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LABOUR MANAGEMENT RELATIONS

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I INTRODUCTION

SURVEYED ARE the significant reported decisions of the Supreme Court in the area of industrial relations law that the court handed down in the years 2012 and 2013. As in the past few years, these two year also have seen hardly any decisions rendered by the apex court which could be called adjudication of a collective labour dispute. Most of the decisions reported center around disputes relating to departmental enquiry, disciplinary action, pendency proceedings, issues relating to *ex-parte* awards and reliefs in the event of violation of mandatory provisions of retrenchment law. It can be stated without hesitation that the workers and the trade unions have accepted it as a *fait accompli* that the strong labour rights jurisprudence developed by the apex court over around four decades after India became a democratic socialistic republic are gradually, but surely, suffering dilution. In the name of reforms in labour law the tiny organised labour sector is becoming disorganized while unorganised sector is getting enlarged. Adding fuel to this trend are the statutory amendments being brought about to the three major central labour legislation by the State of Rajasthan.[1] The requirement of prior permission to be taken under chapter VB of the Industrial Disputes Act, 1947 (ID Act), before effecting layoff, retrenchment or closure of industrial establishments employing 100 or more workmen has been made applicable to only those establishments employing 300 or more workmen. Further with respect to the Trade Unions Act,

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1 These amendments received the Presidential assent on 9th Nov. 2014. For further information see http://timesofindia.indiatimes.com/india/President-nod-to-Rajasthan-labour-law amendments/articleshow/45084160.cms (last visited on Aug. 12, 2014). The Factories Act 1948 is applicable to premises with 10 or more workers with power and 20 or more without power, and the amendments have raised these numbers to 20 and 40 respectively. The increase in maximum over time work to 100 hours will make the eight-hours-day a mirage. For a critique of the amendments made by the State of Rajasthan to the Central labour legislation which have the blessings of the new dispensation at the Centre see K. Chandru, Ad-hocism in the decisions to modify labour laws *Economic and Political Weekly,* (EPW) July 26, 2014 Vol. XLIX No. 30 at 15-18.

1926 registration of a trade union would henceforth require membership of 30% of the total number of employees. The amendment made to the Central Contract Labour (Regulation and Abolition) Act, 1970 raises limit of the applicability of the Act to 50 or more workers from the current 20 workers. It is submitted that the amendments are alarming in their content as these seek to exclude many establishments from the purview of the three key legislation on the plea that these amendments are conducive to good environment for doing business in India with ease. They are also alarming as these legitimize the judicial approach in recent days which have the effect of diluting the labour rights jurisprudence built brick by brick by the judiciary and the legislature in the past. It appallingly reflects the dwindling political potency of labour. It is feared that the Rajasthan model may soon be adopted at the national level. Among the proposed amendments at the national level, of concern in the context of labour management relations, is the Apprentices Act, 1961 which is targeted to expand the scope of employment as apprentices on the shop floor. The proposed amendment seeks to encourage induction of non-engineer apprentices. It is proposed that in the first year, an apprentice will get 70% of what a semi-skilled worker gets, in the second year 80% and in the third year 90%.[2] Anxiety in this regard emanates from the fact that 'apprentice' is not a 'workman' for the purposes of the ID Act and other labour welfare legislation.[3] The Indian policy makers necessarily have to rethink and ensure that the growth that they want to generate with the help and co-operation of the workers is an inclusive growth. How the policy makers can create a contented labour force whose co-operation and industrial harmony is a *sine qua non* for economic growth of any nation, especially one which is wedded to the concept of socialism and egalitarian form of society is a question that needs serious consideration. It has to ensure that the operation of the economic system is not allowed to be concentrated in the hands of a mighty few to the detriment of others.

As stated above, most of the cases reported deal with domestic enquiry, powers of industrial adjudicators in disciplinary matters under the ID Act and reliefs in the event of violation of the mandatory provisions of retrenchment law. There is only one reported decision in *Medha Kotwal Lele* v. *Union of India*[4] specifically on the provisions of the Industrial Employment (Standing Orders) Act, 1946 where the apex court has given further directions to ensure that its earlier directions in *Vishaka* v. *State of Rajasthan*[5] for making law against sexual harassment at work place robust and that the same be followed in letter and spirit.[6] It seems that the strong stand taken by the Supreme Court in *Medha Kotwal Lele* has been responsible

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2 *Available at*: http://www.livemint.com/Politics/NjxZFO80kcDVB39t6BRC1H/Cabinet-approves-changes-in-labour- laws.html (lasted visited on Nov. 11, 2014).

3 *National Small Industries Corporation Ltd.* v. V *Lakshminarayanan* (2007) 1 SCC 214.

4 (2013) 1 SCC 297; (2012) 10 SCALE 458.

5 (1997) 6 SCC 241.

6 Sexual harassment at work place is now a misconduct under the directions of the court in *Vishaka* and also under the Sexual Harassment of Workmen at workplace (Prevention, Prohibition and Redressal) Act, 2013.

for pushing the legislation dealing with sexual harassment at work place namely, Sexual Harassment of Workmen at Workplace (Prevention, Prohibition and Redressal) Act, 2013, which has since become operational. One important and pro active decision of the Supreme Court under the Contract Labour (Regulation and Abolition) Act has been included because of its immense bearing on the labour management relations. The court found that the work of laying railway tracks was work of a perennial nature and could not be assigned to contractors, more so when the notification had been issued by the Central Government prohibiting employment of contract labour for such works by the Port Trust. There is only one decision having a bearing on the Trade Unions Act, 1926.

II INDUSTRIAL DISPUTES ACT, 1947

Retrenchment

(i) Introductory

The year 1953 witnessed insertion of statutory provisions relating to retrenchment in the ID Act for the first time. The original definition of 'retrenchment' was amended in the year 1984 whereunder cases of termination on account of 'efflux of time' and/or there being 'stipulation in the contract of employment' specifying the date of disengagement were excluded from the definition of 'retrenchment' by adding exclusionary sub-clause (bb) in the definition in section 2(oo) of the Act. Further, in 1976 a new chapter, namely, VB was inserted in the ID Act making prior permission of the appropriate government a mandatory requirement before effecting, *inter alia*, retrenchment in industrial establishments employing 300 or more workmen which was subsequently substituted by 100 or more workmen effective from 1984. Further evolution of the law relating to retrenchment has been through the process of judicial interpretation. The state of evolution today indicates deep inroads into the normal remedy of reinstatement with backwages in cases of illegal retrenchment to payment of compensation instead.

(ii) Violation of retrenchment law

The question that arose for consideration of the apex court in *Asstt. Engineer***,** *Rajasthan Development Corp.* v. *Gitam Singh*[7] was, where the workman had worked for only eight months as daily wager preceding the date of termination

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7 (2013) 5 SCC 136; also see In *Ramji Pandey* v. *P.O. Labour Court* **(**2012) II LLJ 61 (All) wherein Rakesh Tiwari J. declared the reasoning given by the labour court as fallacious when it held that the workmen having worked for only nine months preceding the date of termination even though making the working days to 240 days had not rendered one year of 'continuous service' and was not entitled to the relief under retrenchment law. The court held that the reasoning given by the labour court was contrary to the law declared by the apex court in *Mohanlal* v. *Bharat Electronics* (1981) II LLJ 70 (SC) where it has been held that continuous work of 240 days is to be calculated by computing the number of days actually worked by the workman computing them backwards from the date of termination. Admittedly the labour court

and had put in 240 days of work during the said period, could it be said that he has put in one year of continuous service, and if so, whether violation of section 25F of the Act would warrant reinstatement with continuity of service and 25% back wages as ordered by the labour court. It was the case of the workman before the Supreme Court that the award of the labour court called for no interference in view of the settled legal position that violation of the provisions of section 25F ordinarily attracts relief of reinstatement, continuity of service and full backwages. The worker relied mainly on the decision of the apex court in *L. Robert D'Souza* v. *Executive Engineer, Southern Railway;*[8] *Harjinder Singh* v. *Punjab State Warehousing Corp.*[9] and *Devinder Singh* v. *Municipal Council Somaur.*[10]

On the other hand, it was the case of the management that the well settled legal position laid down in a catena of cases by the apex court is that in cases where the daily wage worker has put in 240 days of service in eight months preceding the date of termination, he should be granted only compensation and not reinstatement. It was argued that the relief of reinstatement, continuity of service and 25% backwages was unjustified.

The apex court held that the finding of the labour court that the workman was a daily wager who had put in 240 days of service prior to the date of his termination of service and that his termination was in violation of section 25F of the Act could not be faulted and therefore, warranted no interference. The only question that needed attention and consideration was whether the direction of the labour court for reinstatement of the worker with continuity of service along with 25% of back wages was proper.

The court referred to one of its earlier decisions in *Assam Oil Co. Ltd, New Delhi* v. *Its Workmen*[11] that the normal rule in cases of wrongful dismissal was reinstatement and that there could be cases where it would not be expedient to follow this normal rule and direct reinstatement. Having regard to the facts of that case, the Supreme Court set aside the order of reinstatement although the dismissal of the employee was found to be wrongful and awarded compensation. This position was thereafter reiterated in *Hindustan Steel Ltd.* v. *A K Roy;*[12] *Ruby General Insurance Company Ltd.* v. *Shri P. P. Chopra;*[13] *Management of Panitol Tea Estate*

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had rendered a finding of fact that workman has worked for 240 days in 9 months from the date of his termination but according to him the workman should have worked for 240 days in all the twelve calendar months preceding the date of termination. The single judge held that S. 6(N) of the U.P. ID Act, 1947 (Same as S. 25F of the ID Act) would be applicable in payment of retrenchment compensation.

8 (1982) 1 SCC 645.

9 (2010) 3 SCC 192.

10 (2011) 6 SCC 584.

11 AIR 1960 SC 1264.

12 (1969) 3 SCC 513.

13 (1969) 3 SCC 653.

v. *the workman*;[14] *Tulsidas Paul* v. *The Second Labour Court, W.B;*[15] *and Manager, RBI, Bangalore* v. *S. Mani*;[16] *etc.*

After review of a long list of cases, the court observed that it could be said without any fear of contradiction that the court has not held as an absolute proposition that in the case of wrongful termination/dismissal, the dismissed employee is entitled to reinstatement in all cases. There can be situations where it would be inexpedient to order reinstatement. The court observed thus:[17]

> Therefore, the normal rule that the dismissed employee is entitled to reinstatement in cases of wrongful dismissal has been held to be not without exception. Insofar as wrongful termination of daily-rated workers is concerned, this Court has laid down that consequential relief would depend on host of factors, namely, manner and method of appointment, nature of employment and length of service. Where the length of engagement as daily wager has not been long, award of reinstatement should not follow and rather compensation should be directed to be paid. A distinction has been drawn between a daily wager and an employee holding the regular post for the purposes of consequential relief.

The court observed further that insofar as wrongful termination of daily-rated workers is concerned, it had been laid down by it in earlier cases that consequential relief would depend on various factors, namely, manner and method of appointment, nature of employment and length of service. The court distinguished the instant case, from *Harjinder Singh*[18] and *Devinder Singh*[19] which were strongly relied upon by the workman in his favour.

In *Harjinder Singh*, the employee concerned was initially appointed by the respondent corporation as work charge motor mate but after a few months was appointed as munshi in the regular pay scale for three months. His services were extended from time to time and later on terminated after giving one month's notice by the managing director of the corporation. He challenged the implementation of the notice in a writ petition but later on withdrew it with liberty to avail his remedy under the ID Act. After two months, the MD of the corporation issued notice for retrenchment of the workman along with a few others by giving them one month's wage in lieu of notice under section 25F of the Act. On an industrial dispute being raised, the labour court found that there was no contravention of section 25F but instead the termination was violative of section 25G of the ID Act and accordingly, passed an award of reinstatement with 50% of back wages holding that the action of the management was not in consonance with the statutory regulations and articles 14 and 16 of the Constitution, The high court held that the appointment of the

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14 (1971) 1 SCC 742.

15 (1972) 4 SCC 205.

16 (2005) 5 SCC 100.

17 *Supra* note 7, at 144-145.

18 *Supra* note 9.

19 *Supra* note 10.

workman was not in accordance with the regulation and was violative of articles 14 and 16 of the Constitution and substituted the award of reinstatement with 50% of backwages by directing that the workman shall be paid instead a sum of about Rs. 88000/- by way of compensation. It is this order of the single judge of the high court which was set aside by the Supreme Court while restoring the order of the labour court.

The court observed that *Harjinder Singh* was not a case of daily-rated worker and that the single judge was wrong in entertaining the plea that the workman was employed in violation of articles 14 and 16. Besides *Harjinder Singh* decision was based on its own facts and the same were not applicable to facts of the case at hand.

Referring to *Devinder Singh*, the court observed that the workman concerned was engaged by the Municipal Council, Sanuar for doing work of a clerical nature and was continued in that position for more than two years. His services were discontinued thereafter in violation of section 25-F and the labour court passed an award of reinstatement without back wages. The division bench of the high court set aside this award holding that his initial appointment was contrary to the recruitment rules and articles 14 and 16 of the Constitution. The Supreme Court found the approach of the division bench of the high court erroneous by assuming that the initial appointment was contrary to law. It held that the high court had neither found any jurisdiction infirmity in the award of the labour court nor was an error in law apparent on the face of record. The court set aside the order of the high court and restored the award of the labour court.

The court was of the view that *Harjinder Singh* and *Devinder Singh* do not lay down the proposition that in all cases of wrongful termination reinstatement must follow. These two cases lay down the legal principle that judicial discretion exercised by the labour court cannot be disturbed by the high court on wrong assumptions like the initial employment of the employee was illegal.

The court concluded that in a large number of its decisions it has laid down in clear terms that with regard to wrongful termination of daily wagers, who have worked for a short period, that the award of reinstatement cannot be said to be the proper relief and rather the award of compensation in such cases would be in consonance with the demand of justice. Before exercising the judicial discretion, the labour court has to keep in view all relevant considerations including the mode and manner of appointment, nature of employment, length of service, the ground on which the order of termination of service has been made and the delay in raising the industrial disputes before grant of relief. The court also referred to the discussion in *Bharat Sanchar Nigam Ltd.* v. *Man Singh*[20] which was a case of termination of the services of daily rated workers in violation of section 25F. The workman had raised an industrial dispute of illegal termination after five years and the labour court had awarded reinstatement of the workman which award was not interfered

20 (2012) 1 SCC 558; for detailed discussion of this case, see *infra* note 26.

with by the high court. The apex court set aside the order of reinstatement and awarded monetary compensation in lieu of reinstatement.

Coming back to the facts of the case at hand, the apex court held that the workman here having put in only 240 days of work in eight months, the labour court failed to exercise its judicial discretion appropriately and it suffered from a serious infirmity. The high court, both at the stage of single judge as well as in the intra-court appeal before the division bench, had erred in not considering the relevant aspects referred to in the earlier judgment. The court set aside the award of reinstatement with continuity of service with 25% back wages and ordered instead payment of Rs. 50,000/- as compensation which, it thought appropriate, would meet the ends of justice. The payment so ordered was payable within the six weeks from the date of the order failing which the said amount would carry interest @ 9% per annum. It is submitted that there can be no disagreement that daily-rated workers who have put in only few years of service need to be compensated and not reinstated in the event of illegal termination but it is submitted that the compensation must act as a deterrent so that the management follows the law in letter and spirit before depriving any employee of his livelihood.

In *Bhavnagar Municipal Corporation* v. *Salimbhai Umar Bhai Massuri*,[21] the main issue before the Supreme Court was whether termination of services of the respondent workman on the expiry of the contract period would amount to 'retrenchment' within the meaning of section 2(oo) of the ID Act? The workman was appointed on daily wages as helper in the water works department in the appellant corporation for two fixed periods under two separate owners. The services of the respondent workman stood terminated on the expiry of the last date mentioned in the second order. In all, the service rendered by him was for a total period of 54 days. He raised an industrial dispute alleging violation of sections 25 G and H of the ID Act by not being called for work before appointing new workman. The labour court directed the corporation to reinstate the respondent workman with continuity of service. This award was assailed by the corporation before the high court in a writ petition. The single judge of the high court dismissed the same. Similar was the fate in the intra- court appeal.

In the special leave to appeal of the corporation, the Supreme Court observed that the labour court as well as the high court had completely misunderstood the scope of section 2(oo) (bb) as also sections 25 G and H of the ID Act. The court observed that the facts clearly indicated that the respondent workman had worked only for 54 days in fixed periods and on the expiry of the second term his service stood automatically terminated on the basis of the term stipulated in the contract of employment which was for a fixed term.

The question, therefore, was whether the termination of service of the respondent on the expiry of the period mentioned in the contract of employment would amount to "retrenchment" within the meaning of section 25 H of the ID Act so as to entitle him to claim reinstatement?

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21 (2013) 14 SCC 456.

Referring to sub-section (bb) of section 2(oo) of the ID Act, the court observed that it clearly states that if the termination of the services of the workman is as a result of non-renewal of the contract of employment between the employer and the workman under stipulation in that behalf contained therein, the same would not constitute 'retrenchment'. Facts in the present case clearly indicated that the respondent workman's service stood terminated on the expiry of the fixed periods mentioned in the office orders and that he had worked only for 54 days. The fact that the appointment order used the expression "daily wages" did not make the appointment casual because it was the substance that mattered not the form. According to the court, the contract of employment consciously entered into between the parties would, over and above the specific terms of the written agreement, indicate that the employment was for a short period and the same was liable to termination, on the expiry of the fixed period. Dealing with section 25 H of the Act, the court observed that it will apply only if the respondent established that there had been "retrenchment" within the meaning of section 2 (oo) and was not excluded by the sub-clause (bb) of the Act. The court had no hesitation in stating that the facts clearly indicated that there was no retrenchment within the meaning of section 2 (oo) read with sub-section (bb) of the said definition, and as such section 25 H had no application. It further observed that it was sorry to note that the labour court, the single judge and the division bench of the high court had not properly appreciated the factual and legal position in this case. When rights of the parties are being adjudicated serious thoughts need to be bestowed by the labour court as well as by the high court to the issues at hand. The court set aside the award passed by the labour court and confirmed by the high court.

In *Raj Kumar* v. *Jalagaon Municipal Corporation*[22] the respondent corporation engaged, *inter alia*, five workers as casual labour in different departments. The respondent corporation discontinued services of the said casual workers after they had rendered service ranging from one year to ten years. Their services were terminated in different years as and when the management deemed it proper. Each of the five raised industrial dispute though belatedly. The conciliation proceedings having failed the appropriate government referred these "deemed" industrial disputes for adjudication to the labour court which held that all these terminations were illegal and awarded reinstatement of all the five workers.

A single judge of the Bombay High Court set aside the award of the labour court holding that there was gross and inordinate delay in raising the dispute on the part of the workmen and therefore, the disputes should not have been referred to the labour court for adjudication. It further, held that the labour court had committed serious error of law in passing the award of reinstatement and ordered compensation of Rs. 10,000/- be paid to each workman in lieu of reinstatement. The division bench of the high court while agreeing with the single judge also held that they were not regular workers but were only daily rated workers. It relied

22 (2013) 2 SCC 751.

on *Uma Devi*[23] to hold that they were not workers selected through due process and they were only daily rated workers engaged as and when work was available.

It is submitted that the grievance of the workers in this case was not one for regularization but was regarding illegal termination. Therefore, the reference to *Uma Devi* by the division bench of the high court was uncalled for. Even if it is assumed for the sake of discussion that the appointment of the workers was not in accordance with rules yet the challenge to the termination in violation of section 25-F was maintainable as well as sustainable. It is further submitted that the courts have many a time been confusing the issue of illegal termination with the issue of regularization. The courts must appreciate that when challenge is against illegal termination of casual workers, the same cannot be confused with a demand for regularization. The sooner the courts realize this difference the better it will be.

Coming back to the case under review, in the special leave petition (SLP) preferred by the workers against the orders of the high court, the Supreme Court observed that in view of the concurrent findings of both the single judge and the division bench of the high court that the appellants were appointed on daily wages as and when work was available and that they were not appointed on regular basis against sanctioned posts, there was no justification for interference. However, the court was of the view that the compensation amount of Rs. 10,000/- awarded by the single judge was inadequate. It directed that those workers who had approached the conciliation officer after eight to ten years from the date of termination be paid a sum of Rs.50,000/- each and the workman who had approached the conciliation officer within two to three years be given a sum of Rs.1,00,000/- as compensation. The court, accordingly, modified the judgment passed by the single judge of the high court.

In *Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division, Kota* v. *Mohan lal* [24] the sole question to be answered was the consequent relief that was to be granted to the workman whose termination was held to be illegal being in violation of section 25F of the ID Act. The facts of this case were as follows.

The respondent workman was engaged as "Mistri" on muster role by the appellant employer from 01.11.1984 to 17.02.1986. On 18.02.1986 his services were terminated. While doing so neither one month's notice nor pay in lieu thereof or compensation under section 25-F was paid to him. In 1992 the workman raised an industrial dispute which became the subject matter of a reference to the labour court to adjudicate on the legality or otherwise of non-employment of the workman. It held that section 25F of the ID Act was violated rendering the termination illegal and directed that the workman was entitled to reinstatement with continuity in service and 30% of back wages.

In writ petition filed by the management against the award of the labour court, the single judge of the high court held that though there was violation of section

23 *State of Karnataka* v. *Uma Devi* (3) (2006) 4 SCC 1.

24 (2013) 14 SCC 543.

25F of the Act, the labour court was not justified in directing reinstatement of the workman when he had belatedly raised the industrial dispute, *i.e.*, after six years of termination. Relying on the judgment of *Balbir Singh* v. *Punjab Roadways*[25] the single judge substituted the order of reinstatement by awarding compensation of Rs. 5000/-. The division bench of the high court on appeal by the workman restored the award of the labour court.

The Supreme Court in the special leave petition preferred by the management held that the division bench of the high court was clearly in error in restoring the award of the labour court. It held that the compensation granted by the single judge was too low and enhanced to Rs. one lakh in lieu of reinstatement. It directed the management to pay of the said compensation amount to the workman within six weeks from the date of order failing which it shall be liable to pay the said amount with interest of 9 % per annum.

In *Bharat Sanchar Nigam Limited* v. *Man Singh*,[26] the respondent-workmen worked with the appellant management on daily wages during the year 1984-85 and thereafter their services had to be terminated due to non-availability of work. No notice or retrenchment compensation was given to them before terminating their services. They raised an industrial dispute nearly after five years alleging violation of section 25F ID Act which was referred by the appropriate government to the labour court for adjudication. The labour court by its award in 2005 ordered reinstatement of the respondent workmen on the same post which they were holding at the time of their termination. This award was challenged by the department by filing a writ petition before the high court, which after hearing the parties upheld the award of the labour court. The management approached the Supreme Court by way of special leave to appeal.

The apex court observed that in a catena of decisions it has consistently held that the award of reinstatement in violation of section 25F of the ID Act should not be passed by way of relief on setting aside the order of termination. It distinguished a daily wager who does not hold a post from a permanent employee, in the matter of grant of relief. In view of the already settled legal position, it held that the respondent workmen who were engaged as daily wagers and had merely worked for more than 240 days, were not entitled to the relief of reinstatement and ordered the appellant to pay rupees two lakhs as compensation (to meet the ends of justice), to each of the respondents in full and final settlement of their claim within six weeks of the order. The court further directed that non payment of the sum within the said stipulated time, would carry interest @ 12% per annum.

(iii) Relief for illegal retrenchment and claim for regularization

In *Raj Kumar* v. *Jalagaon Municipal Corporation*,[27] the apex court was to deal with appeals arising against the common judgment and order of the division

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25 (2001) 1 SCC 133.

26 (2012) 1 SCC 558.

27 (2013) 2 SCC 751.

bench of the Bombay High Court which had upheld the order of the single judge quashing the award passed by the labour court in cases of retrenchment of casual workers who had worked for different number of years and were ordered to be reinstated by the labour court. The single judge quashed the order of the labour court and directed payment of compensation of Rs.10, 000/- to each of the casual worker whose services were illegally terminated. He opined that by ordering reinstatement the labour court had committed a serious legal infirmity in law, which view was affirmed by the division bench. It also referred to the fact that it was not the case of the workers that their appointments were in conformity with the ratio laid down by the Supreme Court in *Umadevi*[28] and, therefore, the order of the labour court was unsustainable.

The Supreme Court held that in view of the concurrent findings by the single judge as well as the division bench of the high court there was no justification to interfere with the order passed by the two courts below. However, it directed that Rs.10,000/- as order to be paid to each of the workmen was not adequate compensation and, therefore, an amount varying from Rs.50,000/- to Rs.1,00,000/- each depending upon the number of years they had worked with the respondent be paid to them.

It is submitted that the reference to *Umadevi* by the high court was uncalled for given the fact that the workers had not sought the relief of regularization of their services. It was a simple case of termination *de-hors* the provision of retrenchment law. This infirmity in the order of the single judge of the high court was neither noticed by the division bench nor by the Supreme Court. It only highlights that even the constitutional courts are not appreciating the distinction between a claim for regularization and a claim against illegal retrenchment.

(iv) Definition of 'continuous service' in the light of bipartite settlement for claiming regularization:

In *H.S. Rajashekara* v. *State Bank of Mysore*[29] the petitioner was inducted into the service of the respondent bank as a temporary sub-staff in 1985 and was intermittently taken into employment based on the need for such staff thereafter. During the year 1994-95 he claimed to have rendered more than 240 days of service in a calendar year which fact, according to him, entitled him to be included in the 'protected category' of employees for being considered for permanent absorption. Having satisfied the protracted category criteria, he applied to the bank for absorption as a permanent employee by citing the example of another employee who was similarly placed like him and had been granted permanent status. His case was taken up by the union which recommended his absorption as a permanent employee. When he did not receive any favourable response from the bank, he filed a writ petition in the High Court of Karnataka, which without considering the matter on merits, gave direction to the bank to take a decision on

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28 See *supra* note 23.

29 (2012) 1 SCC 285.

his representations by passing a written order and communicate the same to the petitioner.

The bank rejected his claim for permanent absorption on the ground, *inter alia*, that he had not worked for 240 days in a calendar year. He again approached the high court. A single judge held that he was not entitled for absorption by holding that the service of 240 days in a calendar year was to be determined with reference to the service rendered between 1st January of a particular year, up to the 31st day of December of the same year. The single judge further held that the services rendered by him in different branches of the bank intermittently could not be taken together for counting one year of 'continuous service' in a calendar year. This order was assailed in a writ appeal and the division bench of the high court held that the petitioner was not entitled to regularization in terms of the parameters laid down in *Umadevi*.

The petitioner preferred SLP to the Supreme Court which observed that the case of the petitioner needed to be considered from two perspectives, firstly, his grievance against violation of articles 14 and 16 in as much as he was discriminated when another employee similarly placed like him was granted permanent status. Secondly, that the high court had failed to appreciate that his eligibility for grant of permanent status on the basis of 240 days service in a 'calendar year' had to be considered in the light of the bipartite settlement between the Federation of the Bank and the employees union in pursuance of which a circular No.18/19/20 dated 07.09.1990 of the Federation of the Bank had been issued where it was provided that a *badli* worker is entitled to be absorbed if he completes 240 days of *badli* service in a block of twelve months or a calendar year after 10.02.1988.

The Supreme Court observed that in the light of the above circular the high court had failed to appreciate that for labour related matters the terms 'calendar year' and 'block of twelve months' are interchangeable. The court observed thus:[30]

> It would be sufficient, if the petitioner could establish, that he had rendered more than 240 days of service in a 'block of twelve months'. This in our view should have been the determining factor in a case where the consideration pertain to the consideration of an employee's claim for inclusion in the 'protracted category' merely on account of having rendered 240 days service in a 'calendar year'. In view of the above, we are satisfied, that the petitioner fulfills the condition of having rendered service of 240 days in a calendar year.

The court further observed that the pleadings in the special leave petition, as also the judgments and orders of the high court did not disclose any condition to the effect, that service rendered while computing 240 days in a calendar year should have been rendered in the same branch of the bank.

Considering the above factual ingredients and the fact that the petitioner had been litigating since the year 1999, the court felt that it would not be appropriate

30 *Supra* note 29 at 289.

to require re-adjudication of the entire controversy all over again. It directed the bank to absorb the petitioner as a permanent employee in the sub-staff cadre on the basis of having rendered service for more than 240 days during the year 1994-95. The court directed that he would not be entitled to any further remuneration for the period hitherto before, other than the differences in the emoluments, for the service already rendered by him. It, however, made it clear that the relief granted in this case was in view of the facts and circumstances of the case and could not as such be treated as a precedent.

This case certainly shows the sensitivity of the court towards the sufferings of the employee who had to litigate for long 13 years for seeking redressal which should have been granted to him as a matter of course in view of the unambiguous and clear circular issued by the Federation of the Bank. It also shows how the management of the public sector bank resorted to violation of fundamental rights of the employee and spent money of the public exchequer on avoidable litigation.

Disciplinary proceedings

(i) Introductory

Norms pertaining to disciplinary proceedings, their fairness and propriety constitute an integral aspect of the law relating to labour management relations because of their role not only in peaceful and just disposal of disciplinary matters but also in securing a disciplined as well as contented workforce. In this regard strict adherence to norms governing discipline as well as disciplinary proceedings is of great significance. The Supreme Court in the years surveyed had occasions to clarify the law relating to disciplinary action during pendency of proceedings before the labour court/tribunal, both with regard to connected as well as unconnected subject matters in the pending proceedings, the powers of the labour courts/tribunals under section 11A of the ID Act, the difference in the nature of disciplinary proceedings as against criminal prosecution and the need for ensuring a safe work environment at work place for women.

(ii) During proceedings before industrial adjudicator

In the context of disciplinary proceedings the court clarified the law embodied in proviso to section 33(2) (b) and held that the requirement of approval of the action taken by employer in respect of dismissal of a workman where a dispute involving that workman is already pending before labour court or industrial tribunal is mandatory. The court has held that the order of dismissal without approval is inoperative from the date it was passed. But where complaint under section 33A has been filed by the workman alleging violation of the proviso to section 33(2)(b), then it has to decided on merits as if it is a reference under section 10 of the ID Act. Here the labour court/industrial tribunal shall be exercising powers under section 11A of the Act and the fate of the disciplinary action will depend upon the outcome of the proceeding before the labour court/industrial tribunal on merits. If the action of the management is upheld, the only remedy available to the workman is to seek punishment of the management under section 31 for violation of the proviso to section 33(2) (b). But if the action of the management is not sustained, the order of reinstatement will relate to the date of termination.

In Rajasthan State Road Transport Corporation v. *Satya Prakash*,[31] the respondent was working as a bus conductor on daily wage basis under the appellant corporation. His appointment was for a period of three months only though it appeared that it was continued for a little while more. The allegations against him were that during this short period also there were instances of misbehavior with the staff, of using abusive language and coming to office in drunken state. On that particular date while on duty, a flying squad found that he had not issued tickets to passenger from whom he had collected money. He was proceeded against departmentally, but he did not appear before the enquiry officer despite notices. The corporation led the evidence, and the enquiry officer held that the charge was proved. He was dismissed from service.

This time there was another industrial dispute concerning the workman pending determination before the labour court/ tribunal concerning the demands of the workman. No approval of the action of his dismissal was sought by the management from the labour court/ tribunal before which the proceeding was pending. In the circumstances, the workman made a complaint before the said labour court/tribunal under section 33-A which was entertained. He took the plea that the appellant was expected to apply for the necessary approval of its action to the tribunal/ labour court under the proviso to section 33(2) (b) by the ID Act. The appellant having failed to do so the termination of his service was bad in law. The tribunal which heard the complaint held that the corporation had not held a departmental enquiry as contemplated under the standing orders. It is important to state here that the workman had not participated in the enquiry despite notices of personal hearings having been served on him. The tribunal gave an opportunity to the management to prove the misconduct before it; so also to the workman to defend himself in accordance with the principles of natural justice. It held that though the charge stood proved against the workman in the enquiry held by it, there was non-compliance with the provisions of section 33(2) (b) which had led to filing the complaint under section 33A. By its award, it directed reinstatement of the workman though without backwages but with continuity of service. This was done after referring to the case law laid down by a constitution bench of the court in *Jaipur Zila Sahkari Bhoomi Vikas Bank Ltd.* v. *Ram Gopal Sharma*[32] that non-compliance with section 33(2) (b) would make the termination in-operative. The award of the labour tribunal was left undisturbed by the single judge as well as the division bench of the high court.

The corporation approached the apex court by way of SLP. The question which arose for consideration of the Supreme Court was whether the tribunal was right in awarding reinstatement with continuity of service in the proceedings under section 33A of the Act which arose out of initial breach of section 33(2) (b) of the Act by the corporation.

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31 (2013) 9 SCC 232.

32 (2002) 2 SCC 244.

To decide the issue in question the court referred to the background of the constitution bench decision in *Jaipur Zila Sahkari Bhoomi Vikas Bank Ltd.* In the said case, the court was concerned with the interpretation of section 33(2) (b) of the Act in the context of a reference arising out of conflicting judgments thereon. The court found that in two cases, *viz*., three judge division benches of the court *Strawboard Manufacturing Co* v. *Gobind* [33] and *Tata Iron and Steel Co. Ltd.* v. *S.N. Modak*,[34] had taken the view that if the approval was not granted under section 33(2) (b) of the Act, the order of dismissal became ineffective from the date it was passed. It also found that another bench of three judges in *Punjab Beverages (P) Ltd.* v. *Suresh Chand* [35] had expressed a contrary view. The question referred for the consideration of the constitution bench, therefore, was as follows: If the approval is not granted under section 33(2) (b) of the ID Act, whether the order of dismissal becomes ineffective from the date it was passed or from the date of non-approval of the order of dismissal and whether failure to make application under section 33(2) (b) would not render the order of dismissal inoperative?

While considering the issue, the court noted the object behind enacting section 33, as it stood prior to the amendment in 1956. It was to ensure that industrial proceedings pending before any authority/court/tribunal under the Act are held in peaceful atmosphere, undisturbed by any other industrial dispute. In all cases, prior permission of the authority/labour court/tribunal was necessary whether the misconduct in respect of which disciplinary action was taken was connected or unconnected with the pending dispute. In the course of time, it was felt that the unamended section 33 was too stringent. Section 33 was, therefore, amended in 1956 to permit the employer to make changes in conditions of service or to discharge or dismiss an employee in relation to matters not connected with the pending industrial dispute. At the same time, it was also felt necessary that some safeguards, must be simultaneously provided for the workman, and therefore, a provision was made that the employer must make an application for prior permission if the proposed dismissal/discharge is in connection with a pending dispute. In other cases, where there is no such connection, and where the workman is to be dismissed/ discharged, firstly, there has to be an order of discharge or dismissal, and then as laid down in the proviso to section 33(2) (b), the concerned workman has to be paid wages for one month, and an application is to be made to the authority concerned before which the earlier proceeding is pending, for approval of the action taken by the employer.

The court noted that the contravention of section 33 involves penalty under section 31(1) of the Act. Hence, the proviso to section 33(2) (b) cannot be diluted or disobeyed by an employer as the violation of the same follows prosecution. The constitution bench of the court held that proviso to section 33(2) (b) is a mandatory provision made to afford protection to the workmen to safeguard their

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33 AIR 1962 SC 1500.

34 AIR 1966 SC 380.

35 (1978) 2 SCC 144.

interest, and it is a shield against victimization and unfair labour practice by the employer during the pendency of an industrial dispute. Therefore, the order of dismissal or discharge made without complying with the said proviso is void and inoperative. If a workman is aggrieved by the approval granted by the labour court or tribunal his remedy is to file a complaint under section 33A of the Act. This section has a definite purpose to serve *viz*., to provide a direct access to the tribunal and thereby a speedy remedy, instead of resorting to the time consuming procedure of seeking a reference under section 10 of the Act. In that complaint, however, the employee will succeed only if he establishes that the misconduct is not proved and not otherwise, and if he does succeed in so establishing, it will relate back to the date on which the order of dismissal was passed by the employer as if it was inoperative. This remedy is independent of the penal consequences which the employer may have to face under section 31(1) of the Act if prosecuted for the breach of section 33.

A reading of subsection (b) of section 33 A clearly lays down when such a complaint is made, the tribunal shall adjudicate upon the complaint as if it were a dispute referred to it, and shall submit his or its award to the appropriate government and the provisions of the Act shall apply accordingly. Thus, in that complaint, the employee will have to prove his case on merit. It is clear that enquiry under section 33A is not confined only to the determination of the question as to whether the alleged contravention by the employer of the provisions of section 33 has been proved or not. But the complainant has to prove his case on merit. In *Jaipur Zila* the constitution bench endorsed the view taken in *Strawboard* and *TISCO* and held that the view expressed in *Punjab Beverages* was not correct.

Coming to the present case, the court observed that the tribunal accepted that misconduct had been duly proved before it. Having held so, the tribunal was expected to dismiss the complaint filed by the workman. It could not have passed the order of reinstatement with continuity of service in favour of the workman on the basis that initially the appellant had committed a breach of section 33(2) (b) of the Act. It is true that the management had not applied for necessary approval as required under that section. But the complaint having been filed under section 33A for violation to follow section 33(2) (b) proviso, the said complaint came to be adjudicated as a reference as required by the statute. The same having been done, and the misconduct having been held to be proved, there was no question to hold that the termination would continue to be void and imperative. The *de jure* relationship of employer and employee came to an end with effect from the date of the order of dismissal passed by the appellant. In the facts of the present case, when the workman had indulged in misconduct within a very short span of service which had been duly proved, there was no justification to pass the award of reinstatement with continuity of service. The Supreme Court held that the single judge and the division bench of the high court had fallen in error in upholding the order of the tribunal. Since the complaint was decided like a reference, it ought to have been dismissed.

In the present case, the employee having worked for three months or some more extended time, there was no question of violation of section 25-F. The

appellants could have discontinued his services as it is, since he was a daily wager. However, since there was an allegation of misconduct, they allowed him an opportunity to explain but he did not participate in the enquiry. The enquiry officer held that the allegation stood proved. He filed a complaint under section 33 A of the Act for not following the mandatory requirement under section 33(2) (b) proviso. The complaint was treated as a reference and the misconduct was proved to the satisfaction of the tribunal on merit. That being the position, the findings had to relate back and the employee relationship had to be held snapped from the date of the order of dismissal having been passed. The Supreme Court set aside the award of the labour court and the orders of the high court upholding the award.

(iii) Other cases

In the judicial decisions discussed below it will be seen that the Supreme Court has emphasized the importance of discipline at the work place and has come heavily against the employees for violating the discipline which is a *sine qua non* for healthy work atmosphere.

In *Manoj H. Mishra* v. *Union of India*[36] the appellant was working as tradesman/B Class III in a public sector enterprise, Kakarapar Atomic Power Project (KAPP) at Surat, Gujarat. He was an office bearer of the recognized trade union and was subsequently also declared a 'protected workman'. Since KAPP was dealing with atomic energy, all employees including the appellant were given oath of secrecy and were made to execute a written agreement to maintain confidentiality. He resigned from the primary membership of the union allegedly because of unfair labour practices adopted by the management of KAPP.

During monsoon season there were heavy rains; the rain water entered the establishment causing heavy losses to the property of the corporation. He informed the press and media about it and also alleged that all this happened because of the culpable negligence of the KAPP management and also because of the widespread corruption in the organization. The rain water entered the record room and the computer rooms washing away all the records and the computer components. Also, the nuclear reactor of the plant submerged in water and some of the nuclear waste got mixed with it. The management proceeded against him for alleged misconduct of scandalizing the organization to earn cheap publicity. Before the enquiry officer he admitted his guilt and stated that the management had assured him of being dealt with leniently. The enquiry officer required him to make his statement unconditionally which he did. The enquiry officer submitted his report to the management and held that the charges stood proved on his own voluntary admission. On the basis of the findings of the enquiry officer the disciplinary authority ordered his removal from service by way of punishment. He filed his appeal against the order of removal which was dismissed; so was his revision. He challenged the order of removal before the high court in a writ petition which was dismissed by the single judge of the court. The court noted that the petitioner had admitted his guilt and had confined his challenge to the quantum of punishment only. It did not

36 (2013) 6 SCC 313.

find any basis for interference with the punishment awarded. The employee filed intra-court appeal (LPA) in which he sought to amend the ground of challenge by taking the plea that he was a whistle-blower to highlight wrongs in the corporation which was *bona fide* and, therefore, his alleged acts could not amount to 'misconduct' which amendment was not allowed by the high court and his writ appeal was dismissed.

On appeal to the apex court the appellant workman raised the plea that his act was that of a 'whistle blower' in public interest and could not be treated as misconduct and sought quashing of the proceedings. The court issued notice to the parties limited to the question of punishment only.

The Supreme Court held that neither the single judge nor the division bench of the high court had committed any error in rejecting the submission of the employee. The court did not examine the question that the action of the appellant employee would not constitute 'misconduct' under the rules in view of repeated admission of guilt by the employee.

The court held that he could not now be permitted to resile from the admission made before the enquiry officer. The plea to reopen the enquiry before the appellate and the revisionary authorities had been rejected earlier. The court was not inclined to exercise its extra-ordinary jurisdiction under article 136 of the Constitution for re-opening the entire issue at this stage. The apex court held that exercise of extra-ordinary power was not warranted given the fact that the employee had failed to demonstrate perversity of the decision rendered by the high court. It opined that the employee had violated his oath of secrecy and confidentiality. It did not agree that the employee had acted as a "whistle blower" which plea he had taken belatedly and had been rejected by the division bench of the high court. The court held that the decision of the single judge as well as the division bench was faultless.

In *Davalsab Husainsab Mulla* v. *North West Karnataka Road Transport Corporation*,[37] the appellant, who was working as driver with the respondent corporation, was found traveling without ticket by the checking squad and was required to pay penalty which enraged him. He used filthy language against the checking squad members, and attempted serious physical assault on them. He then approached senior officers of the checking squad and challenged them to close the gate of the officers and announced that he is going to sit on satyagraha. Further, he was alleged to have threatened a senior officer that he would burn him in the presence of other officials and employees.

On the basis of the reports received from the checking squad and other officers, he was proceeded against departmentally for the said alleged misconducts. The enquiry officer gave his findings against him. The enquiry report stated that the charges were proved against him on the basis of the material on record. The disciplinary authority imposed the penalty of dismissal which order was upheld by the labour court on a reference of the dispute of non-employment raised by

37 (2013) 10 SCC 185.

him. He assailed the award of the labour court in a writ petition before a single judge of the high court. The single judge substituted the award of dismissal with withholding of two increments which decision was assailed by the corporation in the intra-court appeal preferred by it. The division bench of the high court set aside the decision of the single judge and restored the award of the labour court. The employee preferred SLP to the Supreme Court against the judgment of the division bench of the high court.

It may be mentioned here that he was proceeded against on 27 occasions earlier also for his different acts of misconduct in which on one occasion the allegation was that he threatened a co-employee. Having regard to all the facts and circumstances, the labour court had declined to exercise the discretionary jurisdiction under section 11A of the Act to interfere with the punishment of dismissal imposed on the appellant.

The Supreme Court observed that the discretionary power under section 11-A of the Act has to be exercised judicially and judiciously. The court held that it will be only in appropriate cases that the labour court/labour adjudicatory authorities can substitute lesser punishment for major penalty. Greater care and caution have to be observed while exercising the said discretionary jurisdiction in replacing the punishment of discharge or dismissal. Describing the scope of jurisdiction under section 11-A of the Act, the court observed thus:[38]

> It has to be remembered that the question of exercise of the said discretion will depend upon the conclusion as regards the proof of misconduct as held proved by the management and only if it finds that the discharge or dismissal was not justified. Therefore, the satisfaction to be arrived at by the Labour Court while exercising its discretionary jurisdiction under Section 11A of the Act must be based on sound reasoning and cannot be arrived at in a casual fashion, inasmuch as, on the one hand the interference with the capital punishment imposed on the workman would deprive him and his family members of the source of livelihood, while on the other hand the employer having provided the opportunity of employment to the concerned workman would be equally entitled to be ensured that the employee concerned maintains utmost discipline in the establishment and duly complies with the rules and Regulations applicable to the establishment. In that sense, since the relationship as between both is reciprocal in equal proportion, when the employer had chosen to exercise its power of discharge and dismissal for stated reasons and proven misconduct, the interference with such order of punishment cannot be made in a casual manner or for any flimsy reason.

In this context, it will be appropriate for the labour court to assess the gravity and magnitude of the misconduct found proved against the employee concerned, the past conduct of the employee, the repercussion it will have in the event of

38 *Supra* note 37 at page 189-190.

interference with the order of discharge or dismissal in the day to day functioning of the establishment which will have far reaching effects on the other workmen and so on and so forth. In the court's efforts to do any good for the employee concerned it should always be remembered that any misplaced sympathy would cause more harm to the establishment which provides livelihood for many employees.

The Supreme Court held that in the light of the gravity of the misconduct of abusive language and insubordination found proved against the workman as well as the past conduct, the labour court rightly held that the order of dismissal was in order which award of the labour court was wrongly interfered with the single judge of the high court, more so, without assigning any reasons therefor. The court held that the division bench of the high court rightly reversed the single judge's order and restored the award of the labour court upholding the order of dismissal. There were no good reasons to interfere with the judgment and order the division bench of the high court was satisfied that in cases like the present one the labour court had rightly declined to exercise its discretionary powers under section 11A of the Act.

In *Divisional Controller, Karnataka State Road Transport Corporation* v. *M.G. Vittal Rao*[39] there was an allegation against the respondent/workman that he in collusion with four other employees had cut the paddle lock of cash room of the employer and stole money. In departmental enquiry the charges were proved and he was dismissed from service. There was also a criminal case filed against him and the other accused under sections 459 and 381 read with section 34 IPC, but he was acquitted in the said criminal case in the revision petition. The workman raised an industrial disputes relating to his non employment which became the subject matter of reference to the labour court. The labour court answered the reference in negative holding that there was sufficient evidence before the enquiry officer to hold that the workman with his colluders had actively involved in committing the alleged misconduct. The workman challenged this award before the high court which allowed the writ petition to the extent that the order of dismissal was modified into an order of termination. The management was directed to pay the terminal benefits since the workman had retired from service. The workman challenged the order of the single judge before the division bench in an intra-court appeal which allowed the appeal and quashed the award of the labour court and reversed the order of the single judge. It held the workman was entitled to 50% of the back wages from the date of dismissal till the date of his retirement (as he had retired during the period of his litigation before the high court). He was also held entitled to consequential benefits of his retirement. The management preferred SLP against this decision but for reasons best known to it, did not challenge the order of the single judge.

One of the important questions that arose before the Supreme Court was whether on the basis of the acquittal by the criminal court the employee could

39 (2012) 1 SCC 442.

claim reinstatement after dismissal was ordered on the basis of a departmental enquiry.

The court observed that the question of considering reinstatement after decision of acquittal or discharge by a criminal court arises only and only if the dismissal from service was based on conviction by the criminal court in view of the provisions of article 311(2) (b) second proviso (a) of the Constitution, or analogous provisions in the statutory rules applicable in a case. The court held that in a case where enquiry has been held independently of the criminal proceedings, acquittal in a criminal court is of no help. In fact, the law is otherwise. Even if a person stood acquitted by a criminal court, domestic enquiry can be held, the reason being that the standard of proof required in a domestic enquiry and that in a criminal case are altogether different. In a criminal case, standard of proof required is beyond reasonable doubt while in a domestic enquiry it is the preponderance of probabilities. The court referred to its earlier catena of judgments[40] on this issue in support of its decision. It also considered the issue as to whether disciplinary proceedings can be held at the time when the delinquent employee is facing a criminal trial. This question has been dealt with by the court from time to time and the legal position is that there is no legal bar for both proceedings to go on simultaneously and the only ground for staying the disciplinary proceedings is that the defence of the employee in the criminal case may not be prejudiced.

The standard of proof in the two proceedings being different, the acquittal of the employee in a criminal case cannot be the basis for taking away the effect of the departmental proceedings nor can such an action of the department be termed as double jeopardy. The facts, charges and nature of evidence *etc*., involved in an individual case would determine as to whether the decision of the acquittal would have any bearing on the findings recorded in the domestic enquiry.

The court was of the opinion that whenever the question of loss of confidence is affirmed the order of punishment must be considered to be immune from challenge for the reasons that discharging an office of trust and confidence requires absolute integrity. In a case of loss of confidence reinstatement cannot be directed. The court referred to its decision in *Kanhaiyalal Agrawal* v. *Gwalior Sugar Co. Ltd*.[41] where the court laid down the test for loss of confidence.

It observed that the loss of confidence cannot be subjective, based upon the mind of the management. Objective facts which would lead to a definite inference of apprehension in the mind of the management regarding trustworthiness or reliability of the employee must be alleged and proved.[42] An employer is not bound

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40 *Nelson Motis* v. *Union of India* (1992) 4 SCC 711: AIR 1992 SC 1981; *State of Karnataka* v. *T. Venkataramanappa* (1996) 6 SCC 455; *State of A.P*. v. *K. Allabakash* (2000) 10 SCC 177.

41 (2001) 9 SCC 609; AIR 2001 SC 3645.

42 *Indian Airlines Ltd.* v. *Prabha D. Kanan* (2006) 11 SCC 67.

to keep an employee in service with whom relations have reached the point of complete loss of confidence or faith between the two. In a case of theft what is important is not the quantum of but the loss of confidence of the employer in the employee.

The instant case is required to be examined in the light of the aforesaid settled legal propositions. The court also made it clear that it is a settled legal proposition that in the case of a grave misconduct like corruption or theft, no punishment other than dismissal may be appropriate. Coming to the case at hand and considering the aforesaid settled legal positions, the court observed that the domestic enquiry found the delinquent employee guilty of all the charges. The enquiry report was accepted by the disciplinary authority and there was no grievance on the part of the workman that statutory provisions/principles of natural justice have not been observed while conducting the enquiry. The disciplinary authority imposed the punishment of dismissal from service could not be held to be disproportionate or non-commensurate to the delinquency. The labour court after reconsidering the whole case had come to the conclusion that the enquiry was conducted strictly in accordance with law in a fair manner and charges had rightly been proved against the delinquent employee. Considering the difference in the standard of proof required in domestic enquiry *vis-à-vis* that applicable to a criminal case, the labour court had repelled the argument of the respondent workman that once he was acquitted by the criminal court he was entitled to all reliefs including reinstatement and backwages. The single judge as well as the division bench had decided the case in favour of the workman taking into consideration the fact that the delinquent employee had been acquitted in the criminal case.

The Supreme Court observed that there was no finding given by the high court that the charges leveled in the domestic enquiry were the same as in the criminal trial; the witnesses were the same; and there were no additional or extra witnesses. The court came to the conclusion that without considering the gravity of the charge, the award of the labour court did not warrant any interference. The court, however, observed that the single judge had granted relief to the delinquent employee which was not challenged by the management in the SLP. Therefore, he was entitled to the said relief granted by the single judge. The court, accordingly, directed that the benefit of the judgment of the single judge be made available to the delinquent employee within the time prescribed by the court.

(iv) Some principles of natural justice

In *Anil Gilurkar* v. *Bilaspur Raipur Kshtria Gramin Bank* [43] the court held that if the management decides to proceed against its employee departmentally, the charges leveled in the charge sheet against the delinquent employee should be specific, definite, unambiguous giving details of the incidents which formed the basis of charges. Further, any enquiry on vague charges is unsustainable in law.

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43 (2012) II LLJ 20 (SC).

(v) Disciplinary Action in respect of sexual harassment at workplace: beyond Vishaka:

The Supreme Court in *Medha Kotwal Lele* v. *Union of India*[44] expressed its disappointment over the fact that the guidelines laid down by it nearly 15 years earlier in *Vishaka* v. *State of Rajasthan*[45] had not been replaced by statutory law. It seems the anguish expressed by the court and further directions issued by it were responsible for the passing of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

The present group of petitions which were in the nature of public interest litigation also raised principally the grievance that women continue to be victims of sexual harassment at workplace. The allegations continued to be that the directions of the court were being followed more in breach than in practice and spirit by the state functionaries and all other concerned. The main case of the petitioners was that women continue to be subjected to harassment through legal and extra-legal methods and they are victims of insult and indignity. There was complete lack of effective implementation of *Vishaka* guidelines inasmuch as that the attitude was one of indifference in establishing effective and comprehensive mechanism in letter and spirit of the *Vishaka* guidelines by the states as well as the employers in private and public sector. This indifference on their part has the effect of defeating the very objective and purpose of these guidelines. The petitioners in these petitions sought further directions to ensure that effective steps are taken by the states to put the mechanism for giving effect to the directions in *Vishaka*. The court made it clear that the guidelines in *Vishaka* are not to prejudice any rights available to the women employees under the Protection of Human Rights Act, 1993.

It will be pertinent to state here that the court referred to its earlier order dated 26.04.04 where it had directed that the complaints committee as envisaged in *Vishaka* will be deemed to be an inquiry authority for the purposes of CC(S) Conduct Rules, 1964 and the report of the complaints committee shall be deemed to be an inquiry report under CC(S) Rules and thereafter the disciplinary authority will act on the report in accordance with the rules. It directed amendments to this effect be made in the CC(S) Conduct Rules, 1964 in the Industrial Employment (Standing Orders) Rules.

The court also referred to its another order dated 17.01.06 where it had observed that although all the states were parties to the proceeding in *Vishaka*, it appears that directions in the said case were not properly implemented by the states/departments/institutions. In order to coordinate the steps taken by the states to implement the directions in *Vishaka* for setting up committees in all the departments/ institutions having 50 or more members of the staff, the court directed appointment of state level officers who may be Secretary of the Women and Child

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44 (2013) 1 SCC 297.

45 (1997) 6 SCC 241.

Welfare Department or any other officer in-charge concerned with the welfare of women and children in each state. The chief secretary of each state was directed to ensure that an officer is appointed as a nodal agent to collect the details and to give suitable direction whenever necessary. Further, the labour commissioner of each state shall take steps that *Vishaka* guidelines were fully carried out in respect of factory, shops and commercial establishments where these directions were not being implemented. They were required to act as nodal agency as regards such establishments and were enjoined with the duty to also collect the details regarding the complaints and also see that the required committees are established in such institutions.

The court observed that from the affidavits filed by the state governments the position that emerged was that states had yet complied with the earlier directions in a substantial number of cases. It also noticed that although in local self-governments general parity has substantially been achieved, the representation of women in Parliament and in the state assemblies was dismal as only 10-11% of the total seats are represented by them, despite the Constitution envisaging specific provisions for ensuring gender parity, equality and guarantee against sexual harassment to women.

The court cautioned that guidelines in *Vishaka* have to be given full effect to in their letter and spirit and safe and secure environment to women at the workplace in every aspect has to be ensured so that women are able to work with dignity, decency and due respect.

The court expressed its disgust that there is still no proper mechanism in place to address the complaints of sexual harassment of women lawyers in bar associations, lady doctors and nurses in the medical clinics and nursing homes, women architects working in the offices of engineers and architects and so on and so forth. It referred to the directions earlier given by it in *Seema Lepcha* v. *State of Sikkim* [46] (decided on 03.02.2012) where the court had directed the state government to give comprehensive publicity to the notifications and orders issued by it in compliance with the guidelines framed in *Vishaka* and the directions given by it earlier in the present petitions by getting the same published in the newspapers having maximum circulation in the state after every two months and also every month on Doordarshan, Sikkim about the various steps taken by the state government for implementation of the said guidelines.

The court had further directed the social welfare department and the legal service authority of the state to give wide publicity to the notifications and orders issued by the state government not only for the government departments of the state and its agencies/instrumentalities but also for the private companies.

The court said that women need to be protected against all kinds of violence by taking active steps and not merely by giving lip service to them. It observed that the existing laws, if necessary, be revised and appropriate new laws enacted

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46 (2013) 11 SCC 641.

by Parliament and the state legislatures to protect women from any form of indecency, indignity and disrespect at all places from home to the workplace. This also needs to be supplemented by new initiatives for education of women and girls who have limitless potential in all spheres of life. The guidelines in *Vishaka* cannot be allowed to remain mere symbolic. It issued the following further directions for the purpose until legislative enactment on the subject was put in place:[47]

i) The States and Union Territories which have not yet carried out adequate and appropriate amendments in their respective Civil Services Conduct Rules (By whatever name these Rules are called) were directed to do so within two months from the date of the judgment by providing that the report of the Complaints Committee shall be deemed to be an inquiry report in a disciplinary action under such Civil Services Conduct Rules and a mere preliminary investigation leading to disciplinary action but shall be treated as a finding/report in an inquiry into the misconduct of the delinquent.

ii) The States and Union Territories which had not so far carried out amendments in the Industrial Employment (Standing Orders) Rules were directed to do so within two months from the date of the judgment.

iii) The States and Union Territories shall form adequate number of Complaints Committees so as to ensure that they function at taluka level, district level and state level. Those States and/or Union Territories which have formed only one Committee for the entire State shall now form adequate number of Complaints Committees within two months from today. Each of such Complaints Committees shall be headed by a woman and as far as possible in such Committees an independent member shall be associated.

iv) The State functionaries and private and public sector undertakings/ organizations/ bodies/institutions etc. were directed to put in place sufficient mechanism to ensure full implementation of the *Vishaka* guidelines and further provide that if the alleged harasser is found guilty, the complainant – victim is not forced to work with/under such harasser and where appropriate and possible the alleged harasser should be transferred. Further provision should be made that harassment and intimidation of witnesses and the complainants are treated as serious misconducts liable to severe disciplinary actions.

v) The Bar Council of India has been put under legal obligation to ensure that all bar associations in the country and persons registered with the State Bar Councils follow the *Vishaka* guidelines. Similarly, Medical Council of India, Council of Architecture, Institute of Chartered Accountants, Institute of Company Secretaries and other statutory Institutes have been directed to ensure that the organizations, bodies, associations, institutions and persons registered/affiliated with them follow the guidelines laid down by *Vishaka*. To achieve this, necessary instructions/circulars shall be issued by all the

47 *Supra* note 44 at 309.

> statutory bodies such as Bar Council of India, Medical Council of India, Council of Architecture, Institute of Company Secretaries within two months from the date of the judgment. On receipt of any complaint of sexual harassment at any of the places referred to above the same shall be dealt with by the statutory bodies in accordance with the *Vishaka* guidelines and the guidelines in the present order.

The court was of the view that if there is any non-compliance or non- adherence to the *Vishaka* guidelines, its orders following *Vishaka* and the above directions, it will be open to the aggrieved persons to approach the respective high courts to seek redressal. The high courts of such state would be in a better position to effectively consider the grievances raised in that regard.

The question still remains whether the 2013 legislation will be able to achieve the purpose underlying the *Vishaka* guidelines and the further directions issued by the apex court in *Medha Kotwal Lele* in their letter and spirit.

Judgment and order need not to be detailed

In *Board of Trustees of Martyrs Memorial Trust* v. *Union of India*,[48] the Supreme Court, though not dealing with a labour matter, made some pertinent observations which are equally relevant in labour matters. It observed that brevity in judgment writing has not lost its virtue. The court emphasized that all long judgments or orders are not great nor are brief orders always bad. What is required of a judicial decision is due application of mind, clarity of reasoning and focussed consideration. A slipshod consideration or cryptic order or decision without due reflection on the issues raised in a matter may render such decisions unsustainable. It is high time that hasty adjournments be avoided and every matter that comes up the consideration of the court or tribunal be examined with all the seriousness it deserves.

Recall of the *ex-parte* awards

In *Ram Shiroman Mishra* v. *Vishwanath Pandey*,[49] the case of the petitioner, in short, was that the respondent had falsely alleged that he was in the employment of the petitioner and his services were illegally terminated in violation of section 25F of the ID Act. The respondent had claimed that he was unemployed since the date of his termination and he was entitled to full back wages and continuity in service. The matter was referred to the labour court by the Delhi administration. The petitioner was served with the notice issued by the labour court but could not appear before it. It passed an *ex-parte* award reinstating the respondent with continuity of service and full wages and he came to know about it only when he was summoned by the implementation cell of the labour department. The petitioner, thereafter, moved an application for setting aside the *ex-parte* award before the labour court but it rejected the application on the ground that it was filed after the

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48 (2012) 10 SCC 734.

49 (2012) 8 SCC 575.

issuance of the recovery certificate *i.e.,* after the award had become enforceable under the provisions of the ID Act. Relying on the judgment of *Sangham Tape Co.* v. *Hans Raj* [50] it come to the conclusion that after the award is published and recovery certificate is issued by the industrial tribunal, the labour court had become *functus officio*. It, therefore, did not have any jurisdiction to entertain the application for setting aside the award.

The petitioner challenged the said order before the high court which dismissed the writ petition. The high court observed that no explanation was given by the petitioner as to why no steps were taken to challenge the award expeditiously. It may be relevant to notice here that the labour court in its award had noted that the petitioner was duly served of the claim but no written statement was filed by him and, therefore, it proceeded *ex-parte*. The labour court had on merits decided the matter.

The Supreme Court, while dealing with the special leave petition of the petitioner, noted that the high court had not referred to the judgment of the court in *Sangham Tape Co*. It had simply dealt with the aspect of delay. Since the high court had confirmed the labour court's view based on *Sangham Tape Co.*, the Supreme Court thought it proper to examine whether reliance placed by the labour court on that case was apt. The court noted that on the question whether the industrial/labour court becomes *functus officio* after 30 days of the pronouncement/ publication of the award and loses its power to recall an *ex-parte* award on an application made by the aggrieved party thereafter, two division bench decisions of the Supreme Court have taken apparently conflicting views.

In *Sangham Tape Co.* a two judge bench had held that an application for recall of an *ex-parte* award may be entertained by industrial/labour court only in case it is filed before the expiry of 30 days from the date of pronouncement/ publication of the award. However, a contrary view was taken by another two judge bench in *Radhakrishna Mani Tripathi* v. *L.H. Patel*.[51] In both the cases the court referred to and relied upon the earlier decisions in *Grindlays Bank Ltd.* v. *Central Government Industrial Tribunal*[52] and *Anil Sood* v. *Labour Court* [53] but read and interpreted these two decisions differently. Noticing this conflict, a division bench in *Haryana Suraj Malting Ltd.* v. *Phool Chand* [54] (to which Aftab Alam J.) was a party, observed that the said conflict could be resolved by a larger bench and sought reference of the issue be placed before a three judge bench.

In view of the fact that the matter was already awaiting disposal by a bench of three judges, the court decided not to dispose of the matter at this stage and await its decision. The court granted leave to the petitioner in this case and stayed the proceedings relating to execution of the award, pending final decision.

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50 (2005) 9 SCC 331.

51 (2009) 2 SCC 81.

52 (1980) Supp. SCC 420.

53 (2001) 10 SCC 534.

54 (2012) 8 SCC 579.

Binding nature of settlements between workers association and management

In *Air India Cabin Crew Association* v. *Union of India,*[55] the Supreme Court held that once a workman was placed in the executive cadre, he ceased to be a workman and also ceased to be governed by the settlements arrived at between the management and the workmen through the trade union concerned. The court held that it was not a question of an attempt made by such employees to wriggle out of the settlements which had been arrived prior to their elevation to the executive cadre, which, by operation of law, ceased to have any binding force on the employee so promoted by the management. The effect of this judgment is that the settlements arrived at between the management and the Air India Crew Association ceased to have binding effect on the workmen who became non-workmen on their promotion and became part of the executive cadre.

Claims with respect to existing rights: section 33-C (2)

In *Nagar Council, Kapurthala* v. *Davinder Kumar*,[56] the Supreme Court observed that for establishing their claim that they were entitled to wages for working on Saturdays and Sundays, the workmen must establish their legal right in the proceedings under section 33-C(2). The court referred to its earlier decision in *Nagar Council* v. *Tajinder Singh*[57] that an application under section 33-C(2) would be maintainable if the workman have a legal right in relation to these claims which he has to establish. The appellant in this case which is 'State' within the meaning of article 12 of the Constitution very fairly did not deny or dispute the legal rights of the respondent workman but had before the high court stated in its written statement that it was not in a position to discharge its financial liability owing to financial constraint as octroi had been withdrawn. The high court in its impugned judgment had noticed that octroi had since been again levied and, therefore, issued directions for payment of wages for Saturdays and Sundays.

The Supreme Court observed that the counsel for the appellant when confronted with the position that the liability had not been denied by the appellant and that octroi was again been levied by it did not dispute the liability. In that view of the matter, the court did not find the present case as a fit case for exercise of its discretionary jurisdiction under article 136 of the Constitution.

III CONTRACT LABOUR

In *Baleshwar Rajbanshi* v. *B. D. of Trustees for Port Trust of Calcutta,*[58] the Central Government under section 10(1) of the Contract Labour (Regulation & Abolition) Act, 1970 prohibited the employment of contract labour "in the works of sleeper renewal of railway tracks, repairing, restoration and laying and linkage

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55 (2012) 1 SCC 619.

56 (2012) 10 SCC 280; also see *Executive Officer, Municipal Council, Patran* v. *Gajja Ram* (2012) 10 SCC 282.

57 (2000) 9 SCC 432.

58 (2013) 4 SCC 258.

of tracks in the establishment of Kolkata Port Trust, Kolkata" (hereinafter referred to as, "the Port Trust") with effect from the date of the notification in the official gazette.

After the issuance of the notification the appellants who claimed to be engaged for the works covered by the notification for more than two decades through different contractors approached the Calcutta High Court in a writ petition seeking a direction from it to 'the Port Trust' to abolish the system of giving the works covered by the notification to the contractors. On the other hand, the Port Trust also approached the high court by way of a writ petition questioning the validity of the notification.

The two writ petitions came up for hearing together before a single judge. The single judge decided to hear the writ petition of the 'Port Trust' first as the decision on the legality of the notification would have a direct bearing on the writ petition of the individual workman. The single judge upheld the validity of the notification and dismissed the writ petition filed by 'the Port Trust'. The latter challenged this judgment and order before a division bench of the high court in an intra-court appeal which directed the Port Trust to approach the Ministry of Labour for resolving the issue. An SLP was preferred by individual workers against the order of the division bench. The Supreme Court set aside the order of the division bench and directed the division bench of the high court to hear the Port Trust's appeal against the judgment of the single judge and decide it in accordance with law.

After remand, the division bench of the high court once again heard the appeal and disposed it off by a brief order, modifying the order of the single judge and notwithstanding the notification under section 10 of the Act, allowing the Port Trust to assign the work of laying and linkage of railway tracks as one time measure to RITES, another Central Government organization. The division bench simply noted the submission of the counsel for the Port Trust that laying and linking of the railway tracks did not come within daily affairs of the Port Trust; that it was required for the purpose of easy movement of cargo; and further that such railway tracks were laid by railways. The Port Trust claimed that it was for this reason that such contracts were given to railways who would get it executed through contractors.

The high court also noted the submission of the counsel for the Port Trust that laying and linkage of railway tracks could not be termed as work of perennial nature and, therefore, the assignment of railway track laying and linkage of railway tracks to RITES which had the necessary expertise in the work could not come within the mischief of section 10 of the Act. The division accepted the submission of the Port Trust and carved out an exception in its favour from the notification issued by the Central Government under section 10(1) of the Act.

This judgment and order came to be challenged in the Supreme Court in a SLP. The court expressed its inability to appreciate or to even follow the view taken by the high court. It referred to the object of the Contract of Labour Act,

which is to regulate the employment of contract labour in establishments covered by the Act and to provide for its abolition in certain establishments. The court referred to the scheme of the Act and held that the Central Government before issuing the notification had sought advice of the central board which first constituted a committee under section 5 of the Act to go into the question of abolition of contract labour in the establishment of Calcutta Port Trust (CPT). The committee, after examining the matter in detail observed in its recommendation that an examination of the entire gamut of activities in which CPT was engaged in, it was of the opinion that work/jobs of sleeper renewal of railway tracks repairing/restoration laying and linkage of tracks in the establishment of CPT seemed to be of a regular nature and attracted the provisions of section 10(2) of the Contract Labour Act. The committee, accordingly, recommended prohibition of contract labour in the above mentioned job.

The matter was thereafter considered by the central board and it recommended to the Central Government for prohibition of employment of contract labour in the jobs of sleeper renewal for railway contracts repairing / restoration laying and linkage of tracks in the establishment of CPT. Acting upon the aforesaid recommendations, the Central Government issued the notification under section 10(1) of the Act which, *inter alia*, covered laying and linking of tracks in the establishment of CPT.

It was thus quite clear that the notification was issued after following a statutory scheme and it was based on a detailed investigation of issues of facts followed by two tiers of recommendations first by the committee constituted under section 5 and the second by the advisory board constituted under section 3 of the Act, respectively.

The Supreme Court observed that whether the work of laying and linking of tracts is of perennial nature and whether workers engaged through contractors are employed by the Port Trust for their work are pure questions of fact that were investigated by the statutory committee constituted under section 5 of the Act and covered by the recommendations made both by the committee and by the advisory board. It was, therefore, quite wrong for the division bench of the high court to completely nullify that part of the notification in a highly causal and off hand manner and simply on the *Ipse dixit* of the respondent; more so when the division bench did not otherwise find any illegality in the notification in question.

In the light of the above discussions, the Supreme Court found no justification for the division bench of the high court to carve out the exception and to rationalize the assignment of the contract to RITES merely on the ground that it is another Central Government organization. The court held that the high court had clearly exceeded its jurisdiction in passing the impugned order and, accordingly, quashed the same. The Supreme Court restored the order of the single judge of the high court.

IV TRADE UNION LAW

In *Gyana Patnaik General Secretary Tata Refractories Shramik Sangh, District Jharsuguda, Orissa* v. *State Implementation Officer-Cum-Labour Commr, Orissa*[59] the High Court of Orissa was approached by the appellant praying for quashing of the order of Labour Commission, Orissa, Bhubaneswar, appointing the district labour officer, Jharsuguda as the returning officer to conduct the election for the office bearers of Tata Refractories Shramik Sangh, which was the only recognized trade union functioning in the Tata Refractories. The high court while dismissing the writ petition held that the said appointment was intended to ensure that there was proper representation of the workers of the factory. It directed the returning officer to conduct election and to complete the election process, in all respects, within a period of four weeks from the date of the order in accordance with the procedure contemplated in the Model Election Rules *viz -a- viz* the registered bye-laws of the association. The present appeal was filed by the appellant challenging the said order of dismissal of the writ petition.

The petitioner before the Supreme Court was aggrieved by the said directions of the high court by which the returning officer was directed to follow the procedure contemplated in the Model Election Rules, which presumably meant the verification of membership under the Membership and Recognition of Trade Union Rules promulgated in 1994.

From the respective submissions of the parties, it appeared that the election of the office bearers of the union had last taken place in April, 2007, and, although, the tenure of the office bearer was for one year, till date no further elections had been conducted. As a result, there arose a state of vacuum, though the petitioners claimed they had been continuing in the management of the trade union. The court observed that in the light of the vacuum existing, the impasse needed to be resolved, more so, when the provisions of the Trade Unions Act, 1926 were silent on the subject matter of conduct of election of office bearers of registered trade unions and the procedure therefor.

The court observed that having regard to the fact that different groups were claiming to be the office bearers of the association, it was necessary to adopt a pragmatic approach to resolve the impasse. The court, accordingly, appointed the district labour officer as the returning officer to conduct the election of the office bearers of the union within a period of 12 weeks notwithstanding the order of the high court. The court directed the elections be conducted in accordance with the bye-laws of the union and by way of secret ballot on the basis of the membership as existing in the register of members of the trade union. The expenses for the conduct of the elections were directed to be borne by the union. The court set aside the directions of the high court and disposed of the special leave petition in terms of the above directions.

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59 (2011) 15 SCC 565.

V CONCLUSION

The state of law pertaining to labour management relations as reflected in the decided cases surveyed above reinforces the existing approach of recognition of exceptions to the normal rule of reinstatement in the case of wrongful dismissal to the extent of generally providing only compensation in place of reinstatement; more so, in the case of daily wage and casual workers especially where they had worked for a few years or raised the dispute belatedly. However, this approach raises two issues of concern. Firstly, the trend has been to order compensation on a case to case basis without any effort being made on the part of the Indian judiciary to lay down proper guidelines for determining the same, introducing consistency in determination of compensation and avoiding wide variation in the amount of compensation in similar cases. Secondly, there is lack of clarity between a claim for regularization and a claim against illegal retrenchment. *Umadevi* is a case only on regularization and does not in any way have any bearing in cases where the relief sought is against illegal retrenchment.

The surveyed years reflect the commitment of the judiciary as well as the legislature in establishing a formidable structure for dealing with cases of sexual harassment of women at workplace as indicated by the decision of the Supreme Court in *Medha Kotwal Lele* as well as the enactment of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.