the writ petition was that it was demanding Rs. 13,000 as monthly compensation from each of the petitioners for allowing them to continue their services in the ESI Hospital as the contract labour. Since they did not accede to these demands, they were disengaged from the services as contract labour in the ESI Hospital.

The single judge of the high court, placing reliance on an earlier judgment of the High Court of Delhi in *PTI Employees Union* v. *Press Trust of India Ltd.*,[16] held that the petitioners ought to be relegated to avail the alternate remedy that is available under the ID Act. The question is whether the petitioners were engaged by the ESIC under contractual employment or contract labour of the sub-contractor and whether they had an alternate remedy available under the ID Act in the case at hand?

It will be pertinent to state here that in *PTI Employees Union*, the relationship of master and servant was not in dispute. The only question was as to whether the petitioners therein were entitled to invoke the writ jurisdiction of the High Court of Delhi under article 226 of the Constitution for a declaration that termination of their service by the management was in violation of sections 25F and 25G of the ID Act. It is in this context that the court held that the petitioners therein should be relegated to the statutory remedy under the ID Act, *i.e.,* the labour court.

The said judgment, after surveying a large number of judgments[17] of the Supreme Court and the high courts, culled out the following principles:

i. Industrial Disputes Act is a complete code in itself which provides the remedies to the employees in respect of all industrial disputes. All industrial disputes, in the first place have to be adjudicated by the labour court/industrial tribunal, as the case may be, under the ID Act and the awards of the labour court/industrial tribunal are amenable to the writ jurisdiction of the high courts. This is the legislative policy and intendment underlying the ID Act.

ii. The writ petition should not be entertained in respect of industrial disputes for which a statutory remedy is available under the ID Act unless 'exceptional circumstances' are made out.

iii. If the writ petition involves a disputed question of fact, the same shall not be entertained. The writ jurisdiction is a discretionary jurisdiction and should not ordinarily be exercised if there is an alternate remedy available to the petitioner.

16. 2020 SCC OnLine Del 1216 (*PTI Employees Union*).

17. *U.P. State Bridge Corporation Ltd.* v. *U.P. Rajya Setu Nigam S. Karamchari Sangh*, (2004) 4 SCC 268; *A.P. Foods* v. *S. Samuel*, (2006) 5 SCC 469; *State of Uttar Pradesh* v. *Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti*, (2008) 12 SCC 675; *Transport and Dock Workers Union* v. *Mumbai Port Trust*, (2011) 2 SCC 575; *Satpal Singh* v. *Delhi Sikh Gurdwara Management Committee* (2011) 181 DLT 45; *Chennai Port Trust* v. *Chennai Port Trust Industrial Employees Canteen Workers Welfare Assn.*, (2018) 6 SCC 202 and *Marwari Balika Vidyalaya* v. *Asha Srivastava* 2019 SCC OnLine SC 408.

iv. The sole test for entertaining a writ petition relating to industrial dispute is the existence of 'exceptional circumstances.' If the court is satisfied on the existence of 'exceptional circumstances,' then and only then the court shall proceed to ascertain whether the writ involves disputed questions of fact. If the court finds 'exceptional circumstances' but the writ involves disputed questions of fact then the writ petition shall not be entertained. In other words, the writ petition may be entertained only if the court is satisfied, firstly, on the existence of 'exceptional circumstances' and secondly, the writ petition does not involve disputed questions of fact.

Accordingly, the High Court of Delhi in *PTI Employees Union* directed the petitioners to resort to the statutory remedies under the ID Act, *i.e.,* the labour court.

In the present case, as stated above, the court had not gone into the issue of the subtle distinction between contractual worker and contract labour to know the nature of their employment. It had assumed that the ID Act envisages statutory remedy even for contract labour which is not the correct position in law. In law, the contract labour, even if their strength may be 86, as in this case, could not on their own even collectively, raise an industrial dispute unless their cause was espoused by the trade union of the workers of the ESIC as there exists no master and servant relationship between them and the ESIC.[18] Therefore, in the circumstances of the case, the court ought to have treated this case as a case of 'exceptional circumstances' and considered their prayer of direction to the ESIC to ensure that UPRNN requires the new sub-contractor to re-engage the employees of old sub-contractor on the basis of their seniority, subject to the availability of the job with the new sub-contractor.

In the present case, the high court permitted the petitioners to restore the claim petitions filed earlier before the appropriate authorities and pursue the same in accordance with law. The court directed thus:

> 35. … Needless to add, that if there is a need for further Workmen at the hospital, the new Contractor would consider appointing the Petitioners, who have considerable experience of working in the hospital.
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> 36. The writ petitions and all pending application are, accordingly, disposed of in the above terms, giving liberty to the Petitioners to avail of their remedies in accordance with law.

It is submitted that even if the single judge had revived their right to pursue remedy before the labour court, it could go only into the question as to whether the petitioners were genuine contract labour or they were employed under camouflage or smokescreen by the ESIC and were actually it's employees. It is only in the latter case that the labour court would have jurisdiction to adjudicate the matter. If their case fell in the former category, the labour court would have no jurisdiction to adjudicate on

18. *Telco Convoy Driver's Mazdoor Sangh* v. *State of Bihar* (1989) 3 SCC 271.

merits and grant any relief. It would in that case, adopt a hands-off approach in the matter and leave the contract labour without any remedy before it.

**Victimisation and unfair labour practice**

*Raj Singh*[19] is a glaring case of victimisation and unfair labour practice on the part of a statutory body, the All India Institute of Medical Sciences, New Delhi (AIIMS).It terminated his services, a daily wage driver illegally, immediately before he would have had a right to be considered as an internal candidate for appointment to a permanent post of driver. After ensuring that he ceased to be an internal candidate, AIIMS appointed his cleaner to the said post instead. The petitioner was forced to litigate in pursuit of justice for nearly four decades, a case of avoidable litigation thrust on him by AIIMS. As will be seen from the discussion below, AIIMS had to pay a heavy price at the end costing the public exchequer heavily. The honest tax payers' money was wasted by AIIMS on multiple and avoidable litigation when there was no basis to prolong it. The stand of AIIMS consistently was contrary to the well-settled law that the services rendered by AIIMS as a referral hospital and advanced research centre fell within the definition of 'industry' under section 2(j) of the ID Act. Therefore, the labour court constituted under the ID Act on a reference being made to it by the appropriate government had the jurisdiction to adjudicate on the dispute of non-employment of the workman. In other words, the rejection of AIIMS's stand at various quasi-judicial and judicial forums was known to it as a *fait accompli*, yet, it unabatedly continued with the litigation right up to the Supreme Court and thereafter again in the High Court of Delhi on account of non-implementation of the award of the labour court by it. There seemed to be no end to the sufferings of the workman in foreseeable future even after the Supreme Court had ruled against AIIMS in 2016.The workman was forced to go from pillar to post to get the award implemented. He was compelled to seek execution of the award by coercive measure under section 31(1) of the ID Act before the Delhi High Court by filing a writ petition for the prosecution of the Director, AIIMS. The matter came up for hearing before a proactive and sensitive judge of the high court who ensured that AIIMS executed the award in letter and spirit. It thus gave quietus to the litigation. The directions issued by the single judge of the high court did complete justice to the workman who steadfastly had been pursuing his legal available remedies. Had AIIMS implemented the award passed in 1998 earlier, substantial public money could have been saved which AIIMS recklessly spent on avoidable litigation. The factual matrix of the present case is as under:

> The petitioner joined AIIMS, New Delhi as a driver on daily wage basis with effect from August 1, 1984 and continued to work with usual breaks as such until August 13, 1987, when his services were terminated orally by the management with effect from August 14, 1987. Sometime before the termination of his service, an office circular was issued by AIIMS inviting applications from internal candidates for appointment to a permanent post of driver in AIIMS. Within five days after his termination, his cleaner was appointed in the said permanent position by AIIMS.

19. *Supra* note 1.

> The petitioner made a representation to AIIMS for reinstatement alleging violation of section 25F of the ID Act and that his termination was an act of victimisation and unfair labour practice. He further alleged that the termination of his service was *mala fide* because AIIMS wanted to favour his cleaner who was ultimately appointed to the said post.
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> The petitioner raised an 'industrial dispute' before the conciliation officer, who submitted a failure report. The matter was then referred by the Government of NCT Delhi to the labour court for adjudication. The labour court, *vide* its award dated December 4, 1998, held that the termination of the services of the petitioner by AIIMS was an act of victimisation and unfair labour practice. It directed his reinstatement without back wages, but at the same time directed that since he was deprived of consideration to a permanent position, his entire service shall be taken into account for the purposes of calculating his terminal benefits.
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> This award was challenged both by the employer and the workman before the High Court of Delhi under article 226 of the Constitution. The employer challenged it on the ground, *inter alia,* that AIIMS was not an 'industry' within the meaning of section 2(j) of the ID Act and the award was invalid and further that the petitioner was a daily wage driver whose services could be terminated anytime. The petitioner, on the other hand, challenged the award to the extent that the labour court had erred insofar as it did not award back wages to him which should have been a necessary consequence to the relief of reinstatement.

A single judge of the High Court of Delhi, by a common order dated March 26, 2007,disposed of both the writ petitions holding that the award of the labour court was in order and did not suffer from any infirmity.[20]The single judge turned down the plea of the management that AIIMS is not an 'industry.' The court held that as long as *Bangalore Water Supply and Sewerage Board* v. *A. Rajappa*,[21] holds the field, it was bound to follow it. It also turned down the claim of the workman for back wages on the ground that he had neither in the pleadings nor in the affidavit filed by way of evidence stated that he was unemployed during the period of termination of his services. The court held that the termination of services of the petitioner was an act of victimisation and unfair labour practice. The court observed thus:

> 16. Moving on to the next argument advanced in support of the Institute that the workman was only a daily wager and, therefore, does not have any right to be regularized, the records reflect that just five days after termination of the workman, a circular was issued for recruitment to the same post, and the cleaner of the Institute was appointed against the said post. This makes it evident that the post held by the concerned workman was of a permanent nature, and the mala fide intentions on

20. *AIIMS* v. *Raj Singh*, 2007 SCC OnLine Del 1713.

21. (1978) 2 SCC 213(*Bangalore Water Supply*).

> the part of Institute in terminating the services of the workman and appointing a cleaner working in the Institute as a Driver, cannot be ruled out.
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> 17. Even assuming that there were no mala fide intentions on the part of the management of the Institute in appointing the cleaner to the post of a driver, the argument of the Institute that recruitment to the said post were being made only in compliance with the Recruitment Rules which mandates sponsorship by the employment exchange is self defeating as the Institute failed to explain as to how the said cleaner was appointed to the post of driver since he was also not sponsored by the employment exchange. Taking the argument of the Institute further, and even considering that while some candidates sponsored by the employment exchange were considered by the Institute, fact remains that some other candidates from within the Institute were also considered, yet it is difficult to understand as to why was the workman not considered for the said post when he was already working as a driver with the Institute for about the past three years.

AIIMS did not stop litigation here. It preferred a letters patent appeal mainly on the ground that the judgment of the Supreme Court in *Bangalore Water Supply* has been referred for review to a larger bench of the apex court and therefore, this matter needed reconsideration.[22] The division bench of the high court, *vide* its order dated August 25, 2008, dismissed this appeal. It observed thus:

> **9.** In that view of the mater, it cannot be said that the Labour Court erred in holding the appellant to be an industry. Having considered the decisions in *State of Gujarat* v. *Pratam Singh Narsinh Parmar* (2001) 9 SCC 713, *State of U.P.* v. *Jai Bir Singh* (1997) 4 SCC 257 and *National Physical Lab. Executive Engineer* v. *K. Somasely*,1997 SC 2663, this Court is not persuaded to take a view different from that taken by the learned Single Judge.
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> **10.** We find no infirmity in the impugned order passed by the learned Single Judge that calls for interference. The appeal and the pending application are, accordingly, dismissed.

The AIIMS, without any logic or without raising any new legal ground, in order to further harass the workman, preferred a special leave petition to the Supreme Court.[23] AIIMS again submitted that the judgment of the Supreme Court in *Bangalore Water Supply* had been referred for review to a larger bench of the apex court and that doubts have been raised about whether the government run hospitals and research centres like AIIMS were covered by the definition of 'industry' under section 2(j) of the ID Act.[24] The Supreme Court *vide* its order dated 03.06.2016, did not find any merit in the SLP and dismissed it. The court observed thus:[25]

22. *AIIMS* v. *Raj Singh*, 2008 SCC OnLine Del 1603.
23. *AIIMS* v. *Raj Singh*, (2017) 12 SCC 803.
24. *State of Uttar Pradesh* v. *Jai Bir Singh* (2005) 5 SCC 1.
25. *Supra* note 23 at 804.

> **5.** However, after going through the facts of the case and after taking into consideration the Constitution Bench judgment of this Court, we do not find that it is necessary for us to go into the details further in the matter as the issue has presently been settled by this Court in the said decision.
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> **6.** Accordingly, we do not find any reason to interfere with the impugned order passed by the High Court. We find no merit in the appeal. Hence, the appeal is dismissed, however, with no order as to costs.

It seems that even after this judgment, AIIMS did not implement the award, but nothing happened. The workman then approached the Labour Commissioner, Delhi under section 31(1) of the ID Act seeking implementation of the award of the labour court dated December 4, 1998, but nothing worthwhile happened.

Feeling completely frustrated he filed a writ petition as a last resort, under article 226 of the Constitution in the High Court of Delhi seeking directions to the labour commissioner to initiate criminal prosecution of the Director, AIIMS for its wilful default in not implementing the award dated December 4,1998 passed by the labour court.

On this petition the High Court of Delhi directed AIIMS to work out the entitlements of the petitioner in terms of the award of the labour court under various heads, *viz.,* salary/wages-spanning between December 4, 1998 *i.e.,* the date of the award and the date of superannuation *i.e.,* October 31, 2016; money payable towards leave encashment; dues payable towards provident fund contribution; gratuity amount; and monthly pension payable from the date of superannuation.

Pratibha Singh, J. of the high court, *vide* her order dated October 12, 2021, directed the AIIMS to pay a sum of Rs. 50,49,079, as calculated by AIIMS towards the above entitlements and also release payment of Rs. 19,900 towards monthly pension. It also directed AIIMS to pay worker's contribution of Rs. 30,000 towards the Employees Health Scheme and provide him all the medical facilities for which he was entitled to. The said Rs. 30,000 amount which AIIMS was made to pay was *in lieu* of the costs for the long drawn litigation foisted on the workman by it.

This case clearly shows how timely intervention by a proactive and sensitive judge can bring quietus to a prolonged litigation and render justice to the aggrieved workman who had been subjected to acts of unfair labour practice and victimisation. The court was conscious of the fact that the management of AIIMS had foisted long drawn litigation on the workman to wear him out and to compel him to abandon his pursuit of justice. The old saying that "there is a light at the end of the tunnel" proved to be true in his case.

**Section 9A: Unilateral change in service conditions and the consequences thereof**

In *Caparo Engineering India Ltd.*,[26] the apex court was called upon to decide whether the transfer of nine workers from the plant of the appellant in Dewas, Madhya Pradesh to a place called Chopanki in District Alwar, Rajasthan, amounted to change

26. *Supra* note 6.

of condition of service of the workmen in violation of section 9A of the ID Act? This question arose in the following factual matrix:

> The concerned nine workmen were employed and working in the Dewas factory of the appellant for long years. They were all transferred to Chopanki, District Alwar which is 900 kilometres away from Dewas. The respective workmen through their union raised an industrial dispute before the conciliation officer. On failure of the conciliation proceedings, a reference of the industrial dispute relating to their transfer was made by the appropriate government to the labour court. The specific point of reference was whether the transfer was valid and proper and if not, what relief could be granted to the workmen concerned?
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> The case of the workmen before the labour court was that the employer pressurised them to resign and, on their refusal, they were transferred without any justifiable cause and notice. It, therefore, amounted to change of the service conditions in violation of section 9A of the ID Act which was *mala fide* and illegal. Further, it was the case of workmen that they had all along worked in Dewas and Chopanki did not have any facilities including residential accommodation nearer to the place of work and their services were not at all required there.The nature of the work discharged by them at Dewas related to manufacturing of pipes, whereas in Chopanki, the work required was manufacturing of nuts and bolts. They contended that such transfer amounted to change in the nature of work without notice. They accordingly prayed that the labour court should declare the transfer as illegal and void. The workers also raised the question of unfair labour practice on the part of the employer who they alleged intended to reduce the number of workers at Dewas to take it out of the scope of various labour legislation.
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> The labour court, on appreciation of the evidence produced by both the parties,found that the employer could not prove that there was reduction of production at the Dewas factory rendering the staff proportionately surplus. It also came to the conclusion that the transfer of nine workmen amounted to change in their nature of work which was done with the intention to reduce the number of workmen in the Dewas factory.As such, the said act was covered by clause 11 of the Schedule IV of the ID Act[27] which required notice of change to be given to the workmen. Admittedly, no such notice was given and therefore, the order of transfer was in violation of section 9A of the ID Act.
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> The labour court, accordingly held the transfer as null and void and set aside the same.

27. Conditions of service for change of which notice is to be given

    11. Any increases or reduction (other than casual) in the number of persons employed or to be employed in any occupation or process or department or shift, not occasioned by circumstances over which the employer has no control.

> The management preferred a writ petition against this award under article 227 of the Constitution which was dismissed by a single judge of the Madhya Pradesh High Court. The writ appeal of the management dismissed by the division bench of the court on the ground that the same was not maintainable against the order of the single judge under article 227 of the Constitution.

Assailing this judgment and order of the division bench, the management in its special leave to appeal before the Supreme Court submitted that the high court had committed a grave error in treating the writ petition as one under article 227 of the Constitution when it had preferred the writ petition under article 226 of the Constitution. The Supreme Court turned down this submission of the management on the ground that it had in the cause title, as also in the body of the writ petition, referred to it as a writ petition under article 227 of the Constitution. It had not sought in the prayer clause relief by way of a writ of *certiorari*; it only sought the relief of quashing of the award of the labour court.

On merits, the Supreme Court held that these nine workmen had worked for more than 25 to 30 years at the Dewas factory. They were transferred by the management to Chopanki at the fag end of their service career. The court also took note of the fact recorded by the labour court that there were no educational and medical facilities and no residential areas within 40 to 50 kilometres of the Chopanki plant. The transport facilities were also conspicuous by their absence. The court also noticed that at Dewas, they were covered by the definition of "workman" and were entitled to the protection of the provisions of the ID Act, whereas at Chopanki, they were put in the category of supervisors with intent to take them out of the scope of definition of "workman" under the ID Act so as to deny them the protection under the said Act.

The court had no hesitation in holding that in these circumstances on transfer from Dewas to Chopanki, the nature of the service conditions and the nature of the work would have changed. Therefore, in such cases, section 9A read with Schedule IV of the ID Act would be attracted. Further, in view of the clear findings of the labour court and the legal position under section 9A read with Schedule IV of the ID Act, there was no infirmity in the award of the labour court as upheld by the single judge of the High Court of Madhya Pradesh. The labour court was justified in holding that the transfer of the nine workmen was in violation of section 9A of the ID Act and was arbitrary, *mala fide* and an act of victimisation. It, accordingly, upheld the award of the labour court setting aside the transfer orders of the workmen.

**Scope of the powers of industrial adjudicator under section 11A**

*Degree of proof required for proving misconduct in domestic inquiry: preponderance of evidence*

In *Standard Chartered Bank*,[28] the industrial adjudicator had held that the standard of proof for proving a misconduct was beyond reasonable doubt. The Supreme Court in the present case rightly held that the findings of the industrial tribunal to this

28. *Supra* note 7.

effect were contrary to the well-settled legal position in service jurisprudence. Mere preponderance of evidence to the satisfaction of the enquiry officer or the industrial adjudicator, as the case may be, is sufficient to sustain the charge of misconduct. Proving of the misconduct beyond reasonable doubt as held by the tribunal was misconceived.

*The power of the industrial adjudicator under section 11A is not supervisory but appellate power*

The more important question in *Standard Chartered Bank* that the Supreme Court had to deal with was the scope of the power of the industrial adjudicator under section 11A of the ID Act in disciplinary matters relating to dismissal or discharge. It is submitted that the Supreme Court on this issue has time and again fallen in error, as in this case, in not appreciating that after the introduction of section 11A in the ID Act, the power of the industrial adjudicator in a reference relating to dismissal or discharge has ceased to be supervisory in nature and is that of an appellate authority.[29] It is now within the realm of industrial adjudicator, as an appellate authority, to reappreciate the evidence in a reference matter relating to dismissal or discharge and satisfy itself on the question of proving of the misconduct. It can also differ from the conclusion arrived at by the enquiry officer even if there has been complete compliance with the principles of natural justice in the domestic enquiry held against the workman.

The basic infirmity writ large in the judgment of the Supreme Court in the present case is that it has fallen in error in holding that the powers of the industrial adjudicator under section 11A are not appellate in nature. In the classic judgment of the Supreme Court in *Workmen* v. *Firestone Tyre & Rubber Co. of India (P) Ltd.*,[30] the court has in clear terms highlighted the changes that have been brought about in the legal position in disciplinary matters when referred for adjudication after the incorporation of section 11A in the ID Act. The changes in legal position that have emerged in the post-section 11A era are mainly two: firstly, the power that can be exercised now by the industrial adjudicator in a reference under section 11A is that of appellate nature and not merely supervisory. The satisfaction of the management about the proving of the misconduct is now substituted by the satisfaction of the industrial adjudicator. Secondly, the industrial adjudicator may consider the proportionality of punishment and may, in appropriate cases, reduce the quantum of punishment in the interest of justice even when the misconduct has satisfactorily been proved and the principles of natural justice have been followed. The constitutional courts have, unfortunately, more often than not, failed to appreciate this important change brought about by section 11A.

29. For a detailed critique of the Supreme Court judgments on this issue, see Bushan Tilak Kaul, "Disciplinary Action and Powers of Industrial Adjudicator: A Critique of Judicial Intervention" 49 *JILI*309 at 351-56 (2007).

30. (1973) 1 SCC 813 (*Firestone*). Earlier the powers exercised by the industrial adjudicator in disciplinary matters was that of supervisory jurisdiction as laid down in *Indian Iron & Steel Co. Ltd.* v. *Their Workmen*, 1958 SCR 667. See Bushan Tilak Kaul, "Labour Management Relations" XLI *ASIL* 433 at 453 (2005).

In the case at hand, there can be no quarrel on the facts that there was sufficient evidence of the misconduct committed by the two employees who needed to be dealt with sternly in the interest of maintaining high discipline in the organisation. It is also not disputed that the industrial tribunal was wrong in proceeding on the assumption that the misconduct had to be proved beyond reasonable doubt. However, the Supreme Court was wrong in holding that the industrial tribunal could not convert itself into a court of appeal and revisit and reappreciate the evidence in *toto*.

It is submitted that in a reference, it is within the powers of the industrial tribunal to reappreciate the entire evidence as an appellate body and come to a conclusion different from that of the enquiry officer or the disciplinary authority, as the case may be.

In *Gajadhar Nath*,[31] the U.P. SRTC impugned the order of the High Court of Allahabad before the Supreme Court which had upheld the order of the industrial tribunal directing the management to reinstate the workman in service and had awarded 50% of the salary to be paid to the workman for the period when he was kept out of employment by the order of the management removing him from service. The facts leading to filing of this special leave petition before the Supreme Court were as under, the workman, a conductor, was removed from service on account of a misconduct of having failed to issue tickets to the passengers against the money collected from them. He raised an industrial dispute against the order of his removal from service. On reference, the industrial tribunal returned a preliminary finding that the domestic inquiry conducted by the management against him was not fair and proper. As a result, the management led evidence by examining an assistant traffic inspector who inspected the vehicle and found the passengers in the bus travelling without tickets. He stated in his evidence that when he tried to record statements of the passengers who had paid the money but were not issued tickets, the workman did not allow him to record the statement and hurled unruly words against him. In the cross-examination, he stated that the report filed by him did not bear the signature of the driver or the workman and that no statement of any passenger could be recorded. In his cross-examination, these assertions of his were not questioned.

On appreciation of the evidence led before it, the industrial tribunal set aside the order of removal from service and ordered his reinstatement with 50% back wages. The tribunal came to this conclusion by finding the management's evidence faulty on three counts: (i) the inspector should have recorded either the statements of passengers who had been travelling in the bus without a ticket or at least should have submitted their oral statements along with their personal details; (ii) the fact that the inspector had inspected the bus on the alleged date was also not proved; and (iii) had there been any misbehaviour on the part of the workman towards the inspector, an FIR should have been recorded about the same in the police station concerned.

In the writ petition filed before the high court against this award, it agreed with the findings of the industrial tribunal and dismissed the writ petition of the management.

31. *Supra* note 7.

The Supreme Court, in the special leave petition preferred by the management, found the reasoning of the industrial tribunal as upheld by the high court clearly erroneous and unsustainable in law. The court held that the tribunal or the high court could not have rejected the evidence led by the employer before the adjudicatory authority in respect of the misconduct. It observed that the evidence of the inspector was clear that he had found 17 passengers without tickets and this statement of his had not been disputed in the cross examination. Further, non-lodging of the FIR could not be the circumstance to be held against the witness examined by the employer. It was further of the opinion that the initiation of criminal proceedings against an employee or not initiating the proceedings had no bearing to prove misconduct in departmental proceedings. The court was of the firm opinion that the order of removal from service could not be said to be unfair and unjust in any manner which would warrant interference at the hands of the tribunal and the high court.

The court held that the three reasons recorded by the tribunal were absolutely perverse and not supported by any evidence. It held that the tribunal had misapplied the basic principles of law and the high court had thereafter wrongly confirmed the award of the tribunal. Consequently, the court allowed the appeal and set aside the orders of the high court and the tribunal.

*Disciplinary action can be taken even in respect of one of the charges in the chargesheet if provedin the domestic inquiry and such finding of the enquiry officer is accepted by the disciplinary authority*

In *Vijay Kumar Yadav*,[32] the charge of causing loss to the extent of Rs. 2,46,922.56 was held to be proved against the delinquent employee by the enquiry officer. He, however, exonerated him of the other charges. The disciplinary authority disagreed with the enquiry officer insofar as he had exonerated him of the other charges without issuing any notice on the said disagreement. The disciplinary authority ordered his removal from service and further directed him to make good the entire loss caused to the management. The High Court of Allahabad held that the disagreement with the enquiry officer recorded by the disciplinary authority was without notice and in violation of the principles of natural justice. The court set aside the order of punishment passed by the disciplinary authority in *toto* and ordered arrears of salary to be paid to the workman till the date of his superannuation along with other consequential retiral benefits.[33]

The Supreme Court in the special leave to appeal preferred by the appellant management issued notice limited to that question as to whether the high court ought to have maintained the punishment order of recovery of Rs. 2,46,922.56 in respect of the charge of causing loss to the management which misconduct was also held to be proved by the enquiry officer.

The court held that once the charge of causing loss to the extent of Rs. 2,46,922.56 was held to be proved by the enquiry officer and accepted by the

32. *Ibid*.

33. *Vijay Kumar Yadav* v. *State of U.P.*, 2019 SCC OnLine All 4017.

disciplinary authority, the high court ought to have maintained the punishment order of recovery of the whole amount from the respondent employee. The court, accordingly, partly allowed the appeal of the appellant to that extent.

**Retrenchment**

*Termination of services of workman appointed de hors the service rules amounts to 'retrenchment'*

In *K.V. Anil Mithra*,[34] the material facts as summarised by the Supreme Court are, the respondent university which was established by an ordinance, made appointments of non-teaching staff at different posts and categories at different points of time on daily wage basis between the period 1993 to 1995.After some time, the university passed an order regularising the services of the aforementioned daily wage workers, giving them the status of regular employees. Several objections were raised regarding the validity and manner of enforcement of the orders of regularisation. Subsequently, the university passed a later order de-regularising their services and consequently, their employment came to be terminated. In a challenge to the order of de-regularisation before the High Court of Kerala, a division bench of the court upheld the order of de-regularisation passed by the authorities. It held that the employees who were appointed as daily wagers had been appointed without following the prescribed process of selection as per the ordinance and hence, could not lay any claim to their appointment. The order of the high court upholding de-regularisation attained finality. The division bench of the high court, however, left the question of non-observance of the provisions of the ID Act unanswered and open to be examined before the appropriate forum under the ID Act.

The appellant workmen raised an industrial dispute. The appropriate government referred the matter for adjudication to the industrial tribunal. The limited question in terms of the reference to be examined by the industrial tribunal was about the legality of the act of de-regularisation of the employees earlier regularised and the subsequent act of termination of their services by the university and the consequent relief, if any, to which the workmen may be entitled to.

The tribunal, on appreciating the material on record, returned the finding that the act of terminating the workmen was in violation of section 25F of the ID Act. The reason given for such finding was that the workmen concerned had completed more than 240 days of service in the preceding 12 months from the alleged date of termination and that their termination amounted to 'retrenchment.' Admittedly, there was non-compliance with the mandatory provisions of section 25F of the ID Act, which made the termination illegal. The tribunal held that the workmen shall be deemed to be in service until the university terminates their services validly in accordance with the provisions of ID Act. It further held that the workmen shall also be entitled to 50% back wages.

This award was impugned before a single judge of the High Court of Kerala by the university which set it aside holding that since the order of regularisation was

34. *Supra* note 8.

illegal, the provisions of section 25F of the ID Act would not be attracted to the termination of illegal appointments. It further held that section 25F of the ID Act only applies to appointments which have been made in accordance with law.

The workmen preferred a writ appeal before a division bench of the high court which, however, did not interfere with judgment and order passed by the single judge. The appellant workmen preferred special leave to appeal before the Supreme Court.

The primary contention of the appellant workmen before the Supreme Court was that the nature of appointments is not a pre-condition for attracting the application of section 25F of the Act. It was further argued that if an employee is a 'workman' under section 2(s) of the ID Act and termination of his service amounts to 'retrenchment' within section 2(oo) of the ID Act and the workman has put in 'one year of continuous service' in the preceding12 calendar months on the date of termination. In terms of section 25B of the ID Act, a workman is deemed to have put in one year of continuous service if he has rendered at least 240 days of service in the last 12 calendar months preceding the date of termination. In such cases, the employer is required to comply with clauses (a) and (b) of section 25F of the ID Act before effecting retrenchment. Its non-compliance shall make the termination *void ab initio* warranting passing of a consequential order of reinstatement with full back wages. Reliance was placed upon various decisions of the Supreme Court in support of their contention.[35]

On the other hand, the case of the respondent university was that while the definition of 'retrenchment' under section 2(oo) of the ID Act contains the words 'for any reason whatsoever,' it cannot be interpreted so as to protect workmen whose appointments are vitiated by fraud and deceit and therefore the appellant workmen were not entitled to seek protection of section 25F of the Act. The respondent university also referred to a number of decisions of the apex court in support of its contentions.[36]

After considering the judgments relied upon by the parties and on perusing the material available on record, the Supreme Court held that it was clear that employees were covered by the definition of 'workman,' the university was an 'industry' and the dispute relating to non-employment was an 'industrial dispute.' Further, the workmen had put in more than 240 days of service preceding the date of termination of their service making it one year of continuous service within the meaning of section 25B of the ID Act.

35. *State Bank of India* v. *N. Sundara Money* (1976) 1 SCC 822 (*N. Sundara Money*); *L. Robert D'Souza* v. *Executive Engineer, S. Rly.* (1982) 1 SCC 645 (*Robert D'Souza*); *Punjab Land Development and Reclamation Corpn. Ltd.* v. *Presiding Officer, Labour Court*, (1990) 3 SCC 682 (*Punjab Land Development*); for a detailed critique of *Punjab Land Development and Reclamation Corpn. Ltd.*, see Bushan Tilak Kaul, "Industrial Relations Law" XXVI *ASIL*291 at 301-04 (1990);and *Nagar Mahapalika* v. *State of U.P.*, (2006) 5 SCC 127.

36. *R. Vishwanatha Pillai* v. *State of Kerala*, (2004) 2 SCC 105; *Rajasthan Tourism Development Corpn. Ltd.* v. *Intejam Ali Zafri*, (2006) 6 SCC 275; *Satluj Jal Vidyut Nigam* v. *Raj Kumar Rajinder Singh* (2019) 14 SCC 449 and *Punjab Urban Planning & Development Authority* v. *Karamjit Singh*, (2019) 16 SCC 782.

In the present case, the sole issue which had to be considered by the Supreme Court was whether the termination amounted to 'retrenchment' within the meaning of section 2(oo) of the ID Act so as to attract application of section 25F of the ID Act. The court examined the definition of the term 'retrenchment' along-side the diverse yet coinciding *ratios* laid down by it in a catena of judgments.[37]On judicious examination of the aforesaid judgments and the plain language of the definition, the court held that the language of section 2(oo) refers to termination 'for any reason whatsoever' which is wide enough to include termination of service even if the same is contrary to the service rules or without authority or without following the due procedure subject to the exceptions contained in the said section.

In view of this legal position, the Supreme Court noted that non-observance of the twin conditions by the university rendered all such terminations as *void ab initio*, which ordinarily follows with the relief of reinstatement with all the consequential benefits, which of course is not automatic. It is open to the consideration of a court or tribunal to grant an alternative relief depending on the facts and circumstances of a specific case as has been held in a number of judgments.[38]

The court observed that the views expressed by the high court in the impugned judgment were unsustainable in law and were not in conformity with the scheme of the ID Act. It accordingly set aside the same. The court partly allowed the appeals of the aggrieved workmen by substituting the relief of reinstatement along with 50% of the back wages as ordered by the industrial tribunal with one-time payment of a lumpsum monetary compensation of Rs. 2,50,000 to each of the appellant workmen in full and final satisfaction of the dispute.

*Retrenchment of daily rated worker in violation of section 25F: compensation is the appropriate relief*

In *Ranbir Singh*,[39] the workman was engaged verbally on daily wage basis in 1983 and his services were also terminated verbally in the year 1991 without complying with the mandatory provisions of section 25F of the ID Act by the respondent organisation. The industrial dispute relating to his non-employment was referred to the labour court which awarded reinstatement with 25% of back wages for non-compliance with section 25F of the Act.

In the writ petition filed by the respondent against the award of the labour court, the high court granted reliefs of monetary compensation of a paltry sum of Rs. 25,000 in *lieu* of reinstatement with 25% of back wages as awarded by the labour court.

In the special leave petition preferred by the workman, the Supreme Court enhanced the compensation to Rs. 3,25,000. The court held although he had worked

37. *Supra* note 35, see *N. Sundara Money*, *Robert D'Souza*, *Punjab Land Development*.

38. *BSNL* v. *Bhurumal* (2014) 7 SCC 177 (*Bhurumal*);for a detailed critique of *Bhurumal*, see Bushan Tilak Kaul, "Labour Management Relations" L *ASIL* 829 at843-46 (2014); and *District Dev. Officer* v. *Satish Kantilal Amrelia*, (2018) 12 SCC 298, for a detailed critique of *Satish Kantilal Amrelia*, see Bushan Tilak Kaul, "Labour Management Relations" LIV *ASIL* 529 at 532 (2018);

39. *Supra* note 8.

for a number of years, his appointment was that of a daily rated worker and, therefore, reinstatement could not be the appropriate relief in view of the earlier judgment of the court in *Bhurumal*.[40]

It is submitted that the plea of the counsel for the petitioner workman has not been dealt with. There has been no discussion on his submission that the juniors of the workman were either retained or regularised while his service alone was terminated. If the records of the respondents had been summoned by the court in the interest of justice and had it noticed that there was either violation of section 25G of the Act or the action of the respondents amounted to an unfair labour practice or it was violative of articles 14 and 16, the relief of reinstatement with 25% back wages as awarded by the labour court would have been the appropriate relief.[41]

*Irrigation department of a state government is not a 'factory' and hence not an 'industrial establishment' to attract chapter V-B of the ID Act: predominant activity test applied*

In *Somdutt Sharma*,[42] an interesting and important question that arose for consideration of the Supreme Court was whether the irrigation department of the state government employing more than 100 workmen was an "industrial establishment" within the meaning of section 25L of the ID Act to attract chapter V-B of the ID Act making prior permission of the appropriate government a condition precedent for effecting a valid retrenchment of the workman. The labour court in its award held that the irrigation department was covered by chapter V-B of the ID Act and, therefore, effecting retrenchment without prior permission of the appropriate government was bad in law. It accordingly, ordered reinstatement of the workman without back wages. This award was confirmed both by the single judge as well as the division bench of the Madhya Pradesh High Court.

The Supreme Court noted that neither the labour court nor the high court had gone into the question as to whether the irrigation department was a "factory" within the meaning of the Factories Act, 1948 before it could be described as an "industrial establishment" within the meaning of section 25L of the ID Act.[43] Therefore, the

40. *Supra* note 38.

41. See, *Ajaypal Singh* v. *Haryana Warehousing Corpn.*, (2015) 6 SCC 321;For a detailed critique of *Ajaypal Singh*, see Bushan Tilak Kaul, "Labour Management Relations" LI *ASIL* 817 at 821-822 (2015) and *Maharashtra SRTC* v. *Casteribe Rajya Parivahan Karmchari Sanghatana*, (2009) 8 SCC 556 (*Casteribe*). For a detailed critique of *Maharashtra SRTC* v. *Casteribe Rajya Parivahan Karmchari Sanghatana*, see Bushan Tilak Kaul, "Labour Management Relations" XLV *ASIL* 533 at 566 (2009).

42. *Supra* note 8.

43. 25L. Definitions. – For the purposes of this Chapter, –

(*a*) 'industrial establishment' means—

(*i*) a factory as defined in clause (*m*) of Section 2 of the Factories Act, 1948 (63 of 1948);

(*ii*) a mine as defined in clause (*j*) of sub-section (1) of Section 2 of the Mines Act, 1952 (35 of 1952); or

(*iii*) a plantation as defined in clause (*f*) of Section 2 of the Plantations Labour Act, 1951 (69 of 1951);

primary question was whether the irrigation department fell within the meaning of section 2(m) of the Factories Act.[44]

The primary test for determining the scope of the definition of 'factory' for the purpose of the Factories Act is to see whether the establishment in question involves a "manufacturing process." The court noted that the irrigation department is responsible for creation and maintenance of irrigation potential through construction of water resources projects. It also deals with disaster management, calamity management, maintenance of flood control works, reservoir operations, etc. None of these functions involves pre-dominantly "manufacturing process" and therefore, the definition of "industrial establishment is not attracted in the present case. The court observed thus:[45]

> 10. … Even assuming that some of the employees may be doing the work of pumping of water, that is not sufficient to hold that the Irrigation Department of the first appellant is carrying on manufacturing process. Overall activities and functions of the Irrigation Department will have to be considered while deciding the question whether it is carrying on manufacturing activities. Few employees of the Irrigation Department out of several may be incidentally operating pumps. But the test is what are the predominant functions and activities of the said Department. Even if the activity of operation of pumps is carried on by a few employees, the Irrigation Department does not carry on manufacturing process. As it is not carrying on manufacturing process, it is not a factory within the meaning of clause (m) of Section 2 of the Factories Act.

Therefore, the court had no hesitation in coming to the conclusion that the irrigation department of the state could not be an industrial establishment within the meaning of section 25L of the ID Act. Accordingly, chapter V-B of the ID Act was not attracted. The court held that the state had complied with section 25F in chapter VA of the Act and therefore the retrenchment was valid. It, accordingly, set aside the judgment of the division bench of the high court.

*Government having not joined the proceedings before the labour court: ex-parte proceedings held was in order and was bound to face the consequences*

In *Munta Aalamkhan Nurbeg*,[46] the workman alleged that having served for more than 240 days in the 12 months preceding his termination, the said termination by the state government was in violation of mandatory provisions relating to

44. 2. Interpretation. – In this Act, unless there is anything repugnant in the subject or context, –
(*m*) "factory" means any premises including the precincts thereof—
(*i*) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
(*ii*) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on

45. *Supra* note 8, *Somdutt Sharma* at 56-57.

46. *Supra* note 8.

retrenchment law. The dispute raised by him became subject matter of a reference before the labour court which answered the reference in his favour on the basis of the evidence led by him. The state government did not participate in the proceedings in spite of being duly served by the labour court. It awarded reinstatement of the workman along with 70% of the back wages. The state government unsuccessfully challenged this award before a single judge of the High Court of Gujarat who found no infirmity in the aforesaid award.

The state government impugned this decision before the Supreme Court under article 136 of the Constitution. The court, after hearing the parties and perusing the material on record, was satisfied that the award was passed in accordance with law. The court took note of the fact that the state government had not participated in the proceedings before the labour court and it was left with no option but to proceed *ex-parte* against the state and rendered the award on the basis of the evidence adduced by the workman. The court held that the award did not suffer from infirmity and dismissed the appeal of the state.

**Abandonment of service**

In *Sureshwati*,[47] the respondent who had joined as an assistant teacher and subsequently been appointed as a clerk in the school which had eventually got grants-in-aid from the state from 2005, claimed that her services had been terminated by the management of the school on March 8, 2006, illegally and in violation of section 25F of the ID Act. Her case was that no departmental enquiry was held before terminating her services. On reference to the labour court by the state government, the labour court passed an *ex-parte* award in her favour. The award was impugned by the management in a writ petition before the High Court of Uttarakhand which was allowed with the direction to the labour court to decide the matter *de novo* in accordance with law.

On remand, the labour court allowed the parties to lead evidence in support of their stand. The stand of the management was that the employee had remained continuously absent since 1997, *i.e.,* when she got married and shifted to Dehradun. Therefore, it amounted to abandonment of her service.

The management adduced sufficient evidence to prove that the employee had been continuously absent from school since 1997 and had concealed material facts, which evidence she failed to rebut. After appreciating the evidence led by the parties, the labour court answered the reference against the employee and held that she was not entitled to any relief. Further, the labour court came to the definite conclusion that she had decided to raise her claim in 2006 only after the school had got grants-in-aid from the state.

Aggrieved by this award, the employee approached the high court by way of a writ petition seeking setting aside of the award. A single judge of the high court allowed the writ petition on the sole ground that the management had not conducted any inquiry into the alleged charge of abandonment of service by the employee. The

47. *Ibid.*

management challenged this judgment and order in a special leave petition before the Supreme Court.

The Supreme Court referred to a number of its earlier judgments[48] where it has been clearly held that where the management has failed to hold an inquiry before dismissal or discharge of the workman, it was open to it to justify the action before the labour court by leading evidence for the first time. The entire matter would be open for the labour court which will have jurisdiction to satisfy itself on the evidence that may be led by both the parties whether the dismissal or discharge was justified.

The court in this case perused the award passed by the labour court and found that a full opportunity was given to both parties to lead evidence, both oral and documentary, to substantiate their respective case. The court expressed its surprise that the high court had not adverted to such evidence. It had disposed of the writ petition on the sole ground that the school had not conducted a disciplinary enquiry before discharging the employee from service. The court was of the opinion that sufficient evidence had been led by the management to prove that she had not been in the employment of the school since July, 1997. She had initially been appointed as an assistant teacher *de hors* the rules and was subsequently appointed as clerk. She had failed to prove that she had been in employment for 240 days preceding her alleged termination on March 8, 2006. The onus to prove the same was entirely upon her which she had failed to discharge. In the aforesaid facts and circumstances, the Supreme Court allowed the appeal of the management and set aside of the judgment and order of the high court. It, accordingly, restored the award of the labour court.

**Regularization: Issues relating thereto**

*Failure of the court to make distinction between 'irregularity' and 'illegality'*

In *Bharat Sanchar Nigam Limited*,[49] the material facts can be summarised as under, the respondent was a daily rated *mazdoor* working in the appellant company since the year 1973. His services were regularised with effect from August 11, 1986 and he superannuated on August 30, 1989. Thereafter he continued to work in the appellant company on daily wage basis. His services were terminated by the appellant company in the year 1993. The respondent thereafter, made a representation to the appellant company demanding payment of gratuity and other retiral benefits. However, it denied his retiral benefits on the ground that he had not completed 10 years of qualifying service as mandated by the service rules.

The respondent chose not to get his dispute espoused under the ID Act. He rather opted to file an original application before the central administrative tribunal with the plea of grant of his retiral benefits. The central administrative tribunal allowed his application holding that the appellant company having regularised his service under the regularisation scheme of 1989, should have been given permanent status

48. *Workmen* v. *Motipur Sugar Factory*, (1965) 3 SCR 588; *Delhi Cloth & General Mills Co.* v. *Ludh Budh Singh*, (1972) 1 SCC 59; *Firestone*, *supra* note 30 and *Bhavnagar Municipal Corpn.* v. *Jadeja Govubha Chhanubha*, (2014) 16 SCC 130.

49. *Supra* note 9.

and his retiral dues needed to be settled. The appellant company preferred a writ petition before the High Court of Jammu and Kashmir which was dismissed. It upheld the reasons assigned by the central administrative tribunal. The appellant company filed a special leave petition before the Supreme Court impugning this judgment and order.

The Supreme Court noted that the court in *State of Karnataka* v. *Umadevi* (3)[50] had categorically held that keeping in view the constitutional scheme of equality, as contained in articles 14 and 16 of the Constitution, regularisation or permanent continuance of temporary, contractual, casual, daily wage or *ad hoc* employees in public employment *de hors* the constitutional scheme is impermissible in law. The court referred to the following observations in *Umadevi*:[51]

> 43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious

50. (2006) 4 SCC 1 (*Umadevi*). For a detailed critique of *State of Karnataka* v. *Umadevi* (3), see Bushan Tilak Kaul, "Labour Management Relations" XLII *ASIL* 480, 525 (2006).
51. *Id*.at 36 –37, 42.

> employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.
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> …
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> 53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Naranyanappa*,[52]*R.N. Nanjundappa*,[53] and *B.N. Nagarajan*,[54] … of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one-time measure, the services of such *irregularly* appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

The court observed that in view of the aforesaid observations of the court in *Umadevi*, there could not be any doubt that the 1989 regularisation scheme was not applicable in respect of the respondent employee and the likes who had not been appointed in accordance with the rules in vogue in the appellant organisation. The

52. (1967) 1 SCR 128.
53. (1972) 1 SCC 409.
54. (1979) 4 SCC 507.

court further held that the case of the respondent workman did not come within the purview of the exceptions carved out by it in *Umadevi*. The court held that the award of the central administrative tribunal as also the judgment and order of the high court were unsustainable in law in view of its decision in *Umadevi*. It accordingly set aside the judgment of the high court.

The Supreme Court in this case has completely ignored the fact that the case related to appointment of a *mazdoor* on daily wages in 1973 and his regularisation in 1986 even though not in accordance with law, he could have been granted the benefit of regularisation under the regularisation scheme of 1989, which it seemed was not considered having already been regularised in 1986. His case deserved to be considered under the 1989 scheme given the fact that for a *mazdoor*, the recruitment rules would not have been stringent enough as to make him ineligible for consideration for regularisation. In the circumstances, it seems to be a case of irregular appointment and not illegal appointment. It is submitted that there is no discussion to this effect in the Supreme Court judgment. The court has failed to appreciate that it was a case of irregularity and not illegality.

It is a well settled legal position in *Umadevi* itself that the courts can always cure irregularity. The case of the workman should have been considered with compassion and he should not have been denied the benefit of regularisation at least under the 1989 scheme. He deserved to be given the retiral benefits after having worked for long years as a daily wager and his case could well be covered under the exceptions in *Umadevi*.

*Demand of regularisation legitimate: workman to establish denial on account of unfair labour practice on the part of the employer*

In *Pandurang Sitaram Jadhav*,[55] the issue of regularisation did not arise directly under the ID Act but arose under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (Maharashtra Act). The material facts were that 11 complaints were filed in 2001 before the industrial court under the Maharashtra Act by individual daily wage workers claiming that they had been working with the respondent for periods more than 240 days continuously for a long period of time from 1987 onwards and had not been given regular status by the state government which amounted to unfair labour practice under the said Maharashtra Act. The industrial court allowed these complaints and held that these complainants were being denied the benefit of permanency including increments, bonus, provident fund, retirement benefits, *etc*. as were admissible to the regular employees. The industrial court noticed the plea of the respondent state that there was absence of any sanctioned posts and also there was ban on recruitment by the state government. It, however, treated the action of the state as an unfair labour practice and granted permanency on the ground that they were not new appointees and had been working for the last 12 to 20 years.

The order was challenged before the single judge of the High Court of Bombay but with no success. The respondent State, however, filed a letter patents appeal before

55. *Supra* note 9.

a division bench of the court which allowed the appeal on the ground that there were no regular posts available for making such appointments and there was absence of sanctioned posts. The individual workmen preferred a special leave petition before the Supreme Court against the said judgment.

The court noticed that the gravamen of the reasoning of the division bench of the high court was its judgment in *Umadevi*.[56] It observed that the division bench had not appreciated *Umadevi* in its perspective. The court in *Umadevi* had frowned upon the directions issued by the Karnataka High Court under article 226 of the Constitution for absorption, regularisation or permanent continued status in the absence of recruitment which was not in terms of the constitutional scheme. It observed that if an employee is continued under the cover of an interim order of the court, it would not entitle him to any right of absorption or permanency.

The court in the present case observed that *Umadevi* was further clarified and elucidated in *Casteribe*.[57] In *Casteribe*, the court was dealing with the Maharashtra Act itself wherein the powers of the industrial and labour court were wide enough to empower it to accord permanent employment to those who had been made victims of unfair labour practice. Such power was not to be affected by *Umadevi* as that was a case limited to the scope of powers being exercised under articles 32 and 226 of the Constitution for regularisation and matters of public importance. Thus, the power to take affirmative action by way of ordering regularisation remained intact under the provisions of the Maharashtra Act. The labour court and industrial tribunal under the said Act was competent enough to enquire into unfair labour practices of engaging persons on contract basis over a long period of time and to give a finding thereon. The Supreme Court held that under the Maharashtra Act, it had no doubt that the appellants before it would be entitled to the benefits of regularisation and merely a delay in preferring the claim would not come in their way except that the benefit of regularisation would arise from the date when the complaints were filed.

The Supreme Court held that the findings given by the industrial court on unfair labour practice was sound and the same had been confirmed by the single judge of the high court. The judgment of the division bench of the high court suffered from infirmities due to its failure to appreciate the perspective of *Umadevi* as explained by it in *Casteribe*. The court accordingly directed the respondent to regularise the appellants from the date of their filing of the complaint and further directed it to issue the orders of regularisation within three months from the date of this order. The court made it clear that the services rendered for the earlier period would be counted for the purpose of calculation of benefits without being monetarily entitled for that period. It allowed the appeals of the applicants.

**Section 33(2)(a) and (b): scope**

*Legislative history of section* 33 *discussed*

Section 33 of the ID Act as it originally stood, enjoined all employers not to change service conditions of employees to the prejudice of the workman or dismiss

56. *Supra* note 50.
57. *Supra* note 41.

or discharge any workman during pendency of an industrial dispute before the authorities under the Act. This provision was intended to protect the workman against victimisation by changing the service conditions or dismissing or discharging during the pendency of an industrial dispute before the authorities. It was also intended to allow the dispute resolution through conciliation or adjudication to be held in a peaceful atmosphere. However, in due course of time it was felt that the provision in the original form was creating hardship for employers from taking *bona fide* action against the workman in the interest of maintaining discipline in the industrial establishments. To lessen the rigour of the original section, the section was amended in1950 which allowed managements to take action against the workmen by way of dismissal or discharge during the pendency of an industrial dispute before the authorities provided it sought prior permission of the authorities to do so.[58] Before granting such permission the authority was expected to satisfy itself *prima facie* that the act of the management was not an act of victimisation or unfair labour practice or contrary to the principles of natural justice.

However, in due course, it was felt that even the amended section 33 was too stringent as it practically took away the right of the employer to make any alteration in the conditions of service or to make an order of dismissal or discharge without making distinction as to whether alteration or such order of dismissal or discharge was in any manner connected or unconnected with the dispute pending before the conciliation or adjudicatory authority.[59]To make the law pragmatic, legislative intervention became imperative. Therefore, Parliament by an amendment drew a distinction between "matters connected with the pending industrial dispute" and "matters not connected with the pending industrial dispute." Section 33 was divided into section 33(1) and section 33(2) and rigour of the law in case of alterations in

58. Amended by Act 48 of 1950, s. 34.

S. 33 after the 1950 amendment reads thus:

33. Conditions of service, etc., to remain unchanged during pendency of proceedings. — During the pendency of any conciliation proceedings or proceedings before a Tribunal in respect of any industrial dispute, no employer shall, –

(a) alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceedings; or

(b) discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute, save with the express permission in writing of the conciliation officer, Board or Tribunal, as the case may be.

59. See, *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.* v. *Ram Gopal Sharma* (2002) 2 SCC 244 (*Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.*). Also see, *Straw Board Mfg. Co. Ltd.* v. *Govind* 1962 Supp (3) SCR 618 and *John D'Souza* v. *Karnataka SRTC* (2019) 18 SCC 47. For a detailed discussion on section 33(2)(b), see Bushan Tilak Kaul, "Labour Management Relations" LV *ASIL* 435 at 460 to 65 (2019);

conditions of service or dismissal or discharge not connected with the pending dispute was made less stringent.[60]

In *Chittibabu*,[61] the Supreme Court has once again emphasized the importance of distinction between section 33(1)(a) & (b) and section 33(2)(a) &(b) of the ID Act.In the former case, the employer is required to take prior permission of the authority before which the dispute is pending, whether it is conciliation or adjudication authority, to alter the service conditions or to take disciplinary action by way of dismissal or discharge against the workman/workmen who is/are "connected with the pending dispute" to which the workman/workmen is/are a party. Here, alterations in the service conditions or taking of disciplinary action by way of dismissal or discharge is prohibited unless prior permission is given by the authority before which the industrial dispute is pending.

In the latter case, the employer is within his right to alter service conditions or dismiss or discharge a workman/workmen, after holding a departmental inquiry in accordance with the principles of natural justice in respect of a misconduct which is

60. Amended by Act 36 of 1956, s. 21 (with effect from March 10, 1957).

S. 33 (1) to (3) after the 1956 amendment reads thus:

33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.— (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall,—

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

(b) for any misconduct connected with the dispute discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute,

save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute,—

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—

(*a*) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or

(*b*) by discharging or punishing, whether by dismissal or otherwise, such protected workman,

save with the express permission in writing of the authority before which the proceeding is pending.

61. *Supra* note 9.

"not connected with the pending dispute" to which the workman/workmen is/are a party, provided the employer simultaneously thereafter pays one month's wages to the workman/workmen concerned and moves an application before the authority before whom the proceeding is pending for approval of the action taken by the employer. If the action is approved by the said authority, it relates back to the date of termination but, if it is not permitted it is *non-est* in the eyes of law.

In the present case, the court found that the strike resorted to by the workmen and the vandalism indulged in by them led to destruction of property of the management. The disputes that were pending before the conciliatory authority were related to demand for promotional avenues, payment of monthly wages before seventh day of each month, drinking water and protective clothing. In the second dispute raised by the workmen, they were making a claim for status of permanency. The disciplinary action resorted to by the management was in respect of the alleged misconduct involving the destruction of property of the employer. Therefore, the dismissal for misconduct was "not connected with the pending dispute" before the conciliation authority. The assistant labour commissioner had come to the conclusion that the enquiry was made in accordance with the principles of natural justice and there was no evidence that any of the workmen were protected workman entitled to protection under section 33(3) of the ID Act. The assistant labour commissioner himself had given a finding that the disciplinary action was taken because the acts of omission and commission on the part of the workmen had resulted in law-and-order situation.

The Supreme Court held that the assistant labour commissioner and both the single judge as well as the division bench of the high court had greatly erred in concluding that prior permission was required under section 33(1)(b) which only showed non-application of mind. It was a clear case which had to be decided under section 33(2)(b) as this provision was squarely applicable in the present case. There was no dispute about the fact that there was compliance with provisions of section 33(2)(b) of the ID Act by the management. The court, accordingly, allowed the appeal of the management and set aside the order of the division bench of the Madras High Court which had upheld the orders of the single judge and assistant labour commissioner.

In *Duncan Engineering Ltd.*,[62] the High Court Bombay had to deal the correctness or otherwise of an award passed by the Labour Court, Pune. It had held the dismissal order of the workmen void and inoperative for non-compliance with the provisions of section 33(2)(b) of the ID Act and requiring the management to reinstate the workmen with continuity of service, full back wages and all other consequential benefits. This award was passed by the labour court in the following factual matrix:

> The management was carrying on manufacturing business of some automobile parts and the workmen concerned were employed in one of its factories. The workmen were served with chargesheets alleging that they had indulged in acts of wilful insubordination, disobedience and participated in illegal strike, riotous and disorderly behaviour.

62. *Supra* note 1.

Dissatisfied with their reply, the management initiated disciplinary proceedings against them. The enquiry officer recorded a finding that the workmen were guilty of the charges. The management acting on the said enquiry officer's report, terminated the services of the workmen with immediate effect. They raised an industrial dispute against their dismissal which was referred for adjudication to the Labour Court, Pune. The subject matter of the reference was legality or otherwise of the order of termination and the reliefs to which the workmen would be entitled to if it was found that their termination was illegal. The workmen filed their claim before the labour court contending that the dismissal order was *per se* bad and illegal for want of approval under section 33(2)(b) of the ID Act. It was the case of the workmen that issuance of chargesheet and the consequent order of termination of service was an act of victimisation for having joined the INTAK Union which was espousing their cause. The order of termination was passed pending the reference pertaining to the charter of demands raised by the union of which they were members. They contended that the dismissal order was inoperative having been passed without seeking the approval of the authority before which the reference was pending. On merits, it was alleged that the inquiry was not fair and proper and that the findings recorded by the enquiry officer as regards the misconduct were perverse.

The management's case was that the act of termination was not victimisation. The workers had been given ample opportunity by the enquiry officer who took the decision upon considering all the material placed before him including the evidence adduced by both the parties. The management further contended that it was necessary to seek approval and denied that the order of dismissal was void for breach of section 33(2)(b) of the ID Act.

The labour court framed the preliminary issues relating to fairness or otherwise of the findings recorded by the enquiry officer. It came to the conclusion that the enquiry was fair, proper and in accordance with the principles of natural justice. Nevertheless, in the final award, the labour court held that there was non-compliance with the provisions of section 33(2)(b) of the ID Act as no approval of the labour court had been taken before whom the reference of the industrial dispute unconnected with the misconduct was pending. Resultantly, there was non-compliance with the said provision which was mandatory in nature in terms of the judgment of the Supreme Court in *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.*.[63] It upheld the contention of the workmen that the termination was bad in law on that count, and accordingly ordered that they were entitled to reinstatement, back wages and

63. *Supra* note 59.

> continuity of service and other consequential benefits. It was this award which was the subject matter of challenge by the management before the single judge of the High Court of Bombay.

The management confined their challenge under article 227 of the Constitution restricted to the order of reinstatement with consequential benefits on the ground, *inter alia*, that once the workmen filed an application under section 33A of the ID Act or sought reference under section 10 of the ID Act, the industrial adjudicator could not restrict adjudication only to the issue of non-compliance of section 33(2)(b) but must also adjudicate the substantive dispute on merits in accordance with the provisions of the ID Act. The management relied upon various judgments[64] of the Supreme Court to submit that once the departmental enquiry was found to be in accordance with law, the industrial adjudicator could not have interfered with the termination order at all merely because there was non-compliance with section 33(2)(b). In such a case, the only course open to the workmen should have been to seek prosecution of the management under section 31(1) of the ID Act.

However, the workmen relying on *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.* contending that the said judgment of the constitution bench of the Supreme Court had resolved the controversy when it held that the dismissal order in contravention of section 33(2)(b) of the ID Act was void and inoperative. It was argued that the decision in *Rajasthan State Road Transport Corporation*[65] was based on the peculiar facts of that case and in *Karur Vysya*[66] the issue of non-compliance was left open.

The High Court of Bombay relied upon the following observations of the Supreme Court in *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.*:[67]

> 15. …An employer who does not make an application under section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under section 33-A

64. *Punjab National Bank Ltd.* v. *Workmen*, AIR 1960 SC 160; *Rajasthan State Road Transport Corporation and another* v. *Satyaprakash* (2013) 9 SCC 232 (*Rajasthan State Road Transport Corporation*); *Management of Karur Vysya Bank Limited* v. *S. Balkrishnan* (2016) 12 SCC 221 (*Karur Vysya*)and *Management of North East Karnataka Road Transport Corporation* v. *Shivsaharanappa* (2017) 16 SCC 540.

65. *Ibid*.

66. *Ibid*.

67. *Supra* note 59 at 254 – 55.

> notwithstanding the contravention of section 33(2)(b) proviso, driving the employee to have recourse to one or more proceeding by making a complaint under section 33-A or to raise another industrial dispute or to make a complaint under section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.
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> …
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> 18.In view of what is stated above, we respectfully agree with and endorse the view taken in the case of *Strawboard* and *Tata Iron and Steel Co*. and further state that the view expressed in *Punjab Beverages* on the question is not the correct view.

The high court, after considering the matter in its entirety, held that in its considered view, the decision of the labour court was in accordance with the principles laid down in *Jaipur Zila Sahakari Bhoomi Vikas Bank* and hence the labour court was justified in declaring the termination as *void ab initio* for non-compliance with section 33(2)(b) of the ID Act. The court further held that the labour court was justified in ordering reinstatement with consequential benefits. It, however, clarified that the respondent workmen would be entitled to reinstatement provided they had not attained the age of superannuation during the interregnum period. Those who had attained the age of superannuation would be entitled to wages from the date of dismissal till the date of their superannuation. It, accordingly, dismissed the petition of the management.

## III CONCLUSION

In the year under survey, only a few path breaking judgments have been handed down by the Supreme Court. In a collective dispute concerning a number of workers, a situation like the one in *Caparo Engineering India Ltd.*,[68] it held that an industrial adjudicator would be justified to hold that even transfer of workmen could amount to unilateral change of service conditions to the prejudice of the workmen. It would be violative of section 9A of the ID Act and liable to be declared arbitrary, *mala fide* and an act of victimisation warranting setting aside of the same. Such an action generally adopted by the management is to victimise the workmen by transferring them to remote areas and place them in supervisory capacity so as to exclude them from the coverage of the ID Act. This is a common practice resorted to by the management to coerce workmen to tender resignations even after having served for long years and contributed to the health and wealth of the organisation. This approach of the court is purposive construction of section 9A of the ID Act and should go a long way in minimising such unfair labour practices.

The court has reiterated the principle that the civil courts are *coram non judice* in respect of subject matters of 'industrial dispute' under the ID Act.[69]The said Act is

68. *Supra* note 6.

69. *Supra* note 3, *Milkhi Ram*.

a complete code in respect of industrial disputes and the industrial adjudication machinery constituted there under is expected to decide industrial disputes expeditiously, in a peaceful environment and pass orders in tune with the concept of social justice.

The two decisions of the Delhi High Court have culled out the principles which govern as to what constitutes 'exceptional circumstances' while entertaining a writ petition under article 226 of the Constitution in respect of subject matters covered under the ID Act.[70] A single judge of the court has shown enormous sensitivity and ensured that the statutory body implemented the award of the labour in letter and spirit. The judge castigated the management and imposed costs on it for foisting long drawn litigation on the worker.[71] This is an appropriate case where the concerned officials should have been held personally liable to pay a portion of the money payable to the workman due to unnecessary litigation encouraged and thrust by them on the workman.

The apex court has reiterated the basic principle of service jurisprudence that mere preponderance of evidence to the satisfaction of the enquiry officer or the industrial adjudicator is sufficient to sustain a charge of misconduct. Proving of the misconduct beyond reasonable doubt has never been the requirement in a domestic inquiry.[72]The court has reiterated the well-settled legal position that mere disagreement of the disciplinary authority with the findings of the enquiry officer in his report exonerating the charge sheeted employee is not enough for punishing the workman.[73] The disciplinary authority is bound to give cogent reasons of disagreement on the basis of the material on record before awarding punishment to the workman. Further, the court has made it clear that the finding of the inquiry officer in respect of one of the charges which stands proved in an inquiry against the workman, if accepted by the disciplinary authority, can be the basis for punishing the delinquent even when in respect of the other charges he has been exonerated for lack of evidence.

In a reference of industrial dispute relating to dismissal or discharge, it is within the powers of the industrial tribunal to reappreciate the entire evidence as an appellate body and come to a conclusion different from that of the enquiry officer or the disciplinary authority, as the case may be. The Supreme Court, even during the year under survey, has once again failed to appreciate this legal position since the introduction of section 11A in the ID Act and its interpretation in *Firestone*[74] which still holds the field.[75]This change in legal position from supervisory (pre-section 11A position) to the appellate jurisdiction (post-11A position)needs to be appreciated by the Supreme Court to avoid further miscarriage of justice.[76]

70. *Supra* note 1, *Naveen Kumar*.
71. *Supra* note 1, *Raj Singh*.
72. *Supra* note 7, *Standard Chartered Bank*.
73. *Supra* note 7, *Vijay Kumar Yadav*.
74. *Supra* note 30.
75. *Supra* note 7, *Standard Chartered Bank*.
76. For a detailed discussion, see *supra* note 29.

The court has reiterated the legal position that termination of services of a workman appointed *de hors* the service rules amounts to 'retrenchment' and non-compliance with section 25F of the ID Act renders it illegal with all consequences.[77]

The legal proposition that compliance with section 33(1) or 33(2) of the ID Act, as the case may be, is mandatory is well settled. Any order of dismissal or discharge in violation of either of the said provisions is *non-est* in the eyes of law, notwithstanding the fact that the enquiry held by the employer against the workman may have been in complete conformity with the principles of natural justice.[78] This approach of the court is as it should be.[79]

77. *Supra* note 8, *K.V. Anil Mithra* and *supra* note 35, *Punjab Land Development*.

78. *Supra* note 9,*Chittibabu*.

79. S. 33 of the ID Act has been conceived as a fetter on the power of the management to resort to unilateral change in the service conditions to the prejudice of the workman or victimise him or subject him to unfair labour practice during the pendency of an industrial dispute.