O P MALHOTRA'S

THE LAW OF INDUSTRIAL DISPUTES

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DR E. V. RAO

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER I Preliminary

S. 1. Short title, extent and commencement.—

(1) This Act may be called the Industrial Disputes Act 1947.

1[(2)It extends to the whole of India:

2[* * *]]

(3) It shall come into force on the first day of April, 1947.

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1 Subs by Act 36 of 1956, s 2, for the former sub-section (wef 29-8-1956).

2 Proviso omitted by Act 51 of 1970, s 2 and Sch (wef 1-9-1971).

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER I Preliminary

S. 2. Definitions.—

In this Act, unless there is anything repugnant in the subject or context-

(a) 'appropriate government' means-

(i) in relation to any industrial dispute concerning [3][* * *] any industry carried on by or under the authority of the Central Government [4][* * *] or by a railway company [5][or concerning any such controlled industry as may be specified in this behalf by the Central Government] [6][* * *] or in relation to an industrial dispute concerning [7][a Dock Labour Board established under section 5A of the Dock Workers (Regulation of Employment) Act, 1948 (9 of 1948), or [8][the Industrial Finance Corporation of India Limited formed and registered under the Companies Act, 1956 (1 of 1956)], or the Employees' State Insurance Corporation established under section 3 of the Employees' State Insurance Act, 1948 (34 of 1948), or the Board of Trustees constituted under section 3A of the Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948 (46 of 1948), or the Central Board of Trustees and the State Boards of Trustees constituted under section 5A and section 5B, respectively, of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (19 of 1952), [9][* * *] or the Life Insurance Corporation of India established under section 3 of the Life Insurance Corporation Act, 1956 (31 of 1956), or [10][the Oil and Natural Gas Corporation Limited registered under the Companies Act, 1956 (1 of 1956)], or the Deposit Insurance and Credit Guarantee Corporation established under section 3 of the Deposit Insurance and Credit Guarantee Corporation Act, 1961 (47 of 1961), or the Central Warehousing Corporation established under section 3 of the Warehousing Corporations Act, 1962 (58 of 1962), or the Unit Trust of India established under section 3 of the Unit Trust of India Act, 1963 (52 of 1963), or the Food Corporation of India established under section 3, or a Board of Management established for two or more contiguous States under section 16, of the Food Corporations Act, 1964 (37 of 1964), or [11][the Airports Authority of India constituted under section 3 of the Airports Authority of India Act, 1994 (55 of 1994)], or a Regional Rural Bank established under section 3 of the Regional Rural Banks Act, 1976 (21 of 1976), or the Export Credit and Guarantee Corporation Limited or the Industrial Reconstruction Bank of India Limited], [12][the National Housing Bank established under section 3 of the National Housing Bank Act, 1987 (53 of 1987) or] [13][[14][an air transport service, or a banking or an insurance company,] a mine, an oil-field,] [15][a Cantonment Board,] or a [16][major port, any company in which not less than fifty-one per cent. of the paid-up share capital is held by the Central Government, or any corporation, not being a corporation referred to in this clause, established by or under any law made by Parliament, or the Central public sector undertaking, subsidiary companies set up by the principal undertaking and autonomous bodies owned or controlled by the Central Government, the Central Government and]

17[(ii) in relation to any other industrial dispute, including the State public sector undertaking, subsidiary companies set up by the principal undertaking and autonomous bodies owned or controlled by the State Government, the State Government:

Provided that in case of a dispute between a contractor and the contract labour employed through the contractor in any industrial establishment where such dispute first arose, the appropriate Government shall be the Central Government or the State Government, as the case may be, which has control over

such industrial establishment.]

18 [(aa) "arbitrator" includes an umpire;]

19[20[(aaa) "average pay" means the average of the wages payable to a workman—

(i) in the case of monthly paid workman, in the three complete calendar months,

(ii) in the case of weekly paid workman, in the four complete weeks,

(iii) in the case of daily-paid workman, in the twelve full working days,

preceding the date on which the average pay becomes payable if the workman had worked for three complete calendar months or four complete weeks or twelve full working days, as the case may be, and where such calculation cannot be made, the average pay shall be calculated as the average of the wages payable to a workman during the period he actually worked;]

21[(b) "award" means an interim or a final determination of any industrial dispute or of any question relating thereto by any Labour Court, Industrial Tribunal or National Industrial Tribunal and includes an arbitration award made under Section 10-A;]

22[(bb) "Banking Company" means a banking company as defined in Section 5 of the Banking Companies Act, 1949 (10 of 1949)[23], having branches or other establishments in more than one State, and includes [24][the Export-Import Bank of India] [25][the Industrial Reconstruction Bank of India,] [26][* * *] [27][the Small Industries Development Bank of India established under section 3 of the Small Industries Development Bank of India Act, 1989 (39 of 1989),] the Reserve Bank of India, the State Bank of India, [28][a corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970), [29][a corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980), and any subsidiary bank]], as defined in the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959);]

(c) "Board" means a Board of Conciliation constituted under this Act;

30[(cc) "closure" means the permanent closing down of a place of employment or part thereof;]

(d) "conciliation officer" means a conciliation officer appointed under this Act;

(e) "conciliation proceeding" means any proceeding held by a conciliation officer or Board under this Act;

31[(ee) "controlled industry" means any industry the control of which by the Union has been declared by any Central Act to be expedient in the public interest;]

[32][***]

(f) "Court" means a Court of Inquiry constituted under this Act;

(g) "employer" means—

(i) in relation to an industry carried on by or under the authority of any department of [33][the Central Government or a State Government,] the authority prescribed in this behalf, or where no authority is prescribed, the head of the department;

(ii) in relation to an industry carried on by or on behalf of a local authority, the chief executive officer of that authority;

34[(gg) "executive" in relation to a trade union, means the body, by whatever name called, to which the management of the affairs of the trade union is entrusted].

35[(h) "Federal Railway" * * *]

(i) a person shall be deemed to be "independent" for the purpose of his appointment as the Chairman or other member of a Board, Court or Tribunal, if he is unconnected with the industrial dispute referred to such Board, Court or Tribunal or with any industry directly affected by such dispute:

[36][*Provided* that no person shall cease to be independent by reason only of the fact that he is a shareholder of

an incorporated company which is connected with, or likely to be affected by, such industrial dispute; but in such a case, he shall disclose to the appropriate Government the nature and extent of the shares held by him in such company;]

37[(j) "industry" means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen;]

(k) "industrial dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person;

38[(ka) "Industrial establishment or undertaking" means an establishment or undertaking in which any industry is carried on:

Provided that where several activities are carried on in an establishment or undertaking and only one or some of such activities is or are an industry or industries, then,—

(a) if any unit of such establishment of undertaking carrying on any activity, being an industry, is severable from the other unit or units of such establishment or undertaking, such unit shall be deemed to be a separate industrial establishment or undertaking;

(b) if the predominant activity or each of the predominant activities carried on in such establishment or undertaking or any unit thereof is an industry and the other activity or each of the other activities carried on in such establishment or undertaking or unit thereof is not severable from and is, for the purpose of carrying on, or aiding the carrying on of, such predominant activity or activities, the entire establishment or undertaking or, as the case may be, unit thereof shall be deemed to be an industrial establishment or undertaking;]

39[(kk) "insurance company" means an insurance company as defined in section 2 of the Insurance Act, 1938 (4 of 1938), having branches or other establishments in more than one State;]

40[(kka) "khadi" has the meaning assigned to it in clause (d) of section 2 of the Khadi and Village Industries Commission Act, 1956 (61 of 1956);]

41[[(kkb)] "Labour Court" means a Labour Court constituted under section 7 ;]

42[(kkk) "lay-off" (with its grammatical variations and cognate expressions) means the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the breakdown of machinery [43][or natural calamity or for any other connected reason] to give employment to a workman whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched.

Explanation.—Every workman whose name is borne on the muster rolls of the industrial establishment and who presents himself for work at the establishment at the time appointed for the purpose during normal working hours on any day and is not given employment by the employer within two hours of his so presenting himself shall be deemed to have been laid-off for that day within the meaning of this clause:

Provided that if the workman, instead of being given employment at the commencement of any shift for any day is asked to present himself for the purpose during the second half of the shift for the day and is given employment then, he shall be deemed to have been laid-off only for one-half of that day:

Provided further that if he is not given any such employment even after so presenting himself, he shall not be deemed to have been laid-off for the second half of the shift for the day and shall be entitled to full basic wages and dearness allowance for that part of the day];

(l) "lock-out" means the [44][temporary closing of a place of employment], or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him;

45[(la) "major port" means a major port as defined in clause (8) of section 3 of the Indian Ports Act, 1908 (15 of 1908);

(lb) "mine" means a mine as defined in clause (j) of sub-section (1) of section 2 of the Mines Act, 1952 (35 of 1952);]

46[(ll) "National Tribunal" means a National Industrial Tribunal constituted under section 7B ;]

47[(lll) "office bearer", in relation to a trade union, includes any member of the executive thereof, but does not include an auditor;]

(m) "prescribed" means prescribed by rules made under this Act;

(n) "public utility service" means—

(i) any railway service [48][or any transport service for the carriage of passenger or goods by air;]

49[(ia) any service in, or in connection with the working of, any major port or dock;]

(ii) any section of an industrial establishment, on the working of which the safety of the establishment or the workmen employed therein depends;

(iii) any postal, telegraph or telephone service;

(iv) any industry which supplies power, light or water to the public;

(v) any system of public conservancy or sanitation;

(vi) any industry specified in the [50][First Schedule] which the appropriate Government may, if satisfied that public emergency or public interest so requires, by notification in the Official Gazette, declared to be a public utility service for the purposes of this Act, for such period as may be specified in the notification:

Provided that the period so specified shall not, in the first instance, exceed six months but may, by a like notification, be extended from time to time, by any period not exceeding six months, at anyone time if in the opinion of the appropriate Government public emergency or public interest requires such extension;

(o) "railway company" means a railway company as defined in section 3 of the Indian Railways Act, 1890 (9 of 1890);[51]

52[(oo)] "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuating if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

53[(bb) termination of the service of the workman as a result of the non-removal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or]

(c) termination of the service of a workman on the ground of continued ill-health;

54[(p) "settlement" means a settlement arrived at in the course of conciliation proceeding and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to [55][an officer authorised in this behalf by] the appropriate Government and the conciliation officer;]

(q) "strike" means a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment;

56[(qq) "trade union" means a trade union registered under the Trade Unions Act, 1926 (16 of 1926);]

57[(r) "Tribunal" means an Industrial Tribunal constituted under section 7A and includes an industrial Tribunal constituted before the 10th day of March, 1957, under this Act;]

58[(ra) "unfair labour practice" means any of the practices specified in the Fifth Schedule;]

59[(rb) "village industries" has the meaning assigned to it in clause (h) of section 2 of the Khadi and Village Industries Commission Act, 1956 (61 of 1956);]

60[(rr) "wages" means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment, and includes—

(i) such allowance (including dearness allowance) as the workman is for the time being entitled to;

(ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles;

(iii) any travelling concession;

61[(iv) any commission payable on the promotion of sales or business or both;]

but does not include—

(a) any bonus;

(b) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the workman under any law for the time being in force;

(c) any gratuity payable on the termination of his service;]

62[(s) "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding [63][ten thousand rupees] per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature].

CONSTRUCTION

Unless there is anything repugnant in the subject or context

The definition of a word or phrase in the definition section of a statute does not necessarily apply to every context in which the word or the phrase may appear. If the word or phrase is used in a context in which the definition will not fit in, then the word or phrase has to be interpreted according to its ordinary meaning. When a statute does not contain the qualifying words 'unless there is anything repugnant in the subject or context', those qualifying words are always understood. Words must take their colour from the context and need not have the same meaning in every section.[64]The definition section is a dictionary for the purpose of the Act but the expressions which are defined may be used in different senses and with a meaning of a limited character.[65]Where an Act, like the General Clauses Act, is enacted in order to shorten the language used in parliamentary legislations and to avoid a repetition of the same words in the course of the same piece of legislation, it is not meant to give a hide-bound meaning to terms and phrases generally occurring in the legislation. This is the reason why the definition sections contain words like 'unless there is anything repugnant in the subject or context'. Words and phrases have either a very narrow or a very wide significance, according to the requirements of the context and subject of the legislation, which would decide whether the one or the other meaning is to be attached to such words or phrases. The statute book contains many illustrations showing that the same words have been used in different senses in different contexts.[66] In *Bennett Coleman*, in view of the words 'unless the context otherwise requires', preambling the definition section of the Working Journalists and other Newspaper Employees' (Conditions of Service) and Miscellaneous Provisions Act 1955, construing the words 'who is employed' in the definition of the 'Working Journalist', the Supreme Court held that even an ex-employee could resort to the protection of the Act with respect to the claims which accrued to him while he was in employment, even after ceasing to be in employment.[67]

Means

When a statute says that a word or phrase shall 'mean' not merely 'include'—certain things or acts, the definition is a hard and fast definition, and no other meaning can be assigned to the expression than, that which is put down in the definition.[68] In other words, the legislature intends to exhaust the significance of the term defined.[69]

Includes

'Shall include' is a phrase of extension and does not restrict the definition; it is not equivalent to 'shall mean'.[70] 'Include' is generally used in interpretation clauses, in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. When the word 'includes' is used in a definition, the legislature intends the definition to be enumerative, but not exhaustive. That is to say, the term defined will retain its ordinary meaning, but its scope would be extended to bring within it matters, which its ordinary meaning mayor may not comprise.[71]But 'include' is susceptible of another construction, which may become imperative if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case, it may afford an exhaustive explanation of the meaning, which, for the purposes of the Act, must invariably be attached to those words.

Need for Common Definitions

Stressing the need for simplicity and uniformity in the definitions of terms constantly used in the labour laws, the NCL-II observed:

> One of the most important steps that one needs to take in rationalising and simplifying the existing labour laws is in the area of simple common definitions of terms that are in constant use; such terms include 'worker', 'wages' and 'establishment'. By making the law applicable to establishments employing 20 or more Workers, irrespective of the nature of the activity in which the establishment is engaged, we have avoided the need to define 'industry'. After examining all aspects of the question, we have come to the conclusion that the persons engaged in domestic service are better covered under the proposed type of umbrella legislation, particularly in regard to wages, hours of work, working conditions, safety and social security.[72]

Clause (a): APPROPRIATE GOVERNMENT

Evolution

The term 'appropriate government' was not defined in the Trade Disputes Act 1929 (7 of 1929). The term was defined by s 2(a) of the Industrial Disputes Act 1947. Before it reached its present form, the definition had undergone a number of amendments, which have been indicated in the footnotes to the text of the section. The definition is exhaustive. It is not discriminatory or unconstitutional and does not contravene the principle of equality under Art. 14 of the Constitution.[73]

Sub-Clause (i): Central Government

In relation to any industrial dispute concerning an industrial undertaking or establishment enumerated in this clause, the Central Government is the appropriate government. In a union territory like Delhi, the central and the state governments merge and it is immaterial whether an order of reference is made by the one or the other.[74] The word 'concerning', according to Webster's Third New International Dictionary, means 'relating to, regarding, respecting, about-an affair that concerns one:..'. The word 'concerning' must be construed in a reasonable manner, and as referring to such 'industrial disputes' as have got a proximate, intimate and real connection with the establishments or authority mentioned in the definition, and it must not be taken to refer to a connection which is farfetched, remote and hypothetical. It would, therefore, be a question of fact, in each case, to be decided with reference to the facts of that case, as to whether an 'industrial dispute' concerns any of the corporations or authorities mentioned in the definition or not.[75]

Any industry carried on by or under the authority of the Central Government

Before discussing the judicial gloss on this highly controversial definition with special reference to the phrase "*by or under the authority of the Central Government*", it is pertinent to bring to the notice of the readers that s 2(a) has been amended by the Parliament by ID Amendment Act 2010, whereby the following phrases were inserted in sub-cl (i) and sub-cl (ii) of cl (a) of s 2, ie, 'appropriate Government' after the words 'major port':

[76][any company in which not less than fifty-one percent of the paid-up share capital is held by the Central Government, or any corporation, not being a corporation referred to in this clause, established by or under any law made by the Parliament, or the Central public sector undertaking, subsidiary companies set up by the principal undertaking and autonomous bodies owned or controlled by the Central Government,] the Central Government, and

(ii) [77][in relation to any other industrial dispute, including the State public sector undertaking, subsidiary companies set up by the principal undertaking and autonomous bodies owned or controlled by the State Government, the State Government;

Provided that in case of a dispute between a contractor and the contract labour employed through the contractor in any industrial establishment where such dispute first arose, the appropriate Government shall be the Central Government or the State Government, as the case may be, which has control over such industrial establishment.]

In view of the said amendment of major significance, most of the law laid down by High Courts and the Supreme Court in the pre-amendment phase will have no application to cases arising in the post-amendment phase, in so far as the Central Public Sector undertakings and Statutory Corporations falling within the above parameters are concerned. Viewed thus, a large majority of the decisions discussed below, which were rendered in the pre-amendment phase - on the question *which is the appropriate government in respect of a central public sector undertaking: is it the central government or the state government in whose territorial jurisdiction the unit is located?* - stand reduced to mere academic discussion and research work, with no practical application to disputes arising after 2010. With these introductory remarks, let us take a look at the welter of confusing judicial trends that ruled the industrial relations firmament for over six decades.

In construing the phrase '*carried on by or under the authority of the Central Government,*' in the definition of 'appropriate government' in s 2(a) of the Act, there being nothing to the contrary in that provision, the word 'authority' must be construed according to its ordinary meaning and, therefore, must mean a legal power given by one person to another to do an Act. In other words, a person is said to be authorised or to have authority when he is in such a position that he can Act in a certain manner without incurring liability, to which he would be exposed but for the authority, or, so as to produce the same effect as if the person granting the authority had for himself, done the Act. The words 'under the authority of, mean pursuant to the authority, such as where an agent or servant acts under such authority of his principal.[78] These words mean much the same as 'on behalf of'.[79] This phrase must, therefore, mean and is intended to apply to industries carried on directly under the authority of the Central Government.[80] For an industry to be carried on under the authority of the Central Government, it must be an industry belonging to the Central Government, that is to say, its undertaking.[81] The expression 'carried on by or under the authority of the Central Government' involves a direct nexus with the industry, through servants or agents of the Central Government.[82] In order to come within the purview of this expression, an industry must be acting pursuant to the authority of the Central Government, as if it were an agent or servant of the Central Government with the latter as its principal.[83] Thus, an industry carried on by or under the authority of the Central Government is a Central Government industry, which may be carried on directly by the Central Government or by some body or person nominated by the government for that purpose. The definition of the employer in s 2(g) of the Act, which also uses the same words, *viz*, 'carried on by or under the authority of the government, means either an industry carried on directly by a department of the government, such as posts and telegraphs or the railways, or one carried on by such department, through the instrumentality of an agent.[84]

Under s 80 of the Punjab Reorganisation Act 1966, from the appointed date, ie, 1 November 1966, the Beas Dam Project was to be 'carried on' by the Central Government, although the Central Government was to Act on behalf of the successor states and the State of Rajasthan. It was held that in relation to an industrial dispute between the project and its workmen, subsequent to the appointed day, the appropriate government to make a reference was the Central Government, and not the State of Punjab.[85]Likewise, Central Electro Chemical Research Institute, which is one of the national laboratories established by the Council of Scientific and Industrial Research, has been held to be controlled by and 'carried on or under the authority of the Central Government, for the purpose of the Act.' Accordingly, the appropriate government is the Central Government, and not the state government.[86] No business owned or carried on by a private person or a limited company can be a business carried on by or under the authority of the government.[87] Likewise, industries which are carried on by incorporated commercial corporations, which are governed by their own constitutions, for their own purposes, cannot be described as carried on by or under the authority of the Central Government as these corporations are independent legal entities and run the industries for their own purposes. Even if the Central Government owns the entire share capital and controls such corporations, the industries carried on by them are still worked under the authority of their own constitutions or charters. [88]

In *Heavy Engineering Mazdoor Union*, the State of Bihar referred an industrial dispute between the heavy engineering corporation, a company incorporated under the Companies Act 1956, and its workmen, for adjudication, to the industrial tribunal. The reference was challenged in a writ petition by the mazdoor union before the High Court of Patna, contending that the 'appropriate government' to refer the dispute was the Central Government and not the state government. The High Court rejected the contention and upheld the validity of the order of reference.[89] In appeal, by special leave against the holding of the High Court, a two judge Bench of the Supreme Court affirmed the holding of the High Court as it held that the words 'under authority of' mean 'pursuant to the authority', like an agent or servant acting under or pursuant to the authority of its principal or master. Since the corporation could not be said to be carrying on its business pursuant to the authority of the Central Government, it was not acting under the authority of the Central Government.

Relying on common law interpretation, the Bench took the view that the company derives its powers and functions from its memorandum and articles of association. The fact that the entire share capital was contributed by the Central Government and all the shares were held by the President and officers of the Central Government, who were incharge of the management of the corporation, was not relevant, as the shareholders and the corporation were distinct entities. And the fact that the President of India and certain officers of the Central Government held all its shares did not make the company an agent either of the President or of the Central Government. The power to decide as to how the company should function, how the directors should be appointed and how the wages and salaries payable by the company to its employees should be determined, were all derived from the memorandum and articles of association of the corporation and not by reason of the company being an agent of the Central Government. Therefore, on the basis of the incorporation of the company and in view of the law of principal and agent as regards a company registered under the Companies Act, the court came to the conclusion that the State of Bihar was the appropriate government, and not the Central Government. This holding was followed by a three judge Bench of the court in *Hindustan Aeronautics*, in which the dispute related to the workmen employed in the Barrackpore branch of Hindustan Aeronautics, whose Head Office is located in Bangalore. The Supreme Court rejected the contention that the appropriate government was the Central Government or, in the alternative, Karnataka Government, and held that West Bengal was the appropriate government.[90]

In *Rashtriya Mill Mazdoor Sangh*, another three judge Bench considered the purport of the expression 'under the authority of any department of the Central Government' for the purpose of payment of bonus, while interpreting s 32(4) of the Payment of Bonus Act. The court held that the industrial undertaking had its own personality and status despite the power exercised by the Central Government, which directed the management and subjected it to regulatory control.[91] These two decisions were followed by a two judge Bench decision of the court in *Food Corporation.*[92] In *Air India Statutory Corpn*, K Ramaswamy J held that the corporations and companies held and controlled by the central and state governments will be the instruments of centre and states respectively within the meaning of Art. 12 of the Constitution.[93] Therefore, after this decision, the law laid down by the court in the earlier dicta,[94] stands overturned. So also do the holdings of the Karnataka,[1] Delhi,[2] Kerala,[3] Bombay,[4] Patna,[5] Madras[6] and Bombay,[7] High Courts.

In Bharat Glass Works, the question, before Calcutta High Court was whether an undertaking, the management and control of which was taken over by the Central Government, could be said to be an industry 'carried on by or under the authority of the Central Government.' Subsequent to the said takeover, the State of West Bengal referred an industrial dispute between the company and its workmen, to an industrial tribunal, for adjudication. The order of reference was challenged before the Calcutta High Court on the ground that an industry which is 'controlled' in the manner laid down under that Act, must be held to be 'carried on under the authority of the Central Government'. A single judge of the High Court negatived the contention, holding that a business which is carried on by or under the authority of the Central Government must be a Central Government business. In other words, an industry, to be 'carried on by or under the authority of the Central Government', must be an industry 'belonging to the Central Government, that is to say, its own undertaking'.[8]

In *DP Kelkar*, the Bombay High Court held that under the provisions of Ch IIIA, the management and control of the establishment is completely taken away from the directors and substantially from the shareholders, and the effective management and control of the Central Government, through the authorized controller, is substituted. In the circumstances, it is impossible not to hold that the industrial undertaking is being 'carried on under the authority of the Central Government'.[9]

In *National Textile Corpn*, dissenting from *DP Kelkar*, the Allahabad High Court declined to accept the temporary external control of the management of the mills as tantamounting to an abrogation of the proprietary rights and ownership of the mills, which continued with the company only, and held that the industry in respect of the mills, on account of their management being taken over in accordance with the provisions of the Industries (Development and Regulation) Act 1951, could not be said to be carried on by or under the authority of the Central Government.[10] This point may not be covered by the ratio of the holding of the Supreme Court in *Air India Statutory Corporation* (supra), because such a company cannot be said to be an instrument of the state. But as long as its control and management vests with the Central Government, under the Industries (Development & Regulation) Act, it cannot be gainsaid that factually, it is 'carried on under the

authority of the Central Government', by virtue of the provisions of that Act. Hence, the 'appropriate government' to refer a dispute to, between such company and its workmen, would be the Central Government. The view expressed by Ramaswamy J in *Air India Statutory Corporation*, does not seem to have found favour with several High Courts.

In *Cotton Corporation*, the Karnataka High Court held that merely because the government of India was holding a majority of the shares in the Cotton Corporation of India, and was exercising control over corporation, it could not be said that the Central Government was the appropriate government within the meaning of s 2(a)(i). On this view of the matter, the court held that the state government, within whose territorial jurisdiction the dispute arose, would be the appropriate government.[11] In respect of Castrol (India) Ltd, which deals in lubricants, the Central Government is the appropriate government, as it falls within the category of industries engaged in the manufacture or production of mineral oil, motor and aviation spirit, diesel oil, kerosene oil, etc, which have been declared as controlled industries within the meaning of s 2(a)(i), by a notification issued on 6 May 1994.[12] Where a reference was made by the state government regarding a dispute relating to Hindustan Aeronautics Ltd, it was challenged on the basis of the ratio of *Air India Statutory Corpn.* A single judge of the Bombay High Court repelled the contention and held that the said decision in *Air India Statutory Corpn* was rendered in connection with the Contract Labour (Regulation and Abolition) Act 1970, and hence, it had no application to a case falling under the Industrial Disputes Act and that, being a decision by a Bench of three-judges, it could not be said to overrule the earlier decision given by a co-ordinate Bench in *Hindustan Aeronautics*,[13]to the effect that the state government was the appropriate government for the purpose of Industrial Disputes Act.[14]

In *Saudi Arabian Airlines*, a single judge of the Bombay High Court held that where a reference for adjudication was made by the state government, being the appropriate government under s 2(a) as on the date of reference, a subsequent amendment to s 2(a), by which Central Government was made the appropriate government in respect of the said industry, can have only a prospective operation and it would not put an end to the adjudication proceedings already commenced on the reference made by the state government in the pre-amended period. The proceedings commenced upon the said reference must be carried to their logical conclusion, even after the amendment comes into force. The award passed by the labour court and published by the state government in that case was, therefore, held perfectly valid and justified.[15] In *Meenakshi Patel v EEPC* , a single judge of the Bombay High Court held that the Engineering Export Promotion Council, though not a 'controlled industry', was certainly an industry carried on 'under the authority of the Central Government' and, therefore, the Central Government would be the appropriate government.[16] In respect of Indian Council of Agricultural Research (ICAR), the Central Government is the appropriate government as it exercises sufficient authority and control in the actual functioning of ICAR.[17]

Any Industry Carried on by a Railway Company

With respect to a railway company, the 'appropriate government' is the Central Government. But a business carried on by a private limited company, though under the licence and control of the East India Railway Administration, is not an industry carried on by a railway company.[18] However, the Central Government and not the state government, will be the appropriate government for making the reference of a dispute, for adjudication, on the matter of a termination of the service of a coolie working under a railway contractor.[19]

Any controlled industry as may be specified in this behalf by the Central Government

In order that the Central Government may be the 'appropriate government' in relation to a controlled industry, two requirements must be satisfied, *viz*,

(a) the industry should be a 'controlled industry'; and

(b) it should have been 'specified in this behalf ie, it should have been specified as such for the purpose of this provision.[20]

These two requirements are to be satisfied cumulatively.[21] As pointed out by the Supreme Court in *Bijay Cotton Mills*, that in order to attract the provisions of this clause, it is not enough that the industry in question is a 'controlled industry', but it should also have been specified by the Central Government as a 'controlled industry' for the purposes of s 2(a)(i).[22] In relation to the employees employed in a canteen, run by a contractor in the premises of the Hindustan Petroleum Corporation, a single judge of the Bombay High Court held that the Central Government would be the appropriate government, in view of the fact that the Central Government had notified that the appropriate government with respect to the corporation will be the Central Government.[23]

Specified Corporations

With respect to disputes relating to the following corporations and bodies, the Central Government has specifically been made the 'appropriate government':

(a) A Dock Labour Board;

(b) The Industrial Corporation of India Limited, formed and registered under the Companies Act 1956;

(c) The Employees State Insurance Corporation;

(d) A Board of Trustees;

(e) The Central Board of Trustees and the State Board of Trustees;

(f) The Indian Airlines Corporation and the Air India Corporation;

(g) The Life Insurance Corporation of India;

(h) The Oil and Natural Gas Commission;

(i) The Deposit Insurance and Credit Guarantee Corporation;

(j) The Central Warehousing Corporation;

(k) The Unit Trust of India;

(l) The Food Corporation of India;

(m) The International Air Port Authority of India;

(n) A Regional Rural Bank;

(o) The Export Credit and Guarantee Corporation Ltd;

(p) The Industrial Reconstruction Corporation of India Ltd; and;

(q) The Banking Services Commission.

A Banking Company

A banking company has been defined in cl (bb) of s 2. It is only with respect to the banking companies falling within the definition of a banking company in the Act, that the Central Government is the appropriate government. With respect to the other banking companies, only the State Government in which the bank is situated, would be the appropriate government, [*See, notes under cl (bb)*].

An Insurance Company

An insurance company has been defined in cl (kk) of s 2. It is only in relation to the insurance companies falling within the definition, that the Central Government is the appropriate government; with respect to the other companies, it is the state government. [*See, notes under cl (kk)].*

A Mine

The words, 'in relation to an industrial dispute concerning ... a mine,' in this clause, have to be construed without reference to the broad definition of an industry in s 2(j) of the Act.[24] It is quite clear that the employees who are employed in any mining operation, for the purpose of searching and obtaining minerals by extraction, including all borings, bore-holes and oil-wells and other modes of working, as enumerated in the definition of a 'mine', can be stated to be employed in a mine. Likewise, employees engaged in loading ore in a mine, are employed in a mine.[25] But, unless a person is so employed, he cannot be said to be engaged in any kind of work incidental to or connected with mining operations.[26] An illustration of this point is *Serajuddin & Co,*[27] where the Supreme Court held that an 'industrial dispute' between the workmen employed in the head office of a company at Calcutta, engaged in a mining business, having its mines in the State of Orissa, was not an industrial dispute concerning a 'mine', as the head office was not connected with the mining operations. The Patna High Court, in *Khas Jeenagora Coal Co,* took the view that the Central Government was not the 'appropriate government' in connection with a dispute connected with the non-employment of a person working as a watchman or as a peon, in the bungalow of a director of the company, situated at the mine site.[28] Likewise, regarding a dispute about the clerks working in the accounts section of certain collieries, who were not doing any job directly connected with the mining operations, the

appropriate government was the state government and not the Central Government.[29] The Gauhati High Court held that an oil refinery cannot be treated as a mine within the meaning of s 2(j)(viii) of the Mines Act.[30]

The expression 'concerning a mine' in s 2(a)(i) of the Act—a welfare statute—has to be liberally construed. There is no indication in the Act that the word 'mine' should be given a narrow meaning such as to exclude stone-quarries.[31] It is a well-settled position of law that a quarry is included in 'mine'.[32] Loading and unloading of ore is an activity connected with mining.[33] But a cement factory using lime stone from mines miles away from the factory and working independently of such mines, cannot be called a workshop of the mines, even if the mine and the factory are owned by the same management.[34] An industrial dispute between the Neyveli Lignite Corporation Ltd and the employees engaged in its security force was not an industrial dispute concerning a 'mine', because the category of Watch and Ward-the security force-was not included in the definition of 'a person employed in the mine' in s 2(1)(h) of the Mines Act, prior to its amendment by Act 42 of 1983.[35]

An Oil-field

The appropriate government in relation to an industrial dispute concerning an oil-field is the Central Government.

A Cantonment Board

The Punjab High Court held that the 'appropriate government', with respect to a cantonment board created and regulated by the provisions of the Cantonment Act 1924 while managing the affairs of the cantonment board under the provisions of Ch III of the Act and acting under the supervision and control of the Central Government, was the Central Government.[36] However, the legislature specifically included 'Cantonment Board' in s 2(a)(i) by the Amending Act No 36 of 1964, thereby putting an end to any confusion in this regard.

A Major Port

The expression 'in relation to any industrial dispute concerning a major port' was considered by the judicial commissioner, Kutch, with respect to a dispute in *PK Pillai*.[37] The company had an office in the Kandla Port, which was carrying on its business in the port. It was observed that these words would have applied if there were a dispute 'between the port authorities and their workmen or between people doing the port work and their workmen'. But the company was neither a port authority, nor doing port work; hence the 'appropriate government' was the state government, and not the Central Government. But in the under-noted case,[38] the Bombay High Court held that the activities of a firm, carrying on its business of clearing, shipping and managing a godown department in a port, were concerning a 'major port', hence the Central Government was the appropriate government. In connection with a dispute relating to the Port of Mormugoa, a major port by virtue of r 2(f) of the Industrial Disputes (Central) Rules 1957, the reference of such dispute by the administrator appointed by the President, was held to be a reference by the Central Government, which was the 'appropriate government'.[39] The Central Government is the 'appropriate government' in respect of a dispute arising in the Union Territory of Goa, Daman and Diu.[40] In *Hindustan Aeronautics*, a reference made by the Government of UP under s 4K of the UP Industrial Disputes Act 1947 was challenged by the petitioner company. Quashing the reference, Shishir Kumar J, of the Allahabad High Court held that a reference by the state government under the said section of the State Act was itself not maintainable in view of the fact that the Central Government, which exercises control and authority over Hindustan Aeronautics, is the appropriate government; and, by the same token, any subsequent application made by the state government under s 6(6) of the said Act for correcting any clerical or arithmetical error in the relevant award was also not maintainable.[41]

Sub-clause (ii): State Government

In relation to any industrial dispute other than those specified in sub-cl (i), the appropriate government would be the State Government. In other words, all industrial disputes which are outside the purview of sub-cl (i) are the concerns of the state government, under sub-cl (ii). Thus, the general rule is that an industrial dispute arising between an employer and his employee would be referred for adjudication by the state government, except in the cases falling under s 2(a)(i) of the Act.[42]The Act has not defined the meaning to be assigned to the word 'state government'. But for the purposes of this clause, the 'Union Territory of Delhi', administered by the lieutenant governor, has been held to be a 'state government' by a Full Bench of the Delhi High Court.[43]Consequently, where a function is to be discharged in relation to 'industrial disputes' or the exercise of any other power under the Act and the 'appropriate government' is the 'State Government', it can be validly discharged by the lieutenant governor of Delhi. This is the plain reading of the provisions of s 2(a)(ii) of the Act, read with s 3(8)(b)(iii) and s 3(60) of the General Clauses Act 1897.[44]

Concerns having establishments in more than one State

It has been seen that in relation to 'industrial disputes' concerning the bodies envisaged in sub-cl (i) of cl (a) of s 2, the Central Government, and in relation to other industrial disputes, the state government is the 'appropriate government'. In cases where the entire business of an establishment is confined to the territories of a state, obviously, the government of that state is the 'appropriate government'. But difficulties arise in cases where an employer has establishments in more than one state. The Act does not contain any provisions in this connection. Nor does it contemplate a joint reference by more than one state.[45] In certain cases, the courts have relied upon the principles governing the jurisdiction of civil courts to entertain actions or proceedings. The principle of 'cause of action' has been pressed into service, though this test is neither comprehensive, nor satisfactory. The Act does not deal with 'the cause of action', nor does it indicate as to what factors will confer jurisdiction on the 'appropriate government' for making a reference in the case of an employer having establishments in more than one state. No exhaustive definition of a 'cause of action' is possible. A Full Bench of the Patna High Court, in *Paritosh Kumar Pal*, observed that, generally, a cause of action 'constitutes all that bundle of facts which, entitles the plaintiff to claim the legal reliefs sought for, and broadly speaking, those very considerations would be attracted in the case of an 'industrial dispute' also, which would encompass all that bundle of facts on the basis of which a workman would invoke the provisions of the Industrial Disputes Act.[46]

The decision of the Bombay High Court, in *Lalbhai Tricumlal,* has erroneously been taken to be the foundation up on which the edifice of the subsequent case law has been built. In this case, the head office of the employer company was in Ahmedabad and it had a branch office in Bombay. The services of a workman, who was employed in the Bombay branch, were terminated. The workman filed an application before the labour court at Bombay under the Bombay Industrial Relations Act 1946, for reinstatement. The employer raised the objection that the labour court at Bombay had no jurisdiction to deal with the application, as the only court that was competent to deal with the matter was the labour court at Ahmedabad. The Bombay labour court, therefore, made a reference to the industrial court, under s 81 of that Act, and the industrial court held that the Bombay labour court had jurisdiction. In a writ petition against the said order, Chagla CJ observed that, applying the well-known tests of jurisdiction, a court or tribunal would have jurisdiction if the parties reside within its jurisdiction or if the subject-matter of the dispute substantially arises within jurisdiction. And, therefore, the correct approach to this question is to ask ourselves - *where did this dispute substantially arise?* Since the workman had been dismissed from service in Bombay, it was held that the dispute had substantially arisen in Bombay and the labour court at Bombay had jurisdiction.[47]However, the court refrained from expressing an opinion on the question of whether the Ahmedabad Court would have jurisdiction as well or not. It is obvious that this case was neither under the Industrial Disputes Act nor was it concerned with the question as to which government was the 'appropriate government' in relation to the dispute. It is also significant to note that the High Court was only dealing with the question as to whether the Bombay labour court, under the BIRA, had jurisdiction to deal with the application. The said observations of Chagla CJ were blindly followed by various courts in subsequent decisions, and no court appears to have paused to look into the anatomy of this case.

In *Lipton,* the facts were: the Delhi office of the employer company exercised control over the salesmen and other employees of the company posted in Punjab, Rajasthan and Utter Pradesh states, apart from those working in Delhi territory. An industrial dispute relating to fixation of grades and scales and the bonus was referred to an industrial tribunal for adjudication by the Delhi Administration, which, apart from the workmen employed in the Delhi office, also included the employees working in the other states, under the control of the Delhi office. The employer company raised a preliminary objection before the tribunal that it had no jurisdiction to make an award in respect of the employees who were employed outside the State of Delhi. The industrial tribunal as well as the labour appellate tribunal, rejected this objection as all the workmen working under the control of the Delhi office, whether they worked in Delhi or not, received their salaries from the Delhi office and they were controlled from the Delhi office in matters of leave, transfer, supervision etc. In these circumstances, it was held that the Delhi state was the 'appropriate government', not only with respect to the workmen employed in the Delhi office, but in respect of those working in other offices as well which were controlled by the Delhi office. Though in appeal against the award, this point was raised before the Supreme Court, it was not seriously pressed at the time of hearing. The Supreme Court, therefore, did not discuss this question and contented itself with a perfunctory observation, *viz*, 'we are of the view that the industrial tribunal, Delhi had jurisdiction to adjudicate on the dispute between Lipton Ltd and its workmen of the Delhi office'.[48]

In *Indian Cable Co,* the company had closed its branch in Ambala in the State of Punjab and had, consequently, terminated the services of all its employees working in that branch. After the closure, the State of Punjab referred the dispute relating to the justifiability of the retrenchment of the workmen, for adjudication. The employer company, *inter alia*, raised a preliminary objection before the tribunal, that the Punjab government was not the 'appropriate government' to make the reference, because at the relevant time, the company had no office in that state. In appeal against the order of the tribunal, upholding the validity of the reference, in view of its decision on another point, the Supreme Court did not consider it necessary to express any opinion on this question.[49] But echoing the voice of Chagla CJ, in *Lalbhai Tricumlal Mills*, the court made an obiter observation that: 'the Act contains no provisions bearing on this question, which must consequently

be decided on the principles governing the jurisdiction of courts to entertain actions or proceedings,' though it did not spell out the principles governing the jurisdiction of the courts, to entertain actions or proceedings in the context of the Industrial Disputes Act and again contented itself by extracting a passage from *Lalbhai Tricumlal Mills* and saying that 'these principles are applicable for deciding which of the states has jurisdiction to make a reference under s 10 of the Act'.

Lalbhai Tricumlal Mills and *Indian Cable Co* were mechanically followed by the court in *Sri Ranga Vilas Motors*, in which the head office of the company was situated in Krishnagiri, in the State of Madras, and it had a branch at Bangalore, in the State of Mysore, where the concerned workman was employed. The service of the workman was terminated at Bangalore, but the dispute was sponsored by the workmen at Krishnagiri, which gave it the character of an 'industrial dispute'. The court observed that since there was a separate establishment at Bangalore, where the concerned workman was working and the impugned order had to operate on the workman at Bangalore, the Mysore government was the 'appropriate government'. The court adumbrated the test:

> Where did the dispute arise? Ordinarily, if there is a separate establishment and the workman is working in that establishment, the dispute would arise at that place... there would clearly be some nexus between the dispute and the territory of the state and not necessarily between the territory of the state and the industry concerning which the dispute arose.[50]

The ratio of this case is that the place where the impugned order operates on the service of a workman, is the place where/the 'cause of action' arises and the state in which that place is situated, will be the appropriate government for making the reference of an industrial dispute arising out of the impugned order. The implication of this decision and the relevant observations clearly indicate that since the government of Mysore was the appropriate government, by necessary implication the State of Madras could not be the appropriate government. In *Paritosh Kumar Pal*, the facts briefly were: the employer company had its registered office as well as its head office, at Calcutta, while it had no establishment in Bihar. The business in the State of Bihar was controlled from Calcutta. A workman working as a medical-cum-sales representative at Patna was dismissed by an order issued from Calcutta. A Full Bench of Patna High Court held that the *situs* of the employment of workman would determine the territorial jurisdiction of the tribunal in a dispute arising from the termination of such employment.[51] This holding of the High Court is not correct law, even if we apply the test of *Sri Rangavilas Motors*, where the company had establishments at two places, namely, in Karnataka as well as in Madras. Admittedly, in *Paritosh Kumar* (supra), there was no establishment in the State of Bihar, which could have been the appropriate government with respect to the dispute.

In *Spencer & Co*, a single judge of the Delhi High Court made an unreasoned obiter that 'there may be more than one appropriate government.[52] Likewise, a single judge of the Kerala High Court, in *Emerald Valley Estates*, in his obiter, observed: 'There may be cases where part of the cause of action arose in two or more states. In such cases, two or more states may have a concurrent jurisdiction.[53] So also, the Gujarat High Court, in *Vinod Rao*, made obiter observations that two governments may have simultaneous jurisdictions to refer a dispute for adjudication to the tribunals appointed by them.[54]

In *Gestetner Duplicator*, another single judge of the Delhi High Court, specifically took this view. In this case, the concerned workman was employed by the administrative office of the company at Delhi. But at the relevant time, when his service was terminated, he was working at Hubli, in the State of Karnataka. The reference with respect to the termination of the service of the workman was made by the Delhi administration. Faced with the question of whether Karnataka was the appropriate government to make the order of reference, as the order of termination had operated on the service of the workman at Hubli, the court relied upon the obiter observations of the single judge in *Spencer* (supra) in holding that there can be more than one appropriate government to refer the same dispute for adjudication to the tribunals appointed by it.[55] In support of this view, the court also relied upon the provisions of s 10(1)(a) and s 33B of the Act, but without working out their scope and implications. These provisions do not apply to such situation at all.

A single judge of the Karnataka High Court, has taken the view that if a cause of action could arise where the contract was concluded, the dispute could arise where the contract of employment was terminated.[56] In other words, there can be two 'appropriate governments' to deal with the same industrial dispute. On the other hand, in *J&J Dechane*, the Kerala High Court quashed the order of reference made by the State of Kerala, relating to the termination of the service of a medical representative employed for canvassing orders for the sale of its products, in the States of Kerala and Mysore, by a company having its registered office at Hyderabad, in the State of Andhra Pradesh. The court took the view that the employer company was not carrying on any business in the State of Kerala, as it had no establishment in that state, and the workman was only a roving representative of the company, for promoting the sales of its products. Therefore, the State of Andhra Pradesh, and not the State of Kerala, was the 'appropriate government'. Gopalan Nambiyar J, observed that:

> It seems reasonable, and fairly clear, that there can be only one government which can be regarded as the 'appropriate government'

for the purpose of making a reference under s 10(1)(c). The consequences of holding that more than one government can refer the same industrial dispute for adjudication, appear to us to be startling.[57]

Similarly, the Madhya Pradesh High Court, in *Medical Representatives*, quashed, the order of reference made by the State of Madhya Pradesh, with respect to the termination of the service of an employee employed by a company, which had its head office at Bombay, to canvass for the sales of its products in the State of Madhya Pradesh. In this case, the fact that the State of Maharashtra was the appropriate government was not disputed, but it was contended that the State of Madhya Pradesh was also concurrently the appropriate government to make the reference, since, inasmuch as the service of the workman was terminated in the State of Madhya Pradesh, the cause of action arose there. In view of the fact that the company was not carrying on its business anywhere in the State of Madhya Pradesh as on the date of the reference, the State of Madhya Pradesh could not be the appropriate government. Furthermore, since the dispute between the company and the workman arose at Bombay, where the order of the dismissal was passed, only the State of Maharashtra could be the appropriate government. The court observed that keeping in view the very significance and meaning of the adjective 'appropriate', qualifying the word 'government', only one government can be called as the appropriate government for making the reference.[58]

Another Division Bench of Bombay High Court, in *General Superintendence Co*, took the view that two governments cannot be the 'appropriate governments', operating in the same field, in respect of the same subject-matter. If two governments are to operate, 'there will be t wo authorities operating in the same field, at the same level, which is not envisaged under the Industrial Disputes Act'. The court then noticed indications available under the Act, to show that if one government is acting, another government cannot Act in the same field, in respect of the same subject-matter.[59] The law as stated in *J&J Dechane* (Kerala), *Medical Representatives* (MP), and *General Superintendence Co* (Bombay), is correct, whereas the decisions rendered in *Gestetner* and *Spencer* (Delhi), *Emerald Valley* (Kerala) and *Vinod Rao* (Gujarat) are wrong. The wording of the provision so conspicuous in so far as the word 'appropriate' qualifies the singular expression 'government' that there cannot be more than one appropriate government exercising the power of reference in respect of the same dispute involving the same parties at the same time. The consequences of the holding that there can be more than one appropriate governments to refer the same dispute for adjudication to the tribunals appointed by them, will be startling and result in an unending and tangled multiplicity of industrial litigation, which would be devastating for industrial peace. Some of the latter class of cases have been analysed in the following paragraphs.

In *Godrej Soaps*, it was held that, in respect of a workman appointed as a sales supervisor for a part of the territory of Karnataka but at all times stationed at Bombay, and whose termination order was served in Bombay coupled with the further fact being that the employer had no branch or administrative office in Karnataka, the appropriate government was the State of Maharashtra, and not Karnataka.[60] It is submitted that this case was rightly decided consistent with the spirit of the letter of the definition and the spirit of the Act. In *BG Sampat*, the facts disclosed that the appointment letter was issued from the head office of the company, located in Bombay, but the workman was employed in Calcutta. A single judge of the Calcutta High Court held that the government of West Bengal was the appropriate government to refer a dispute relating to the termination of the said workman.[61]

In *New Delhi GM Union*, the Delhi High Court upheld the refusal by the government of Delhi to refer a dispute relating to the Management Development Institute, on the ground that the said institute was situated in the State of Haryana, and therefore, the matter could not be referred for adjudication for want of jurisdiction.[62] Where the situs of the employment of a workman was found to be Gurgaon, and the termination letter was also issued at Gurgaon, the appropriate government could not be held to be the Government of the NCT of Delhi just because the head office of the company was located in Delhi. It is axiomatic that the territory within which the services of an employee are wrongfully terminated, would be the territory where the cause of action substantially arises partly, if not wholly. The reference made by the government of the NCT of Delhi was quashed as not being competent. The jurisdiction would be with the competent courts of Gurgaon and it would be for the concerned government to consider whether a reference is to be made.[63] In a case where a workman, who was initially appointed at the head office of the company at Madras, but was later transferred to Kanpur, was dismissed while he was working at Kanpur, it was held that the conciliation officer of Madras, had the territorial jurisdiction to admit the dispute for conciliation.[64]

What is relevant while sustaining a dispute under s 2A, before a labour court, is the place where the cause of action arose substantially, namely, the place where the employee was working at the time when the order of termination was issued, and not the place of the initial appointment, even if he was transferred to other places. In view of the categorical finding that the workman was last employed, at the time of his termination, at Jamshedpur, he could not maintain the claim before the labour court at Madras.[65] In *Udaipur Distillery*, the petitioner-workman filed a complaint before the industrial court, Mumbai against his transfer from Mumbai to Delhi. Rejecting the contention that Mumbai industrial court had jurisdiction to try the case, Khandeparkar J, held that ID Act does not deal with jurisdictional issues and that s 20 of CPC applied to the

case. In view of the fact that the decision of transfer was taken at Udaipur by the respondent-company, the said dispute substantially arose at Udaipur.[66]

In *Mining & Allied Machinery Corpn*, the facts disclosed that the Central Government, being the appropriate government, had delegated the powers to the West Bengal Government under s 39 of the Act. The State Government referred the dispute relating to closure, to the Industrial Tribunal. While the reference was pending adjudication, the Central Government issued a notice convening a meeting for hearing on the application, but closed the factory down. Rejecting the contention of the employees' union, Seth J, of the Calcutta High Court held that *by delegating the power to make reference to the State Government, the Central Government merely created a parallel authority and hence the order of the State Government was not liable to be quashed*. Similarly, such delegation could not be said to have taken away the jurisdiction of the Central Government to issue a notice convening a meeting.[67]In respect of the closure of undertakings engaging less than 300 workmen and located in Lucknow and Kanpur, which are governed by the UP Industrial Disputes Act 1947, the Deputy Commissioner of Labour, Government of UP, has no jurisdiction to issue a prosecution notice under s 25R of the Central Act, as it has no application to the undertakings located in the State of UP.[68] In respect of a dispute relating to a workman engaged in the office of the *Kerala State EDC*, which is located in Mumbai, the appropriate government is the State Government in terms of s 2(a)(i) of the ID Act.[69]

The decisions rendered, and the observations made, in *Vinod Rao*, *Gestetner*, *Spencer*, as also the latest decision of Seth J., in *Mining and Allied Machinery Corporation* call for some analysis. In the face of clear and unambiguous language used in s 2(a) as to which one - the Central or the State Government - is the appropriate government in respect of such and such establishments/undertakings, to hold that "*there could be more than one appropriate government*" is a judicial perversion of grave dimensions. The learned judges of Gujarat, Delhi, Kerala and Calcutta have grossly misdirected themselves and handed down irresponsible and reckless decisions with no application of judicial mind. Let us imagine the consequences of a situation in which two governments make a reference of an identical dispute relating to the same undertaking/establishment to two different tribunals, which pass divergent and/or diametrically opposite awards involving workmen of the same employer working in different states! *Even from a common sense point of view - not to speak of a legal or judicial sense - is it possible to envisage multiple authorities exercising power in respect of the same subject-matter involving the same parties at the same time?*

Reverting to Mining and Allied Machinery Corporation, what is meant by the observation that "in delegating the power to the State Government, the Central Government had merely created a parallel authority"? The facts of the case disclose that it was a case covered by s 25-O of IDA, which requires prior permission before closing down the undertaking, and the State Government referred the application made by the employer for adjudication. Is it possible to visualise an odious situation in which the State Government refers the dispute relating to closure for adjudication, and, while the said reference is pending before the tribunal, the Central Government issues a notice convening a meeting for hearing the self-same application and, still worse, at the same time, closes down the factory even before the reference is disposed of by the adjudicator, thus reducing the entire law relating to the closure of undertakings to a mockery? The views expressed by the learned judges in the above cases - result not in industrial peace and harmony - but plunge the industrial community in chaos and anarchy, thereby setting the scheme and objects of Industrial Relations Law at naught! This kind of judicial callousness and indifference, which has become more rampant in the recent past deserves to be denounced in the strongest language and terms. The decisions rendered in J&J Dechane, Medical Representatives, and General Superintendence, are consistent with the spirit of s 2(a) and are right, whereas the above four decisions rendered, and the observations made, in Vinod Rao, Gestetner, Spencer and Mining and Allied Machinery Corpn are absolutely misconceived, wholly perverse and completely wrong.

In *Tata Memorial Hospital*, the facts briefly were: there were two unions operating in the Tata Memorial Centre, Mumbai - The Tata Memorial Hospital Workers Union, which was the recognised union, and The Tata Memorial Hospital Kamgar Sanghatana. The second mentioned union filed two applications before the industrial court under ss 15 & 16 respectively seeking cancellation of the recognition of Workers Union and granting recognition to itself. Before the industrial court, the management raised objection as to the maintainability of the said applications on the ground that in respect of the undertaking, the Central Government was the appropriate government. The industrial court held that the state government was the appropriate government, which was upheld by a single judge, but reversed by a Division Bench of the Bombay High Court, which held that the Central Government was the appropriate government in view of the fact that that the Governing Council of the Centre was managing the institution as a delegate of the Central Government; that on this view of matter and also on the basis of the Supreme Court decision rendered in *Steel Authority of India*, the Division Bench held that the Central Government was the appropriate government. The issue before the Supreme Court was which of the two - the State or the Centre - was the 'appropriate government'. Setting aside the order of the Division Bench, Gokhale J (for self, Kabir and Joseph JJ), held that mere allocation of business under any department would not in any manner decide the issue as raised in the present case as to whether a particular industry is under the control of the Central Government. The business rules cannot be conclusive to show that any institution or organization listed under the allocation of business,

would be part of any department of the Government of India,[70] but in so far as Tata Memorial Centre was concerned, the State Government was the appropriate government.[71] It is submitted that this case was rightly decided. The NCL-II observed:

> There is no need for different definitions of the term 'appropriate government'. There must be a single definition of the term, applicable to all labour laws. The Central Government should be the 'appropriate government' in respect of Central Government establishments, railways, posts, telecommunications, major ports, lighthouses, Food corporation of India, Central Warehousing Corporation, banks (other than cooperative banks), insurance, financial institutions, mines, stock exchanges, shipping, mints, security printing presses, air transport industry, petroleum industry, atomic energy, space, broadcasting and television, defence establishments, cantonment boards, central social security institutions and institutions such as those belonging to the CSIR, ICAR, ICMR, NCERT and in respect of industrial disputes between the contractor and the contract labour engaged in these enterprises or establishments. In respect of all others, the concerned state government or union territory administrations should be the appropriate governments. In case of a dispute, the matter will be determined by the National Labour Relations Commission, that we want to be set up.[72]

Clause (aa): ARBITRATOR

Arbitrator

Clause(aa) has been inserted by s 2 of the Act 36 of 1964 and it has to be read with s 10(A)(1A). In the case of a reference which is being made to an even number of arbitrators, it becomes necessary to bring in an umpire so as to have a majority award. A provision, therefore, has been made to include an 'umpire' in the definition of an 'arbitrator'.

Clause (aaa): AVERAGE PAY

Average pay

This clause lays down the manner of calculating the 'average pay' of monthly, weekly or daily-rated workmen, for certain purposes of this Act.[73] There are three categories set forth, and then, there is a residual category. The first is the case of a 'monthly paid' workman; the second, of a 'weekly paid' workman and the third, of a 'daily paid workman'. The residual category is that of those persons, whose 'average pay' cannot be calculated upon any of these three bases. In such cases, the pay is to be calculated as the average of the wages payable to the workman during the period that he had actually worked. The period of three months, four weeks or 12 days, as specified for the first three categories of workmen, must precede the day on which the pay becomes payable. In case a workman has not worked for the period specified, the average pay shall be calculated as the average wages payable to him for the period he had actually worked. In *Indian Hume Pipe*, the Madras High Court held that where a workman was being paid fixed wages for every working day, but such wages were paid to him fortnightly, he was to be treated as a daily-rated workman and not one falling under the residual part of the clause, for computing his 'average pay'. It was observed that the residual part of this clause is applicable to piece-rated Workers and the like, whose wages depend upon the quantum of work turned out and which are liable to vary from day to day, and it might also apply to cases where the workman has not worked during the entire period of three calendar months, four weeks or twelve days, as the case might be, preceding the relevant date.[74]

Clause (b): AWARD

Award

An 'award' must be:[75]

(i) an interim or final determination, (ii) of an industrial dispute or any question relating thereto, and (iii) by any:

- (a) labour court;
- (b) industrial tribunal;
- (c) national tribunal; or
- (d) an arbitrator, under s 10A.

Interim or Final Determination

The definition of an award is analogous to that of a 'decree' as defined in s 2(2) of the Code of Civil Procedure.[76] It plainly

requires an 'industrial dispute' or 'any question relating thereto', to be determined by the adjudicator. The object of the decision in the 'award' is to resolve the differences between the disputants. The expression 'determination of any dispute' means an adjudication of the dispute between the parties.[77] The definition of an 'award' has two parts. The first part covers an interim or final determination of any industrial dispute. The second part takes in an interim or final determination of any question relating to that dispute but the basic postulate common to both the parts of the definition is the existence of an industrial dispute, actual or apprehended. The 'determination' contemplated by the definition is not a termination of the proceedings before the tribunal, by one method or the other. There is a 'determination' only when there is an adjudication of the industrial dispute or of a question relating thereto, on merits.[78] The word 'determination' implies an adjudication upon the relevant materials, by the tribunal.[79] It is implicit in the word 'determination' that it should be judicial, implying that the tribunal should exercise its own judgment.[80] The words' interim' or 'final determination' of any industrial dispute or of any question, necessarily involve an application of the mind of the tribunal, to the problem before it. The determination may be final or interim, because there is scope for such determination even in the interim stage, whilst the inquiry into the dispute is in progress. In any case, there should be a determination of the dispute in the sense that it should not be left incomplete and unresolved, because the expression 'determination' implies that the adjudicator has to adjudicate upon the whole dispute, as referred to him. Hence, he cannot leave a part of the dispute to be resolved by the parties.

In *Birla Cotton*, the court remanded the award to the tribunal, who had left a part of the dispute relating to the standardization in the wage-structure unresolved, to be resolved by the parties, with the direction that a joint committee should be formed to go into and investigate the anomalies in the categories to be found in the company. The Supreme Court directed the tribunal to itself decide the question, and if necessary, with the help of assessors. Thus a partial adjudication of a dispute is not a determination as contemplated by the definition of an 'award'.[81] If, however, a number of demands are referred to the tribunal for adjudication and the tribunal decides only one or some of such issues, and gives its 'award' with respect to those issues, which is published under s 17, it will be the final adjudication in so far as those demands are concerned, because each of the demands is an industrial dispute by itself.[82] Orders of the authorities under s 33(1) or s 33(2) are not awards as contemplated by this clause, because there is no final or interim determination of an 'industrial dispute' in such cases.[83] The definition contemplates that it should be a 'determination' of an 'industrial dispute', by a labour court, an industrial tribunal, a national tribunal or an arbitrator under s 10A. Hence, a determination of the dispute by any other authority, such as one by a High Court, in its writ jurisdiction under Art. 226 of the Constitution, will not be an award.[84] An order passed under s 33C(2) is not an 'award' within the meaning of s 2(b) of the IDA. Proceedings under s 33C are in the nature of execution proceedings. When the quantum of amount due to a workman is determined by a labour court, it is a 'decision' and not an 'award', and hence, need not be published under s 17.[85]

Interim Award and Interim Relief

An 'interim award' is like a 'preliminary decree' within the meaning of s 2(2) of the Code of Civil Procedure.[86] The word 'interim', *inter alia*, has been defined in the *Oxford Dictionary* as 'a temporary or provisional arrangement, adopted in the meanwhile'. In the context of the definition of the term 'award', the word 'interim' qualifies the 'determination of any industrial dispute' as well as 'any question relating thereto'. Hence, any interim determination of an 'industrial dispute' itself or of 'any question relating thereto', will fall within the definition of an 'award'. An interim award in this context means only a provisional arrangement, made in a matter of urgency and subject to a final adjustment or complete determination of the dispute; for example, a payment on an account, pending the final settlement of the amount.[87]

In *Hotel Imperial*, the Supreme Court held that the adjudicator may give an award about the entire dispute at the end of the proceedings, which will be the final determination of the industrial dispute referred to it. It is also open to the adjudicator to make an award in respect of some of the matters referred to it, whilst some others remain to be decided. This would be the determination of the matters decided and would be an *interim award*. Whether the award is interim or final, it will have to be published as required by s 17 of the Act. An *interim relief*, on the other hand, is granted by an order, given under the power conferred on the adjudicator under s 10(4), with respect to matters incidental to the points of dispute referred for adjudication. During the pendency of the adjudication of an industrial dispute, the adjudicator can give an interim relief where it is admissible as being incidental to the main question referred to it. The tribunal has the power to make an interim award on a point of dispute referred to it for adjudication, or on a matter incidental to the main question.[88] The Patna,[89] Punjab,[90] Delhi[91] and Calcutta[92] High Courts have taken the view that an order granting an interim relief must take the form of an interim award, and therefore, must be published under s 17, so as to be enforceable under s 17 A. On the other hand, a single judge of the Karnataka High Court has expressly dissented from the view of the Patna High Court and held that:

> Interim relief, eg, a direction to pay a subsistence allowance to a dismissed workman during the pendency of a dispute concerning the validity of his dismissal, or any other interim relief which the tribunal has the power to grant, need not and should not be made in the form of an award. Such an order should only be in the nature of an interim order ... [93]

The holding of the Karnataka High Court is the correct law, while the view of the other High Courts is clearly wrong. Once it is conceded that there is no interim or final determination of a *dispute or difference*, it follows that *there is no award within the meaning of s 2(b)* and, by the same token, s 17, which mandates the publication of 'Awards', is not attracted. An order granting an interim relief is not the determination of the dispute, inasmuch as it does not decide any question or dispute between the parties, even as an interim measure. It is like any other order made in the course of adjudication, before making the award by determining the dispute. An order of an interim relief, not being an interim award, will not require publication. Nor will its disobedience be punishable under s 29 of the Act. But the relief granted by such an order can be realised through the machinery of s 33C of the Act. Under s 10(4), an adjudicator has the power to adjudicate on matters 'incidental' to the points of dispute referred for adjudication. *A priori*, while adjudicating on the points referred for adjudication, the tribunal can grant interim relief. In the case of a dismissal, the tribunal can grant an interim relief after finding that the inquiry on the basis of which the Workers were dismissed, was not fair and proper. But the interim relief can be granted only from the date of application for such relief, and not from the date of the dismissal of the workman.[1]

Though an industrial tribunal can give an interim relief, 'ordinarily, interim relief should not be the whole relief that the workmen would get, if they succeeded finally'.[2] In a case of discharge or dismissal, it is not open to the tribunal to order a reinstatement as an interim relief, for that would be giving the workman the very relief that he could get on a trial of the complaint, if the employer fails to justify the order of dismissal.[3] Interim relief granted by the industrial tribunal, directing the employer not to transfer the workmen to another station, pending the adjudication of the dispute under reference, is the whole relief that the workmen would get in case they succeed in the adjudication. In *Darshak Limited*, the Karnataka High Court has upheld the validity of such relief.[4] It is submitted that this decision is misconceived and is repugnant to the very concept of interim relief. As a matter of principle and law, no interim relief of whatsoever nature could be granted to a workman whose service has been terminated or who has been dismissed, until the dispute is finally adjudicated, for the simple reason that the moment the termination or dismissal order is served on the employee, it starts producing its legal consequences in so far as that very moment, he ceases to be the employee of the organisation. Until the action of employer is overturned in a proper proceeding directed to that end, such an ex-employee cannot claim any compensation from the employer in the form of 'interim relief'. The learned judge of Karnataka High Court had clearly transgressed his legitimate confines in upholding the misplaced award passed by the labour court.

Where, in an industrial dispute relating to the date of birth of a workman, the tribunal directed the employer not to retire the workman till the final decision of the reference was made, the High Court quashed the interim award of the tribunal and held that it was not open to the tribunal to give such interim relief which was the whole relief the workman could get finally, that if ultimately the workman loses in the reference, even then he would get the service benefits, whereas the employer could not be compensated for the consequential loss and that, in such cases, the balance of convenience would always lie in favour of the employer.[5] In granting interim relief, the tribunal must determine that there is a good *prima facie* case in favour of the workmen in the final adjudication and that on the facts of the particular case, an interim relief by way of the interim award is necessary.[6] In other words, while exercising the discretion to grant interim relief in an appropriate case, the tribunal has to consider *prima facie*, the balance of convenience and the necessity of its interference for protecting the parties from irreparable injury.[7]The insertion of s 10-B in the Industrial Disputes Act 1947, by the Tamil Nadu Amendment Act 1982, (Act 36 of 1982), has not taken away the right of the tribunal to award interim relief because the power of the government under s 10B is to be exercised immediately after the reference has been made under s 10(1). Furthermore, a quasi-judicial power vested in the tribunal, under s 10(4) of the Act, cannot be taken away by conferring an administrative power on the government.[8]

Howsoever wide the powers of the tribunal may be, it cannot award its own brand of interim reliefs, pending the adjudication. An interim relief must be a relief carved out of the main relief claimed by the workmen. In *Radio Foundation*, the High Court of Patna quashed a direction given by the industrial tribunal, to the employer, to deposit two months' wages, to be paid to the workmen if they succeeded in the case, which was in the nature of asking the management to give a security in cash in order to enable the workmen to get the money if they ultimately succeeded on their demand for a bonus. The High Court held that the tribunal had no power to give an interim relief of this kind.[9] Likewise, an order of the labour court, directing an employer to deposit a certain amount in the court, with the stipulation that if the amount was not deposited, steps would be taken to recover the same as arrears of land revenue, was quashed by the Allahabad High Court, which held that it was beyond the jurisdiction of a labour court to direct a party to deposit any amount in the court or recover the same as arrears of land revenue.[10] In awarding an 'interim relief', it is not sufficient to say that the workman concerned was undergoing great hardship, as merely that fact cannot be a ground for the grant of an interim relief. It is incumbent upon the tribunal to discuss the relevant facts of the case and find out in what way the stand of the employer is unjustified, if at all so, and whether the demand for the relief is justified. It is only after such findings are recorded that the interim relief can be granted, and not otherwise.[11] An interim order for an interim relief is not an award and is not enforceable under s 17 and the violation of such order is not punishable under s 29. However, the tribunal has inherent power to enforce its interim order by making compliance with such order a condition precedent for employer

to participate in the adjudication proceedings.[12]

The Decision on Preliminary Issues

The labour appellate tribunal took the view that the findings of a tribunal on preliminary issues are in no sense 'interim award' because such findings order no relief in favour of any party and the position in respect to the findings on preliminary issues is similar to that of the interlocutory orders passed by a civil court under the Code of Civil Procedure, as regards jurisdiction or limitation, for the suit to proceed on merits. An 'award' to be 'interim' or 'final', must grant or refuse to grant all or any of the reliefs which have been asked for in the inquiry and this cannot include orders which are interlocutory.[13] A similar view has been taken by a single judge of the Punjab and Haryana High Court in holding that an interim order deciding a preliminary objection whether the tribunal has jurisdiction to adjudicate upon the dispute referred to it or not, cannot be said to be an 'award' because it does not 'determine' any part of the dispute or any of other question relating thereto.[14] The Calcutta High Court held that a 'no-dispute award' made by the tribunal, where none of the parties appeared before it, would not be an 'award' and its publication would not convert it into an award. On the construction of the expression 'or of any question relating thereto', the court observed that it means any matter incidental to the dispute and 'to constitute an award, the main dispute might be decided first and thereafter any such matter or question relating to the main dispute might be decided or adjudicated upon'.[15] On the other hand, a single judge of the Allahabad High Court held that the decision of the labour court that the matter referred to it for adjudication was not an 'industrial dispute' is itself a determination of a 'question relating thereto' and would fall within the definition of 'award'.[16]

In *Cox & Kings,* the Supreme Court has disagreed with the view of the Allahabad High Court. In this case, an order of reference relating to the termination of services of certain workmen had been held to be invalid by the labour court for the reason that no demand of the workmen in this connection had been made on the employer, as such no 'industrial dispute' had come into existence. This order of the labour court was published in the gazette of the government as an 'award' under s 17(1) of the Act. Subsequently, upon a demand notice having been served by the workman on the management bringing into existence the 'industrial dispute', the dispute again had been referred to the labour court for adjudication. The question for consideration before the court, therefore, was whether the previous order of the labour court holding that the dispute under reference was not an 'industrial dispute', was an 'award' within the meaning of s 2(b) which required termination under s 19(6) of the Act, before the second reference could be made. The court laid down a two-fold test for a decision of a tribunal to fall within the definition of an 'award', *viz*:

(i) it must be an adjudication of a question or point relating to the industrial dispute which has been specified in the order of reference, or is incidental thereto, and

(ii) such an adjudication must be one on merits. The decision of the labour court did not satisfy either of these criteria. Therefore, the court held that it did not possess the essential attributes of an 'award'. The determination of the question that the dispute under reference was not an 'industrial dispute' would not make such determination an 'award'. Nor the publication of such a decision under s 17(1) would confer the status of an award on it. In support of this conclusion, the court further observed that since the order 'by its very nature did not impose any continuing obligation on the parties bound by it', it was an additional reason for holding that the second reference was not barred. [17]

The effect of the aforesaid decision is that the decision of a tribunal on a preliminary issue will not be an 'award' and, therefore, it need not be published under s 17(1). If it is not published, it will not become enforceable under s 17A or binding under s 18, nor will it be operative under s 19, so as to require termination thereunder. The attention of the court does not appear to have been drawn to the provisions of s 20(3), which fixes the points of time on which the proceedings before the adjudicatory authorities are deemed to have commenced and concluded. The adjudicatory proceedings on a reference are deemed to have commenced on the date of the reference of the dispute for adjudication and are deemed to have concluded on the date on which the award becomes enforceable under s 17A. Therefore, in a case where the tribunal decides that the dispute under reference is not an 'industrial dispute', it will not be able to proceed any further with the adjudication, such that decision puts an end to its jurisdiction. If such a decision is not an 'award', it will not become enforceable under s 17A, and the proceedings before the tribunal shall, therefore, never be deemed to have concluded. Thus, in such cases, there will be a perpetual 'pendency' before the tribunal for the purposes of ss 10, 23, 33 & 33A. This will lead to a manifest absurdity and repugnancy. In such cases, in order to avoid uncertainty, inconvenience and confusion, a liberal construction of the statute is permissible.[18]

The words '*any question relating thereto*', in the definition of an 'award' in s 2(b), and the words '*matters incidental thereto*' in s 10(4), are wide enough to take in their fold preliminary questions such as whether the dispute under reference is an 'industrial dispute' or not. This construction would avoid repugnancy, confusion and absurdity. This was the rationale of the decision of the Allahabad High Court in the *Swadesi Cotton Mills* case. But, instead of reverting to this rationale, the Supreme Court disposed it off with a perfunctory statement that, 'in our opinion, this is not a correct statement of law on

the point'. It appears that the court thought that only a decision on merits would satisfy the requirements of the definition of an 'award', without spelling out the implications of the expression '*any question relating thereto*' appearing in the definition of 'award' in s 2(b), or of the words '*matters incidental thereto*' occurring in s 10(4). The decision on this point, therefore, requires a reconsideration. In *Hindustan Motors*, it was held that the construction placed on the expression 'or any question relating thereto' by the Calcutta High Court in *BR Herrman* (supra) could lead to absurdity and inconvenience. In the case of a 'no-dispute' award, the dispute still subsists and awaits adjudication, as there has been no award. Therefore, a second reference of the same dispute cannot be held to be bad.[19] In *Gurbhej Singh*, the facts were: the labour court dismissed the reference for non-prosecution, whereupon the government made a second reference of the same dispute. The issue was whether such a reference is barred by *res judicata*. Negating the contention, it was held that such dismissal of first reference could not bar a second reference as there was no adjudication on merits.[20]

Compromise Award

The Act does not contain any provision specifically authorising an industrial adjudicator to record a compromise and pass an award in its terms corresponding to the provisions of O 23, r 3 of the Code of Civil Procedure. But this does not mean that the tribunal is precluded from taking note of a compromise entered into between the Workers and management. In *DN Ganguli*, the Supreme Court made an obiter observation to the effect:

> it would be very unreasonable to assume that the industrial tribunal would insist upon dealing with the dispute on merits even after it is informed that the dispute has been amicably settled between the parties... There can, therefore, be no doubt that if an industrial dispute before the tribunal is amicably settled, the tribunal would immediately agree to make an award in terms of the settlement between the parties. [21]

The Bombay High Court in *Maharana Mill*, while dealing with a case of withdrawal of a dispute by the parties from adjudication also made an obiter observation that the position might have been different, if the dispute had been settled on merits by private agreement and the tribunal had been asked to make an award in terms of the agreement.[22] The Madras,[23] Madhya Pradesh,[24] Andhra,[25] and Patna,[26] High Courts have taken the view that even if the parties to a dispute come to a settlement by mutual discussion outside the field of industrial adjudication, still the tribunal cannot abdicate its duties to find out the process by which the settlement has been arrived at and weigh the pros and cons of the same, apply independently its mind to it and thereafter determine the dispute or question in the light of such settlement. The tribunal can adopt the compromise entered into by the parties as the foundation of its award after satisfying itself that the settlement is fair and just. In *Hindustan HFE Union*, the Delhi High Court observed that it would be difficult to subscribe to the proposition that the consent award cannot be regarded as an award unless it bears on its face an expression of the tribunal's opinion that it is fair, just and equitable. The court emphatically held that a consent award is as good as an award made by the tribunal after contest and is to be treated as an award so long as the compromise embodied in the award resolves the disputes between the parties which had been referred to the tribunal for adjudication and is not tainted with fraud, collusion, coercion or undue influence. Such consent award is binding on the parties unless it is terminated in the manner provided by sub-s (6) of s 19 of the Act.[27] This view does not appear to be the correct view of Law as it seems to suggest that it is not necessary for the tribunal to bring its own judicial mind to bear upon the compromise to give it the character of 'determination'. In *Government Silk Weaving Factory*, the Supreme Court upheld the validity of a settlement which was adopted by the tribunal after applying its mind judicially to it.[28]

The Gujarat High Court in *Gandhidham Nagarpalika*, observed that if the parties do not adduce evidence on the issue whether or not settlement was just and fair, they impliedly meant that they accept the averments made in their respective pleadings and they do away with the requirement of any proof thereof. Subsequently, neither party can make the grievance that the other party did not lead any evidence before the tribunal.[29]

Where, during the pendency of an industrial dispute before the tribunal, the management and the workman arrived at a compromise settlement and filed the same before the tribunal, the rejection of the said settlement by the tribunal on the ground that the workman was not present was perverse. In such a case, the tribunal was bound to accept the compromise.[30] In *Indian Bank*, the facts disclosed that the Bank, having entered into an agreement with the canteen staff, challenged the consent award passed by the tribunal. Seth J, of Calcutta High Court rejected the contention of the Bank that it was not an award within the meaning of s 2(b).[31] But, where the workman, after accepting the offer made by the management for a compromise on certain terms, withdrew the said acceptance at the next hearing before the labour court, the passing of an award by the labour court on the alleged compromise was erroneous and hence not sustainable.[32]

Withdrawal of the Dispute

There has been some conflict of judicial opinion on the question whether the order of a tribunal permitting withdrawal of

an 'industrial dispute' from adjudication for private settlement by subsequent negotiation or by arbitration by private arbitrators, even if published under s 17 of the Act, would be an 'award' under s 2(b). A single judge of the Kerala High Court,[33] observed that the expression 'determination' in the definition of award in the Act indicates only a coming to an end, may be in any way whatever, though it may require examination and choice. But another single judge of the same High Court dissented from these observations and said that, to satisfy the definition of an award there should be an interim or final determination of the dispute and there is none where the tribunal merely dismissed the reference for non-prosecution, and held that an order of the tribunal permitting withdrawal of the dispute for subsequent settlement or arbitration cannot amount to an award.[34] Likewise, the Bombay High Court, held that there must be 'determination' of an industrial dispute or a question relating thereto and if the dispute remains unresolved as before and is to be determined in future either by private arbitration or negotiation, there is no determination of the dispute by the Tribunal. It was, therefore, held that even though the order made by the Tribunal was described as 'award', and also published as such in the official gazette, it would not be an 'award' within the meaning of the definition.[35] This view of the Bombay High Court was followed by the Madhya Pradesh High Court.[36] The Mysore High Court has also held that there was determination only when there was an adjudication on the merits.[37] This is the correct view of the law. Occasionally, in the course of adjudication proceedings, the workmen give up or do not press some of the demands before the tribunal. Consequently, no evidence is led on such demands. It is impossible for any tribunal to adjudicate upon any demand without evidence on record. In the absence of any allegation that such demands were unfairly given up, the tribunal is to content itself by recording that the demands were given up or were not pressed. Such holding will constitute an award.[38]

Ex parte Award

Section 15 of the Act makes it the duty of the tribunal to make an award and submit it to the 'appropriate Government'. Rule 10B of the Industrial Disputes (Central) Rules 1957 prescribed the procedure to be adopted by the tribunal when a reference is made to it and the scheme of the rules makes it clear that the tribunal must make a pronouncement on the validity of the claim made by one party and repudiated by the other. Although r 22 empowers the tribunal to proceed *ex parte*, when one of the parties to the proceedings before it fails to appear, the adjudicator is not absolved of his duty to make the determination of the dispute which he is called upon to decide. The scheme of the Act and the rules make it obvious that even though a party is placed *ex parte*, the tribunal must pronounce on the dispute and record its findings with respect to that matter. In other words, the tribunal has no power to reject the reference.[39] The Andhra, Allahabad, Kerala, Madhya Pradesh and Mysore High Courts have held that a reference dismissed by the tribunal for default of appearance of workmen, even though published in the official gazette, does not attain the sanctity to get itself exalted into an 'award' as defined in s 2(b) of the Act, because such an order does not involve any adjudication whatsoever of the dispute referred to it and in no manner sets at rest the differences between the opposing parties.[40] To satisfy the definition of 'award', there should be an interim or a final determination of the dispute and there is none where the tribunal merely dismissed the reference for non-prosecution.[41]

Section 17(2) gives finality to the 'award' published under s 17(1). But if there is no 'determination' of the industrial dispute or any question relating thereto as contemplated by s 2(b), the order of the tribunal dismissing the reference merely on the ground of non-prosecution would not be an 'award' in the eye of law. Hence, the publication of such an order purporting to be an 'award' would not make it final under s 17(2). In view of the provisions of r 22 of the Central Rules, the adjudicator may proceed *ex parte* where any party fails to attend or be represented or after having attended or being represented fails to file the pleadings or participate in the proceedings, as if that party 'had duly attended or had been represented'. In such situations, if after applying its mind fully to the statements and documents placed before it by the party appearing before it, the tribunal makes the award, such an award is not assailable.[42] Furthermore, after an *ex parte* award becomes enforceable on the expiry of 30 days as contemplated by s 17 A, an application to assail such an award will not be maintainable.[43] But if an aggrieved party can successfully show to the reviewing court that its absence from taking part in the adjudication proceedings was unavoidable and was not due to any lack of *bona fides*, it may be a case for quashing an *ex parte* order.[44]

In *RB Girap*,[45] the labour court dismissed the reference because on the date for filing the claim statement of the workman, neither the workman nor his advocate were present. But when the workman became aware of the order of the labour court, his advocate advised him that the application for setting aside the order need not be filed till the award is published in the government gazette. After publication of the award, the workman filed the application for restoration, which was rejected by the labour court as time-barred. The award was quashed by Bombay High Court, restoring the matter to the labour court. The delay in making the application for restoration was condoned for the reason that the poor employee drawing negligible wages should not be denied the opportunity of being heard on merits by the labour court, and he should not be punished for the erroneous advice given to him by his lawyer. If the tribunal is clothed with the authority to pass an *ex parte* award, then necessarily by implication it follows that it can set aside the same. If the tribunal in seisin of the controversy is not relegated to the position of *functus officio*, then, there is no question and/or doubt about the tribunal's competence to entertain the application for setting it aside.[46] Till the award is published under s 17A and thirty days expire

from the publication thereof, the tribunal has all control. It may become *functus officio* only thereafter, and not at any interim stage or prior to the said stage. The tribunal can reopen its order till the award becomes final.[47] The labour court cannot set aside an *ex parte* award after the expiry of 30 days from the date of publication of award, as it becomes *functus officio* after the said period.[48] However, in *Anil Sood,* the Supreme Court held that the labour court/industrial tribunal would not become *functus officio* and has jurisdiction to deal with the application for setting aside the *ex parte* award. The court observed:

> The aspect that the party against whom award is to be made due opportunity to defend has to be given is a matter of procedure and not that of power in the sense in which the language is adopted in s 11. When matters are referred to the tribunal or court, they have to be decided objectively and the tribunals/courts have to exercise their discretion in a judicial manner without arbitrariness by following the general principles of law and rules of natural justice. The power to proceed *ex parte* is available under rule 22 of the Central Rules which also includes the power to inquire whether or not there was sufficient cause for the absence of a party at the hearing, and if there is sufficient cause shown which prevented a party from appearing, when if the party is visited with an award without a notice which is a nullity and therefore, the tribunal will have no jurisdiction to proceed and consequently, it must necessarily have power to set aside the *ex parte* award.[49]

The above decision deserves to be assailed in so far as it propounds that the tribunal has the power to set aside an award even after the expiry of 30 days after its publication by the Government. It is one thing to say that the tribunal does not become *functus officio* on the submission of the award to the government and hence it can set aside an *ex parte* award if it could be shown that a party had sufficient cause in not appearing before the tribunal or that he was prevented from so appearing before the tribunal, and quite another to suggest that the tribunal continues to enjoy the power to set aside an *ex parte* order even after the award had come into operation. Such an interpretation of law is positively disastrous to the very concept of 'dispute settlement' and is unwarranted. Once the award came into force on the expiry of thirty days after its publication, the decision of the tribunal is made public. Further, it implies that the dispute has been conclusively adjudicated by a competent authority after adhering to the procedure prescribed thereof. What remains thereafter is nothing more than implementation of the terms of the award, even if it were found that the award was, or had to be, passed *ex parte.* Thereafter, it cannot be permitted to be set aside by the same tribunal on the ground that there was justification for setting it aside because a party to the dispute had shown sufficient cause for not showing up at the appropriate time. If, it was found the labour court or tribunal had not served the notice to one of the parties, and proceeded to adjudicate the dispute arbitrarily, then the right course for the aggrieved party is to approach the High Court and get it quashed, instead of permitting the trial court to meddle with the award, even after it came into force, and set it aside. If, on the other hand, it was found that the party did not choose to appear even after putting it on notice and even after granting sufficient number of adjournments, then the defaulting party should not be permitted to gain an undue advantage out of his own wrong. At any rate, it doesn't appeal to common sense to invest the same tribunal/labour court with the power to set aside its own award, that too, after it takes effect under s 17A. It is submitted that *Anil Sood* was wrongly decided and requires review by a larger Bench.

In *LML*, the facts were that the labour court had not served notice on the management which was a party to the dispute raised by the workman, and the submitted the *ex parte* award to the government. The application filed before the labour court for setting aside the said *ex parte* award having been rejected on the ground that thirty days had expired and hence the labour court became *functus officio*, the employer moved the High Court. Following the decision of Supreme Court in *Anil Sood*, the Delhi High Court directed the labour court to dispose of the application of the defaulting party in terms of the said ratio.[50] In *Surajgarh KVS Samiti,* the High Court of Rajasthan dismissed the writ petition filed by the management against the rejection of its application for setting aside the *ex parte* award, as it was found that the tribunal rejected the said application on the ground that the management did not appear in the adjudication proceedings despite service of notice and that the application was without merit.[51] In *Ajit Singh*, a single Judge of Punjab and Haryana High Court held that the labour court would become *functus officio* after the expiry of 30 days of the publication of the award, and hence the order passed by it setting aside the *ex parte* award after that period would be invalid.[52] It is submitted that the decision of Punjab High Court in *Ajit Singh* lays down the correct law as compared to that of Supreme Court in *Anil Sood* (supra).

Relief

After determination of the issues referred to it, the tribunal has to award relief. If the claim is not sustainable, the tribunal may not award any relief. But if the claim is made out, it may award in full or part, the relief claimed by the aggrieved party, depending upon the circumstances of each case.[53]

1. Form of the Award

For detailed discussion of the form of the award, see notes and comments under s 16.

2. Publication of Award

See notes and comments under s 17.

3. Commencement of Award

See notes and comments under s 17A.

4. Period of Operation of the Award

See notes and comments under s 19.

5. Retrospective Effect of Award
6. Binding Effect of Award

See notes and comments under s 18(3).

7. Enforcement of Award

A party in whose favour an award is made may enforce it in any of the following manners:

(i) By moving the 'appropriate Government' to prosecute the defaulting party under s 29.

(ii) Where any money or benefit which is capable of being computed in terms of money under an 'award' to a workman from his employer, such workman may make an application under s 33C to the appropriate government or the layout court, for the recovery of the money or computation of such benefit in terms of money due to him under the award.

(iii) The breach of an award may itself be raised as an 'industrial dispute' to lead to another reference to an industrial tribunal.[54]

(iv) Institute a civil suit for obtaining a decree in satisfaction of the dues under the award, and such a decree will be enforceable by execution proceedings under O 21 of the Code of Civil Procedure.[55]

The point No (i) is only a criminal provision for breach of an award, the point No (iii) will lead to absurdity and point No (iv) will lead to protracted and prolix litigation. The only proper mode of recovery of money or benefit under an award is the point No (ii). But an award of Industrial Tribunal is the decision of an industrial dispute by a statutory Tribunal and can have no more statutory force than the decree of the civil court. Either it may be executed or otherwise implemented in the manner laid down in the relevant law, but cannot be enforced by a prerogative writ of *mandamus* as an instrument having the force of Law itself.[56]

Clause (bb): BANKING COMPANY

Banking Company

The term 'Banking Company' was inserted in the Act by the Industrial Disputes (Banking and Insurance Companies) Ordinance 1949, which was promulgated on 30 April 1949 and then enacted into law by s 3 of the Industrial Disputes (Banking and Insurance Companies) Act 1949 (54 of 1949). This definition was amended by s 3 of the Act 36 of 1956 which again was substituted by the present definition by the State Bank of India (Subsidiary Banks) Act 1959 (38 of 1959), s 64 and Sch 3, Pt 2. The definition was again amended by s 38 and Sch 2, Pt 2 of Act 18 of 1964, where 'the Industrial Development Bank of India' was also included in the definition. Now, by the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970 (Act 5 of 1970) 'a corresponding new Bank constituted under s 3 ' of that Act has been further included in the definition. The definition is not violative of Art. 14 of the Constitution as discriminatory.[57] To fall within the meaning of this definition, a Banking Company has to satisfy two requirements, *viz*:

(i) It should be a 'Banking Company' as defined in s 5 of the Banking Companies Act 1949 (10 of 1949).

(ii) It should have branches or other establishment in more than one State. The following Banks have specifically been included in the definition:

(a) The Industrial Development Bank of India;

(b) The Reserve Bank of India;

(c) The State Bank of India; and

(d) Any subsidiary Bank as defined in the State Bank of India (Subsidiary Banks) Act 1959.

A 'Banking Company' does not cease to be a 'Banking Company' by merely changing its name and transferring some of its assets and liabilities to some other company. For a Banking Company to cease to be Banking Company within the meaning of s 2(bb) of the Industrial Disputes Act, it is necessary that the licence granted to it by the Reserve Bank of India under s 22 of the Banking Companies Act must be cancelled.[58] It is necessary that the Banking Company must, at the time in question be able to accept deposits of money from the public repayable on demand or on such terms on which the money might have been deposited. It is sufficient that Banking is the primary business of the company even if by reason of certain supervening cause, it is not able for the time-being to carry on the work of receiving deposits and of making payment.[59]

Clause (c): BOARD

Board

This clause is the reproduction of s 2(a) of the repealed Trade Disputes Act 1929. It has not since been amended. A 'board' is constituted under s 5 of the Act, by a notification in the official gazette. It is constituted for the purpose of promoting settlements of industrial disputes. Its powers are wider than those of a conciliation officer. Under s 10(1)(a), existing or apprehended disputes are referable to a board for promoting their settlement. Section 11 deals with the powers of boards, while s 13 deals with their duties. Section 20 specifies the points of time when the proceedings before a board are deemed to have commenced and concluded.

Clause (cc): CLOSURE

Closure

The expression 'closure' had not been defined in the Act hitherto. But, in view of a lot of litigation being centered around the closure of industrial undertakings, subsequent legislation has accentuated the need for defining a 'closure'. Section 25(FFA) and s 25(O) impose certain conditions on indiscreet closures. Therefore, with a view to effectively deal with the subject, this definition has been inserted. Certain judicial dicta have held that even a temporary closure in certain circumstances, could be deemed to be a closure. But, under the present definition, it is only 'the permanent closing down' of a place of employment that can be taken to be a closure. However, a closure may be partial. In other words, it is not necessary that the whole establishment is closed, for the purposes of the definition. In *Glass Workers*, a dispute raised by the union that the closure of the industrial establishment effected in 1982 was not *bona fide* closure, but was in fact a lock-out, was referred for adjudication to the industrial tribunal. The tribunal passed an award holding that the closure was real and *bona fide*. Justice Tiwari of Allahabad High Court upheld the order of the tribunal to the effect that no relief could be granted to the workmen in a dead industry.[60] For a detailed discussion, see the notes and comments under s 25FFF.

Clause (d): CONCILIATION OFFICER

Conciliation Officer

A conciliation officer is appointed under s 4 of the Act. His appointment may be for a limited period or it may be permanent. Conciliation officers are charged with the duty of mediating in and promoting the settlement of industrial disputes. Section 11 deals with the procedure and powers of conciliation officers, while s 12 deals with their duties. Section 20 specifies the points of time at which the conciliation proceedings shall be deemed to have commenced and concluded.

Clause (e): CONCILIATION PROCEEDING

Conciliation Proceeding

The term 'conciliation proceeding', means any proceeding before a conciliation officer or a board. Where a dispute relates to a 'public utility service' and a notice under s 22 has been given, the conciliation officer is bound to initiate the conciliation proceedings. But regarding other establishments, discretion is given to the conciliation officer to initiate or not to initiate the conciliation proceedings. However, a board can initiate the proceedings only after a reference has been made to it under s 10 of the Act and the scope of the 'conciliation proceedings' before the board is limited by the terms of the reference made to it. Before the amendment of the definition of 'settlement' in s 2(p), by the Amending Act of 1956, any settlement arrived at in the absence of the conciliation officer, was held not to be binding under the Act.[61] But after the amendment, a written agreement between the parties, arrived at otherwise than in the course of 'conciliation proceedings', has been included in the definition and would be a binding 'settlement', provided that the requirements of that provision are complied with.

Clause (ee): CONTROLLED INDUSTRY

Controlled Industry

The industries, the control of which the Union Government, by a Central Act, may declare to be expedient in the public interest, will fall within the purview of this definition. Schedule 1 to the Industrial (Development & Regulation) Act 1951 gives the list of such controlled industries. [See also Notes and Comments under s 2(a) —'appropriate government', under the caption 'any controlled industry as may be specified in this behalf by the Central Government'.]

Clause (f): COURT

Court

Section 2(b) of the repealed Trade Disputes Act 1929 (Act 7 of 1929) was identical to this clause, which was originally enacted in the IDA 1947. There has been no amendment of this clause so far. The appropriate government may appoint a court of inquiry under s 6, for inquiring into any matter appearing to be connected with or relevant to an industrial dispute. The procedure to be followed by the court and its powers have been laid down in s 11. Section 14 prescribes the duties of the court of inquiring into the matters referred to it and reporting thereon to the appropriate government, ordinarily, within a period of six months from the commencement of its inquiry. The reference to a court of inquiry is to be made under s 10(1)(b).

Clause (g): EMPLOYER

Employer

The repealed Trade Disputes Act 1929, contained a somewhat similar, though not identical, provision in s 2(c). The present clause was originally enacted in the IDA. The definition is neither exhaustive nor inclusive.[62] The word 'employer' is not specifically defined, but the clause merely indicates who is to be considered an employer for the purposes of an industry, carried on by or under the authority of a department of government and by or on behalf of a local authority.

The definition of an 'employer' has been made exclusive and it is probably for the benefit of the employees. For example, if a departmental head has taken an action, a complaint can be taken against such action as being the action of the employer. To that extent, the agent or the person for the time being in authority, is clothed with the personality of the employer, so that he may be answerable.[63] An employer under s 2(g) means, in relation to an industry carried on by or under the authority of any department of the Central Government or a state government, the authority prescribed in that behalf, or where no such authority is prescribed, the head of the department.[64]On a combined reading of s 2(g), 2(j) and 2(s), it is apparent that if the state carries on any undertaking or business, it is an employer within the meaning of the Act and persons working in such undertakings, are its workmen.[65] The definition of the term 'employer' is, therefore, intended to operate only in relation to an activity properly describable as an industry.[66]

Rule 2(g) of the Industrial Disputes (Central) Rules 1957, prescribes that, with reference to cl (g) of s 2, in relation to an industry carried on by or under the authority of a department of the Central Government or state government, the officer-in-charge of the industrial establishment shall be the 'employer' in respect of that establishment, and in relation to an industry concerning the railways, carried on by or under the authority of a department of the Central Government, anyone of the officers mentioned in sub-cll (a), (b) and (c) of r 2(g)(ii), shall be the 'employers'. The definition of the term 'employer' in this clause, is neither exhaustive nor inclusive. The meaning given to the term 'employer' by this definition is only illustrative. The term 'employer', therefore, must be given its ordinary grammatical meaning.[67]

Central Government

The expression 'Central Government' has been defined in s 3(8) of the General Clauses Act 1897.

State Government

The expression 'state government' has been defined in s 3(60) of the General Clauses Act 1897. In *Sarju Prasad*, it was held that, with respect to a workman working in the irrigation department of the State of Bihar, the State of Bihar was the real employer.[68]

Local Authority

A 'Local Authority' has been defined by s 3(31) of the General Clauses Act 1897, as

> A municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the government with, the control or management of a municipal or local fund.

The definition of an 'employer' clearly shows that a local authority may become an employer if it carries on an industry.[69]

'In relation to an industry carried on by'

The words 'in relation to an industry carried on by' used in the definition, have to be read with the word 'means' in both the sub-clauses. So read, the words 'in relation' make the intention of the legislature quite clear, ie, that they indicate that it was in relation to those particular industries only, that the expression 'employer' was defined. Thus interpreted, the expression 'employer' means the Central Government, the state government or the local authority 'in relation to' the industries carried on by them.[70]

'Carried on by or under the Authority of'

For the scope and meaning of this expression, see the notes and comments under the caption 'Carried on by or under the authority of' in the definition of 'appropriate government' in s 2(a).

Other Employers

The term 'employer' is not defined in the Act, except where the term is used in relation to an industry carried on by a department of the Central or state government or by some local authority.[71] The meaning given to an 'employer' by the definition, is only illustrative, not exhaustive.[72] But the manner in which the definition is drafted shows that the 'employers' include, within the ambit of the Act, governments as well as private persons, as it is clear that its elaborate machinery was devised not only for the industries run by the government and local authorities, but also for the industries run by private persons.[73] In other words, the term 'employer' must be given its ordinary grammatical meaning, namely a person who employs someone to work or to do something for him.[74]This construction is also consistent with the phraseology employed by the legislature in different sections of the Act and, any other construction of the expression 'employer' would create incongruity and repugnancy between the different sections.[75] Hence, in relation to a proprietary concern, the word 'employer' will mean the owner of the concern; in relation to a firm, it will mean the partners of that firm and in relation to a joint stock company, it will mean the corporate body.[76] Thus, in a case where an employee was employed by the branch office of a newspaper office establishment, while formal confirmation was made by the head office, for the purposes of the definition, the branch office was held to be the 'employer'.[77]But the Visakhapatnam Dock Labour Board, constituted under the Dock Workers (Regulation of Employment) Act 1948, in view of its functions under the relevant provisions of the Act and the Dock Workers (Regulation of Employment) Scheme 1959 framed thereunder, was held not to be the 'employer' of the Dock Labour workmen, as there was no employer-employee relationship between the board and such workmen. Since the functions of the board did not come within the definition of an 'industry' within the meaning of s 2(j) of the Act, it could not fall within the meaning of an 'employer' as defined in this clause.[78] The president of a municipality has been held to be an 'employer'.[79] But a member of a club, which is registered as a society under the Societies Registration Act, is not an employer as contemplated by the definition in this provision.[80]

Change of Ownership: *Successor-in-interest*

An 'employer' in industrial law, means not only a person who engages another to work for him, but also his successors and legal representatives.[81] Industrial law regards the rights and obligations of the old concern as continuing and capable of being enforced as against the new management and is not affected by the substitution of a new management for the old. In other words, the transfer of a business *ipso facto*, does not terminate the services of the workmen employed in such

business and a purchaser of such a concern as a going concern, with all its assets and liabilities, is bound to continue the old employees on the same emoluments and with a continuity of service.[82] Therefore, when there is a transfer of business from one (owner) management to another, the rights and obligations which existed between the old management and their Workers continue to exist *vis-a-vis* the new management, even after the date of transfer,[83] provided, however, that there is a continuity of service and identity of business.[84] Thus, a person who, on such transfer, becomes the owner of a concern, becomes the employer of the employees of the establishment and hence, becomes liable for the past services of its workmen.[85]This principle of industrial law finds recognition in statutory provisions like s 18(3)(c) of the Act and ss 114 and 115 of the Bombay Industrial Relations Act.

As long as there is identity of the business itself, a mere change of name would not affect the rights of the Workers. For instance, where a banking company transferred some of its assets and liabilities to another concern and changed its name, it was held that it did not cease to be an employer.[86] Likewise, where a transfer is effected in favour of a *benamidar*, with a view to victimize the workmen, such a *benamidar* would not become the employer and the original employer would not cease to be the employer.[87] But where the business is not taken over as a going concern, or it does not retain its identity, the new management, though dealing in the same line, cannot be considered to be a successor or assignee of the old business.[88] In *Anakapalle CAIS*, the Supreme Court summed up the factors to be taken into consideration while determining the question as to whether a purchaser of an industrial concern can be held to be a successor-in-interest of the vendor.

Illustrations

Where the purchaser purchased only the machinery and plant of a concern and did not purchase the concern as a going concern, or its goodwill, such purchaser could not be considered as a successor-in-interest and no liability could be cast on him.[89] Likewise, where the running business is not taken over, even though the purchaser was dealing in the same line of business, he could not be considered to be a successor or assignee of the old business and the old workmen, who were employed by the purchaser, could not claim a continuity of service against the new management.[90] On the other hand, where there is merely a change in the management or the establishment, the new management is the successor of the previous management.[91] A change of partnership by an inclusion or retirement of a partner, although it legally changes the constitution of the firm, will not bring about change of business or employer.[92] Where the proprietorship business was taken over and continued by a private limited company, in which the former proprietor, his wife and his manager became directors and the new company was formed to carry on and continue the former business in the same style, though a different entity; under a different name, the new company was held to be the successor-in-interest of the old proprietorship business and was bound to continue to employ the former workmen.[93] Where a company sold its machineries and business to a co-operative society; but the co-operative society did not purchase the good-will of the company; nor did it purchase the outstandings and the liabilities of the company; but the society continued the same business in the same place, without any appreciable break and took in its employment, a number of employees of the company, the society was held to be a successor-in-interest of the company.[94]

In *Industrial Paper ALE Union*, the facts, which require a somewhat detailed narration, were: the union represented its members employed by AIDC in its Extensible Sack Kraft Paper Project ('ESKPP') under Industrial Paper (Assam) Ltd, ('IPAL'), raised a dispute for non-payment of salaries of its members by AIDA after October, 1998 on the plea that the members of the appellant were not the employees of Assam Industrial Development Corporation ('AIDC') but of the IPAL. Accordingly the appropriate Govt vide notification dated 20-2-1999 referred the following issues to the Labour Court for adjudication:

1. Whether the management of Assam Industrial Development Corporation (AIDC) is justified to deny as owner of the Sack Craft Paper Project of M/s Industrial Papers (Assam) Ltd (IPAL), though they have signed an agreement with a contractor as 'owner' of the Sack Kraft Paper Project, Dhing, District Nagaon, Assam.
2. Whether the AIDC is justified to deny to take the responsibility of the Industrial Papers (Assam) Ltd employees, though the employees were appointed by the AIDC through the advertisement published in the newspaper.
3. Whether the management of AIDC is justified by not absorbing or engaging the employees of the IPAL, in their other Promoted industries or give them salary regularly though they have failed to install or run the proposed Paper Mill in Dhing, Nagaon.
4. If not, then the said affected employees are entitled for either regular monthly salary from the management or absorption in the other Industrial Units promoted by the Assam Industrial Development Corporation, Guwahati.
5. And the AIDC should not recruit or appoint new employees to say other their Promoted Industries until and unless the employees of the Industrial Paper are engaged or absorbed by the Management.

AIDC raised preliminary objection against the issues figured in the government order, *inter alia*, questioning the very maintainability of the reference on the ground that the purported dispute was not an industrial dispute; that the notification issued by the Government could not constitute an industrial dispute because AIDC was not a proper or necessary party; and that the members of the union, being employees of a separate company ie IPAL, could not claim to be the employees of AIDC, which was merely a Promoter Company. The Labour Court in its Award held as follows:

1. There was no material on record to show that AIDC had transferred Sack Kraft Paper Project, Dhing, to IPAL at any point of time. It was observed that though both parties have approved the appointment of candidates at IPAL and AIDC none of them came within the categories of those post advertised.
2. The Issue is redundant as members of the Union do not come within the categories of posts advertised.
3. It was not incumbent of AIDC to absorb members of the appellant-Union to any other AIDC industry.
4. IPAL could not be run, it was incumbent for AIDC to terminate the services of the members of the appellant-Union giving them terminal benefits according to relevant industrial and labour laws.
5. Until that was done AIDC was obliged to give the members of the appellant-Union regular salaries.

The writ petition and writ appeal filed by the union were dismissed at both the tiers of the High Court on the ground that AIDC was not the owner of ESKPP of IPAL, and hence no liability could be fastened to AIDC for the absorption/engagement of the employees of IPAL in any other industry promoted by AIDC or to pay them salaries regularly after the closure of the project. Aggrieved by the decision, the union approached the Supreme Court. Dismissing the appeal, Pasayat J (for self and Kapadia J) held:

> In the written statement before the Labour Court, AIDC has taken specific stand in the following manner:
>
> "That when the employees were paid regular salary by IPAL Project from its own fund/account at that time no such demand was raised by the employees of IPAL. When they found that the Project is virtually closed and they are not getting salary from their own Project, they demanded that they belong to AIDC for the sake of getting salary from AIDC without doing any job for AIDC. In such situation the employees of IPAL cannot be treated as employees of AIDC. These employees were appointed/recruited against the Project as per the job specification and as per requirement and sanctioned strength of IPAL while seeking requisition from Employment Exchange the requisition was signed by General Manager, Sack Kraft Paper Project as the employer. All the employees have been appointed on behalf of the IPAL Project. They are employees of IPAL governed by all rules and regulations of Industrial Papers Assam Ltd. Under these circumstances stated above the management of AIDC cannot take any responsibility for the employees of IPAL."
>
> Above being the position, the judgment of the Division Bench affirming that of learned single Judge cannot be faulted and the appeal stands dismissed. Subject to what is stated above, dismissal of the appeal shall not stand in the way of the concerned employees or recognized Unions making claim for arrears of salaries or claims to be due from IPAL.[95] (paras 14 & 15)

Contract Labour

The definition of 'employer' in s 3(14) of the Bombay Industrial Relations Act 1946, is wider than the definition in s 2(g) of the IDA and is capable of being applied in a wide and generic sense to any employee engaged at any time, in the industry concerned and to any employer in the same industry. In the under-noted cases,[96] the owners of certain undertakings have been held to be the employers *qua* the workmen employed by the contractors. The Bombay Dock Labour Board constituted under the Dock Workers' Regulation of Employment (Scheme) 1951, has been held to be the employer of the workmen working under the stevedores, though the wages of such workmen were paid by the stevedores.[97] On the other hand, a colliery manager was held not be the 'employer' of a workman working under a contractor in the colliery, merely by reason of the fact that he had suspended such workman in the exercise of the statutory duty cast on him under the Mines Act.[98]

3 Words and figures "the Agricultural Refinance Corporation established under s 3 of the Agricultural Refinance Corporation Act, 1963, (10 of 1963)" which were inserted by Act 10 of 1963, s 47 and Sch II, were omitted by Act 36 of 1964, s 2 (wef 19-12-1964).

4 The words "by the Federal Railway Authority" omitted by AO 1948.

5 Ins by Act 65 of 1951, s 32 (wef 8-5-1952).

6 The words "operating a Federal Railway" omitted by AO 1950.

7 Subs by Act No 46 of 1982, s 2 (wef 21-8-1984).

8 Subs by Act 24 of 1996, s 2, for the words "the Industrial Finance Corporation of India established under s 3 of the Industrial Finance Corporation Act, 1948" (wef 11-10-1995).

9 The words and figures "or the Indian Airlines' and "Air India' Act, 1953 (27 of 1953)" omitted by Act 24 of 1996, s 2 (wef 11-10-1995). Earlier these words were inserted by Act 35 of 1965.

10 Subs by Act 24 of 1996, s 2, for "the Oil and Natural Gas Commission, established under s 3 of the Oil and Natural Gas Commission Act, 1959 (43 of 1959)" (wef 11-10-1995).

11 Subs by Act 24 of 1996, s 2, for the words "the International Airports Authority of India constituted under s 3 of the International Airports Authority Act, 1971 (43 of 1971)" (wef 11-10-1995).

12 Ins by Act 53 of 1987, s 56 and Second Sch, Part III (wef 9-7-1988).

13 Subs by Act 54 of 1949, s 3, for "a mine, oil-field".

14 Subs by Act 24 of 1996, s 2, for "a banking or an insurance company" (wef 11-10-1995).

15 Ins by Act 36 of 1964, s 2 (wef 19-12-1964).

16 Subs by Act 24 of 2010, s 2 (wef 15-9-2010 *vide* SO 2278 (E), dated 15-9-2010), for the words "major ports, the Central Government, and".

17 Subs by Act 24 of 2010, s 2 (wef 15-9-2010 *vide* SO 2278 (E), dated 15-9-2010). Before substitution, sub-clause (ii) stood as under:

> "(ii) in relation to any other industrial dispute, the State Government;".

18 Ins by Act 36 of 1964, s 2 (wef 19-12-1964).

19 Ins by Act 43 of 1953, s 2 (wef 24-10-1953).

20 Clause (aa) was relettered as "(aaa)" by Act 36 of 1964, s 2 (ii) and clause (aa) was inserted.

21 Subs by Act 36 of 1956, s 3 (wef 10-3-1957).

22 Subs by Act 38 of 1959, s 64 and Sch III, Pt II, for cl (bb) which was inserted by Act 54 of 1949, s 3.

23 Now, see the Banking Regulation Act, 1949 (10 of 1949).

24 Ins by Act 28 of 1981, s 40 and Sch II, Pt II (wef 1-1-1982).

25 Ins by Act 62 of 1984, s 71 and Sch III, Pt II (wef 20-3-1985).

26 The words "the Industrial Development Bank of India" omitted by Act 53 of 2003, s 12 and Sch, Pt III (wef 2-7-2004).

27 Ins by Act 39 of 1989, s 53 and Sch II, Pt II.

28 Subs by Act 5 of 1970, s 20 for "and any subsidiary Bank" (wef 19-7-1969).

29 Subs by Act 40 of 1980, s 20, for "and any subsidiary bank" (wef 15-4-1980).

30 Ins by Act 46 of 1982, s 2 (wef 21-8-1984).

31 Ins by Act 65 of 1951, s 32 (wef 8-5-1952).

32 Clause (eee) omitted by Act 36 of 1964, s 2 (wef 19-12-1964). Earlier cl (eee) was inserted by Act 43 of 1953, s 2 (wef 24-10-1953).

33 Subs by the AO 1948 for the words "a Government in British India".

34 Ins by Act 45 of 1971, s 2 (wef 15-2-1971).

35 Clause (h) omitted by the AO 1950.

36 Ins by Act 18 of 1952, s 2 (wef 4-3-1952).

37 On the enforcement of cl (c) of s 2 of Act 46 of 1982, cl (j) of s 2 shall stand substituted as follows:—

"(j) "industry" means any systematic activity carried on by co-operation between an employer and his workmen (whether such workmen are employed by such employer directly or by or through any agency, including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes (not being wants or wishes which are merely spiritual or religious in nature), whether or not,—

(i) any capital has been invested for the purpose of carrying on such activity; or

(ii) such activity is carried on with a motive to make any gain or profit, and includes—

(a) any activity of the Dock Labour Board established under section 5A of the Dock Workers (Regulation of Employment) Act, 1948 (9 of 1948);

(b) any activity relating to the promotion of sales or business or both carried on by an establishment, but does not include—

(1) any agricultural operation except where such agricultural operation is carried on in an integrated manner with any other activity (being any such activity as is referred to in the foregoing provisions of this clause) and such other activity is the predominant one.

Explanation.—For the purposes of this sub-clause, "agricultural operation" does not include any activity carried on in a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951; or

(2) hospitals or dispensaries; or

(3) educational, scientific, research or training institutions; or

(4) institutions owned or managed by organisations wholly or substantially engaged in any charitable, social or philanthropic service; or

(5) khadi or village industries; or

(6) any activity of the Government relatable to the sovereign functions of the Government including all the activities carried on by the departments of the Central Government dealing with defence research, atomic energy and space; or

(7) any domestic service; or

(8) any activity, being a profession practised by an individual or body of individuals, if the number of persons employed by the individual or body of individuals in relation to such profession is less than ten; or

(9) any activity, being an activity carried on by a co-operative society or a club or any other like body of individuals, if the number of persons employed by the co-operative society, club or other like body of individuals in relation to such activity is less than ten;"

38 Ins by Act 46 of 1982, s 2 (wef 21-8-1984).

39 Ins by Act 54 of 1949, s 3 (wef 14-12-1949).

40 Ins by Act 46 of 1982, s 2 (wef 21-8-1984).

41 Clause (kka) re-lettered as cl (kkb) by Act 46 of 1982, s 2 (wef 21-8-1984), earlier cl (kka) was ins by Act 36 of 1956, s 3 (wef 10-3-1957).

42 Ins by Act 43 of 1953, s 2 (wef 24-10-1953).

43 Subs by Act 46 of 1982, s 2, for "or for any other reason" (wef 21-8-1984).

44 Subs by Act 46 of 1982, s 2, for "closing of a place of a employment" (wef 21-8-1984).

45 Clauses (la) & (lb) ins by Act 36 of 1964, s 2 (wef 15-12-1964).

46 Ins by Act 36 of 1956, s 3 (wef 10-3-1957).

47 Ins by Act 45 of 1971, s 2 (wef 15-12-1971).

48 Ins by Act 36 of 1964, s 2 (wef 19-12-1964).

49 Ins by Act 45 of 1971, s 2 (wef 15-12-1971).

50 Subs by Act 36 of 1964, s 2 for "Schedule" (wef 19-12-1964).

51 Now the Railways Act, 1989 (24 of 1989).

52 Ins by Act 43 of 1953, s 2 (wef 24-10-1953).

53 Ins by Act 49 of 1984, s 2 (wef 18-8-1984).

54 Subs by Act 36 of 1956, s 3, for clause (p) (wef 7-10-1956).

55 Ins by Act 35 of 1965, s 2 (wef 1-12-1965).

56 Ins by Act 46 of 1982, s 2 (wef 21-8-1984).

57 Subs by Act 18 of 1957, s 2, for clause (r) (w.e.f. 10-3-1957), earlier cl (r) was amended by Act 36 of 1956, s 3 (wef 10-3-1957).

58 Ins by Act 46 of 1982, s 2 (wef 21-8-1984).

59 Ins by Act 46 of 1982, s 2 (wef 21-8-1984).

60 Ins by Act 43 of 1953, s 2 (wef 24-10-1953).

61 Ins by Act 46 of 1982, s 2 (wef 21-8-1984).

62 Subs by Act 46 of 1982, s 2, for cl (s) (wef 21-8-1984), earlier, subs by Act 36 of 1956, s 3 (wef 29-8-1956).

63 Subs by Act 24 of 2010, s 2 (wef 15-9-2010 *vide* S.O. 2278 (E), dated 15-9-2010), for the words "one thousand six hundred rupees".

64 *Kartick Chandra Malik v Rani Harsha Mukhi Dasi* AIR 1943 Cal 345 (FB).

65 *Rai Jogendra CG Bahadur v Bhawani Charan Law* AIR 1945 Cal 425 (DB), per Mittel J.

66 *N Subramania Iyer v Official Receiver* AIR 1958 SC 1 [LNIND 1957 SC 72], 10, per Sinha J.

67 *Bennett Coleman & Co Pvt Ltd v Punya Priya Das Gupta* (1969) 2 LLJ 554 [LNIND 1969 SC 150] (SC), per Shelat J.

68 *Gough v Gough* [1891] QB 665, per Esher MR.

69 *Hyderabad Asbestos Cement Products Ltd v EIC* 1976 Lab IC 868 [LNIND 1975 AP 238], 874 (AP) FB), per Krishna Rao J.

70 *Savoy Hotel Co v London County Council* [1900] 1 QB 665.

71 *Hyderabad Asbestos Cement Products Ltd v EIC* 1976 Lab IC 868 [LNIND 1975 AP 238], 874 (AP) (FB), per Krishna Rao J.

72 Government of India (2002), *Report of NCL-II*, Chap 13, p 39, para 6.38.

73 *Firebricks & Potteries Ltd v Firebricks & Potteries Ltd Workers' Union* (1956) 1 LLJ 571, 573 (Mys), per Venkataramayya CJ.

74 *National Buildings Construction Corpn Ltd v MK Jain* 1981 Lab IC 62, 67 (Del), per Anand J.

75 *Continental Construction Pvt Ltd v Goi* 1977 Lab IC 1199, 1200-01 (AP) (DB), per Jeevan Reddy J.

76 Ins by Amendment Act 24 of 2010 (wef 15-9-2010).

77 Subs. Ibid. prior to substitution, the sub-cl (*ii*) read as under:

> "(*ii*) in relation to any other industrial dispute, the State Government."

78 *Heavy Engineering Mazdoor Union v State of Bihar* (1969) 2 LLJ 549 [LNIND 1969 SC 121], 552 (SC), per Shelat J.

79 *Carlsbad Mineral Water Mfg Co Ltd v PK Sarkar* (1952) 1 LLJ 488 [LNIND 1951 CAL 116] (Cal), per Harries CJ.

80 *Abdul Rehman Abdul Gafor v E Paul* (1962) 2 LLJ 693 [LNIND 1961 BOM 50] (Bom), per Desai J.

81 *Bharat Glass Works Pvt Ltd v State of West Bengal* (1958) 1 LLJ 467 [LNIND 1957 CAL 30], 470 (Cal), per Sinha J.

82 *Indian Naval Canteen Control Board v IT* (1965) 2 LLJ 366, 367 (Ker) (DB), per Menon CJ.

83 *Mgmt of Bihar Khadi Gramodyog Sangh v State of Bihar* 1977 Lab IC 466 [LNIND 1984 SC 252], 481 (Pat) (DB), per SK Jha J.

84 *Heavy Engineering Mazdoor Union v State of Bihar* (1969) 2 LLJ 549 [LNIND 1969 SC 121], 553 (SC), per Shelat J.

85 *Union of India v LC* (1970) 1 LLJ 184, 186 (P&H), per Tuli J.

86 *Administrative Officer, Electro Chemical Research Institute v State of TN* 1990 Lab IC 1815, 1818 (Mad) (DB), per Venkataswami J.

87 *Carlsbad Mineral Water Mfg Co Ltd v PK Sarkar* (1952) 1 LLJ 488 [LNIND 1951 CAL 116] (Cal), per Harries CJ.

88 *Abdul Rehaman Abdul Gafor v E Paul* (1962) 2 LLJ 693 [LNIND 1961 BOM 50], 697 (Bom) : AIR 1963 Bom 267 [LNIND 1961 BOM 50]: (1963) 65 Bom LR 20, per Desai J.

89 *Heavy Engineering Mazdoor Union v State of Bihar* (1969) 2 LLJ 549 [LNIND 1969 SC 121], 553 (SC) : AIR 1970 SC 82 [LNIND 1969 SC 121]: (1969) SCC 765, per Shelat J.

90 *Hindustan Aeronautics Ltd v Workmen* (1975) 2 LLJ 336 [LNIND 1975 SC 249], 338-39 (SC), per Untwalia J.

91 *Rashtriya Mill Mazdoor Sangh v Model Mills* (1984) 2 LLJ 507 [LNIND 1984 SC 252], 514 (SC), per Desai J.

92 *Food Corpn of India Workers Union v Food Corpn of India* 1985 Lab IC 732, 73 & -37 (SC), per Khalid J.

93 *Air India Statutory Corpn v United Labour Union* (1997) 1 LLJ 1113 [LNIND 1996 SC 2076], 1128 (SC), per K Ramaswamy J.

94 *Heavy Engineering Mazdoor Union v State of Bihar* (1969) 2 LLJ 549 [LNIND 1969 SC 121] (SC), per Shelat J.

1 *Workmen Karnataka PF Employees Union v Addl IT* (1983) Lab IC 1523, 1531-32 (Kant), per Malimath J.

2 *Central Warehouse Corn v Delhi Admn* (1983) 63 FJR 125 (Del), per Avadh Behari Rohatgi J.

3 *Indian Naval CC Board v IT* (1965) 2 LLJ 366, 368 (Ker) (DB), per Menon CJ.

4 *Abdul Rehman Abdul Gafor v E Paul* (1962) 2 LLJ 693 [LNIND 1961 BOM 50], 697 (Bom), per Desai J.

5 *Mgmt of Bihar Khadi Gramodyog Sangh v State of Bihar* 1977 Lab IC 466 [LNIND 1984 SC 252], 473 (Pat) (DB), per SK Jha J.

6 *Swadeshi Cotton Mills Thozhilali Shemalana Padukappu Union v National Textile Corpn Ltd* (1984) 1 LLJ 140 [LNIND 1983 MAD 83] (Mad) (DB), per Nainar Sundaram J.

7 *National Building Construction Ltd v Ram Pal Singh* 1997 Lab IC 2667, 2672 (Bom), per Lodha J.

8 *Bharat Glass Works Private Ltd v State of West Bengal* (1958) 1 LLJ 467 [LNIND 1957 CAL 30] (Cal), per Sinha J.

9 *DP Kelkar v Ambadas Keshav Bajaj*, AIR 1971 Bom 124 [LNIND 1970 BOM 33], 143 DB, per Kotwal CJ.

10 *National Textile Corpn v IT* 1979 Lab IC 1024, 1027 (All) (DB), per Ojha J.

11 *Cotton Corporation of India Ltd v GC Odusmath* (1999) 1 LLN 382 : (1999) 1 LJ 19 : (1998) 6 Kar LJ 181 [LNIND 1998 KANT 158], (Kant) (DB).

12 *Mgmt of Castrol (l) Ltd v P Ganesan* (2001) 2 LLN 1107 (Mad), per Padmanabhan J.

13 *Hindustan Aeronautics Ltd v Workmen* (1975) 2 LLN 235 (SC).

14 *Hindustan Aeronautics Ltd v NW Union* (2001) 4 LLN 269 (Bom), per Rebello J.

15 *Saudi Arabian Airlines v Shehnaz Mudbhatkal* (1999) 1 LLN 708, 715, 720 (Bom) : (1999) 2 LJ 109, per Srikrishna J.

16 *Meenakshi Patel v EEPC* (2001) 4 LLN 1276 (Bom), per Mhatre J.

17 *Indian Council of Agricultural Research v Duryodhan H Ingole* (2010) 4 LLJ 410 (Bom), per Bobde J.

18 *Carlsbad Mineral Water Manufacturing Co Ltd v PK Sarkar* (1952) 1 LLJ 488 [LNIND 1951 CAL 116] (Cal), per Harries CJ.

19 *JR Jugele, Railway Contractor v Sitabaiatamaram* 1990 Lab IC 1018, 1019 (Bom) (DB), per Ghodeswar J.

20 *Bhowra Coke Plant v Bhowra Coke Plant Workers' Union* (1956) 1 LLJ 195 (LAT).

21 *Firebricks and Potteries Ltd v FPL Workers' Union* (1956) 1 LLJ 571 (Mys), per Venkataramayya CJ.

22 *Bijay Cotton Mills Ltd v Workmen* (1960) 1 LLJ 262 [LNIND 1960 SC 40] (SC) : AIR 1960 SC 692 [LNIND 1960 SC 40], per Gajendragadkar J.

23 *General Employees Assn v Union of India* (1992) 1 LLJ 242, 244 (Bom) : (1991) 61 FLR 382, per Kantharia J.

24 *Serajuddin & Co v Workmen* (1962) 1 LLJ 450 [LNIND 1962 SC 122], 453 (SC), per Gajendragadkar J.

25 *Ambika Prasad v State of Orissa* (1974) 1 LLJ 65, 67 (Ori) (DB), per RN Misra J.

26 *Assam Rly Trading Co v CGIT* 1970 Lab IC 488, 491, per Banerjee J.

27 *Serajuddin & Co v Workmen* (1962) 1 LLJ 450 [LNIND 1962 SC 122], 453 (SC), per Gajendragadkar J.

28 *Khas Jeenagora Coal Co Pvt Ltd v Salim M Merchant* (1965) 2 LLJ 302 (Pat) (DB).

29 *Mgmt of Jamadoba Colliery v PO, CGIT-cum-LC* 1989 Lab IC (NOC) 113 (Pat), per SB Sinha J.

30 *Mgmt of Indian Oil Corpn v State of Assam* 1990 Lab IC (NOC) 137 (Gau) (DB).

31 *Bisra Limestone Co Ltd v Central Labour Inspector* (1969) 2 LLJ 112 [LNIND 1968 ORI 117], 115 (Ori) (DB), per Barman CJ.

32 *State of Maharashtra v Mohanlal Devichand Shah* (1965) 2 LLJ 157 [LNIND 1965 SC 98], 160-61 (SC), per Sikri J.

33 *Ambika Prasad v State of Orissa* 1974 Lab IC 805,807 (Ori) (DB), per Misra J.

34 *Cement Works Karmachari Sangh v IT* 1971 Lab IC 143, 14 & 47 (Raj), per Tyagi J.

35 *Neyveli Lignite Corpn Ltd v Subbarayan* 1984 Lab IC 1880 (Mad), per Pandian J.

36 *Cantonment Board, Ambala v State of Punjab* (1961) 1 LLJ 734 (Punj) (DB), per Falshaw J.

37 *PK Pillai v Burma Shell OS & D Co of India Ltd* AIR 1956 Kutch 9, per Dave CJ.

38 *Tulsidas Khimji v Jeejeebhoy* (1961) 1 LLJ 42 [LNIND 1960 BOM 39] (Bom) (DB), per Desai J.

39 *Goa DL Union v Govt of UT of Goa, Daman & Diu* (1968) 2 LLJ 536 (G, D & D), per Jetley JC.

40 *Goa Sampling Employees Assn v General Superintendence Co of India (Pvt) Ltd* 1985 Lab IC 666 [LNIND 1984 SC 338] (SC) : AIR 1985 SC 357 [LNIND 1984 SC 338]: (1985) 1 SCC 266, per Desai J.

41 *Hindustan Aeronautics Ltd v State of UP*, (2012) 2 LLJ 11 (All), per Shishir Kumar J.

42 *Serajuddin & Co Ltd v Workmen* (1962) 1 LLJ 450 [LNIND 1962 SC 122], 452 (SC), per Gajendragdkar J.

43 *Mgmt of Patiala Iron Works v Union of India* 1975 LIC 1265 (Del) (FB), per Avadh Behari J.

44 *India Tourism Dev Corpn v Delhi Administration* 1982 Lab IC 1309, 1319 (Del) (FB), per Chadha J.

45 *Paritosh Kumar Pal v State of Bihar* 1984 Lab IC 1254, 1260 (Pat) (FB), per Sandhawalia CJ.

46 *Paritosh Kumar Pal v State of Bihar* 1984 Lab IC 1254, 1260 (Pat) (FB), per Sandhawalia CJ.

47 *Lalbhai Tricumlal Mills Ltd v DM Vin* (1956) 1 LLJ 557 [LNIND 1955 BOM 36], 558 (Bom) (DB), per Chagla CJ.

48 *Lipton Ltd v Employees* (1959) 1 LLJ 431 [LNIND 1959 SC 14], 436 (SC), per SK Das J.

49 *Indian Cable Co Ltd v Workmen* (1962) 1 LLJ 409 [LNIND 1962 SC 100], 413 (SC), per Venkatarama Ayyar J.

50 *Workmen of Sri Ranga Vilas Motors Pvt Ltd v Shri Rangavilas Motors (P) Ltd.* (1967) 2 LLJ 12 [LNIND 1967 SC 26], 17 (SC) : AIR 1967 SC 1040 [LNIND 1967 SC 26], per Sikri J.

51 *Paritosh Kumar Pal v State of Bihar* 1984 Lab IC 1254, 1260 (Pat) (FB), per Sandhawalia CJ.

52 *Spencer & Co Ltd v Delhi Administration* 1975 FLR 76, per Dalip Kapur J.

53 *Emerald Valley Estates Ltd v Secy, Estates Staffs Union of South India* 1979 Lab IC 86 (Ker), per Bhaskaran J.

54 *Vinod Rao v PO, LC*, 1980 Lab IC 1191, 1193-94 (Guj) (DB), per Sheth J.

55 *Associated Traders & Engineers Pvt Ltd v Addl IT* (1976) 49 FJR 187 (Del), per HL Anand J.

56 *Juggat Pharma Pvt Ltd v Deputy Commissioner of Labour* (1982) 2 LLJ 71, 72 (Kant), per Bopanna J.

57 *J&J Dechane Distributors v State of Kerala* (1974) 2 LLJ 9, 13-14 (Ker) (DB), 1973 KLJ 784, per Gopalan Nambiyar J.

58 *Assn of Medical Representatives v IT* (1966) 1 LLJ 614 [LNIND 1966 MP 107], 618-19 : AIR 1967 MP 114 [LNIND 1966 MP 107]: 1966 MPLJ 769 (MP) (DB).

59 *Genl Superintendence Co of India Ltd v Goa Dock Labour Union*, (1984) 1 LLJ 56 [LNIND 1982 BOM 219], 57 : (1984) 86 Bom R 30(Bom) (DB), per Jahagirdar J.

60 *Godrej Soaps Ltd v State of Karnataka* (1998) 3 LLN 709 (Kant), per Goud J.

61 *BG Sampat v State of West Bengal*, (1999) 3 LLN 160 (Cal), per Kundu J.

62 *New Delhi General Mazdoor Union v Govt of Delhi* (2000) II LLJ 1191(Del), per Sikri J.

63 *DLF Universal Ltd v Government of NCT* (2002) 2 LLN 596 (Del), per Kaul J.

64 *S Ramesh v Tamil Nadu PP Ltd* (2001) 1 LLN 557 [LNIND 2000 MAD 247] (Mad) (DB), per Jayasimha Babu J.

65 *Mgmt of Best & Crompton Engg Ltd v PO, LC* (2002) 2 LLN 306 (Mad), per Murugesan J.

66 *Mohan R Matre v Udaipur Distillary Co Ltd* (2003) 4 LLJ 1004.

67 *Mining and AMC Employees Union. v Union of India* (2003) 4 LLJ 872 (Cal), per Seth J.

68 *IOL Limited, Kanpur v State of UP* (2004) 4 LLJ 369 (All), per Ambwani J.

69 *Kerala State EDC Ltd v Jayashree NK* (2003) 4 LLJ 1067 (Bom), per Khandeparkar J.

70 *Steel Authority of India Ltd v National Union of Waterfront Workers* AIR 2001 SC 3527 [LNIND 2001 SC 1870]: (2001) 7 SCC 1 [LNIND 2001 SC 1870] : (2001) 5 SCALE 626 [LNIND 2001 SC 1870], per Qadri J.

71 *Tata Memorial Hospital Workers' Union v Tata Memorial Centre* AIR 2010 SC 2943 [LNIND 2010 SC 725]: (2010) 8 SCC 480 [LNIND 2010 SC 725] : (2010) 4 LLJ 830 [LNIND 2010 SC 725], per Gokhale J.

72 Government of India (2002), *Report of NCL-II*, Chap 13, pp 37-38, para 6.24.

73 Chapter VA, in particular ss 25F, 25FF and 25FFF, *Industrial Dispute Act 1947*.

74 *Indian Hume Pipe Co Ltd v K Palaniswami* (1968) 1 LLJ 90 (Mad) (DB) : AIR 1968 Mad 52 [LNIND 1966 MAD 206], per Anantanarayanan CJ.

75 *Maharana Mill Kamdar Union v NL Vyas* (1959) 2 LLJ 172, 175 (Bom) (DB), per Chainani CJ.

76 See, notes and comments under s 2(92), *Mulla's Code of Civil Procedure*, 1989, 14th ed, Vol 1, pp 13-25.

77 *Andhra Handloom Weavers Co-operative Society v State of AP* (1963) 2 LLJ 488, 490 (AP) : AIR 1964 AP 363 [LNIND 1963 AP 118], per Gopalakrishnan Nair J.

78 *Cox & Kings (Agents) Ltd v Workmen* (1977) 1 LLJ 471 [LNIND 1977 SC 142], 476 (SC) : AIR 1977 SC 1666 [LNIND 1977 SC 142]: (1977) 2 SCC 705 [LNIND 1977 SC 142], per Sarkaria J.

79 *Sital v CGIT* (1969) 2 LLJ 275 (MP) (DB), per Pandey J.

80 *Coimbatore DMW Union v Dhanalakshmi Mills Ltd* (1960) 2 LLJ 556 (Mad), per Ramachandra Ayyar J.

81 *Birla Cotton Spg & Weaving Mills Ltd v Workmen* (1962) 1 LLJ 648 [LNIND 1962 SC 206] (SC) : AIR 1966 SC 1158 [LNIND 1962 SC 206]: (1963) 2 SCR 716 [LNIND 1965 SC 347], per Wanchoo J.

82 *Asbestos Cement Ltd v PD Sawarkar* (1970) 2 LLJ 129 [LNIND 1970 SC 65] (SC), per Shelat J.

83 *Pallavan Transport Corpn Ltd v M Muthuchezian* 1986 Lab IC 1541 -42 (Mad), per Sathiadev J.

84 *Krishnarajendra Mills Workers' Union v ALC* (1968) 1 LLJ 504, 509 (Mys) (DB), per Tukol J.

85 *Divisional Forest Officer v Dy Commr of Labour* (1999) 2 LLJ 282 (AP), per Sudershan Reddy J.

86 Notes under the caption 'Preliminary decree', *Mulla's Code of Civil Procedure*, 14th ed, pp 13-25.

87 *Thakur Yugal Kishore Sinha v State of Bihar* (1950) 1 LLJ 539 (Pat) (DB), per Meredith CJ.

88 *Hotel Imperial v Hotel Workers Union* (1959) 2 LLJ 544 [LNIND 1959 SC 136], 552 (SC), per Wanchoo J.

89 *Mgmt of Bihar State Electricity Board v Workmen* (1971) 1 LLJ 389, 393 (Pat) (DB).

90 *Punjab National Bank Ltd v AN Sen Alr* 1952 Punj 143(DB), per Harnam Singh J.

91 *Mehar Singh v Delhi Administration* (1973) ILR 1 (Del) 732, 737-38, per RN Agarwal J.

92 *Jeewan Lal* (1929) *Ltd v State of WB* 1975 Lab IC 1161 (Cal), per Sabyasachi Mukharjee J.

93 *Darshak Ltd v IT* (1986) 1 LLJ 253, 257 (Kant) : ILR 1987 Karnataka 50, per Rama Jois J.

1 *Manager, Jaipur Syntex Ltd v PO Industrial Tribunal* (1990) 1 LLJ 323, 325 (Raj) : (1989) 59 FLR 99, per MB Sharma J.

2 *Hotel Imperial v Hotel Workers Union* (1959) 2 LLJ 544 [LNIND 1959 SC 136], 552 (SC), per Wanchoo J.

3 *Delhi Cloth & General Mills Ltd v R Dayal, Addl IT* (1960) 2 LLJ 712 [LNIND 1960 SC 283],715 (SC), per Wanchoo J.

4 *Darshak Ltd v Industrial Tribunal* (1986) 1 LLJ 253, 259 (Kant) : ILR 1987 Karnataka 50, per Rama Jois J.

5 *Rajasthan SEB v IT* (2002) 1 LLN 1251 (Raj), per Keshore J.

6 *Mgmt of Bihar State Electricity Board, Patna v Workmen* (1971) 1 LLJ 389, 393 (DB).

7 *National Textile Corpn v State of Rajasthan* (1989) 1 LLN 778 (Raj) (DB), per PC Jain J.

8 *EID Parry (India) Ltd v IT, Madras* (1993) 2 LLJ 1 [LNIND 1992 MAD 89] (Mad) per Bakthavatsalam J.

9 *Mgmt of Radio Foundation Engg Ltd v State of Bihar* 1970 Lab IC 1119, 1121-1122 (Pat) (DB), per Untwalia J.

10 *Jaswant Sugar Mills Co Ltd v Labour Court* (1975) 2 LLJ 16 (All), per Gulati J.

11 *Mgmt of Bihar State Electricity Board, Patna v Workmen* (1971) 1 LLJ 389, 393 (Pat) (DB).

12 *Debarata Sen v State of West Bengal*, 1998 (4) LLN 941 (Cal).

13 *Certain Tanneries in Dindigul v Workmen* (1955) 2 LLJ 171 (LAT).

14 *Mgmt of Ambala Cantantonment Electric Supply Corpn Ltd v Workmen* 1971 Lab IC 854, 860 (P&H), per Tuli J.

15 *BR Herman & Mohatta (I) Pvt Ltd v Seventh* IT 1977 Lab IC (NOC) 13 (Cal) (DB).

16 *Workmen of Swadeshi Cotton Mills Ltd v Mgmt* 42 FLR 255, 262.

17 *Cox & Kings (Agents) Ltd v Workmen* (1977) 1 LLJ 471 [LNIND 1977 SC 142] (SC) : AIR 1977 SC 1966 : (1977) 2 SCC 705, per Sarkaria J.

18 Maxwell on *Interpretation of Statutes*, 1969, 12th ed, pp 43-44.

19 *Hindustan Motors Ltd v Janardan Singh* (2001) 4 LLN 1066 (Cal) (DB), per Hrishikesh Banerji J.

20 *Gurbhej Singh v State of Punjab* (2004) 1 LLJ 16 : (2003) 135 PLR 188 (P&H) (DB).

21 *State of Bihar v DN Ganguli* (1958) 2 LLJ 634 [LNIND 1958 SC 92], 641 (SC) : AIR 1958 SC 1018 [LNIND 1958 SC 92]: [1959] SCR 1191, per Gajendragadkar J.

22 *Maharana Mill Kamdar Union v NL Vyas* (1959) 2 LLJ 172, 176 (Bom) (DB), per Chainani CJ.

23 *Coimbatore DMW Union v Dhanalaxmi Mills Ltd* (1960) 2 LLJ 556 (Mad), per Ramachandra Ayyar J.

24 *Sital v Central Government IT* (1969) 2 LLJ 275, 280 (MP) (DB), per Pandey J.

25 *Andhra Handloom weavers' Co-operative Society v State of AP* (1963) 2 LLJ 488 (AP), per Gopalakrishnan Nair J.

26 *Workmen of Indian Cable Co Ltd v ICC Ltd* 1973 Lab IC 208, 210 (Pat) (DB), per Anwar Ahmad J.

27 *Hindustan Housing Factory Employess Union v Mgmt* (1971) 2 LLJ 222 (Del) (DB), per Hardy J.

28 *Workmen of Government Silk Weaving Factory, Mysore v PO Industrial Tribunal* (1973) 2 LLJ 144 [LNIND 1973 SC 143], 146 (SC) : AIR 1973 SC 423 : (1973) 2 SCC 134, per Vaidialingam J.

29 *Gandhidham Nagarpalika Adipur v RC Israni* (1993) 1 LLJ 432, 439 (Guj) (DB) : (1992) GLH 423, per Divecha J.

30 *Bargarh Coop Sugar Mills Ltd v PO* , IT 2002 (4) LLN 934 (Ori) (DB).

31 *Indian Bank v Central Government Industrial Tribunal* (2003) 1 LLJ 331 : (2002) 95 FLR 83 (Cal), per Seth J.

32 *Guman Singh v PO, LC,* (2003) 4 LLJ 736 (P&H), per Mittal J.

33 *Krishnankutty Nair v IT* (1957) 2 LLJ 45, 48 (Ker), per Varadaraja Iyengar J.

34 *Workmen of TR Ltd v Travancore Rayons Ltd* (1967) 1 LLJ 518, 520 (Ker), per Gopalan Nambiyar J.

35 *Maharana Mill Kamdar Union v NL Vyas* (1959) 2 LLJ 172, 176 : (1961-62) 2 FJR 155 (Bom) (DB).

36 *Sital v CCIT* (1969) 2 LLJ 275, 279-80 (MP) (DB), per Pandey J.

37 *Pandavapura SS Karkhane Ltd v State of Mysore* 1969 Lab IC 729 (Mys) (DB), per Somnath Iyer J.

38 *Glaxo Laboratories (India) Ltd v PO, LC* 1977 Lab IC 1523,1533-34 (AP) (DB), per Sheth J.

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42 *KV Kumaran v LC,* 1982 Lab IC 1241, 1243 (Ker), per Sukumaran J.

43 *Nagar Palika Haldwani v Municipal Employees Union* 1983 Lab IC (NOC) 13 (All), per SC Mathur J.

44 *Ramjas College, v LC IV, Delhi* 1987 Lab IC 1556 (Del), per Kirpal J.

45 *RB Girap v Borivali GCH Society Ltd* (1990) 2 LLJ 558, 559 (Bom), per Pendse J.

46 *Ranigunj Chemicals Works v Fourth IT,* 1998 (1) LLN 880 (884) (Cal), per Mitra, J.

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48 *P Viyapuri v PO* (1998) 3 LLN 349 (Mad), per Sathasivam J.

49 *Anil Sood v PO Labour Court* (2001) 2 LLN 611 (612) (SC) : (2001) 10 SCC 534 : (2001) 1 LLJ 1113.

50 *LML Ltd v PO, Labour Court* 2002 (2) LLN 585 [LNIND 2002 DEL 52] (Del) (DB).

51 *Surajgarh KVS Samiti v Labour Court* 2002 (2) LLN 698 (Raj), per Madan, J.

52 *Ajit Singh v PO, LC200!* (4) LLN 1165 (P&H), per Sudhalkar, J.

53 See, notes and comments under s 10(4), Caption: *Jurisdiction to give relief.*

54 *India Paper Pulp Co Ltd v India Paper Pulp Workers, Union* AIR 1949 FC 148 .

55 *Bilash Chandra Mitra v Balmer Lawrie & Co Ltd* (1953) 1 LLJ 337 [LNIND 1952 CAL 141] (Cal), per HK Bose J.

56 *KM Mukherjee v Secretary, State Bank of India* 1968 Lab IC 127 (Cal), per Basu J.

57 *All India Bank Employees' Assn v National IT* (1961) 2 LLJ 385 [LNIND 1961 SC 283], 401-02 SC, per Rajagopala Ayyangar J.

58 *Bharat Nidhi Ltd v Ex-employees* (1953) LAC 53.

59 *Jwala Bank Ltd v Shitla Prashad Singh* AIR 1950 All 309 [LNIND 1949 ALL 212], 311 (DB), per Malik CJ.

60 *Glass Workers Mazdoor Sangh v PO, IT* (2005) 4 LLJ 395 (All), per Tiwari J.

61 *Nagarcoil Electric Supply Corpn v IT* (1953) 1 LLJ 208 (TC), per Subramanya Iyer J.

62 *Western India Automobile Assn v IT* (1949) 1 LLJ 245, 246 (FC), per Mahajan J.

63 *Maharashtra SRTC v Madhukar Narayanrao* 1970 Lab IC 225, 235 (Bom) (DB), per Abhyankar J.

64 *Heavy Engineering Mazdoor Union v State of Bihar* (1969) 2 LLJ 549 [LNIND 1969 SC 121], 553 (SC), per Shelat J.

65 *Somu Kumar Chatterjee v Dist Signal TC Engineer* (1970) 2 LLJ 179, 185 (Pat) (DB), per Jha J.

66 *Madras GCE Union v Gymkhana Club* (1967) 2 LLJ 720 [LNIND 1967 SC 292] (SC), per Hidayatullah J.

67 *Workmen of Swatantra Bharat Mills Canteen v Mgmt* 1984 Lab IC 1235 (Del), per GC Jain J.

68 *Sarju Prasad v State of Bihar* 1984 Lab IC 1264, 1266 (Pat) (DB).

69 *Madras GCE Union v Gymkhana Club* (1967) 2 LLJ 720 [LNIND 1967 SC 292] (SC), per Hidayatulah J.

70 *Somu Kumar Chatterjee v District Signal TC Engineer* (1970) 2 LLJ 179 (Pat) (DB), per Jha J.

71 *Western India Automobile Assn v IT* (1949) 1 LLJ 245 -46 (FC), per Mahajan J.

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73 *Western India Automobile Assn v IT* (1949) 1 LLJ 245 -46 (FC), per Mahajan J.

74 *Budge Budge Municipality v PR Mukherjee* (1950-51) 2 FJR 80, 84 (Cal) (DB), per Harries CJ.

75 *Western India Automobile Assn v IT* (1949) 1 LLJ 245 -46 (FC), per Mahajan J.

76 *Birla Bros Ltd v Modak* (1948) ILR 2 Cal 209.

77 *Narayana Pillai v IT* (1959) 2 LLJ 182 -83 (Ker), per Vardaraja Ayyangar J.

78 *Visakhapatnam Dock Labour Board v Stevedores'Assn* (1970) 1 LLJ 46 [LNIND 1969 SC 324], 56 (SC) : AIR 1970 SC 1926 [LNIND 1969 SC 326]: (1969) 2 SCC 801 [LNIND 1969 SC 324], per Vaidialingarn J.

79 *Natwarlal Vithaldas Patel v Municipality of Vadnagar* (1965) 1 LLJ 608, 610 (Guj) (DB), per Mehta J.

80 *Mgmtof Madras Gymkhana Club v PO, Addl LC* (1986) 2 LLJ 415 -16 (Mad), per Sathiadev J.

81 *Dahingeapara Tea Estate v Workmen* (1956) 1 LLJ 187, 189 (LAT).

82 *Ramjilal Nathulal v Himabhai Mills Co Ltd* (1956) 2 LLJ 244 (LAT).

83 *Odeon Cinema v Workers of Sagar Talkies* (1954) 2 LLJ 314 [LNIND 1954 MAD 134] (Mad), per Rajagopala Ayyangar J.

84 *Kays Construction Co Pvt Ltd v Workmen* (1958) 2 LLJ 660 [LNIND 1958 SC 124] (SC), per Gajendragadkar J.

85 *Bombay Garage Ltd v IT* (1953) 1 LLJ 14 (Bom), per Tendolkar J.

86 *Bharat Bank Ltd v Employees* (1952) 2 LLJ 420 (LAT).

87 *VV Nakhte v SP Shinde* [1953] LAC 67.

88 *Bhanuvilas Theatre v Workmen* (1956) 2 LLJ 176, 178.

89 *Antony D'Souza v Sri Motichand Silk Mills* (1954) 1 LLJ 793 (LAT).

90 *Bhanuvilas Theatre v Workmen* (1956) 2 LLJ 176, 178 (LAT).

91 *Palace Theatre, Salem v LAT* (1954) 1 LLJ 635 (Mad), per Rajagopala Ayyanagar J.

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93 *Kays Comtruction Co (Pvt) Ltd v Workmen* (1958) 2 LLJ 660 [LNIND 1958 SC 124] (SC), per Gajendragadkhar J.

94 *Anakapalle CA&IS v Workmen* (1962) 2 LLJ 621 [LNIND 1962 SC 345] (SC), per Gajendragadkar J.

95 *Industrial Paper (A) LE Union v Mgmt, Assam Industrial Dev. Corpn. Ltd*, AIR 2007 SC 985 [LNIND 2007 SC 33]: AIR 2007 SC 985 [LNIND 2007 SC 33]: (2007) 3 SCC 73 [LNIND 2007 SC 33], per Pasayat J.

96 *Maharashtra Sugar Mills Ltd v State of Bombay* (1951) 2 LLJ 299 [LNIND 1951 SC 38] (SC), per Mahajan J.

97 *Bombay Dock Labour Board v Stevedores Workers* (1954) 1 LLJ 200 (LAT).

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER I Preliminary

[20][S. 2A. Dismissal, *etc.*, of an individual workman to be deemed to be an industrial dispute—

21[(1)] Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.]

22[(2) Notwithstanding anything contained in section 10, any such workman as is specified in sub-section (1) may, make an application direct to the Labour Court or Tribunal for adjudication of the dispute referred to therein after the expiry of forty-five days from the date he has made the application to the Conciliation Officer of the appropriate Government for conciliation of the dispute, and in receipt of such application the Labour Court or Tribunal shall have powers and jurisdiction to adjudicate upon the dispute, as if it were a dispute referred to it by the appropriate Government in accordance with the provisions of this Act and all the provisions of this Act shall apply in relation to such adjudication as they apply in relation to an industrial dispute referred to it by the appropriate Government.

(3) The application referred to in sub-section (2) shall be made to the Labour Court or Tribunal before the expiry of three years from the date of discharge, dismissal, retrenchment or otherwise termination of service as specified in sub-section (1).]

Analysis

Extension of the Definition of Industrial Dispute

This section has been engrafted in the Act by the Amendment Act of 1965 and it has to be read as an extension of the definition of 'industrial dispute' in s 2(k). A long line of decisions had established that an individual dispute could not *per se* be an industrial dispute, but could become one if it was taken up by a trade union or a substantial number of workmen of the establishment.[23] This position of law created hardship for individual workmen who were discharged, dismissed, retrenched or whose services were otherwise terminated when they could not find support by a union or any appreciable number of workmen to espouse their cause. This provision does away with the requirement of espousal of an individual dispute for converting it into an industrial dispute in cases where the dispute arises out of: (i) discharge, (ii) dismissal, (iii) retrenchment, or (iv) otherwise termination of services of an individual workman. By introducing the legal fiction that the dispute of an individual workman connected with or arising out of his discharge, dismissal, retrenchment or otherwise termination of his services by his employer will constitute an industrial dispute not with standing that no other workman nor any union of workmen is a party to the dispute, this provision enlarges the definition of industrial dispute. In enacting this provision, the intendment of the legislature is that a workman whose service has been terminated unlawfully by the employer, should be given relief without it being necessary for the relationship berween the employer and the whole body of employees being involved in that dispute and the dispute becoming generalised one between labour on the one hand and the employer on the other.[24] Any other type of dispute regarding an individual workman is not contemplated by s 2A[25] and will be governed by the principles of law laid down by the Supreme Court in connection with the conversion of an individual dispute into 'industrial dispute' by espousal. In *BK Sharma*, a single judge of the Allahabad High Court held

that where the service of an employee automatically comes to an end on the expiry of a fixed period for which he was employed, it would not amount to discharge, dismissal, retrenchment or termination by the employer.[26]

The Amending Act 46 of 1982,[27] has inserted sub-cl (bb) in the definition of retrenchment under s 2(oo) which excludes the 'non-renewal of contract of employment between the employer and the workmen concerned on its expiry' and the contract of employment being 'terminated under a stipulation in that behalf contained therein, from the purview of the definition of retrenchment'. The Orissa High Court has held that a dispute relating to superannuation of a workman according to the rules is not one relating to 'termination' or 'retrenchment' of the service of a workman.[28] The retirement of a workman has also been excluded from the definition of retrenchment by sub-cl (b) of s 2(oo). In a case where the workman himself terminates the contract of employment either by resigning or abandoning the job, the termination of service would not fall within the definition of retrenchment which postulates the termination of contract of employment 'by the employer'. As a measure of abundant caution, 'voluntary retirement of the workman' from the service has been specifically excluded by sub-cl (a) from the ambit of the definition of'retrenchment'. Though, the termination of service of a workman in cases excepted from the definition of 'retrenchment' in s 2(oo) may not be 'retrenchment', the question arises whether it will not be covered by the expression 'where the employer...otherwise terminates the services of an individual workman', in s 2A. The test is whether the contract of employment had been terminated by the employer or the workman himself. If the service is terminated by the employer in any manner, that case will clearly be covered by this section. In cases where the service has not been terminated by the employer, the case will not fall within the purview of this section. However, if the employer secures resignation of a workman by force or coercion against his will, in substance, it would amount to the termination of the services of the workman by the employer. Therefore, if a workman complains that he has not tendered the resignation voluntarily, but his resignation was secured under threat or coercion and by that process, termination of his service brought about, such a dispute between the individual workman and the employer would be squarely covered by the words 'where any employer...otherwise terminates the services of an individual workman' used in the definition. The question, whether in a given case the resignation was tendered voluntarily or secured under duress etc, is a question of fact.[29] But such a fact is a jurisdictional fact which should be decided first before the tribunal proceeds adjudicate the merits. Therefore, it must be decided as a preliminary issue whether the workman, in fact, resigned his job. If the workman succeeds to prove that the resignation was procured from him under pressure, coercion or threats, etc, it will no longer be a case of voluntary termination of his service by the workman himself. It will be a case of termination of the service of the workman by the employer, which will attract the provisions of s 2A. The same principles will apply to abandonment of job. If, in fact, the workman has not abandoned the job but the employer purports to treat the termination of the service on account of such abandonment, the provisions of this section will be attracted. The Patna High Court in *North Bihar Sugar Mills*, took the view that removing a workman from permanent service and allowing him to continue as a seasonal worker will tantamount to his removal from his permanent service.[30]

The cases where the contract of service lapses on the expiry of the term of employment or in terms of stipulation contained in the contract of employment, presents some difficulty because in such a case the service is neither terminated by the employer nor the workman himself. It is terminated by the mutual contract of the parties. Now by virtue of sub-cl (bb) inserted in the definition of retrenchment by the Amending Act 46 of 1982, termination of service has been taken out of the purview of 'retrenchment'. It cannot also be said that such termination is by the employer. Such termination will not fall within the purview of s 2A. This section entitles an individual workman himself, to raise an industrial dispute regarding discharge, dismissal, retrenchment or termination of his services and it will be competent for the adjudicatory authorities under the Act to deal with such dispute as an 'industrial dispute' even though there is no espousal by his fellow workmen or any union comprised of them.[31]Though this provision brings an individual dispute within the scope of the Act, it does not make any difference with respect to the raising of the dispute. For raising an industrial dispute with respect to the termination of his service, etc, the individual workman must raise the dispute with the employer by making a demand,[32] but the Madhya Pradesh High Court took the view that an individual dispute relating to discharge, dismissal, retrenchment or termination of service of the workman arises immediately after the workman is discharged, dismissed, retrenched or his service is otherwise terminated without his consent or in the face of opposition. Such an individual dispute becomes an industrial dispute and it is not necessary, to make a demand on the management for making the dispute, an industrial dispute.[33] This view is not consistent with the decision of the Supreme Court in *Sindhu Resettlement Corpn.*[34]

In *Ram Prasad Vishwakarama*, the Supreme Court held that where an individual dispute becomes an 'industrial dispute' being sponsored by a trade union or a considerable number of co-workers of the workman, the individual workman is at no stage a party to the industrial dispute independently of the union or the workmen. After the enactment of s 2A, it is not necessary that a dispute relating to the discharge, dismissal, retrenchment or otherwise termination of service of a workman must be sponsored by a trade union or a substantial number of workmen.[35] In other words, even if it is not sponsored by a trade union or a substantial number of workmen, such a dispute will be deemed to be an industrial dispute. From the use of the words 'notwithstanding that no other workman nor any union of workmen is a party to the dispute', it appears that the trade union or co-workmen are not precluded from sponsoring an individual dispute for the purpose of converting it into an industrial dispute. Thus, such a dispute can either *ipso facto* be deemed to be an industrial dispute on a

demand made by the workman himself or by espousal of the dispute by a trade union or a body of workmen. In the former case, the dispute becomes an industrial dispute as soon as the demand is made by the workman that the termination of his service should be recalled and he should be reinstated while in the latter case, it becomes an industrial dispute when the dispute is sponsored by a trade union or a substantial number of workmen and such a demand is made. There is a pertinent distinction between these two types of disputes. In the former case, the dispute is between the workman concerned and the employer while in the latter, the dispute is between the workmen as a body and their employer. In other words, the first is an individual dispute deemed to be an industrial dispute by a fiat of s 2A, while the latter dispute is a collective dispute.

The Madhya Pradesh High Court in *Mgmt of Katkona Colliery*, held that a dispute relating to the discharge, dismissal, retrenchment or otherwise termination of the service of a workman not sponsored by a trade union or a body of workmen will be industrial dispute falling within the purview of s 2A without making a demand on the employer for reinstatement because such a dispute becomes an industrial dispute immediately after the workman is discharged, dismissed, retrenched or his service is terminated without his consent on the face of his opposition. It is, therefore, not necessary in such cases to make a demand on the management for making the dispute an industrial dispute.[36] Likewise, in *Ramakrishna Mills*, the dispute relating to the dismissal of three workmen was not raised by the workmen concerned themselves with the employer but was, in fact, raised and espoused by the union of the workmen. The Madras High Court held that the demand was only that of the concerned workmen though it got projected through their union and that was how it was raised. Hence, the reference could be sustained as relating only to an individual workman.[37] In *Best* & *Crompton*, expressing a similar view, another Division Bench of Madras High Court upheld the common reference made by the government of 75 dismissals. The Bench further pointed out that reference to a wrong provision is no bar to uphold the validity of the reference in applying the correct provision of law. No litigant should be denied his legitimate rights by hyper technicalities or by the wrong quotation of the provisions of law.[38]

A single judge of the Delhi High Court in *Dunlop*, held that even if a dispute of an individual workman is referred to adjudication as a collective dispute having been espoused by a union or workmen, a workman can conduct the dispute before the tribunal to the exclusion of the union.[39] The learned single judge also justified the holding on the facts of the case. On the other hand, in *Enfield India*, the order of reference expressly stated that 'an industrial dispute had arisen between the workman, Thiru Mohan and the management of Enfield India Ltd. But in view of the fact that the union had been representing the workman before the management and the conciliation authorities, a single judge of the Madras High Court took the view that the dispute, in fact, was not between the workman and the management but it was between the workmen of the company as represented by the union and the management of the company. There was no finding that the dispute, in fact, had been sponsored by a substantial number of workmen or the union. Unless there was a valid espousal, the dispute was not of a collective character. Furthermore, an adjudicator has not the power to change or to add to the parties set out in the order of reference.[40] These decisions of the High Courts are neither warranted by the statute nor by precedent being in conflict with *Ram Prasad Vishwakarma*.

A single judge of the Allahabad High Court held that the definition of the industrial dispute in s 2(2) of the UP Industrial Disputes Act 1947, was repugnant to s 2A of the Central Act. Therefore, s 2A of the Central Act will prevail over the definition of 'industrial dispute' as contained in the State Act.[41]But a Division Bench of the same High Court took the view that the effect of amending the Central Act, introducing s 2A in it, is to amend the definition of expression 'industrial dispute' in that Act and it does not follow that the definition of the expression 'industrial dispute' in the UP Act stands automatically amended and the extended definition in the Central Act should be confined to that statute only.[42] Another single judge of that court in *Hari Fertilizers*, held that a dispute relating to the termination of the service of a workman referred to adjudication under s 2A cannot be settled by the union by entering into settlement with the management pending such adjudication without the consent of the concerned workman.[43]

'Any Dispute...Connected with or Arising out of Such Dispute Etc'

From the language of the section, it is clear that only disputes relating to 'discharge', 'dismissal' 'retrenchment', or otherwise 'termination of services' of an individual workman will fall within its purview while other disputes are not comprehended in it. Thus, where a workmen is sought to be retired at a particular date on the ground of his attaining age of superannuation which is disputed by the employee claiming that according to his real date of birth, he has not attained the age of superannuation, the dispute will fall within the purview of the definition of 'industrial dispute' in this section.[44] On the other hand, claims for wages, dearness allowance, gratuity or bonus, will not fall within the ambit of this section.[45] A single judge of the Delhi High Court[46] has taken the view that the question whether the workman concerned is also to get wages as compensation or as a condition for terminating the contract of service, is a matter which arises directly whenever his services are terminated. Furthermore, when the services of a workman are terminated, it would be expected that he would be paid wages and other charges due to him for the period he worked. Accordingly, the bonus, travelling allowance, dearness allowance due to the workman for the period he worked are also connected with the question of termination of his

service because 'when the contract of service is terminated, the workman is certainly entitled to get all remunerations due to him'.

The dispute relating to the transfer of an employee from one department to another or one place to another will not fall within purview of this section. Likewise, the disputes relating to the reduction in rank, demotion or promotion of a workman too will not fall in its purview. In all such cases, the remedy of such individual workman will only be in a civil court.[47]The machinery provided in the Industrial Disputes Act for resolution of disputes will not apply to such disputes, unless they are sponsored by a union or other workmen. In *HS Rangaramu v Karnataka SRTC* , Jain CJ., speaking for a three-judge Bench of Karnataka High Court, held that an industrial dispute arises the moment the order of dismissal or termination is passed, and that merely because the workman has a remedy against such order by way of appeal or revision, it could not be said that the said order of discharge or dismissal would not be effective until such remedy was exhausted. There is nothing like the said dispute maturing into an industrial dispute only after the aggrieved workman has exhausted the remedy of appeal and revision.[48]A Bench of the Supreme Court comprising Rajendra Babu and Shivraj Patil JJ, held that the steps taken by the governments of Karnataka and Andhra Pradesh to make a provision in the Act, enabling an individual workman to approach labour court or industrial tribunal directly without the requirement of reference by the government in a case covered by s 2A, would not be inappropriate.[49] Where the workman disputes the date of his superannuation as fixed by employer and the dispute relates to forcible termination of service before date of superannuation, such dispute of termination falls within the ambit of s 2A.[50] Dispute raised by the contract labour under s 2A(2) - as amended by the State of Andhra Pradesh - on the expiry of the labour contract is not maintainable before tribunal as there was no relationship of master and servant between contract labour and principal employer.[51] Where the dispute raised by a dismissed workman under s 2A was dismissed by the labour court for default on the part of the workman, a single judge of the AP High Court held that the subsequent raising of the dispute by the workman was not barred by *res judicata*, as the dismissal of the dispute in the first instance was for default and not on merits.[52] In yet another case relating to beedi workers, the learned judge held that s 31(2) of the Beedi and Cigar Workers (Conditions of Employment) Act 1966 does not operate as a bar to a dismissed workman, falling within the ambit of that Act, from raising a dispute under s 2A(2) of the ID Act.[53]

Application to Cases of Prior Discharge, etc

section 2A came into effect from 1 December 1965. Though the courts on the plain language of the statute are agreed that this section is not retrospective, there is conflict of opinion among different High Courts on the question: *as to whether an individual dispute of a workman which arose before the day on which this provision came into force and was not sponsored "by his fellow workmen or any union up to that date, could become an industrial dispute after the section came into force?* The conflict was set at rest by Supreme Court in *Ruston and Hornsby*, wherein it was held that it would be an industrial dispute with the meaning of s 2A and could be validl reffered for adjudication by approving the view of the Delhi and other High Courts as against that of Mysore High Court.[54]

Constitutional Validity

The constitutional validity of this section was challenged before a Full Bench of the Delhi High Court[55]on the ground that the Parliament had no power to change the meaning and concept of the expression 'industrial dispute' which had acquired a fixed meaning at the time when the Constitution was drafted and further that the amendment was repugnant to the basic scheme of the Act. The court held that the entry 22 in the list 3 of the Seventh Schedule of the Constitution includes the dispute of an individual workman and the amendment is not repugnant to the scheme of the Act. In view of this holding, the court did not express any opinion with respect to the point made out on behalf of the workmen that in any case, entry 97 of the list 1 of the Seventh Schedule of the Constitution of India would cover the amendment. A similar view has been taken by a single judge of the Punjab and Haryana High Court.[56] Likewise, a single judge of the Madras High Court held that the amendment engrafting s 2A is within the legislative competence of the Parliament under entry 22 of the list 3 of the Seventh Schedule of the Constitution.[57]The Mysore High Court also held that s 2A is not inconsistent with the object of the Act and under entry 22 the Parliament was competent to legislate upon a dispute relating to discharge, dismissal or retrenchment of an individual workman. It was also held that the section does not offend the guarantee of Art. 14 of the Constitution.[58] The Patna High Court held that s 2A is neither *ultra vires* nor does it suffer from the vice of untrammeled power of the government to make a reference nor is it discriminatory in its application.[59]

In the state of UP, there is a parallel Act known as the UP Industrial Disputes Act 1947. Both these Acts simultaneously operate in relation to industrial disputes covered by both the Acts. But the UP Act has no provision like s 2A of the Central Act. Section 12 of the UP Act preserves the power of the state government to refer any industrial dispute or matters connected therewith under the Central Act or to deal with any report or settlement in accordance with the provisions of that Act. For the removal of doubts, s 12A declares that nothing in the State Act shall be deemed to preclude the Central Government from constituting a national tribunal under the Central Act for the time being in force or any such tribunal from exercising any powers conferred upon it under that Act. In *Har Narain*, the state government in exercise of its powers

under the State Act referred an industrial dispute for adjudication under the Central Act invoking the provisions of s 2A. The High Court had to consider the question; whether s 2A of the Central Act could be invoked by the state government when it has its own enactment simultaneously operating in relation to industrial disputes? The High Court held that the provision is saved by the proviso to Art. 254 of the Constitution to operate in the State of UP, where the Central Act also is in force. By virtue of s 12 of the State Act, the state is competent to make the reference under the Central Act and to such references s 2A of the Central Act would apply.[60]As an obiter, the Bench also expressed the view that since s 2A had been added by Parliament in the Central Act which relates to a subject in the Concurrent List, it would operate on the UP Act as well. Later, a Full Bench of the High Court in *Vishnu Dass*,[61]while considering the question; whether s 2A of the Central Act would automatically be deemed to have been inserted in the UP Act also, so as to modify the definition of 'industrial dispute' contained in s 2(1) of the Act, dissented with the obiter of the Division Bench and observed that the operation of s 2A must be confined to matters governed by the Central Act and this section does not modify the definition of 'industrial dispute' in the state Act.

A Full Bench of the Andhra Pradesh High Court held that s 2A of this Act is *pro tanto* repugnant with the provisions of the Andhra Pradesh Shops and Establishment Act of 1966 because the dispute of an individual workman, in regard to termination of services, squarely falls within the field covered by ss 40 and 41 of the Andhra Act, and in view of the fact that the State Act has been assented to by the President, the provisions of that Act, relating to the termination of services of an employee of a shop establishment will prevail upon s 2A and other provisions of this Act insofar as they are attracted by reason of s 2A. But the court refrained from expressing any opinion on the legal position that would arise if the individual dispute of a workman is supported either by the union to which he belongs or in the absence of a union by a substantial number of workmen and such a matter is sought to be referred for adjudication under s 10 of this Act.[62] This question was considered by another Full Bench of the same High Court in *Brindavan Hotels*, in which a large number of workmen had been discharged from their service by the employer and their case was espoused by a union. The question was whether such a dispute was governed by the Industrial Disputes Act or by the Shops and Establishments Act? Answering the question, the High Court observed that there was no conflict between the relevant provisions of the Industrial Disputes Act and the relevant provisions of the Shops and Establishments Act. They do not operate in the same area. In other words, there are no two competing statutes in the field. It was, therefore, held that the workmen's union or a number of workmen can espouse a dispute of an individual workman only under the Industrial Disputes Act and they cannot espouse it under the Shops and Establishments Act. From these two full Bench decisions, on a comparative analysis of the relevant provisions of the two enactments, the following position emerges:

(1) if an individual workman governed by both these Acts wants to raise an individual dispute, he can do so only under the Shops and Establishments Act;

(2) if a workmen's union wants to espouse the dispute of an individual employee, it can do so only under the Industrial Disputes Act; and

(3) in the absence of a workmen's union if a number of workmen want to espouse a dispute of an individual workman, they can do so only under the Industrial Disputes Act.[63]

These two Full Bench decisions were reviewed by a five judge Bench of the court in *APSWIC Society*.[64] In this case, the controversy centered around the question of competence of the state government to refer and the jurisdiction of the labour court to adjudicate the dispute arising out of the termination of individual employees, not backed by the union or a group of workmen. In this situation, what actually was under examination was the correctness of the holding in *Visakhapatnam Dim Marketing Cooperative Society* case, and the holding in *Sri Brindavan Hotel* case relating to the legal position regarding the dispute arising out of the termination of service of workmen espoused by a union was not strictly relevant. The larger Full Bench held that there was an error in the holding of the Full Bench in *Vishakhapatnam Dist Marketing Cooperative Society* case where it held that there was a repugnancy between the State and the Central statutes as there was overlapping between ss 40 and 41 of the State Act on the one hand and s 2A of the Central Act on the other and that because the President's assent to the State Act was sought and obtained, the State Act prevailed over the Central Act under Art. 254(2) of the Constitution. The larger Bench held that the question of repugnany arises only when both the legislatures are competent to legislate in the same field with respect to one of the matters enumerated in the concurrent list in the Seventh Schedule to the Constitution; and, therefore, Art. 254(1) cannot apply unless both the union and the state laws relate to a subject specified in the concurrent list, and they occupy the same field. The scope and ambit of the proceedings available to an individual employee by virtue of s 2A of the Central Act are not identical to those available to him under ss 40 and 41 of the State Act, The object behind the provision made in ss 40 and 41 of the State Act was not to deprive the shop employee of a right or remedy available to him, but only to provide the additional forum for seeking speedy solution to the problem arising out of the termination of his service. The option is left with the workman who is aggrieved by the termination of his service. He may at his choice and convenience either pursue the remedy under s 2A of the Central Act or approach the appellate court (in case of necessity, the labour court and also in second appeal).

In *Shambhu Nath Mukherjee*, the Supreme Court discountenanced the attack on s 2A, on the ground that it is ultra vires the powers of the legislature under entry 22 in list II of the Seventh Schedule of the Constitution and that it was violative of the guarantee under Art. 14 of the Constitution, as order of reference did not *ex facie* show that it was a reference of an individual dispute under s 2A.[65] In *N Shivashankarachari*, a single judge of the Karnataka High Court held that, where the industrial dispute raised by the workman under s 2A alleging that his services were terminated on the basis of a fabricated document is pending before the labour on a reference made under s 10, a writ petition seeking an inquiry into the alleged fradulent document is not maintainable, as it is a question of fact which has to be gone into by the labour court.[66] Where the labour court recorded a finding that there were many contradictions in the statement of the workman regarding his employment on perusal of oral and documentary evidence, that he failed to establish the relationship of employer and employee with the management, and rejected the reference on that ground, the Bombay High Court held that the award of labour court did not warrant interference.[67] The NCL-II recommended that all matters pertaining to individual workers, be it termination of employment or transfer or any other matter, be determined by recourse to the grievance redressal committee, conciliation and arbitration/adjudication by the labour court. The commission further recommended that s 2A be amended by allowing individual disputes being taken up by the affected workers themselves or by TUS and collective disputes by the negotiating agent or an authorised representative of the negotiating college for resolution.[68]

Death of the Workman

In *V Bhaskaran*, a single judge of the Kerala High Court has taken the view that if after having raised the dispute, the workman dies, his legal representatives can further agitate and prosecute the dispute before the industrial authorities because, in law, a legal representative is not a different person from the deceased, but only continues the persona of the deceased. Though, in view of the death of the workman, the adjudicator may not be able to award reinstatement on holding that his dismissal was á illegal and invalid, he can award back wages and other benefits to which the workman would have been entitled if his service had not been illegally terminated. Such benefits can, therefore, be claimed by the legal representatives of the deceased workman in industrial adjudication.[69] But the Madras High Court in *F Veeramani*, dissented from this view and held that in the field of industrial adjudication governed by specific statutory provisions, there is no scope for the adjudication of a claim by the heirs or legal representatives of a deceased workman against the employer. Therefore, where the dispute referred affects an individual, the doctrine of *actio personalis moritor cum persona* is applicable.[70] This conflict was resolved by the legislature by inserting sub-s (8) in s 10 by the Amending Act 46 of 1982.[71] No proceedings pending before any adjudicatory authority in relation to an industrial dispute shall not lapse merely by reason of the death of any of the parties to the dispute being a workman and the adjudicator is enjoined to complete such proceedings and submit his award to the appropriate government. In other words, even after the death of a workman, the proceedings before a tribunal will continue and an order on merits of the rival contentions shall have to be pronounced.[72]

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20 Ins by Act 35 of 1965, s 3 (wef 1-12-1965).

21 section 2A re-numbered as sub-s (1) thereof by Act 24 of 2010, s 3 (wef 15-9-2010 *vide* S.O. 2278 (E), dated 15-9-2010).

22 Ins by Act 24 of 2010, s 3 (wef 15-9-2010 *vide* S.O. 2278 (E), dated 15-9-2010).

23 *Central Provinces Transport Services Ltd v RG Patwardhan* (1957) 1 LLJ 27 [LNIND 1956 SC 91] (SC), per Venkatarama Ayyar J.

24 *Chemicals & Fibres India Ltd v DG Bhoir (l975)* 2 LLJ 168, 170 (SC), per Alagiriswami J.

25 *Mgmt of Samyuktha Karnataka v ML Satyanarayana Rao* 1986 Lab IC 626 -27 (Kant), per Rama Jois J.

26 *BK Sharma v State of Uttar Pradesh* 1976 Lab IC 1092 (All), per KN Singh J.

27 Brought into force wef 21 August 1984.

28 *Gouri Charan Kanungo v PO, IT* 1977 Lab IC 1154, 1157 (Ori) (DB), per Acharya J.

29 *Southern Roadways Ltd, Bangalore v K Padmabhan* 1979 Lab IC 234, 236 (Kant), per Rama Jois J.

30 *North Bihar Sugar Mills Ltd v State of Bihar* 1980 Lab IC 669 (Pat) (DB), per BP Jha J.

31 *Mgmt of Gauhati Transport Assn v LC* 1969 Lab IC 1568, 1573 *(Ass* & Nag), per Goswami J.

32 *Deepak Industries Ltd v State of WB* (1975) 1 LLJ 293 [LNIND 1974 CAL 264] (Cal) (DB), per Salil K Roy Chowdhury J.

33 *Mgmt of Katkona Colliery v PO, CGIT* 1978 Lab IC 1531 (MP) (DB), per GP Singh J.

34 *Sindhu Resettlement Corpn v IT* (1968) 1 LLJ 834 [LNIND 1967 SC 268] (SC), per Bhargava J.

35 *Ram Prasad Vishwakarama v Industrial Tribunal* (1961) 1 LLJ 504 [LNIND 1960 SC 333], 507 (SC) : AIR 1961 SC 857 [LNIND 1960 SC 333]:, per Das Gupta J.

36 *Mgmt of Katkona Colliery, WCF Ltd v PO, CGIT* 1978 Lab IC 1531 (MP) (DB), per GP Singh J.

37 *Ramakrishna Mills Ltd v Govt of TN* (1984) 2 LLJ 259 [LNIND 1984 MAD 23], 266 (Mad) (DB), per Nainar Sundaram J.

38 *Workmen of Best & Crompton Ltd v Mgmt.* (1985) 1 LLJ 492, 494-95 (Mad) (DB), per Shanmukham J.

39 *Dunlop India Ltd v BD Gupta* 1975 Lab IC 702 (Del), per Rajinder Sachar J.

40 *Mgmt of Enfield India Ltd v Second Addl LC* (1981) 2 LLJ 287 (Mad), per Padmanadhan J.

41 *Vishin Das v State of Uttar Pradesh* 1971 Lab IC 769, 771 (All), per Srivastava J.

42 *Cawnpore Sugar Works Ltd v Dr BP Mohindra* (1971) 2 LLJ 169 (All) (DB), per Oak CJ.

43 *Hari Fertilizers v State of Uttar Pradesh* 1992 Lab IC 1877, 1880 (All), per Katju J.

44 *Titagarh Jute Co Ltd v Sriram Tiwari* 1979 Lab IC 513 (Cal), per Chakravorti J.

45 *Mathur Aviation v Lieutenant Governor, Delhi* (1977) 2 LLJ 255, 260 (Del), per Dalip Kapoor J.

46 *Mathur Aviation v Lieutenant Governor, Delhi* (1977) 2 LLJ 255, 259-60 (Del), per Dalip Kapur J.

47 *Rajasthan SRTC v Krishna Kant* 1995 Lab IC 2241, 2247 (SC), per Jeevan Reddy J.

48 *HS Rangaramu v Kerala SRTC* (2002) LLN 860 (Kant), per Jain CJ.

49 *Hospital Employees Union v Union of India* (2003) I LLJ 1127(SC) : (2002) 10 SCC 224.

50 *Binda Prasad Singh v PO, LC* (2003) 3 LLJ 544 (Gau) : 2004 (Suppl.) GLT 564, per Ansari J.

51 *Oil and Natural Gas Corpn Ltd v N Satyanarayana* (2003) 3 LLJ 289 (AP) : (2003) 3 ALD 711 [LNIND 2003 AP 107], per Narasimha Reddy J.

52 *Venkataiah G v IT-cum-LC* (2009) 2 LLJ 289 (AP), per Narasimha Reddy.

53 *Mohd Jani Basha v Mitra Tobacco Products* (2008) 3 LLJ 1022 (AP) : 2008 (4) ALD 519 : 2008 (4) ALT 9, per Narasimha Reddy J.

54 *Rustom and Hornsby (I) Ltd v TB Kadam* (1975) 2 LLJ 352 [LNIND 1975 SC 231], 356 (SC), per Alagiriswami J.

55 *Toshniwal Bros Pvt Ltd v PO, LC* [1969] 19 FLR 352 (Del) (FB), per Dua CJ.

56 *Atlas Cycle Industries Ltd v PN Thukral* 1971 Lab IC 203, 205 (P&H), per Bal Raj Tulli J.

57 *TV Sundaram Iyengar & Sons Pvt Ltd v State of Madras* 1970 Lab IC 203 [LNIND 1968 MAD 149]-05 (Mad), per Kailasam J.

58 *P Janardhana Shetty v Union of India* (1970) 2 LLJ 738 (Mys) (DB), per Chandrasekhar J.

59 *Tata Iron & Steel Co v L C* 1978 Lab IC 1067 (Pat) (DB).

60 *Har Narain Ashok Kumar v State of UP* 1974 Lab IC 318 (All) (DB), per Satish Chandra J.

61 *Vishnu Dass v State of Uttar Pradesh* 1974 Lab IC 1287 (All) (FB), per Jagmohan Lal J.

62 *Visakhapatnam Dist Mktg CS Ltd v Govt of AP* 1977 Lab IC 959 [LNIND 1976 AP 249], 964 (AP) (FB), per Vimadalal J.

63 *Brindavan Hotels v Conciliation Officer* 1977 Lab IC 1572 [LNIND 1977 AP 132], 1578 (AP) (FB), per Sheth J.

64 *Andhra Pradesh SWICS Ltd v LC*, 1987 Lab IC 642 (AP) (FB), per Bhaskaran CJ.

65 *Delhi Cloth & Gen Mills Ltd v Shambhu Nath Mukherjee* 1977 Lab IC 1695 [LNIND 1977 SC 280] (SC), per Goswami J.

66 *N Shivashankarachari v BMT Corpn* (2001) 4 LLN 580 (Kant), per Gururajan J.

67 *Gulab Narayan Tilekar v DV Industries* (2002) 3 LLN 707 (Bom) (DB), per Lodha J.

68 Government of India 2002, *Report of NCL-II*, Chap 13, p 46, para 6.96.

69 *V Bhaskaran v Union of India* (1982) 1 LLJ 485, 486 (Ker), per Vadakkel J.

70 *F Veeramani v Mgmt of MDCSM Society Ltd* 1983 Lab IC 687, 694 (Mad) (DB), per Ratnam J.

71 Brought into force wef 21 August 1984.

72 *Ambabai Manjunath Amin v PL Majumdar, PO, LC* (1987) 1 LLJ 36, 39 (Bom) (DB), per SK Desai J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER I Preliminary

S. 2. Definitions.—

Clause (gg): EXECUTIVE

Executive

The body to which the management of the affairs of a trade union is entrusted is the 'executive' in relation to that trade union, whether it is called as an 'executive' or by any other name. This definition is relevant in the context of s 36(1) of the Act, for the purpose of representation of the workmen.

Clause (h): FEDERAL RAILWAY

Federal Railway

Clause (h), which defined 'federal railway', was deleted by the Adaptation of Laws Orders 1950.

Clause (i): INDEPENDENT

This clause is based on s 2(d) of the repealed Trade Disputes Act 1929. The proviso was added by s 2 of the Industrial Disputes (Amendment) Act 1952. 'For the purpose of his appointment' as the chairman or a member of a board, court or tribunal, a person must be unconnected with:

(i) The industrial dispute referred to it; or

(ii) Any industry directly affected by such dispute.

This clause was clumsily drafted. The words 'for the purpose of his appointment' indicate that the chairman or other member of a board, court or tribunal, should be unconnected with 'the industrial dispute' referred to such board, court or tribunal or with 'any industry to be affected by such dispute', at the time of his appointment. The qualification of being an 'independent person' is prescribed by s 7C, for being appointed to, or to continue in the office of the presiding officer of a labour court tribunal or national tribunal. The real intention of the legislature seems to be that a person who is connected with an 'industrial dispute' or with any industry directly affected by such dispute, should not deal with or adjudicate upon such a dispute as chairman, a member or a presiding officer of a board, court of inquiry, labour court, tribunal or national tribunal, to whom such a dispute is referred. This intention has hardly been brought out by the language of this clause. To be appointed to or to continue in an office is one thing and to investigate, inquire into or adjudicate upon a particular dispute is altogether a different one. Then the definition in this clause does not refer to a labour court and the national tribunal. Further, this clause as well as s 7C do not refer to conciliation officers, who also need be independent persons, in as much as the chairman or a member of a board is required to be an 'independent person'. This definition as well as s 7C require recasting, clearly bringing out the intention of the legislature.

Proviso

This proviso is in the nature of an explanation, whereby it is clarified that merely on account of the fact that a person is a share-holder in an incorporated company, which is connected with, or is likely to be affected by, such an industrial dispute, he shall not cease to be 'independent'. He is, however, required to disclose to the 'appropriate government', the nature and extent of the shares held by him in the incorporated company as soon as he receives the order of reference of the industrial dispute, which is connected with or likely to affect such company.

Clause (j): INDUSTRY

Legislation

There was no definition of 'industry' in the Trade Disputes Act 1929. The present definition continues to be as originally enacted in the IDA. Though this definition has not undergone any amendment, it has undergone variegated judicial interpretations.

This definition is based on s 4 of the Commonwealth Conciliation and Arbitration Act 1904-25 of Australia, which reads thus:

> (i) Any business, trade, manufacture, undertaking or calling of employers on land or water;
>
> (ii) any calling, service, employment, handicraft or industrial occupation or avocation of employees on land or water; and
>
> (iii) a branch of an industry and a group of industries.

Hence, in construing the definition and opinion-making, the courts have been influenced by the Australian decisions,[1] which have been *sub rosa* all the time. Difficulty, however, in using Australian cases with a text book approach is perhaps not noticed, as in a great body of those cases the problem presented in its many facets and the approach was pragmatic.[2] The Amending Act 46 of 1982, which also amended the definition of 'industry', has been substantially brought into force wef 21 August 1984. But the definition of 'industry' has not been brought into force so far. In *Des Raj*, speaking for the court, RN Mishra J, lamented:

> Though almost six years have elapsed since the amendment came on the statute book, it has not been enforced yet. Bare Acts and commentaries on the Industrial Disputes Act have, however, brought in the new definition by deleting the old one, with a note that the new provision has yet to come into force. This situation has further added to the confusion. In the language of Krishna Iyer J, a definition 'is ordinarily, the crystallization of a legal concept, promoting precision and rounding off blurred edges but, alas, the definition in s 2(j), viewed in retrospect, has achieved the opposite.[3]

Industry

The definition of 'industry' in this clause is both exhaustive and inclusive and is ambivalently comprehensive in scope. It is in two parts. The first part says that it means any business, trade, undertaking, manufacture or calling of employees' and then goes on to say that it includes any calling, service, employment handicraft or industrial occupation or avocation of workmen.[4] Thus, one part defines it from the standpoint of the employer; the other from the standpoint of the employees. The first part of the definition gives the statutory meaning of industry, whereas the second part deliberately refers to several other items of industry and brings them in the definition in an inclusive way.[5] The first part of the definition determines an industry by reference to the occupation of the employers in respect of certain activities. The activities are specified by five words, namely, 'business', 'trade', 'undertaking', 'manufacture' or 'calling'. These words determine the scope of the word 'industry' and they describe what the cognate expression 'industrial' is intended to convey. This is the significance or denotation of the term.[6]

'Business' is a word of wide import.[7] This expression is wider than the term 'trade' and is not synonymous with it, and it means practically 'anything which is not an occupation, as distinguished from pleasure'.[8] 'Trade' is not only in the etymological or dictionary sense, but in legal usage as well, a term of a wide scope; it may mean the occupation of a smaller shopkeeper just as well as that of a commercial magnate, while it may also mean a skilled craft.[9] The word 'trade' in its primary meaning is an 'exchange of goods for goods or goods for money' and in its secondary meaning, it is 'any business carried on with a view to profiting, whether manual or mercantile, as distinguished from the liberal arts or learned professions or from agriculture'.[10] The occupation of men in buying and selling, barter or commerce, is generally considered as 'trade'. Occasionally, some work, especially skilled work, is also considered a 'trade', eg, the trade of a goldsmith. But in another sense, a 'trade' would include only persons in a particular line of business, in which persons are

employed as workmen. But the word as used in the statute must be distinguished from professions, although even professions have trade unions.[11] Though 'trade' is often used in contrast with 'profession', 'a professional worker would not ordinarily be called a tradesman, but the word 'trade' is used in the widest application to the appellation 'trade unions'.[12] But an activity, whether it is a 'trade' or a 'business', will be an 'industry', because both have been included in the definition of an industry.[13]

The word 'undertaking' is the most elastic of all the words used in the definition.[14] According to the Webster's dictionary, an 'undertaking' means 'anything undertaken or any business, work or project which one engages in or attempts as an enterprise'. The word 'undertaking' in the context of the definition, has been understood to mean 'any business or any work or project which one engages in or attempts as an enterprise, analogous to business or trade.[15] Krishna Iyer J held:

> To be analogous is to resemble in functions relevant to the subject, as between like features of two apparently different things. So, some kinship through resemblance to 'trade' or 'business' is the key to the problem...Partial similarity postulates selectivity of characteristics for comparability.[16]

'Manufacture' is a kind of a productive activity, in which the making of articles or materials, often on a large scale, is by physical labour or mechanical power.[17] The word 'calling' is again a very wide word and it means one's usual occupation, avocation, business or trade.[18] In certain cases, the word has been given very wide signification meaning 'the way in which a man passes his life'.[19] According to Krishna Iyer J:

> An industry is a continuity, an organised activity, a purposeful pursuit-not any isolated adventure, desultory excursion or casual, fleeting engagement, motivelessly undertaken. Such is the common feature of a 'trade', 'business', 'calling', 'manufacture'-mechanical or handicraft-based 'service', 'employment', industrial occupation or avocation'. The expression 'undertaking' cannot be torn off from the words whose company it keeps. If birds of a feather flock together and *noscitur* a *sociis* is a commonsense guide to the construction the definition of an industry, 'undertaking' must be read down to conform to the restrictive characteristics shared by the society of words before and after it. A wide meaning must fall in line and discordance must be excluded from a sound system'.[20]

In an Australian case, Isaacs J, speaking for the High Court of Appeal, picturesquely illustrated the terms used in the definition of 'industry' as:

> a 'business' (as a merchant), a 'trade' (as a cutler), a 'manufacture' (as a flour miller), an 'undertaking' (as a gas company), a 'calling', (as an engineer) or a 'service' (as a carrier) or an 'employment' (a general term like 'calling'—embracing some of the others, and intended to extend to vocations which might not be comprised in any of the rest), all of these expressions so far indicating the occupation in which the principal...is engaged, whether on land or water...if the occupation so described is one in which persons are employed for pay, hire, advantage, or reward, ie, as employees, then, with the exceptions stated, it is an 'industry' within the meaning of the Act.[21]

The second part views the matter from the angle of the employees and is designed to include something more than what the term primarily denotes. By this part of the definition, any 'calling', 'employment', 'handicraft', 'industrial occupation' or 'avocation' of workmen, is included in the concept of an 'industry'. This part gives an extended connotation to the word. The word 'calling' finds place in both the parts of the definition. In the first part, it refers to the employers and in the second part, to the workmen. The word 'service' in the second part is again of a very wide import. The word 'employment' brings in the contract of service between the employer and the employee.[22] The word 'handicraft' means any manual labour exercised by way of trade or for purposes of gain in or incidental to the making of any article or a part of an article.[23] The word 'avocation' is a word of wide signification, meaning the way in which a man passes his life or spends his time.[24] According to Fowler's Modern English usage, a person's avocations are the things he devotes his time to, his pursuits or engagements, in general, the affairs that he has to see. The word 'occupation' is a word of a still wider signification. In other words, what does not amount to a vocation, may amount to an occupation. The phrase 'occupation or avocation' is, however, qualified by the word 'industrial', which indicates that the 'occupation or avocation' in which the workmen are employed should be of an 'industrial character'. It is thus clear that the first part defines an industry in relation to the activities of the undertaking ie, the employer, while the second defines it in relation to the work done by the employees, thus giving an extended connotation though this part standing alone, cannot define what an is 'industry' is. Discussing the two parts of the definition of an 'industry' in *Gymkhana Club*, the Supreme Court attempted to keep the two notions concerning the employers and the employees apart and expressed the opinion that the denotation of the term

'industry' is to be found in the first part, relating to the employers and the connotation of the term is intended to include the second part relating to the workmen and concluded:

> If the activity can be described as an industry with reference to the occupation of the employer, the ambit of the industry, under the force of the second part, takes in the different kinds of activity of the employees mentioned in the second part. Bur the second part standing alone cannot define 'industry'...By the inclusive part of the definition, the labour force employed in an industry is made an integral part of the industry for purposes of industrial disputes, although an industry is ordinarily something which employers create or undertake. [25]

But later on, the court realised the necessity of qualifying these observations and in *Safdarjung Hospital*, in fact, it did qualify them in the following words:

> It is not necessary to view our definition in two parts. The definition read as a whole, denotes a collective enterprise in which employers and employees are associated. It does not exist either by employers alone or by employees alone. It exists only when there is a relationship between employers and employees, the former engaged in a business, trade, undertaking, manufacture or calling of employers and the latter engaged in any calling, service, employment, handicraft or industrial occupation or avocation. There must, therefore, be an enterprise in which the employers follow their avocation as detailed in the definition and employ workmen who follow one of the avocations detailed for workmen. The definition no doubt, seeks to define an 'industry' with reference to employers' occupation but includes the employees, for without the two, there can be no industry. An industry is only to be found when there are employers and employees, the former relying upon the services of the latter to fulfill their own occupations.[26]

In other words, the first and the second part of the definition are not to be read in isolation, as if there were different industries, but they are aspects of the occupation of both the employers and the employees in an industry. They are two counterparts of the same industry. They are the obverse and reverse of the same coin. In either case, the activity, whether of the employer or of the employees of an undertaking, has, therefore, to be determined in relation to its being a business, trade, undertaking, manufacture or calling of the employer. The words, 'calling', 'service', 'employment', 'industrial occupation' or 'avocation' of workmen, used in the second part of the definition, read with the word 'undertaking' in the first part, obviously mean much more than what is ordinarily understood by the words 'trade' or 'business'.[27] Howsoever wide the sweep of the word 'service' may be, it cannot be taken to a mean 'service howsoever rendered, in whatsoever capacity and for whatsoever reasons'.[28] Likewise, if all the words used in the second part 'are given their widest meaning, all services and all callings would come within the purview of the definition; even services rendered by a servant, purely in a personal or domestic matter, or even in a 'casual' way, would fall within the definition'.[29]Such a wide construction would over-reach the objects for which the Act was passed.[30] Hence, the second part, standing alone, cannot define an industry. In other words, an 'industry' is not to be found in every case of employment or service.[31] In the words of Hidayatullah CJI:

> The definition of industry, read as a whole, denotes a collective enterprise in which employers and employees are associated. It does not exist either by employers alone or by employees alone. It exists only when there is a relationship between employers and employees, the former engaged in a business, trade, undertaking, manufacture or calling of the employers and the latter engaged in a any calling, service, employment, handicraft or industrial occupation or avocation. There must, therefore, be an enterprise in which the employers follow their avocations as detailed in the definition and employ workmen, who follow one of the avocations detailed for workmen. The definition no doubt seeks to define 'industry' with reference to employers' occupation, but includes the employees, for without the two, there can be no industry. An industry, is only to be found when there are employers and employees, the former relying upon the services of the latter to fulfil their own occupation.[32]

The history of industrial disputes and its legislation recognise the basic concept that the activity should be organised and not one which pertains to private or personal employment.[33] In interpreting the wide words of the definition, therefore, the necessity of employing certain limitations as to exclude some callings, services or undertakings from their scope, was felt. For this purpose, the Supreme Court evolved certain tests. A graph of the cases decided by the Supreme Court, if plotted on the background of the expressions used in the two parts of the definition of an 'industry', would represent a rather zig-zag curve. Krishna Iyer J, said:

> The rather zig-zag course of the landmark cases and the tangled web of judicial thoughts', 'have perplexed one branch of the industrial law, resulting from the obfuscation of the basic concept of an 'industry' under the Industrial Disputes Act 1947.[34]

The question as to what is an 'industry', has continuously baffled and perplexed the courts. According to Bhagwati J:

> There have been various judicial ventures in this rather volatile area of the law. The Act gives a definition of an 'industry' in s 2(j) but this definition is not very vocal and it has defied analysis, so that judicial effort has been ultimately reduced merely to evolving tests by reference to characteristics regarded as essential for constituting an activity as an 'industry'. The decided cases show that these tests have not been uniform; they have been guided more by empirical rather than a strictly analytical approach. Sometimes, these tests have been liberally conceived, sometimes narrowly.[35]

Most of the decisions have centered on the expression 'undertaking' as used in the definition. The earliest case decided by the Supreme Court, on the construction of the definition, was *Banerji v Mukherjee* , which dealt with the question as to whether the activities of a municipal corporation would fall within the ambit of the definition. In this case, the court held that though municipal activity could not be truly regarded as a 'business or trade', it would fall within the scope of the expression 'undertaking'. Hence, the non-profit undertakings of the municipality were included in the concept of an industry, even if there was no private enterprise.[36] In the second case, *viz*, *Baroda Borough Municipality*,[37] the court held that branches of work that can be regarded as analogous to carrying on of a trade or business, would fall within the meaning of an industry, as given in s 2(j) of the Act. The ratio of these two decisions is that for an activity to be an industry, it is not necessary that it must be carried on by private enterprise or must be commercial and result in profit. It is sufficient that the activity is an 'undertaking' analogous to the carrying on of a trade or business and involves co-operation between the employers and the employees. This result was reached at by extending the meaning of the expression 'undertaking' to cover adventures not strictly trades or businesses, but 'objects very similar'.[38] But it is not easy to answer the questions *viz*: when can an undertaking be said to be analogous to a trade or business and what are the attributes or characteristics which it must possess in common with trade or business, in order to be regarded as analogous to trade or business? The prescient words are: 'branches of work that can be said to be analogous to the carrying out of a trade or business'. Accordingly, in this perspective, the comprehensive reach of 'analogous' activities must be measured. The similarity stressed relates to 'branches of work', and moreover, the analogy with trade or business is to be in the 'carrying out' of the economic adventure.[39] As a working principle, it has been suggested that, in order to be recognised as an undertaking analogous to trade or business, the activity must be an economic activity, in the sense that it must be productive of material goods or material services.[40] The third case pertaining to the activities of a municipal corporation was *Corporation of Nagpur*, in which the court held that a municipal corporation would be an 'industry' within the meaning of s 2(14) of the CP & Berar Industrial Disputes and Settlement Act 1947.[41]

Unlike the definition of industry in the IDA, the word 'undertaking', in this definition, is qualified by the words 'manufacturing or mining'. Therefore, the court could not press the expression 'undertaking' into service. But the municipal activity was brought within the ambit of the words 'business' or 'trade' and a distinction was drawn between the legal and municipal functions of the municipal bodies. In coming to the conclusion that the latter were analogous to business or trade, because the court observed that they were not legal, the activity was organised and a service was rendered. In discerning the import of the words 'analogous to the carrying out of a trade or business', the court emphasised the analogy in the nature of the organised activities implicit in a trade or business, rather than on equating the other activities with trade or business.[42] Thus, on the one hand, the court said that the non-legal municipal activities would fall within the expression 'business' or 'trade', as used in s 2(14) of the CP & Berar Act, while on the other hand, it said that such activities were analogous to 'business' or 'trade'. This exposition blurs the picture. In the subsequent cases, it viewed the matter a little differently and formulated further tests. The first test evolved was that an activity, business or trade is ordinarily organised. This test taken with the earlier test, that an 'undertaking' must be analogous to a 'business', 'trade' or 'calling', does not appear to widen the meaning of the term 'undertaking', but tends to narrow it down. The second test was that the activity need not necessarily be preceded by a procurement of capital in the business sense, and profit need not be a motive. Accordingly, so long as a relationship of an employer and his workmen is established with a view to the production of material goods or material services, the activity must be regarded as an undertaking analogous to trade or business.[43]

In *Hospital Mazdoor Sabha*, the court noted that the first part of the definition contains the statutory meaning and the second part means 'an enlargement of it by including other items of industry'. As a matter of fact, the expressions used in the second part are not items of industry, but are aspects of the occupation of the employees, which are intended to be an integral part of an industry, for the purposes of industrial disputes. The test that an 'industry' is 'an economic activity' involving an investment of capital and is systematically carried on for profit, for the production or sale of goods, by the employment of labour, was also discarded because a profit motive and an investment of capital were considered unessential. In the case of undertakings run by the government, a further inquiry was suggested, *viz*: 'Can such activity be carried on by a private individual or a group of individuals'? In view of the affirmative answer to this query in the case of hospitals, it was held that a hospital is an 'industry', even if it is run by the government without a profit motive and with

public funds. While determining the question as to whether a particular activity is an 'industry' or not, the questions as to who conducts the activity or whether it is for profit were considered irrelevant. However, it was emphasised that for an 'undertaking', to be an 'industry', it must be analogous to trade or business. But the court recognised that a line must be drawn to exclude some 'callings', 'services', and 'undertakings' from the gambit of the definition of industry. Hence, domestic, personal or casual services were excluded from the definition and examples were given of such services. In this case, though the court rejected the application of the principle of *noscitur a sociis* while interpreting the words of wide amplitude, used in the definition of an 'industry', in reality, it applied this principle to constitute the rationale for the exceptions carried out by it.[44]

Distinguishing the exceptions, the court laid down that an activity, systematically or habitually undertaken for the production or distribution of goods or for rendering material services to the community at large or a part of such community, with the help of employees, is an undertaking. In this way, the connection between a trade and business on the one hand and an undertaking on the other, was established, which seems to indicate that the expression 'undertaking' must take its colour from the other expressions. An industry was thus said to involve co-operation between the employer and the employees, for the object of satisfying material human needs, though not for oneself or for pleasure, nor necessarily for profit. As a matter of fact, there has been a continuous consensus on the point that a lack of business and profit motive or of a capital investment, would not take an activity out of the sweep of 'industry', if other conditions are satisfied.[45] It is the activity in question which attracts the definition and the absence of the investment of any capital or the fact that the activity is or is not conducted for a profit motive, would not make any material difference. Conversely, the mere existence of a profit motive will not necessarily convert the activity into an 'industry', if the other tests are not satisfied.[46] Likewise, the doctrine of *quid pro quo* can have no application for determining the question as to whether an activity is an industry or not. In other words, a consideration for money while providing the services is not an essential characteristic of an 'industry' in a modern state.[47]

In the next case, *Ahmedabad Textile Research Assn,* the court held that the activity of the association was an 'industry' because it was an providing material services to a part of the community, was carried on with the help of employees, was organised in a manner similar to that in a trade or business and there was co-operation between the employers and the employees. For the first time, a fresh test was added: that the partnership should only be an association between the employers and the employees, and the employees should have no rights in the results of their labour or in the nature of the business or trade.[48] In the next case, ie, *National Union of Commercial Employees*, where the case satisfied the tests so far enumerated, a new test was added: that the association of capital and labour must be direct and essential. The services of a solicitor were regarded as those of an individual, depending upon his personal qualifications and ability, to which the employees did not contribute. The contribution of the employees in the case of a solicitor's firm, it was held, had no direct or essential nexus with the advice or services rendered by the solicitor. In this way, the liberal professions were excluded from the gambit of the definition. The reasons given by the court for excluding the liberal professions from the ambit of the wide words used in the definition of an industry were: the doctrine of direct co-operation and the special features of liberal professions.[49] At this point, the court started realising the difficulty of laying down tests from case to case. In the next case, ie, *Harinagar Cane Farm*, where a cane farm was purchased by a sugar factory and worked as a department for the agricultural operations of that firm, it was held to be an industry on the facts of the case. However, it was held that agriculture, under all circumstances, could not be called an industry.[50] Thus, it would appear that the court reversed its method of looking for tests from other cases and referred to them only after it had reached its conclusion on the facts of the case, observing that the court must refrain from laying down unduly broad or categorical propositions.

In *University of Delhi*, the question that came before the court was: whether the bus drivers employed by the Delhi University were workmen, and this question, in its turn, depended upon the jurisdictional question *viz*: whether the educational activity of the Delhi University would be an industry or not. Narrowing down the concept of 'service', the court held that educational institutions would not fall within the meaning of 'industry', because their aim was education and the teachers' profession was not to be equated to that of industrial Workers.[51] The court, however, reiterated that this must not be understood to be a general proposition laid down by it. Thus, though the words used in the definition of an industry, should have been given some definite meaning, they were made subservient to the tests laid down in the earlier dicta, which disclose a procrustean approach to the problem. Since the social norms are not static, the legal norms are not static either. Hence, in the exigencies in which the earlier tests were found unsatisfactory in covering the new situations, the court created new tests. For instance, the emphasis resulting from the extension of the definition in its latter part, to include the services of employees, received little recognition in the later cases. Too much insistence upon a partnership between employers and employees is evident in the case of *National Union of Commercial Employees* (supra), and too little in that of *Ahmedabad Textile Research Association* (supra).

As innovations of new tests in new fact-situations started blurring the picture, a fresh look at the matter became necessary. Hence, in *Gymkhana Cub*, the court reviewed all the earlier cases and made its own comments on them. The main question in the case was: whether the activities of the Club which was a members' club, fell within the definition of an 'industry'?

The claim was based on the contentions that the club was organised as an industry, as it was organised on a vast scale, with multifarious activities; that facilities of accommodation, catering, sale of alcoholic and non-alcoholic beverages, games, etc. were provided; that the club was running parties at which guests were frequently entertained; and that the club had established reciprocal arrangements with other clubs, for its members. Dealing with the above question, the court proceeded to notice the definitions of an 'employer' as given in s 2(g) and 'industrial disputes', in s 2(k) and also analysed and ascribed meanings to the constituent terms used in the definition of an 'industry' in s 2(k). Speaking for the court, Hidayatullah J summed up the principles, settled by the earlier dicta, in the following words:

> The principles so far settled, come to this: Every human activity in which enters the relationship of employers and employees, is not necessarily creative of an industry. Personal services rendered by domestic and other servants, administrative services of public officials, services in aid of occupations of professional men, such as doctors and lawyers, etc, employment of teachers and so on, may result in relationships in which there are employers on the one side and the employees on the other, but they must be excluded because they do not come within the denotation of the term 'industry. ... Where the activity is to be considered as an industry, it must not be casual, but must be distinctly systematic. The work for which labour of workmen is required, must be productive and the workmen must be following an employment, calling or industry avocation. The salient fact in the context is that the workmen are not their own masters, but render service at the behest of the masters. This follows from the second part of the definition of industry. Then again, when private individuals are the employers, the industry is run with capital and with a view to profits. These two circumstances may not exist when government or a local authority enters upon business, trade, manufacture or an undertaking, analogous to trade. … Industry is the nexus between employers and employees and it is the nexus which brings two distinct bodies together to produce a result. We do not think that the test that the workmen must not share in the product of their labours, adopted in one case, can be regarded as universal. There may be occasions when the workmen may receive a share of the produce, either as part of their wages or as bonus or as a benefit.[52]

Thus, having laid down the principles for determining as to what an industry is, the court proceeded to discuss the question of whether the club *viz*, the Madras Gymkhana Club, which was a member's club, was an 'industry'. It was held that though the activity of the club may be falling under the second part of the definition in as much as the work of the club is conducted with the aid of the employees, who follow a 'calling' or an 'avocation', it cannot be described as a 'trade', 'business', 'manufacture' or 'calling' of the members of the managing committees of the club. It was also held that the activity of the club was not an 'undertaking' which was analogous to trade or business, which element does not exist in a members' club. The members' club, therefore, was held not to be an industry. The tests laid down in this case were followed by the court in *Cricket Club of India*, without any further gloss. In this case, the club was incorporated as a company, but in view of the fact that it was not like an ordinary company, constituted for the purpose of carrying on some business, the court said that the club in fact, was a members' club and all services provided in the club for the members had to be treated as the activities of a self-serving institution.[53] A Bench of six judges of the Supreme Court, in *Safdarjung Hospital*, observed that in such cases, particularly in *Gymkhana Club*, it is the kind of establishment which the organisation has, with which the court is concerned. However, as all the earlier cases had been considered in *Gymkhana Club*, the court did not find it necessary to refer to those cases and observed that:

> ... there must be first established a relationship of employers and employees associating together, the former following a trade, business, manufacture, undertaking or calling of employers, in the production of material goods and material services and the latter following any calling, service, employment, handicraft, or industrial occupation or avocation of workmen, in aid of the employers' enterprise. [54]

In *Bombay Pinjrapol*, the facts disclosed that: (a) the value of the milk supplied to the sick and infirm cattle was infinitesimal compared to that sold in the market; (b) the expenses incurred in connection with the treatment of the sick and infirm animals were also negligible compared to the total expenses of the institution; and (c) the number of men employed for such treatment was very small, at all times. The mere fact, therefore, that the Pinjrapol had never purchased milch cows or stud bulls, except for one, made no difference to the determination of the question as to whether their activity of maintaining the cows and bulls could be considered only as an investment. On these facts, it was held that the activities carried on by the Pinjrapol constituted an 'industry'.[55] The objects of the trust from which the Pinjrapol was created were not considered relevant while determining the question whether the activities of the Pinjrapol constituted an industry or not. In *Indian Chambers of Commerce & Industry*, in view of the principles crystallised in the earlier cases, the court observed that there was no warrant to allow any other element to be added to the criteria already laid down for determining what an 'industry' is, and accentuated on the test of systematic activity and co-operation between the employers and the employees, resulting in production and material services.[56] The apparent divergence in judicial dicta became pronounced in the majority judgment in *Indian Standards Institution*, in which the court was confronted with the question as to whether the activities of the Indian Standards Institution, which was registered as a society under the Societies Registration Act and

was established for fixing the Indian Standards, would fall within the ambit of the definition of an 'industry'.[57] In view of the law stated by the court in *Madras Gymkhana*, the tribunal held that the institution was not an 'industry' and hence, the reference was not competent. In appeal, Alagiriswami J, in his dissenting opinion, contented himself by adhering to the rationale of *Madras Gymkhana* and *Safdarjung*. But Bhagwati J, who delivered the majority opinion, preferred to have a second look on *Hospital Mazdoor Sabha*, *Madras Gymkhana* and *Safdarjung* and summarised the law in the following words:

> To summarise, an activity can be regarded as an 'industry' within the meaning of s 2(j), only if there is a relationship of an employer and employees and the former is engaged in a 'business', 'trade', 'undertaking', 'manufacture' or 'calling of employers' and the latter, 'in any calling, service, employment, handicraft or industrial occupation or avocation'. Though 'undertaking' is a word of large import and it means anything undertaken or any project or enterprise, in the context in which it occurs, it must be read as meaning an undertaking analogous to trade or business. In order that an activity may be regarded as an undertaking analogous to trade or business, it must be organised or arranged in a manner in which trade or business is generally organised or arranged. It must not be casual, nor must it be for oneself or for pleasure. And it must rest on co-operation between the employer and employees, who associate together with a view to produce, sell or distribute material goods or material services. It is entirely irrelevant whether or not there is a profit motive or an investment of capital in such activity. Even without these two features, an activity can be an undertaking analogous to trade or business. It is also immaterial whether 'its objects are charitable or that it does not make profits or even where profits are made, they are not distributed amongst the members, or that its activity is subsidised by the government.' Again, it is not necessary that 'the employer must always be a private individual ...The Act, in terms, contemplates cases of industrial disputes where the government or a local authority or a public utility service may be the employer. … It also makes no difference that the material services rendered by the undertaking are in public interest or not. The concept of public interest in a modern welfare state, where new social values are fast emerging and the old are dying out, is indeed to be so wide and so broad and comprehensive in its spectrum and range, that many activities which admittedly fall within the category of 'industry', are clearly designed to subserve public interest. In fact, whenever any industry is carried on by the government, it would be in public interest, for the government can act only in public interest. Whether an activity is carried on in public interest or not can, therefore, never be a criterion for determining its character as an industry.[58]

This deviation from the dicta of *Madras Gymkhana* and *Safdarjung Hospital* provided the background for referring the question of the interpretation of the definition of 'industry' to a seven-judge Bench in *Bangalore Water Supply*.[59] In this case, in an application under s 33C(2), the management of the Board, took a preliminary objection that the board being a statutory body, discharging the regal functions of the state, was not an 'industry' in view of the ratio of the *Madras Gymkhana and Safdarjung Hospital* cases. The labour court rejected the objection and the aggrieved management appealed to the Supreme Court, by special leave. The three-judge Bench which initially commenced the hearing, felt it necessary to place the matter before the chief justice, for consideration by a larger Bench. Accordingly, the appeal was heard by a seven-judge Bench. The leading judgment was delivered by Krishna Iyer J for himself, Bhagwati and Desai JJ on 21 February 1978, while Beg CJI, in a separate concurring judgment, endorsed the majority decision in giving the widest possible amplitude to the words used in the definition and rejecting the rules of *noscitur a sociis* as well as *ejusdem generis* in interpreting the definition of 'industry'. But on that day, Chandrachud J (as he then was), pronounced an order on behalf of himself, Jaswant Singh and Tulzapurkar JJ, agreeing that the appeal should be dismissed. However, he further observed that the area of concurrence or divergence with the rest of the judgment will, if necessary, be indicated later. On 7 April 1978, Jaswant Singh J, delivered the opinion for himself and Tulzapurkar J, agreeing that the appeal should be dismissed, but indicating the area of their divergence. The learned judges expressed their sense of dismay on the earlier dicta, observing thus:

> we have struggled to find out its true scope and ambit in the light of the plethora of decisions of this court, which have been laying down fresh tests from time to time, making our task an uphill one.

They applied the principle of *noscitur a sociis* to the definition and observed:

> Expressed differently, it means that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it, we are of the view that, despite the width of the definition, it could not be the intention of the legislature that categories 2 and 3 of the charities alluded to by our learned brother Krishna Iyer in his judgment, hospitals run on charitable basis or as a part of the functions of the government or local bodies, like municipalities and educational and research institutions, whether run by private entities or by government, and liberal and learned professions like that of doctors, lawyers and teachers, the pursuit of which is dependent upon an individual's own education, intellectual attainments and special expertise, should fall within the pale of the definition. We are inclined to think that the definition is limited to those activities systematically or habitually undertaken on commercial lines, by private entrepreneurs, with the co-operation of employees, for the production or distribution of

> goods or for the rendering of material services to the community at large or a part of such community. It is needless to emphasise that in the case of liberal professions, the contribution of the usual type of employees employed by the professionals, to the value of the end product (*viz*, the advice and services rendered to the client) is so marginal that the end product cannot be regarded as the fruit of the co-operation between the professional and his employees.[60]

But on that day, Chandrachud CJI (as he had by then become) also delivered his opinion, expressing his disagreement with the area of divergence delineated in the judgment of Jaswant Singh J. The chief justice not only endorsed the opinion of Krishna Iyer J, but seems to have gone a step further by discarding the principle of *noscitur a sociis* in interpreting the words used in the definition of 'industry'. He expressed dissent with certain activities being treated as falling outside the definition in the *Hospital Mazdoor Sabha* case. He went to the extent of saying that even the state's regal activity will not fall outside the definition of an 'industry', But in view of the problem of the application of the definition being too policy-oriented to be satisfactorily settled by judicial decisions, the Chief Justice recommended that the Parliament must step in and legislate in a manner which will leave no doubt as to its intention, as 'that alone can afford a satisfactory solution to the question which has agitated and perplexed the judiciary at all levels'.[61] In his leading judgment, Krishna Iyer J, had in theory accepted the application of the principle of *noscitur a sociis*, while interpreting the words used in the definition of an 'industry' in observing:

> If birds of a feather flock together and *noscitur a sociis* is a common sense guide to construction, 'undertaking' must be read down to conform to the restrictive characteristic shared by the society of words before and after. Nobody will torture 'undertaking' in Section 2(j) to mean meditation or *musheira*, which are spiritual and aesthetic undertakings. Wide meanings must fall in line and discordance must be excluded from a sound system.[62]

But in application, he excepted very few categories from the ambit of the definition and discarded the tests laid down in the earlier dicta. It is not possible to understand as to how the principle of *noscitur a sociis* can be partially applied. If the principle is not applied, then there is no logical justification for the categories excepted by Krishna Iyer J in his judgment. Unless the principle is applied, even the services of domestic servants cannot be excluded from the definition of 'industry'. He appears to be conscious of the incongruity in the earlier dicta and the consequences of giving full meaning to the words used in the definition. That is why he indicated his frustration with the present definition and recommended legislative reform. He observed:

> So, the parity is in the *modus operandi* in the working-not in the purpose of the project, nor in the disposal of the proceeds, but in the organization of the venture, including the relations between the two limbs, *viz*, labour and management. If the mutual relations, the method of employment and the process of cooperation in carrying out of the work bear close resemblance to the organization, method, remuneration, relationship of employer and employee and the like, then it is an industry, otherwise not.[63]

In the leading judgment, Krishna Iyer J has, with a crusader's zeal and vehemence, reviewed the earlier dicta on the interpretation of the wide words encompassed in the definition, 'hopefully to abolish blurred edges, illumine penumbral areas' and overrule what the court regards as wrong. Then, he proceeded to formulate positively and negatively, decisive principles for identifying an 'industry' under the Act, which would be authoritative until overruled by a larger Bench or superseded by the legislative branch, which may best be set out in his own words:

I. 'Industry', as defined in section 2(j) and explained in *Banerji* case,[64] has a wide import.

   (a) Where there is a (i) systematic activity, (ii) organised by co-operation between employer and employee (the direct and substantial element is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss, ie, making, on a large scale, prasad or food) *prima facie*, there is an 'industry' in that enterprise.

   (b) Absence of profit motive or gainful objective is irrelevant, be the venture in public, joint, private or other sector.

   (c) The true focus is functional and the decisive test is the nature of the activity, with special emphasis on the employer-employee relations.

   (d) If the organisation is a trade or business, it does not cease to be one because philanthropy animating the undertaking.

II. Although section 2(j) uses words of the widest amplitude in its two limbs, the re-meaning cannot be magnified to overreach itself

(a) 'Undertaking' must suffer a contextual and associational shrinkage, as explained in *Banerji* and in this judgment; so also the words, service, calling and the like. This yields the inference that all organised activity, possessing the triple elements in I (supra), although not a trade or business, may still be an 'industry' provided the nature of the activity, *viz*, the employer-employee basis, bears resemblance to what we find in a trade or business. This takes into the fold, 'industry' undertakings, callings and services, adventures 'analogous to the carrying on of trade or business'. All features, other than the methodology of carrying on the activity, *viz*, in organising the co-operation between employer and employee, may be dissimilar. It does not matter if on the employment terms, there is analogy.

III. Application of these guidelines should not stop short of their logical reach by the invocation of creeds, cults or inner sense of incongruity or outer sense of motivation, for or resultant of the economic operations. The ideology of the Act being industrial peace, regulation and resolution of industrial disputes between employer and workmen, the range of this statutory ideology must inform the reach of the statutory definition. Nothing less, nothing more.

(a) The consequences are: (i) professions, (ii) clubs, (iii) education institutions, (iv) co-operatives, (v) research institutes, (vi) charitable projects and (vii) other kindred adventures, if they fulfil the triple tests listed in I (supra), cannot be exempted from the scope of section 2(j).

(b) A restricted category of professions, clubs, co-operatives and even *gurukuls* and little research labs, may qualify for exemption if they are simple ventures; substantially, and going by the dominant nature criterion, substantively, no employees are entertained but in minimal matters; and marginal employees are hired without destroying the non-employee character of the unit. If, in a pious or altruistic mission, many employ themselves, free or for small honoraria or like return, mainly drawn by sharing in the purpose or cause, such as lawyers volunteering to run a free legal services clinic or doctors serving in their spare hours, in a free medical center or ashramites working at the bidding of the holiness, divinity or like central personality, and the services are supplied free or at nominal cost and those who serve are not engaged for remuneration or on the basis of master and servant relationship, then, the institution is not an industry even if stray servants, manual or technical, are hired. Such eleemosynary or like undertakings alone are exempt-not any other generosity, compassion, developmental passion or project.

IV. The dominant nature test:

(a) Where a complex of activities, some of which qualify for exemption, others do not, involves employees in the total undertaking, some of whom are not 'workmen', as in the *University of Delhi* case[65] or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments, as explained in the *Corpn of Nagpur*,[66] will be the true test. The whole undertaking will be an 'industry', although those who are not 'workmen' by definition, may not benefit by the status.

(b) Notwithstanding the previous clauses, sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies.

(c) Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within section 2(j).

(d) Constitutional and competently enacted legislative provisions may remove from the scope of the Act categories which otherwise may be covered thereby.

V. We overrule the *Safdarjung Hospital* case,[67] the *Solicitors'* case,[68] the *Gymkhana* case,[69] the *Delhi University* case,[70] the *Dhanrajgiryi Hospital* case,[71] and other rulings whose ratio runs counter to the principles enunciated above, and the *Hospital Mazdoor Sabha* case,[72] is hereby rehabilitated.

In the light of the fact that several of the earlier decisions of the Supreme Court, which held that: (i) Hospitals run by Government - as in the case of *Safdarjung Hospital*, [73] (ii) Solicitors firms - as *National Union of Commercial Employees*,[74] (iii) Clubs - as in the case of *Madras Gymkhana Club*,[75]*Cricket Club of India*,[76] etc., (iv) Educational Institutions - as that of *University of Delhi*,[77] are not industries, were overruled comprehensively in *Bangalore Water Supply*, by a seven-Judge Bench, which was the largest Bench ever sat to decide the question, the said cases are not being discussed here, as the law laid down therein is no longer good law post-*Bangalore Water Supply*. Any reference made to them in the following paragraphs is for the limited purpose of analysis and, in passing, according as the context warranted.

It is obvious that even after the *Bangalore Water Supply* decision, the judges themselves have not been satisfied with the interpretation of the definition. The need for legislative reform, has been accentuated by all the judges. In *Chief Conservator of Forests*,[78] a suggestion was made to the court to reconsider the holding in the *Bangalore Water Supply and*

Sewerage Board case before a three judge Bench, which was discountenanced without much ado.

Material Services

In *FICCI*, holding that the several activities of the Federation of Indian Chambers of Commerce and Industry were in the nature of material services to the business community, which were rendered with the co-operation of its workmen and as such, these activities fell within the ambit of the definition of 'industry'.[79] In *Bangalore Water Supply* (supra), the court held that since the professions cannot be excluded from industry, the services rendered for the professional persons must be 'material services'. However, so far, there is a consensus of dicta on the point that the services rendered by domestic and other servants are not 'material services'. The activities of the National Remote Sensing Agency, a research institution, mainly rendering consultancy services or survey facilities, *viz*, the carrying out of surveys by using remote sensing technology, for locating various natural resources, for agriculture, hydrology, meteorology, fisheries, minerals, oil, soils, environmental monitoring, forestry, ocean resources, topography, land sources and crop diseases, and other services, like surveillance and distribution of material to institutions and persons, have been held to be 'material services'.[80] In *Umashankar Jaswal*, a single judge of Bombay High Court held that a small up-marketing business activity, carried on by a petty businessman, could not be termed as a systematic activity, organised by the cooperation between the employer and the employee, for the distribution of goods, and hence, it would not fall within the definition of an 'industry'.[81]

Various Activities

Regal and Sovereign Functions of the State

After the decision of the Supreme Court in *Bangalore WSSB* (supra), the question to be asked is not what is an industry, but what is not an industry. Despite their efforts to find a working formula for determining as to what activity is an industry and what is not, practically all judges have cried in frustration for legislative guidance. The Act in terms, contemplates cases of 'industrial disputes' where the government or a local authority or a public utility service may be the employers. The expansion of the governmental or municipal activity, in fields of productive industry, is a feature of the developing welfare states. This is considered necessary because it leads to welfare, without exploitation of workmen and makes the production of goods and material services cheaper by eliminating profit. Government and local authorities Act as individuals do and the policy of the Act is to put the government and local bodies at par with private individuals. But the operations of the government which are of administrative or governmental character, cannot be regarded as an industry. Likewise, the local authorities also cannot be regarded as an industry, unless they produce goods or render material services and do not share by delegation, in governmental functions or functions incidental thereto.[82]

The regal power of the State has acquired a definite connotation. Lord Watson, in *Richard Coomber*, described such functions as the 'administration of justice, maintenance of order and repression of crime, as among the primary and inalienable functions of a constitutional government.[83] Isaacs J of the HCA of Australia, in his dissenting judgment in the *School Teachers' Assn*, concisely stated that regal functions are inescapable and inalienable. Such are the legislative powers, the administration of the laws, the exercise of the judicial power. This statement of law clearly marks out the ambit of regal functions, as distinguished from the other powers of the state.[84] Relying on this statement, in *Corpn of Nagpur* (supra), the Supreme Court observed that it could not have been in the contemplation of the legislature, to bring in the regal functions of the state within the definition of 'industry' and thus confer jurisdiction on the industrial tribunal to decide disputes in respect thereof the activities of the government, which can be properly described as regal or sovereign activities, are therefore, outside the scope of industry. In *Hospital Mazdoor Sabha* (supra) the court adumbrated a new test which required the court to determine whether such activity could be carried on by a private individual or a group of individuals. If a business or activity could not be carried on by a private individual or a group of individuals, it would not be an industry, while if it could be, it might fall within the scope of an 'industry'. Since a hospital run by the government, can also be run by a private party, it is an 'industry', even if there is no profit motive in the case of a government run hospital. This test of regal and non-regal functions of the state was reiterated by Subba Rao J in *Corpn of City of Nagpur*. But this test was rejected by Hidayatullah J in *Gymkhana Club*, with the observation:

> ...but it is not enlightening, because there is hardly any activity which private enterprise cannot carry on ...Even the infrastructure of Adam Smith can be provided by private enterprise. The East India Company did both.[85]

A priori, in *Safdarjung* (supra), the learned judge held that the Safdarjung Hospital was not an 'industry' because it was run by the government. The obvious consequence of this holding was that any activity carried on by the government, whether regal or non-regal, would be *de hors* the definition of 'industry', but a majority of the three judge Bench, in *Indian Standards Institution* (supra), relied more on *Hospital Mazdoor Sabha* than on *Safdarjung*, while holding that the *Indian Standards Institution* which was 'run by the Government of India, is an industry'. In *Bangalore Water Supply* (supra), the

court was not directly concerned with the categories of employees who came under departments charged with the responsibility for 'essential constitutional functions of the government', while formulating the principles for determining whether it was an industry. In this connection the court observed:

> ...sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies'. Even in departments discharging sovereign functions, if there are units, which are 'industry' and they are substantially severable, then they can be considered to come within s 2(j). (at p. 488)

As to which function could be, and should be, taken as a regal or sovereign function, in *Chief Conservator* (supra), the Supreme Court observed that the dichotomy of the labels such as 'sovereign' and 'non sovereign' or 'regal' or 'non-regal', 'state functions' or 'governmental functions', really does not exist. Therefore, extending the concept of 'sovereign functions', so to include all welfare activities, will erode the ratio of *Bangalore Water Supply*. Hence, except the strictly understood sovereign functions, other activities of the state, such as welfare activities, would fall within the purview of the definition of 'industry'; 'and not only this, even within the wider circle of sovereign functions, there may be an inner circle encompassing some units which could be considered as 'industry', if substantially severable'. Thus, these decisions have not only brought the non-regal functions of the state back into the fold of 'industry', but have also applied the doctrine of severability to the departments of the state discharging regal functions. In *All India Radio*, the Supreme Court held that the functions carried on by the All India Radio and Doordarshan could not be said to be confined to sovereign functions, as they carry on commercial activity for profit, by getting commercial advertisements telecast or broadcast through various *kendras* and stations for a fee.[86] Consequently, All India Radio and Doordarshan would fall under the definition of 'industry'. A Full Bench of the Punjab and Haryana High Court, in *Kuldip Singh*, categorized the functions of the state into four categories *viz*:

(i) the sovereign or the regal functions of the state, which are the primary and inalienable rights of a constitutional government;

(ii) economic adventures clearly partaking the nature of trade and business, undertaken by it as part of its welfare activities;

(iii) organised activity not stamped with the total indicia of business, yet bearing a resemblance to or being analogous to trade and business; and

(iv) the residuary organised governmental activity which may not come within the ambit of the aforesaid three categories.[87]

Of these categories, the Full Bench held that the first and the last categories will not fall within the four corners of the definition of 'industry', while the second and the third would. In this case, the court was concerned with the question as to whether the activity of the state, with reference to construction, establishment and maintenance of the national and state highways can be brought within the definition of 'industry'. The court held that the activity is essentially a governmental function and is in no way even remotely analogous to trade or business. Hence, it cannot possibly come within the ambit of an 'industry'. In *Sub-Divisional Inspector of Post*, a two-judge Bench of the Supreme Court held that the functions of the postal department are a part of the sovereign functions of the state and the postal department is, therefore, not an 'industry' within the definition of s 2(j) of the Act.[88] However, in *Bombay Telephone Canteen Employees Assn*, dealing with the question as to whether the telecommunication department of the Government of India is an 'industry' within the meaning of s 2(j), another two judge Bench presided over by the same learned judge, deviated from 'the dominant nature test' with the observation that 'the consequence is catastrophic and would give a *carte blanche* power with *laissez faire* legitimacy, which was buried fathoms deep under the lethal blow of Art. 14 of the Constitution, which assures to every person, a just, fair and reasonable procedure before terminating the services of an employee'.[89] Both the above decisions rendered in *Sub-Divisional Inspector*, and *Bombay Telephone Canteen Employees*, were overruled by a three-judge Bench in *Srinivasan Rao*, in which the court observed that, since the amended definition of an 'industry', was not brought into force, the law stated by it in the *Bangalore Water Supply*, still held the field. Applying the 'dominant nature test', the court observed that, as a matter of judicial discipline, it was not permissible for it to take a view contrary to that of *Bangalore Water Supply*. It is significant to note that consequent to the decision in *Bangalore Water Supply*, the Parliament did amend the definition of 'industry' in 1982. The amended definition however, was sacrificed at the altar of political expediency.[90] In *HR Thakur*, a single judge of the Bombay High Court held that the telecom factory established by the Government of India, would fall within the definition of 'industry'.[91]

On the question as to whether the irrigation department of a state government is an industry, a two-judge Bench of the Supreme Court, in *Des Raj* (supra), by applying 'the dominant nature test', held that on the facts found in the case, the irrigation department clearly came within the ambit of industry. Contrary to this, in *K Somasetty*, another two-judge Bench

of the court held that the irrigation department, being a regal function, is not an industry.[92] The law laid down by the court in *Des Raj* is correct and it is also sustainable on the rationale of the decision in *Srinivasa Rao.*

Thus in so far as the legal status of 'irrigation' department is concerned, we are saddled with two diametrically opposite decisions given by two coordinate Benches of Supreme Court in *Des Raj* and *Somasetty* (supra). A single judge of Bombay High Court held that that the project of the irrigation department of Maharashtra is an industry.[93] The following two cases decided by Gujarat High Court richly demonstrate the confusion and inconsistency infused by the Supreme Court on the legal status of 'irrigation' department. On the question whether 'irrigation' department of Gujarat State is an 'industry', two Benches of Gujarat High Court - one single judge and the other Division Bench - expressed two diametrically opposite views. In *Maniben Viraji*, a single judge held that 'irrigation' department of the State was an industry,[94] while Shethna J (for self and Dave, J.), held in *Deenanji Bidhaji Thakore*, that 'irrigation' department was not an industry.[95]*Strangely, both these decisions were delivered by the same High Court on the same day, ie, 9th April 2003*. In the latter case, counsel for respondent-workman drew the attention of the Bench to the apparent conflict between the two decisions rendered by the Supreme Court in *Des Raj* and *Somasetty* (supra). The Division Bench held that irrigation department was not an industry. A single judge of Rajasthan High Court held that the '*Women and Child Development*' department - *Neem ka Thana* - of the State Government is an industry.[1] This is a gross misconception on the part of the learned single judge. Is it possible to hold that the *development of women and children* is an economic adventure? Is it possible *that a learned judge at the level of the High Court is so ignorant of the fact that the Constitution declares India as a 'Welfare State'? By what legal principles could it be said that social welfare, women and child welfare, fall outside the sovereign functions of the State?* A single judge of AP High Court held that the 'census' department of the Government is not an 'industry' within the meaning of s 2(j), and that a temporary employee engaged on census work on a consolidated salary could not seek relief under s 25F of the Act.[2] In *Bangalore Turf Club*, a Bench of the Supreme Court comprising Katju and Dattu JJ, while holding that the earlier decision of the Court in *Hyderabad Race Club*,[3] need review by a larger Bench, observed:

> The definition of 'industry' in the Industrial Disputes Act is very wide as interpreted in the aforesaid decision. We cannot apply the judgment given under a different Act to a case which is covered by the ESI Act. Under various labour laws different definitions have been given to the words 'industry' or 'factory' etc. and we cannot apply the definition in one Act to that in another Act (unless the statute specifically says so). It is only where the language used in the definition is in *pari materia* that this may be possible. ... Hence, we are of the opinion that the decision of this Court in the case of *Hyderabad Race Club* (supra) should be reconsidered by a larger Bench. In the meantime, the respondents shall not raise any demand against the appellant-clubs.[4]

The Agricultural Produce Market Committee, set up under the Karnataka Agricultural Produce Marketing (Regulation) Act, 1966, is not performing any sovereign functions and hence, is an 'industry' under s 2(j). The mere fact that the employees of the committee are government servants is not crucial, as the true test is the dominant object for which the functionaries are working.[5] While implementing the national malarial eradication programme, the directorate of health services of the state government cannot be said to be performing sovereign functions, and it satisfies the tests laid down in *Bangalore Water Supply*, and hence, it is an 'industry' within the meaning of s 2(j).[6] The activity carried on by the Tungabhadra board, Tungabhadra dam, is not a sovereign function. It is a commercial venture like any other corporation or industry, and falls within the meaning of s 2(j).[7] The Uttar Pradesh Jal Nigam is an 'industry'.[8] Public works department of state government is an 'industry'.[9] Projects undertaken by the irrigation department of the State of Maharashtra fall within the definition of 'industry', for the purpose of s 2(j).[10] In *MP Kolharkar*, the Supreme Court held that the Central Public Works Department is an industry within the meaning of s 2(j).[11]

The functions of the public service commission, being unalienable regal functions of the state, which by their nature, cannot be assigned to private bodies,[12] will not fall within the ambit of the definition of industry. Likewise, the functions of the judicial department of the government, being obviously in the nature of sovereign functions of the state, would not be an 'industry'.[13] Similarly, relief work undertakings, carried on by the state government, to provide sustenance to persons affected by natural calamities, being regal functions of the state, will not fall within the ambit of an 'industry', mainly because: (i) it is the primary and inalienable function of the state, to provide livelihood to the persons who are affected by natural calamities, such as famine, earthquake, epidemic, flood, scarcity, etc; and, (ii) admittedly, the relief work is not a 'business' or 'trade' and with regard to the undertaking, the activity is not analogous to trade or business, or that it is not a systematic activity, but is carried out casually, at different places, depending on the calamities in a particular area.[14] The activities of the department of industries, mines and power in the government secretariat, again being a regal function of the state, would not be an industry.[15]The activities of the Bombay, Iron and Steel Board, constituted under s 6(1) of the Maharashtra Mathadi, Hamal & Others, Manual Workers (Regulation of employment and Welfare) Act 1969, has also been held to be, regal function of the state.[16]

On the other hand, the activities of the Tamil Nadu Housing Board,[17] and those of the public health department of the government,[18] have been held to be non-regal business functions of the state, and therefore, they are industries. The

activities of the social welfare department of a government,[19] or those tourist department of a state,[20] are also non-regal and therefore, are 'industries'. However, the nature of the actual function and of the pattern of organised activity is decisive. Therefore, it is for the employer to show by relevant evidence, that the activities in question are not analogous to trade or business, such as to take such activities out of the purview of industry. Likewise, in *Chief Conservator of Forests*, it was held that the activities of the forest department of the state, were not of a sovereign nature and therefore, would fall within the definition of an industry.[21] In *Rajendrasinhji Institute*, a single judge of Bombay High Court held that the activities of the Institute involve the co-operation between the managing committee and the employees appointed by it and its activities are calculated to supply pleasurable utilities to members and others. It could not therefore be said to be performing sovereign functions, and hence is an industry.[22]

In striking contrast, in *PN Parmar*, a Bench of the Supreme Court, comprising Pattanaik and Agrawal JJ, held that the forest department of a state government would not fall within the ambit of an 'industry' under s 2(j) and hence, the non-compliance with the provisions of s 25F of the IDA would not vitiate the termination of the services of the employees.[23] This decision is in direct conflict with the ratio of *Chief Conservator of Forests* case, wherein the Supreme Court had held that the work undertaken by the forest department was not a part and parcel of the sovereign functions of the state and as such, a termination of service, without complying with the provisions of s 25F was illegal. It, therefore, calls for some analysis. The facts of the case in *PN Parmar* were identical to those of C*hief Conservator of Forests.* In both the cases, the fundamental issue was, whether the work undertaken by the forest department of a state government could be regarded as a part of the sovereign functions of the state, on which the question of the applicability or otherwise, of the provisions of s 25F rested. In the *Chief Conservation of Forests* case, the issue was answered in the negative. Once it is ruled that the functions of the forest department cannot be regarded as a part of the sovereign functions, the conclusion that the activity falls within the ambit of the definition of an 'industry' in s 2(j), is inescapable, as it satisfies the triple-test laid down in *Bangalore Water Supply*. As a necessary corollary thereto, the provisions of the IDA apply in full flow to the employees of the forest department, who answer to the definition of a 'workman' in s 2(s) of the Act. Viewed in this perspective, the decision rendered in the case of *Chief Conservator of Forests* was right, even though it is possible to question the very premise on which the apex court proceeded, ie, whether the conservation of forests is or is not a part of the sovereign functions of the State. Adverting to the case of *PN Parmar*, the court strangely, observed as follows:

> Ordinarily, a department of the government cannot be held to be an industry and rather, it is a part of the sovereign function ...we find that there has not been an iota of assertion to that effect though; no doubt, it has been contended that the order of dismissal is vitiated for non-compliance with s 25F of the Act. The state, in its counter-affidavit, on the other hand, refuted the assertion of the respondent in the writ petition and took the positive stand that the forest department cannot be held to be an industry, so that the provisions of s 25F of the Act cannot have any application.[24]

The above observations are stale and, at any rate, are not expected of the highest court of the land. Merely because the state averred in its counter-affidavit and took a positive stand, would it mean that the court should accept it at its face value, when the facts disclose something contrary to its submissions? What about the contention of the respondent according to which, going by the ratio evolved by the very same court, in *Chief Conservator of Forests*, there was a manifest violation of s 25(F) on the part of the state government? Once it was found that the facts of both the cases were identical in every sense of the term, it is baffling that the court adopted a dynamic disposition and applied a different yardstick to the case, contrary to what was decided just four years earlier. Why should the respondent be required to separately assert the nature of duty or the job of the establishment, which was an admitted fact falling squarely within the four walls of its earlier decision in *Chief Conservator of Forests*, more so, when counsel for the respondents placed his reliance on the said ruling? As a matter of fact, the single judge and the Division Bench, themselves relied on the ratio of *Chief Conservator of Forests*, while coming to the conclusion that the forest department of a state was not a part of its sovereign functions, and that there was a violation of s 25F, which led to the appeal before the Supreme Court. Could it be said that all these incidents and admitted facts were inadequate for the learned judges to arrive at a fair and reasonable conclusion, consistent with the ratio evolved by a co-ordinate Bench of the same court? With great respect, the decision in *PN Parmar* is wholly perverse and is violative of the norms of judicial discipline. If the court were of the opinion that *Chief Conservator of Forests* was not rightly decided, it should have placed the papers before the Chief Justice, for constituting a larger Bench to review and lay down the correct law, instead of advancing untenable arguments in support of its own misconceptions. The dysfunctional effect of this decision can be stated thus: if any judge of a labour court or High Court is confronted with the dilemma of choosing between *Chief Conservator of Forests* and *PN Parmar*, he would be absolutely free to choose either this or that, as dictated by the tenor of the time, notwithstanding the fact that these decisions represent two extremes on the same issue, and thereby, dilute the whole judicial process. To illustrate, the Bombay High Court, in *Haribhau*, held that the State Forest Department was not an industry under s 2(j).[25]

Educational Institutions

The question that whether the activity of running an educational institution would fall within the definition of an 'industry', was touched upon, but left undecided by the Supreme Court, in the under-noted cases,[26] because it was not called upon to decide. But, in *Corpn of City of Nagpur* (supra),[27] decided by the same Bench on the same day, ie, 29 January 1960, the court included the education department of the corporation, in the departments held to be falling within the definition of an 'industry'. As already stated in the preceding paragraphs, the case of *University of Delhi* (supra), is not being discussed as it was conclusively overruled in *Bangalore Water Supply*. A single judge of the Kerala High Court,[28] has observed that the matter has to be considered in the light of the evidence, as to what type of work a teacher does. The duties which a teacher, in such a school, discharges, has to be proved by adducing the relevant evidence. The Punjab and Haryana High Court, in *Sumer Chand*, held that the section of the university in which a carpenter was employed is an industry.[29] The Kerala High Court, in *Karthiam*, held that despite the excessive commercialisation in the field of education, the statutory definition of an industry does not permit education to fall in its ambit.[30] But a single judge of Allahabad High Court, in *Jagdish Prasad Sinha*, held that the essential duty of a teacher in a school, is to impart education to students, and in view of the ratio of *Bangalore Water Supply*, there is no justification for taking the view that a teacher is not a 'workman', particularly when a school is owned by a company engaged in the sugar and oil manufacturing business.[31] Likewise, a single judge of the Madhya Pradesh High Court held that in the context of the law, as laid down by the Supreme Court, an educational institution will fall within the definition of an 'industry' and a clerk employed therein, would be a workman.[32] The Kerala State Science and Technology Museum which provided a service to the community by stimulating and encouraging scientific literacy among the masses, through its activities, is an industry.[33] The Madhya Pradesh High Court held that the activities of the Jiwaji University will fall within the definition of industry.[34]

But in these cases, the attention of the court does not appear to have had been drawn to the latest holding of the Supreme Court in *Sundrambal*, *viz*, that even if an educational institution is 'industry' as per the ratio of *Bangalore Water Supply*, the nature of the work of the teachers teaching in an educational institution, will not fall within the categories of work enumerated in s 2(s). Taking note of the nature of work done by a teacher, it was held that a 'teacher' is not a 'workman'.[35] In *Ruth Soren*, the Supreme Court held that an 'establishment', running an educational institution imparting education, as defined in the Bihar Shops and Establishment Act 1953, does not carry on a business, trade or profession. Such an activity, though might be an industry as defined in s 2(j), would not be a profession, trade or business for the purposes of Art. 19(1)(g) of the Constitution, and would not be one falling within the scope of an 'establishment', under the Bihar Shops Act. Therefore, the labour court could have no jurisdiction under s 26(2) of the said Act to interfere with the order terminating the service of an employee of the establishment.[36] A technical teachers training institute, providing technical training to the candidates admitted to the institute, is an industry.[37]

In *Kamyani Vidya Mandir*, one of the two issues was "whether an educational institute for mentally challenged children, funded by business houses" fell within the definition of industry. Ms Mhatre J, of Bombay High Court surveyed the decision rendered in *Bangalore Water Supply* (supra) and observed that: (i) the dominant purpose of hiring employees by said institute was only to train mentally challenged children and to look after them; (ii) while so imparting training, goods are manufactured and sold, not with the object of making profit; (iii) that no regular employees were hired by the petitioner to produce the articles, such as, greeting cards, envelopes, candles, etc; (iv) that the articles which were sold in the stalls set up by the petitioner during the festive seasons were those made in the process of training the mentally challenged children; (v) that the articles were made by the children together with the teachers; (vi) there was no evidence to show that the mentally challenged persons, who were being trained, were paid any money for the products manufactured by them during the course of training; and (vii) that in these circumstances, it could not be said that there was any employer-employee relationship between them and the petitioner nor could it be said that there was any systematic activity for the production of the goods. On this view of the matter, the learned judge had set the order of the labour court aside.[38] These divergent views only go to establish that the seven-Judge Bench decision in *Bangalore Water Supply* had, far from giving finality to or clearing the cob-webs that shrouded the definition of 'industry' in s 2(j), made the issue even murkier and foggy as can be seen from the highly divergent views as to the legal status of (a) '*irrigation*' departments of state governments, (b) '*forest*' departments, (c) '*Agricultural*' and '*Farm*' Corporations, (d) *Educational* institutions, (e) '*Telecom*' departments of the government, and several other activities and undertakings, resulting in judicial chaos and mess of grave magnitude.

Research Institutions

In *Ahmedabad Textile IR Assn*, the association was established to carry on research with respect to the textile industry, jointly, for the benefit of its members, by discovery of processes of manufacture, with a view to secure greater efficiency, rationalisation and reduction of cost. The activity, therefore, was held to be an 'industry'.[39] In *Physical Research Laboratory*, the court held that Physical Research Laboratory was not 'industry' because it is not engaged in an activity which can be called a business, trade or manufacture, nor is it an undertaking, analogous to business or trade. It is not rendering any services to others. It is engaged in pure research in space science.[40] A single judge of the Jharkhand High Court took a different view in *Central Rainfed URR Institute*, and held that the institute was not engaged in a commercial

or industrial activity, nor was there anything on record to suggest any economic venture on the part of the workmen. It had no object to produce and distribute any service to satisfy the needs of the consumer community. Thus, the institute would not fall within the ambit of an 'industry', as defined in s 2(j), as it lacked all the elements that could to bring it within the purview of the definition.[41] This decision runs counter to the ratio of *Bangalore Water Supply*.

Municipal Corporations

A municipal corporation is a public corporation and primarily, a non-trading one, since it has mostly governmental functions to perform, within a specified territory. It is indeed a state in miniature.[42] The state may assume 'non-regal' functions by means of its legislative power and when such functions are assumed by the state, it acts simply as a huge corporation, with its legislation as the charter and its actions under the legislation, so far as they are not regal executions of the law, are merely analogous to that of a private company, similarly authorised.[43] Municipal corporations and local bodies too, therefore, have dual functions, ie, regal and non-regal. If such bodies indulge in trading or business or have to assume the calling of employers, they will be employers whether they carry on their business commercially, for the purpose of gain or profit, or not. The Act, therefore, contemplates cases of industrial disputes where the government or a local body or a public utility service, may be the employer. In other words, where the government and local authorities act as individuals do, the policy of the Act is to put the government and the local authorities at par with private individuals. But local authorities cannot be regarded as industries unless they produce material goods or render material services and do not share by delegation, in governmental function or functions incidental thereto.[44] In such a non-regal character, a municipal corporation is a mere entity or a juristic person and it stands for the community, in the administration of its local affairs, wholly beyond the sphere of the public purposes for which governmental powers are conferred upon it.[45]The definition of an 'employer' in s 2(g) of the Act, also indicates that a local authority may become an employer if it carries on an 'industry'. This means that a municipality, if it indulges in an activity which may properly, be described as an 'industry', may be involved in an 'industrial dispute'. It would, therefore, be incongruous and self-contradictory to exempt wholly, the activities undertaken by the government and municipal corporations, in the interest of the socio-economic progress of the country, as beneficial measures, from the operation of the Act, which itself is, in substance, a very important, beneficial measure.[46]

In *Banerji*, the court observed that though municipal activity *per se* cannot be regarded as a 'business' or 'trade', it would nevertheless fall within the expression 'undertaking' appearing in the definition. [47] This decision was next followed in *Baroda Municipality*.[48] The ratio of these two decisions is that it is not necessary that the activity must be carried on by private enterprise, or must be commercial, or must result in profit. It is sufficient if it is analogous to the carrying on of a trade or 'business' and it involves co-operation between the employers and the employees. This result was reached by extending the meaning of the word 'undertaking' to cover adventures not strictly 'trades' or 'businesses', but objects very similar. Later, in *Corpn of Nagpur*, the court had to consider whether a municipal corporation would be an 'industry' within the meaning of s 2(14) of the CP and Berar Industrial Disputes Settlement Act 1947. Justice Subba Rao analysed the activities undertaken by a municipal corporation in greater detail, and evolved the following cardinal principles:

(i) The regal functions described as primary and inalienable functions of the State, though statutorily delegated to a corporation, are necessarily excluded from the purview of the definition. Such regal functions shall be confined to legislative power, administration of law and judicial power.

(ii) If a service rendered by an individual or a private person would be an industry, it would equally be so in the hands of a corporation.

(iii) If a service rendered by a corporation is an industry, the employees in the departments connected with the service, whether financial, administrative or executive, would be entitled to the benefits of the Act.

(iv) If a department of a municipality discharges many functions, some pertaining to an industry as defined in the Act, and other, non-industrial activities, the predominant functions of the department shall be the criterion for the purposes of the Act. [49]

The question as to whether the octroi department (assessment and levying of octroi) is an 'industry' or not, was left undecided in the absence of any appeal against that part of the award of the tribunal.[50] The Punjab and Haryana High Court,[51] took the view that the fire brigade service, maintained by a municipal committee, is an industry, while the Bombay High Court, held that the fire brigade service, maintained by a municipal corporation is not an industry.[52] The running of a dispensary, sanitary and conservancy activities and that of administrative departments, looking after and connected with other departments, was also held to fall within the definition of an industry.[53] The corporation's activity of storing and distributing water, to satisfy human wants, is a systematic activity, falling within the definition of industry.[54] The High Court of Patna held that 'Town Development Authority' is an 'industry'.[55]

Hospitals

In *Hospital Mazdoor Sabha* the Supreme Court adopted the reasoning and the tests laid down by Bombay High Court and held that the activity of running hospitals was not a regal activity of the State, and hence, it would fall within the definition of an industry inasmuch as the activity would be an industry, if it were run by private citizens. The character of the activity was taken as the determinative test. The question as to who conducts the activity, was considered irrelevant. Likewise, the capital investment and the profit motive were also considered unessential.[56] Commenting on the observations of Hidayatullah CJI in *Safdarjung*, Iyer J, in *Bangalore Water Supply*, held that he could not possibly agree that running a hospital, which is a welfare activity and not a sovereign function, could not be an industry. Hospital facilities, research products and training services are 'services', and hence, 'industries' and an absence of profit or the performance of functions of training and research, would not take the institution out of the scope of industry.[57] Accordingly, the learned judge held that *Safdarjung* was wrong, and that *Hospital Mazdoor Sabha* was right. In *Indraprastha Medical Corpn*, the Delhi High Court held that a hospital, being an 'industry' within the meaning of s 2(j), could not be excluded from the purview of the Industrial Employment (Standing Orders) Act 1948 and hence, it was required to adopt the model Standing Orders or submit its own Standing Orders for certification.[58]

Charitable and Humanitarian Institutions

The question, whether the institutions engaged in charitable or humanitarian activities, would fall within the definition of an industry has also engaged the attention of the courts. In *Bangalore Water Supply*, the Supreme Court posed the question: 'Can charity be an industry?', and answered it by stating:

> This paradox can be unlocked only by examining the nature of the activity of charity, for there are charities and charities ... Bedrocked on the ground norms, we must analyse the elements that are charitable economic enterprises, established and maintained for satisfying the human wants.[59]

In *Madras Pinjrapole*, the Madras High Court took into notice the amened objects of the society, which include receiving cows from owners for a fee; the starting a dairy farm was meant for supporting infirm cows, bullocks and horses; acquisition of stud-bulls for cattle breeding and sale of milk, etc. In the circumstances, it was held that the activity of the Pinjrapole did fall within the definition of an industry.[60] Likewise, in *Bombay Pinjrapole*, in view of the immovable properties held, the collection and sale of milk, the activities of the Pinjrapole were held to fall within the definition of an industry.[61] The UP Scheduled Caste FDC, set up for organising and working in various ways for the upliftment of the downtrodden, and to help them financially, for various purposes, including for starting industries, and organising and helping them in getting technical training, is an industry, since the activities are systematic and carried on with the cooperation of the employees.[62] In *Bangalore Water Supply* Iyer J, agreed with the decision that Bombay Pinjrapole was an industry. Iyer J stated three categories of charitable institutions. The first is where the enterprise, like any other, yields profits, but they are siphoned off for altruistic objects. The second is one where the institution makes no profit, but hires the services of employees as in other like businesses, but the goods and services, which are the output of that activity, are made available at low or no costs, to the indigent needy who are priced out of the market. The third is, where the establishment is orientated on a humane mission, which is fulfilled by men who work, not because they are paid wages, but because they share the passion for the cause and derive job-satisfaction from their contribution. He said that the first two categories would fall within the definition of an industry, while the third would not. The manner in which the activity in question is organised or arranged, the condition of the co-operation between the employer and the employee necessary for its success and objects, to render the material service to the community, is the pivotal test to identify whether the activity is an industry or not. The classification of charitable institutions, undertaken by Iyer J and the manner of distinguishing the institutions *inter se*, for the purpose of inclusion and exclusion from the coverage offered by the definition of s 2(j), deserves some analysis. Iyer J held that stray wage earning employees do not shape the soul of an institution into an industry and hence, the third category is not an industry.

This ruling raises the following questions: Applying the test of predominant activity, and not of numerical strength, what was the justification for excluding the third category? Does the definition of, 'workman' exclude stray wage earners from its purview? Is it one of the objects of the Act to price them out of its protective cover? How does this ruling align itself with the safeguards provided under ss 2(A) & 11 (A) of the IDA? And, finally, what kind of rationale underlies this judgment? Iyer J equated charity with trade and business, which is *prima facie*, a grave misconception on his part. The core attribute of any trade and business is the exchange of goods and services, for goods and services or for money, which necessarily presupposes a give-and-take, in which both the transacting parties give to, and at the same time take from, the other, something tangible. On the contrary, the concept of charity rests on the principle that the donor does not expect anything in return from the recipient and there can be nothing of the sort of a 'barter' or 'exchange' in the case of charity. The essence of the former is a two-way relationship of vendor-vendee or supplier-customer, whereas the latter is a one-way

relationship of donor-recipient, with nothing flowing back from the recipient in the form of 'consideration', not even gratitude. If a charitable institution organises its activities on professional lines, it could be with a view to ensure a proper distribution of the benefits and to make the functionaries accountable for their actions. Does the mere fact that a charitable institution streamlines its administration, transform it into an activity analogous to trade or business? It is disappointing that, despite a clear mandate, the Bench took it upon itself to lay down the correct law. The entire line of reasoning of the majority judges proceeded on emotive lines, extending the iron-clad triple-test to charitable institutions in a straight-jacketed fashion, without appreciating the fines, yet substantial aspects that distinguish various activities.

Going by the maxim *nemo dat quid non habet* (no one can give, who does not possess), charity does not simply flow from orientation or passion as averred by Iyer J. In order that a positive orientation translates itself into a tangible help to the indigent needy, it requires something more concrete, whether that 'something' comes out of the surplus generated by an enterprise or the contributions of a handful of people. Does the sole fact, that a charitable institution is funded by an external agency, render the activity any less charitable? What role could the source of finance possibly play in determining the nature and the end-product of the activity, ie, taking care of the material needs of the sick, infirm and disabled, who cannot help themselves? The same logic applies to *Pinjrapoles,* which were also brought into the category of industries by reasoning of Iyer J. Even applying the rule of *noscitur a sociis*, which Iyer J so vehemently pressed into service, by holding that the word 'undertaking' must be read down to conform to the restrictive characteristic shared by the society of words before and after (at p 362), the 'undertaking' of a charity clearly falls outside the definition, for the simple reason that it does not share any of the characteristics of the words preceding or succeeding it, ie, 'trade', 'business', and 'manufacturing'. Regrettably, the judicial contradictions disclosed in the *Bangalore Water Supply* case cast their shadow on various High Courts, as could be seen from the decision rendered by a single judge of Bombay High Court in *Shri Devadeveshwar*, where it was held, that a charitable trust, registered under the Bombay Public Trusts Act 1950, which was maintaining four temples, getting donations from well wishers, providing low cost houses for poor, maintaining them and employing about 40 workmen, was an industry within the meaning of s 2(j).[63] There can be no doubt that the *Bangalore Water Supply* case was wrongly decided *inter alia*, insofar as it related to charitable institutions.

Religious and Spiritual Institutions

In many foundations, centers, monasteries, holy orders and *ashrams*, in the east and in the west, spiritual fascination pulls men and women into the precincts and they work tirelessly in the pursuit of their spiritual aspirations. Such people are not 'workmen' and such institutions are not 'industries', despite some menials and some professionals being hired in a vast complex. The test of the predominant character of the institution and the nature of the relations, resulting in the production of goods and services, are to be looked at. In such cases, stray wage-earning employees would not change the soul of an institution into an industry. The production and distribution of goods and services, calculated to satisfy human wants and wishes (not spiritual or religious, but inclusive of material things or services geared to celestial bliss, like making on a large scale, *prasad* or food), *prima facie*, would be an industry.[64] The Orissa High Court, held that the duties performed by the employees of the Harihar Bahinipati Temple, such as maintenance of peace and order and discipline amongst the pilgrims inside the Sri Jagannath Temple and to prepare sweets for offering to the deities in the temple, were not secular in nature, but were connected with the *seva-pooja* of the temple, and as such being of a spiritual nature, they did not fall within the ambit of an industry.[65]

Similarly, the Gujarat High Court, in *Panchasara Jain Derasar,* held that offerings of certain articles to the deity, is not a sale of such articles. If, assuming that certain articles are sold to persons who come for *'darshan'*, there is no material to show that they are sold for profit, in view of the nature of the activities carried on in the temple, it cannot be held that the temple is an industry.[66] After the decision in *Bangalore Water Supply*, this decision does not hold good. A single judge of the Bombay High Court held that the activities of the Shri Cutchi Visa Oswal Derawasi Jain Mahajan Trust, being of a commercial nature, despite the aims and objects of the trust, fell within the ambit of the expression 'undertaking', as used in the definition of an 'industry'.[67] Likewise, in *Baikuntha Nath Debasthan,* on the facts and circumstances of the case, a single judge of the Calcutta High Court held that the activities of the temple trust fell within the definition of an industry.[68] The Himachal Pradesh High Court held that the Baba Balak Nath Temple Trust is an industry in view of the nature of its work and on applying the dominant on nature test.[69] The Madras High Court held that the *Arulmigu Subramaniasamy Devasthanam* is not an industry within the purview of s 2(j) of theID Act.[70] The *Shiromani GP Committee* performs purely religious functions, and hence is not an industry.[71]

Private and Domestic Activities

In *Bangalore Water Supply*, though the two judges, out of the seven, categorically discarded the principle of *noscitur a sociis* and *ejusdem generis* while interpreting the expressions used in the definition of an industry, in the leading judgment, while holding that domestic employment cannot fall within the scope of an industry, Krishna Iyer J admitted that the meaning of the words of the widest amplitude, used in the two limbs of the definition 'cannot be magnified to over-reach itself and emphasized:

> The literal latitude of the words in the definition cannot be allowed a grotesquely inflationary play, but must be read down to accord with the broad industrial sense of the nation's economic community, of which labour is an integral part. To bend beyond credible limits is to break with the facts, unless language leaves no option.

In this view of law, the learned judge stated the law relating to domestic and private employment, in the following words:

> The image of an industry or even a quasi-industry, is one of a plurality of workmen, not an isolated or single little assistant or attendant. The latter category is more or less like a personal avocation for livelihood, taking some paid or part-time assistance from another. The whole purpose of the Industrial Disputes Act is to focus on the resolution of industrial disputes and the regulation of industrial relations and not to meddle with every little carpenter in a village or blacksmith in a town, who *sits* with his son or assistant to work for the customers who trek in. The ordinary spectacle of a cobbler and his assistant or a cycle repairer with a helper we come across in the pavements of cities and towns, repels the idea of 'industry' and industrial dispute. For this reason, which applies along the line to small professions, petty handicraftsmen, domestic servants and the like, the solicitor or doctor or rural engineer, even like the butcher, the baker and the candle-stick maker, with an assistant or without, they do not fall within the definition of industry. [72]

The history of industrial disputes and its legislation recognises the basic concept that the activity should be an organised one and not that which pertains to private or personal employment.[73] The activity should, therefore, be predominantly carried on by the employment of an organised labour force, for the production or distribution of goods, or for rendering material services to the community at large or a part of such community.[74] Such activity should involve the co-operation between the employer and the employees, for the object of satisfying material human needs, and not for oneself or for pleasure.[75] In other words, where the services are meant for the employers themselves, for their own pleasure, and the material goods are for their own consumption, the activity cannot be an industry.[76] Hence, an activity pertaining to, or in relation to private and personal employment, has to be excluded from the definition of an industry.[77]

Domestic employment cannot be regarded as being in the course of an industry,[78]because the employment of a domestic servant has no resemblance to a trade, business or industry. Domestic servants have a calling or an occupation, but it cannot be said that their employment is an industry. Nor are the private householders, employers who carry on an 'industry' as contemplated by the Act. Further, there is no co-operation between capital and labour, which is necessary to constitute an industry. The domestic servant renders services purely of a personal nature.[79] A building let out on rent by a Palace Administration Board (a body corporate), which administers and manages the estate of a royal family, for the benefit of the junior members of the family, the building being constructed out of the surplus income, was held not to be an 'undertaking' within the meaning of s 2(j) of the Act.[80] But the question, whether the work of an employee is of a domestic nature or of an industrial nature, will depend upon the facts of each case.[81] or instance, in *Hanshree Apartment Owners'Assn*, the Calcutta High Court held that the services rendered by the employees of an apartment owners' association, who were engaged for the purposes of maintaining and keeping the common areas of the entire conglomeration of apartments, would fall within the definition of an industry, as in such a situation, the concept of domesticity of such employee vanishes.[82] In *Som Vihar Apartment Owners*, the issue before the Supreme Court was: whether the persons engaged by the society, which was formed mainly to maintain cleanliness in the apartments and to render certain other services personally to the apartment owners themselves could be characterized as workmen and whether the activity itself could be held to be an 'industry'? Negating the contentions, a Bench comprising Rajendra Babu and Phukan JJ Observed:

> Indeed this Court in *Rajappa's* case (supra) noticed the distinction between such classes of workmen as domestic servants who render personal service to their masters from those covered by the definition 2(J) of the Industrial Disputes Act. It is made clear if literally interpreted these words are of very wide amplitude and it cannot be suggested that in its sweep it is intended to include service however rendered in whatsoever capacity and for whatsoever reason.*In that context it was said that it should not be understood that all services and callings would come within the purview of the definition; service rendered by a domestic servant purely in a personal or domestic matter or even in a casual way would fall outside the definition. That is how this Court dealt with this aspect of the matter. The whole purpose of the Industrial Disputes Act is to focus on resolution of industrial disputes and the regulation will not meddle with every little carpenter or a blacksmith, a cobbler or a cycle repairer who come outside the idea of industry and Industrial dispute. This rationale which applies all along the line to small professions like that of domestic servants would apply to those who are engaged by a group of flat owners for rendering personal services even if that group is not amorphous but crystallised into an Association or a society. The decision in Rajappa's case if correctly understood is not an authority for the proposition that domestic servants are also to be treated to be workmen even when they carry on work in respect of one or many masters.* It is clear when personal services are rendered to the members of a society and that society is constituted

> only for the purposes of those members to engage the services of such employees, we do not think its activity should be treated as an industry nor the workmen. In this view of the matter so far as the appellant is concerned it must be held not to be "industry". Therefore, the award made by the Tribunal cannot be sustained. The same shall stand set aside.[83]

Following the above ruling, another Bench of Supreme Court comprising Patil and Dharmadhikari, JJ, held that the respondent-Housing Society was not an 'industry' nor could it be said that the appellants employed therein were 'workmen'.[84]

Professions

The word 'professional' has not been defined in the Act. But the sense of the word can best be understood in the words of Scrutton LJ, in *Commr of Inland Revenue*.

> ...It seems to me as at present advised, that a 'profession' in the present use of language, involves the idea of an occupation requiring either a purely intellectual skill, or of a manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities. The line of demarcation may vary from time to time. The word 'profession' used to be confined to the three learned professions, the Church, Medicine and Law. It has now, I think, a wider meaning. [85]

The three learned professions, *viz*, the Church, Medicine and Law, cannot be the only professions for all times. Times change. The sphere of human activity and endeavour is constantly expanding, giving rise to problems which require specialisation and expertise. In the course of the last two centuries, trade, commerce and industry have vastly developed, bringing in its wake, problems which have to be tackled by experts. The old crystallised learned profession, *viz*, the Church, medicine and law were, by the very nature of their training, unable to solve the problems of the new developments in trade, commerce and industry. The new developments in trade, commerce and industry, therefore, *inter alia*, threw up a team of experts in the shape of consultant engineers, architects, chartered accountants and journalists, etc, having specialised knowledge in their field.[86] In other words, the essential idea of a 'learned profession', which cannot, in the modern context, be merely limited to the original categories, is that it is the pursuit of an avocation or occupation, substantially involving intellect. There is a complementary feature to this, that the services rendered by a 'learned profession' are primarily characterised by an equipment of learning, skill or judgment, acquired through intellectual means. So long as these criteria are fulfilled, such a profession is a 'learned profession'. In other words, in these liberal professions, the individual activity is characterised by personal skill and intelligence and is dependent upon personal study, character and integrity. These qualities, displayed by the practitioners of these liberal professions, inspire confidence in persons approaching them for advice or guidance. But in each case, the person who approaches a professional person, chooses him according to his conception of the skill, intelligence and integrity of the person. Since such a person approaches in entire confidence, the professional person has a corresponding obligation not to betray the confidence, and advise his client as best as he can.[87] 'A profession ordinarily, is an occupation requiring intellectual skill, often coupled with manual skill. Thus, a teacher uses, purely intellectual skill, while a painter uses both'.[88] In *Federated Municipal and Shire Council Employees' Union*, Isaacs and Rich JJ, speaking for the Australian High Court of Appeal, observed:

> industrial disputes occur when, in relation to operations in which capital and labour are contributed, in co-operation, for the satisfaction of human wants or desires, those engaged in the co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the product or any other terms and conditions of their co-operation. It excludes,...the legal and the medical professions, because they are not carried on in any intelligible sense, by the co-operation of capital and labour and do not come within the sphere of industrialism.[89]

In *Bangalore Water Supply*, Krishna Iyer J pointed out that:

> the halo conjured up in the *Solicitor's* case, ..., hardly serves to 'de-industrialise' the professions. After all, it is not *infra dig* for lawyers, doctors, engineers, architects, auditors, company secretaries or other professionals, to regard themselves as Workers in their own sphere or employers or suppliers of specialised services to society. [90]

In view of the infrastructures of the offices or the clinics of the professional persons, the court observed that:

> the conclusion is inevitable that contribution to the success of the institution—every professional unit has an institutional good-will

> and reputation—comes not merely from the professional or the specialist, but from all those whose excellence in their respective arts, makes for the total proficiency. We have, therefore, no doubt that the claim for exclusion on the score of 'liberal profession' is unwarranted from a functional or definitional angle.

He further observed that if the professions flow out of the scope of industry, flood-gates of exemption from the obligations under the Act will be opened. The court therefore, over-ruled the decision in *Solicitors'* case. But it hastened to add that a small category, perhaps large in numbers, in the *Muffusil*, may not squarely fall within the definition of an industry. A single lawyer, a rural medical practitioner or an urban doctor with a little assistant and/or a menial servant, may ply a profession, but may not be said to be running an industry. That is not because the employee does not make a contribution, nor because the profession is too high to be classified as a trade or an industry with its commercial connotations, but because there is nothing like an organised labour in such employment. In his separate judgment, Chandrachud CJI also observed that he found it difficult to infer from the language of the definition that 'the legislature could not have intended to bring a 'liberal profession' like that of an attorney, within the ambit of the definition of an industry'. And referring to *National Union of Commercial Employees*, he pointed out that the refinements of Law therein, exempting the liberal professions from the scope of industry, are not warranted by the words of the definition, apart from the consideration that in practice, they make the application of the definition to concrete cases dependent upon a factual assessment so highly subjective, as to lead to confusion and uncertainty in the understanding of the true legal position. He, however, observed that:

> The unhappy state of affairs in which the law is marooned, will continue to baffle the skilled professional and his employees alike, as also the judge, who has to perform the unenviable task of sitting in judgment over the directness of the cooperation between the employer and the employees, until such time as the legislature decides to manifest its intention by the use of clear and indubitable language.

He suggested that the Legislature might find a plausible case for exempting the learned and liberal professions of Lawyers, solicitors, doctors, engineers, chartered accountants and the like, from the operation of industrial laws. But until that happens, he considered that in the present state of law, it is difficult by judicial interpretation, to create exemptions in favour of any particular class.[91] A sports club run by a company, with the object of organising, promoting and affording facilities for indoor and outdoor games, athletics, recreation, social meetings, etc, satisfies the tests laid down in *Bangalore Water Supply* and hence, is an industry.[92] Some of the liberal professions are dealt with under the following topics:

Medical

Though in the light of the decision in *Federated Municipal and Shire Council Employees Union*, and the decision of the Supreme Court in *National Union of Commercial Employees*, medical profession would not fall within the definition of an industry. The question was not free from doubt though, since there was no direct case dealing with the medical profession. In *Safdarjung*, with a view to decide the cases under consideration on their own merits, Hidayatullah CJI observed that:

> ... if a hospital, nursing home or dispensary is run as a business, in a commercial way, there may be found elements of industry there. Then, the hospital is more than a place where persons can get treated for their ailment. It becomes a business. [93]

In *Bangalore Water Supply*, over-ruling its decision in *National Union of Commercial Employees*, the court has now unequivocally said that liberal professions, including the medical profession, do not qualify for exemption from the ambit of industry.[94]

Legal

In *National Union of Commercial Employees*, the Supreme Court held that a firm of solicitors is not an industry. It also repelled the further contention that an organisation of professional services, in an institutionalised manner, rendering organised services, depending upon the co-operation of the employers and the employees, engaged by a firm doing different categories of work, would also not make it an industry in view of the nature of the services rendered by the work of the employers.[95] This case, having been over-ruled by the court in *Bangalore Water Supply*, the offices of the practitioners of the legal profession, like those of solicitors or advocates, would fall within the definition of an industry if they fulfil the triple test of: (a) systematic activity; (b) being organised by co-operation between the employers and the employees; and (c) producing or distributing goods and services calculated to satisfy human wants and wishes. The only exception indicated is where a single lawyer may be plying his profession with a little assistant or a menial servant,

because in such an employment, there would be nothing like an organised labour.

Chartered Accountants

In *Rabindra Nath Sen*, a single judge of that High Court held that a chartered accountant, doing audit work, unassisted by stenographers, personal clerks or menial servants, that is to say, doing the entire auditing work, from the examination of the accounts to the making of the report, all by himself, with only such subsidiary and incidental help as may be rendered by his stenographers, typists, personal clerks and servants, may not be carrying on an 'industry', but, if a chartered accountant carries on some auditing work in a magnified scale, with more clients than he can manage himself, and he is perforce compelled to have a division of labour, his clerks doing the examination of the accounts and he himself drawing up the audit reports, on the result of such examination, it might not be said that this type of co-operation is not an industry, as it could cannot be said that such a report was his individualistic production, having no connection with the labour put in by his employees. It was also observed that the work of a chartered accountant was different from that of a solicitor, and therefore, the ratio of *National Union of Commercial Employees* was not applicable to the case of a chartered accountant.[96] But another single judge of same High Court in *Ramakrishna Ayyar*, followed the holding in *National Union of Commercial Employees* and on an analogy of the work of a solicitors firm, held that the aid or services which a chartered accountant might obtain from an audit clerk, or any clerk was by no means essential or indispensable to the practice of his profession. It is quite possible for a chartered accountant to practise his profession, unaided by the services of an audit clerk or any other clerk. That being the position, the test of an essential co-operation between the employer and the employee is entirely absent in the case of an undertaking of a chartered accountant. Applying the other test, namely, that of a co-operation between the capital and labour, to the facts of the case, the court further held that there was no such cooperation, as the only capital of the chartered accountant is his professional qualification, skill, training and reputation and there was, therefore, no co-operation between capital and labour.[1]

However, the court did not deal with the second part of the *Raijndra Nath Sen's* case, as it distinguished that case on facts. In this case, the evidence showed that the chartered accountants' firm was carrying on its business without the help or co-operation of any audit clerk at all and therefore, the co-operation between a chartered accountant and his audit clerks and other clerks, was by no means of an essential and indispensable character, whereas, in *Rabindra Nath Sen's* case, there was a clear evidence of co-operation between the audit clerks and their employers, namely, the chartered accountants, and it was for that reason, that it was held that the business carried on by the firm was an industry. The second part of the decision of the single judge, in *Rabindra Nath Sen's* case, was inconsistent with the ratio of the decisions in *National Union of Commercial Employees* and *Madras Gymkhana* cases. This view was also dissented from by the Kerala, Madras and Bombay High Courts. In *TK Menon and Co*, the Kerala High Court held that if the work of an individual chartered accountant, in case the entire work is done by him, is not an industry, the fact that in view of the volume of the work he has secured, he would have to maintain an employee, cannot make it an industry.[2] This view of the Kerala High Court was followed by the Madras High Court, in *Fraser & Ross*.[3] And a similar view has been taken by the Bombay High Court in *NE Merchant*.[4] But now, the decision in *National Union of Commercial Employees* having itself been over-ruled by the Supreme Court, the offices and activities of chartered accountants would fall within the definition of industry, unless excepted by the legislature. In *Bangalore Water Supply*, Iyer J rejected the test of 'direct and essential nexus' laid down in the *Solicitors'* case (supra), and held:

> ...a solicitor's firm or a lawyer's firm becomes successful not merely by the talent of a single lawyer, but by the co-operative operations of several specialists, juniors and seniors. Likewise, the ancillary services of competent stenographers, para-legal supportive services are equally important. The same test applies to other professions...We have, therefore, no doubt that the claim for exclusion on the score of liberal professions is unwarranted, from a functional or definitional angle. The floodgates of exemption from the obligation under the Act will be opened if professions flow out of its scope. The result of this discussion is that the *Solicitors'* case is wrongly decided and must, therefore, be overruled.[5]

The above reasoning of Iyer J is unassailable. But, having been eloquent about the employment relationship and the co-operation needed between the parties, Iyer J proceeded to draw a further distinction between solicitors employing a substantial number of employees and those operating with a skeleton staff. He went on to observe:

> A single lawyer, a rural medical practitioner or an urban doctor, with a little assistant and/or a menial servant, may ply a profession but may not be said to run an industry...The image of an industry or even a quasi-industry is one of a plurality of workmen, not an isolated or single little assistant or attendant.[6]

The above observation raises some interesting points of analysis in view of the earlier judgment of Iyer J. The phraseology of s 2(j), which includes business and trade, leaves no option than to take the single shop into its fold, regardless of the

number of Workers employed therein. Secondly, once it is conceded that it is the nature of the activity that determines whether it is an industry or not, within the meaning of the Act, then the number of employees engaged therein becomes irrelevant in the light of the fact that s 2(j), as it stood then and as it stands now, does not prescribe the minimum number of workmen as one of the criteria in determining whether a particular activity is industry or not. Thirdly, is it possible to reconcile the above line of reasoning with the critical comments he made against the decisions in *Solicitors* and *Safdarjung*? Strangely, Iyer J seems to have adopted the concept of 'arbitrary differentiation'-not on the basis of the nature of activity-but on the numerical strength of the persons employed. This distinction drawn by him, between solicitors' firms or medical units, engaging one or two Workers and others engaging a higher number of Workers, seems to transcend the scope of the definition of industry.

In this connection, it is pertinent to note that he overruled *Solicitors* on the sole ground that the employer-employee cooperation need not be 'direct and essential' in order to make it an 'industry'. Once the element of 'direct and essential nexus' stands eliminated from the scene as being irrelevant, what remains for inquiry is whether the profession conforms to the triple-test or not, and nothing more. If the answer is in the affirmative, then the activity has to fall within the range of the definition. There is no question of any further classification on the basis of numerical strength. Is it not a hitherto unknown test? Where exactly should it be placed in the triple-test matrix devised by the learned judge? If the same logic is extended to, say, shops and commercial establishments, then those units engaging 'one single little assistant' can rightfully claim exemption from the terms 'business' and 'trade', appearing in the definition. This part of the ruling of Iyer J requires more analysis due to the contradictions that seem to arise therefrom.

Architects

The decision of the Supreme Court in *Bangalore Water Supply* has left no doubt that the offices and activities of architects, if they answer the triple tests laid down therein, would fall within the ambit of industry.

Agriculture

'Agriculture' or 'land' are the exclusive fields of the state legislature.[7] The Parliament, therefore, has no power to legislate with respect to 'agriculture' or 'land' but the Parliament has the concurrent power with the state to legislate with respect to 'industrial and labour disputes',[8] as well as the 'welfare of labour'.[9]The Parliament is, therefore, competent to legislate with respect to labour disputes, even if such legislation affects the labour employed in 'agriculture' or 'agricultural operations'. In the Australian Act, 'agriculture' has specifically been excluded from the definition of industry in s 4, on which our definition is based. On the other hand, in the Bombay Industrial Relations Act 1946, 'agriculture' and 'agricultural operations' have been specifically included in s 3(9) in the definition of 'industry'. But in the Industrial Disputes Act 1947, 'agriculture' has neither been included nor excluded. The Madras High Court, however, held that the State Farm Corporation of India, which is engaged in agricultural operations, is an industry in view of the fact that s 2(j), as amended in 1982 by which 'agriculture' was sought to be excluded from the definition, has not been given effect to.[10] A single judge of Delhi High Court held that Agricultural Marketing Board is an industry.[11] In striking contrast, the Delhi High Court in *Baljeet Singh*, held that State Farm Corporation was 'industry', as it was engaged in the production of high quality seeds. It was decided in an earlier case in which the petitioner was a party, though *ex parte*, that it was not an industry as the predominant purpose of the corporation was 'agricultural' in nature. Sikri J, held that being so, he was barred by the principle of *res judicata* to plead that the said corporation was an industry.[12] It is important to note, though with dismay, that these two decisions of two High Courts manifest the two diametrically opposite views on the same issue.

In *Harinagar Cane Farm*, the court left the question, whether all agriculture and operations connected with it are included within the definition of industry or not, undecided. But on the facts of the case, the activities of the two companies registered under the Indian Companies Act, who were engaged in 'agricultural operations', ie, in one case, the production of sugarcane, wheat, paddy and other articles for sale in the market, to the consumers or to wholesale dealers; and in the other case, of producing sugarcane for use in its sugar factories, were held to be falling within the definition of industry, because the companies had invested capital for carrying on their 'agricultural operations', for the purpose of making profits and the workmen employed by them in their respective operations, contributed to the production of agricultural commodities, which brought in profit to the companies and the 'agricultural operations' in question were carried on by the companies like any other 'trade' or 'business'. However, the court made it clear that agriculture cannot be called an industry under all circumstances.[13] The Orissa High Court held that 'unless agriculture is adopted as a business or calling, the operation ... cannot partake the character of industry'.[14] Now, after the decision of the Supreme Court in *Bangalore Water Supply*, any activity connected with 'agriculture' or 'agricultural operations', affecting 'industrial and labour disputes' or 'welfare of labour', might fall within the ambit of industry, if it satisfies the triple test laid down therein.

Clubs

The Calcutta High Court,[15] took the view that incorporated companies, running clubs for profit and business, would fall

within the definition of industry. He further made obiter observations that even a proprietary members' club would be an industry. The decision of Supreme Court in *Madras Gymkhana Club*, to the effect that it was not an industry on the ground that the activity of the club did not fall within the expressions 'trade', 'business', 'manufacture' or 'calling' of the members or its managing committee, was rejected and overruled in *Bangalore Water Supply*, hence the said decision is no longer a good law.[16] The same is the case with *Cricket Club of India*,[17] In *Bangalore Water Supply*, while over-ruling *Madras Gymkhana, etc.*, Iyer J, proceeded to observe:

> if a club or other like collectivity, has a basic and dominant self-service mechanism, a modicum of employees at the periphery will not metamorphose it into a conventional club, whose verve and virtue are taken care of by paid staff, and the members' role is to enjoy.

For instance, the small man's Nehru Club, Gandhi Granthasala, Anna Manram, Netaji Youth Centre, Brother Music Club, Muslim Sports Club and like organs, often named after national or provincial heroes and manned by members themselves, as contrasted with the upper bracket's Gymkhana Club, Cosmopolitan Club, Cricket Club of India, National Sports Club of India, whose badge is pleasure paid for and provided through skilled or semi-skilled catering staff, might not fall within the definition. In *Cricket Club of India*, it was further urged that since the club was an incorporated body, the doctrine of 'self-service' would not apply. But in view of the constitution of the membership of the club, the court took the view that the activities of the club were still of a self-serving nature. Thus, instead of confining itself to the corporate personality of the club, the court pierced the corporate veil and looked into the membership of the club, without assigning any reason for doing so. By this device, the activities of the Cricket Cub of India were brought within the ratio of the *Madras Gymkhana Club* case. But this is not correct. With a view to further buttress this point, in *Safdarjung*,[18] the court found support from certain observations of Lord Denning MR, in *Hotel & CIT Board*, to the effect that a member of a club, when he goes to his club to have a meal and pays for it, 'is not engaging in a transaction of sale or purchase, the members are just distributing their own property amongst themselves' and the incorporation of the club is only machinery. [19] In taking this view, Lord Denning MR, relied on certain observations of Warrington LJ, in an income-tax case.[20] But in income-tax cases, lifting of the corporate veil is permissible for seeing the economic realities behind the legal facade.[21] In piercing the corporate veil in industrial cases, Lord Denning MR deviated from the established principles relating to the doctrine of lifting the corporate veil.[22] Trade disputes or industrial disputes do not fall within the cases in which lifting of the corporate veil is permissible. The law, in India, on this subject, is laid dow by the Supreme Court in *Tata Engineering and Locomotive Co*, holding that the corporate veil can be lifted where fraud is intended to be prevented or trading with an enemy is sought to be defeated.[23] But in *Cricket Club of India*, neither any fraud was intended to be prevented, nor any trading with an enemy was sought to be defeated. Nor was this a case under a taxing statute. The question of lifting the corporate veil, even without considering the question of whether the corporate veil should he lifted or not, was not justified. If the corporate veil could not be lifted, the club would not fall within the doctrine of a 'self-serving institution'.

Co-operative Societies and Credit Unions

In *Bangalore Water Supply*, relying on the decision of the Australian High Court, in *Queen v Marshall* .[24] Iyer J held that co-operative societies, ordinarily, could not fall outside the scope of the definition of industry, because a society is the employer and the members or others are the employees and the activity partakes the nature of a 'trade'. Merely because co-operative enterprises deserve State encouragement, they do not qualify for an exemption. Even if a co-operative society is worked by the members only, the entity (save where the members are few and self-serving) is an industry because the member-Workers are paid wages and there can be disputes about rates and the different scales of wages among the categories ie, Workers and Workers or between Workers and employer. Likewise, credit unions would also fall within the ambit of the definition of 'industry'. For example, the Rajasthan Co-operative Credit Institutions Cadre Authority is an industry.[25]However, a single judge of the Punjab and Haryana High Court held that the Chandigarh State Co-operative Bank is neither an 'industry' nor an 'industrial establishment' as envisaged in the ID Act.[26]

Miscellaneous Activities

The following activities have been held to fall within the definition of industry: A pharmacy attached to a hospital and a college selling its products to the hospital as well as in the market;[27] the activities carried on by the Employees' State Insurance Corporation (constituted under the Employees' State Insurance Corporation Act 1948), which includes provisions for medical facilities for insured persons and their families;[28] a labour indentor, carrying the business of recruiting labourers,[29] a co-operative milk society,[30] a hair cutting saloon,[31] the Marmat section of the Travancore Devaswom Board, engaged in the construction of buildings for dairy farms, schools, hostels, cottage industries and workshops and building and shops,[32] the activities of the Grain Dealers' Association, whose principal activity is to transport goods from the government godowns to the respective ration shops of its members,[33] a milk supply scheme, a government undertaking supplying milk to the city of Jaipur, under the animal husbandry department,[34] the activities of the

Khadi Gramodyog Sangh,[35] the activities of the survey and investigation division of the irrigation department of the government,[36] the Chambal Hydel Irrigation Project,[37] the Salandi Irrigation Project,[38] the Railways,[39] the activities of the lining division of the irrigation department of the government,[40] the tea board constituted under the Tea Act 1953,[41] the Bihar Relief Committee, which undertook minor irrigation schemes in the State of Bihar, with all ancillary systematic operations,[42]a shop governed by the provisions of the Uttar Pradesh Shops and Establishments Act,[43] the construction work of the Tenughat dam, carried on by the Government of Bihar,[44] the Balemala Dam project, which has the ultimate objective of generating electrical power to run different businesses and industries,[45] the telephone,[46] and telegraph services,[47] Hindustan Dwakhana,[48] Security Paper Mills,[49] and the activities of the irrigation department of the Public Works department.[50] The Bombay High Court held that in the absence of any provision of law, it is 'conceivable that a trade union may, in certain circumstances, be an industry.[51] Likewise, the Madhya Pradesh High Court held that the activities of a society promoting family planning programmes of the state government, in the circumstances of a case, could be an industry.[52]

The Central Institute of Yoga is an industry in view of the fact that it is carrying out a systematic activity.[53] The activities carried on by the Rajasthan State Text Book Board bring it within the purview of the definition of industry.[54] The wool and shawl making factory managed by Kumaon Regimental Centre is an industry.[55] Forest department's work of manufacturing polythene bags is an industry.[56] The activities of the Police Housing Corporation fall within the definition of industry in s 2(j), and hence the Corporation is an 'industry'.[57] The activities of the Uttar Pradesh Scheduled Caste Finance and Development Corporation, such as organising work in various ways, for the upliftment of the down-trodden, helping them in getting technical training etc, have been held to fall within the definition of industry.[58] The activities of a company owning a number of flats in an estate, in rendering services like supply of water, electricity, lifts, sanitation to the tenants etc, has been held to be an industry.[59] The activity of *papad* making, carried on by a cooperative society, has all the trappings of trade and business, *viz*, women Workers being engaged in the preparation of *papad*, under the supervision and control of the society and being paid wages by it. The mere fact that such Workers were styled as 'members' would not exclude the relationship of employee and employer.[60] In *Visakhapatnam DLB*, the Supreme Court held that the Dock Labour Board, constituted under the Dock Workers Regulations and Employment Act 1948, was not an industry.[61] This decision was followed by the court in *Calcutta DLB*.[62] But, by the principles laid down by the Supreme Court in *Bangalore Water Supply*, the *Visakhpatnam DLB* case was overruled by implication, while *Madras Gymkhana* was specifically overruled by a larger Bench. Therefore, in *Management of Dock Labour Board, Visakhapatnam*,[63] on a precise and illuminating analysis of the ratio of these dicta, a single judge of the Andhra Pradesh High Court held that the activities of the Dock Labour Board would fall within the purview of the definition of industry.

The following activities were held not to be industries within the meaning of s 2(j). A retail cloth shop run by two partners, with the assistance of one salesman,[64] a firm of trade marks agents,[65] a building let out on rent by a palace administration board, managing the estate of a royal family, for the benefit of the junior members of the family,[66] the activities of the *Farashkhana and Baggikhana*, including *kapatdwara*, the horse breeding and riding section of the city palace of the Jaipur Maharaja, maintaining the motor garage, museum, gardens, nursery and dairy farms belonging to the Maharaja,[67] a canteen run by a bar association,[68] canteens an hostels run by an educational institution, exclusively meant for its students,[69] the locust warning organisation of the Government of India,[70] the constructional work of a cement factory,[71]a village panchayat, constituted under the Bombay Village Panchayat Act,[72] the Visakhapatnam Dock Labour Board, constituted under the Dock Workers (Regulation Employment) Act 1948—a trust consisting of the shareholders of a property for managing the same on a no profit no loss basis,[73] the National Highways Project, controlled and managed by the public Works department of the government,[74] the activities of the public Works department of a government, relating to the construction of government buildings, such as hospitals, colleges, schools and court buildings,[75] a defence laboratory, engaged in the research for the benefit of the defence organisation of the country,[76] the activities of a *Gurukul* (residential school), where the students do most of the work and employees are hired only for doing heavy work; and that too only in minimal matters, so as not to destroy the non-employee character of the institution,[77] and a blacksmith in a town, working with the help of his son or assistant.[78] The activities of the Central Institute of Fisheries, Nautical and Engineering Training, which is not engaged in research, but engaged only in imparting training to personnel, in deep sea fishing and allied operations, hiring marginal employees to attend to certain minimal matters in the institute, were held not to be an industry.[79] The relief work undertaken by a state, to provide relief to drought affected people,[80] or the activities of a circulating library, run on the premises of the central railway, employing two persons, are not industries.[81] Khadi and village industries,[82] and a District Red Cross Society are industries within the meaning of s 2(j).[83] The plea, that the Posts and Telegraphs Department is not an industrial establishment, cannot be raised for the first time in appeal to the Supreme Court, in view of the fact that it did not raise the point before the industrial tribunal and no such point was argued before it, nor did it raise the plea before the High Court.[84]

'Industry' to be replaced by 'Establishment' - NCL-II

The NCL-II has recommended that the proposed Labour Management Relations Act should be made applicable to all

establishments employing 20 or more Workers, irrespective of the nature of the activity in which the establishment is engaged. The commission felt that, in view of this recommendation, there was no need to define the term 'industry'.[85] The commission recommended that the term 'establishment' may be defined as 'a place or places where some activity is carried on with the help and co-operation of Workers.'[86] A registered society used as a home for children with government aid and donations is an 'industry'.[87] An auditorium, which is a recreation centre, is an 'industry' notwithstanding the fact that it is run by Army.[88]

Clause (k): INDUSTRIAL DISPUTE

Evolution

The definition of the term 'industrial dispute' is, it is no exaggeration to say, a key concept of literally, central importance in the law relating to industrial disputes. The term 'industrial dispute' in s 2(k) was defined in the Industrial Disputes Act 1947, and has remained unamended since. This definition is a modification of the definition of 'trade disputes' in s 2(j) of the repealed Trade Disputes Act 1929, which in its turn, was a reproduction of s 8 of the Industrial Courts Act 1919, of the United Kingdom, which defined a 'trade dispute' as meaning:

> Any dispute or difference between employers and workmen or between workmen and workmen, connected with the employment or non-employment or the terms of employment, or with the conditions of Labour of any person.

The definition also adds to the list of disputes, the one between '*the employers and employers*'. It is rather difficult to comprehend why the Indian Parliament chose to insert the phrase 'between employers and employers' in the definition. The definition of 'trade dispute' (UK) underwent radical changes during the past three decades. Presently, it stands defined in s 218 of the Trade Union and Labour Relations (Consolidation) Act 1992, as under:

> A dispute between Workers and their employer, which relates wholly or mainly, to one or more of the following:
>
> (1) terms and conditions of employment or the physical conditions which any Workers are required to work in;
>
> (2) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more Workers;
>
> (3) allocation of work or the duties of employment as between Workers or groups of Workers;
>
> (4) matters of discipline;
>
> (5) the membership or non-membership of a trade union, on the part of Workers;
>
> (6) facilities for officials of trade unions;
>
> (7) machinery for negotiation or consultation, and other procedures, relating to any of the foregoing matters, including the recognition by employers or employers' associations, of the right of a trade union to represent Workers in any such negotiation or consultation or in the carrying out of such procedures.

The 1992 Act of the UK replaced the phrase 'employers and workmen' by 'workers and their employer', and deleted the phrase 'between workmen and workmen'. These two changes, together with the sharp enumeration of the subjects, limit the range of disputes that can be raised or settled. It goes to the credit of the British Parliament that it has been prompt and responsive to the changing demands of the British economy. In striking contrast, the Indian Parliament left the definition of 'industrial dispute' in the same state in which it was enacted more than five decades ago. The trend in the UK is clearly in favour of a continuous monitoring and a progressive shift towards the simplification and consolidation of Labour laws, whereas, industrial law in India is left to languish for ages, with no salvation in sight, tall claims notwithstanding.[89] The definition has been the subject-matter of numerous decisions of the courts and one feature common to all the decisions is that, in the words of Desai J:

> the expression has been so widely defined as not to leave anything out of its comprehension and purview, involving the areas of conflict that may develop between the employer and the workmen and in respect of which a compulsory adjudication may not be available.[90]

This definition stated broadly, contains two limitations. Firstly, the adjective 'industrial' relates the disputes to an 'industry', as defined in s 2(j) of the Act; secondly, the definition expressly states that not disputes and differences of all

sorts, but only those which bear upon the relationship of employers and workmen and the terms of employment and conditions of labour, are contemplated.[91] In other words, the definition discloses that disputes of a particular kind alone are regarded as industrial disputes. Though the definition does not refer to an industry, on the grammar of the expression 'industrial dispute' itself, the dispute means a dispute in an 'industry.[92]If such an empirical statute as the IDA can be said to be influenced by a theory of labour relations and industrial conflict, that theory is to be found in the definition of an 'industrial dispute'. The Act contemplates the resolution of industrial disputes through several modes, which include: (i) collective bargaining; (ii) conciliation or mediation; (iii) arbitration by a single or team of arbitrators chosen by the parties; and (iv) adjudication by judicial /quasi-judicial authorities. Collective bargaining is, of course, far superior to all other modes of dispute resolution in view of the fact that the parties negotiate and reach a settlement voluntarily in a spirit of give and take without any intervention from a third party. Viewed thus, community of interest is the essence of collective bargaining. This policy of the legislature is also implicit in the definition of 'industrial dispute', A collective bargaining agreement has been broadly defined by Ludwig Teller as an agreement between a single employer or an association of employers on the one hand and a labour union upon the other, which regulates the terms and conditions of employment. He further points out:

> The term 'collective', as applied to 'collective bargaining agreement', will be seen to reflect the plurality not of the employers, who may be parties thereto, but of the employees involved therein. Again, the term 'collective bargaining' is reserved to mean bargaining between an employer or a group of employers and a *bona fide* labour union.

In the language of Ludwig Teller again:

> The collective bargaining agreement bears in its many provisions, the imprints of decades of activity, contending for labour equality through recognition of the notions underlying collective negotiation.[1]

Indeed, in the collective bargaining agreement is to be found a culminating purpose of labour activity.[2] It is well-known how, before the days of 'collective bargaining', labour was at a great disadvantage in obtaining reasonable terms for its contract of service from its employer. As trade unions developed in the country and collective bargaining became the rule, the employers found it necessary and convenient to deal with the representatives of the workmen, instead of the individual workmen, not only for the making or modification of the contracts, but also in the matter of taking disciplinary action against one or more workmen and as regards all other disputes[3] Hence, having regard to the modern conditions of the society, where capital and labour have organised themselves into groups for the purpose of fighting their disputes and settling them on the basis of the theory that 'union is strength', collective bargaining has come to stay.[4] Collective bargaining being the order of the day in a democratic social welfare state, legitimate trade union activities, which must shun all kinds of physical threats, coercion or violence, must march with a spirit of tolerance, understanding and grace in its dealings with the employer. Such activities can flow in a healthy channel only with mutual co-operation between the employer and the employees and cannot be considered as irksome by the management, in the best interests of its business. Dialogues with the representatives of a union help in striking a delicate balance in the adjustment and settlement of various contentious claims and issues.[5] The policy behind this Act is to protect the workmen as a class, against unfair labour practices. What imparts to the dispute of a workman, the character of an 'industrial dispute', is that it affects the rights of the workmen as a class.[6] Griffith C J said:

> The word 'industrial' ... as used to the nature of quality of the disputes, ... denotes two qualities which distinguish them from ordinary private disputes between individuals, namely: (i) that the dispute relates to industrial matters, and; (ii) that on one side at least of the dispute, the disputant are a body of men acting collectively and not individually.[7]

In other words, 'an element of collective bargaining, which is the essential feature of the modern trade union movement, is necessarily involved in industrial adjudication'.[8]

Components of Definition

The definition of 'industrial dispute' in s 2(k), can be divided into four parts for the purpose of discussion in this section as detailed below:

(a) *Factum of dispute*

(b) *Parties to dispute*;

(1) employer and employers; or

(2) employers and workmen; or

(3) workmen and workmen;

(4) individual dispute *versus* industrial dispute;

(5) number of workmen required for espousal of a dispute;

(6) espousal by trade unions;

(7) time of espousal;

(8) effect of subsequent support or withdrawal of support to the dispute;

(9) burden of proof.

(c) *Subject-matter of dispute*:

(1) employment or non-employment;

(2) contract of employment;

(3) determination of contract of employment;

(4) terms of employment, or the conditions of labour;

(5) of *any person*.

(d) *Industry and Industrial dispute*:

> The dispute should relate to an 'industry'. It is not possible to conceive an industrial dispute within the meaning of the Act, unless and until all the four conditions stand satisfied.[9]

Factum of Dispute

The key words of the definition are 'dispute' or 'difference'.[10] In *Beetham v Trinidad Cement Ltd* , Lord Denning, speaking for the privy council, observed:

> By definition, a 'trade dispute' exists, wherever a 'difference' exists and a 'difference' can exist long before the parties become locked in a combat. It is not necessary that they should have come to blows. It is sufficient that they should be sparring for an opening. [11]

The 'dispute' or 'difference', however, must be something fairly definite and of real substance and not a mere personal quarrel,[12] a grumbling or an agitation.[13] 'The term 'industrial dispute' connotes a real and substantial difference, having some element of persistency, and likely, if not adjusted, to endanger the industrial peace of the community'.[14] The expression 'dispute or difference', as used in the definition, therefore, means a controversy, fairly definite and of real substance, connected with the employment or non-employment, with the terms of employment or with the conditions of Labour of any person, and is one in which the contesting parties are directly interested in maintaining the respective contentions. In other words, only those controversies would fall within the definition 'in which the contestants are seeking to raise definite disputes of substance, in which both the parties are themselves directly and substantially interested'. Further, it must also be a grievance felt by the workmen, which the employer is in a position to remedy. Both the conditions must be present: it must be a grievance of the workmen themselves and it must be a grievance which the employer as an employer, is in a position to remedy or set right.[15]

Since such a dispute may arise between different parties, the definition equally contemplates disputes between 'employers and employers', or between 'employers and workmen' or between 'workmen and workmen'. The definition further shows that certain types of disputes can never fall within its ambit. For example, disputes between a government and an industrial establishment or between workmen and non-workmen, are not the kinds of disputes of which the definition takes notice.[16] As a dispute raised by the workmen by making certain demands on the employer, which he declines, becomes an industrial dispute, so also a dispute arising out of demands made by the employer and rejected by the workmen becomes an industrial dispute.[17] An 'industrial dispute' comes into existence when the employer and the workmen are at variance and the 'dispute or difference' is connected with the employment or non-employment, the terms of employment or with the

conditions of labour. In other words, a dispute or difference arises when a demand is made by the workmen on the employer and it is rejected by him and *vice versa*.[18] In *Sindhu Resettlement Corpn,* the Supreme Court held that a mere demand, asking the appropriate government to refer the dispute for adjudication, without a dispute being raised by the workmen with their employer, regarding such demand, cannot become an 'industrial dispute'. Hence, an 'industrial dispute' cannot be said to 'exist' until and unless a demand is made by the workman or workmen on the employer and it has been rejected by him.[19] The Delhi High Court, in *Fedders Lloyd*, went a step further and held:

> "...a demand by the workmen must be raised first on the management and rejected by it, before an 'industrial' dispute can be said to arise and 'exist' and that the making of such a demand to the conciliation officer and its communication by him to the management, who rejected the demand, is not sufficient to constitute an industrial dispute."[20]

In other words, if the workmen do not make a demand on the employer, no 'industrial dispute' will come into existence. Rejection of the claim of the workmen by the employer, in the conciliation proceedings before a conciliation officer, will not give rise to an 'industrial dispute'. This decision has been followed by the Orissa High Court[21] and the majority of a Full Bench of the Himachal Pradesh High Court.[22] But other High Courts have not subscribed to this view.[23] The view of the Delhi High Court, that an industrial dispute does not come into existence when the claim of the workmen made for the first time, in conciliation proceedings before a conciliation officer, is rejected by the employer, is not the correct view of the law. This decision overlooks the law laid down by the Supreme Court in *Bombay Union of Journalists,* that an industrial dispute must be in existence or apprehended on the date of the reference. If, therefore, a demand has been made by the workmen and it has been rejected by the employer before the date of the reference, whether directly or through the conciliation officer, it would constitute an industrial dispute.[24] For making a valid reference, it is sufficient that the dispute partakes the character of an 'industrial dispute', before the date of reference[25]

In *Shambhu Nath Goyal*, though the workman had not made a formal demand for his reinstatement, he had contested his dismissal before the inquiry officer and claimed reinstatement. Against the findings of the inquiry officer, he preferred an appeal to the appellate authority, claiming reinstatement on the ground that his dismissal was bad in law. Then again, he claimed reinstatement before the conciliation officer in the course of the conciliation proceedings, which was contested by the employer. From these facts, the court inferred that there was unimpeachable evidence that the workman had persistently demanded reinstatement, the rejection of which brought the 'industrial dispute' into existence.[26] From this holding, it would appear that the Supreme Court has, by implication, overruled the view of the Delhi High Court. After *Shambhu Nath Goyals* case, another single judge of the Delhi High Court noted that *Shambhu Nath Goyal* had not overruled *Sindhu Resettlement,* but had distinguished it on facts.[27] As a matter of fact, in *Shambhu Nath Goyal,* the demand had actually been made on the management. The court also pointed out that the decision of the three-judge Bench in *Sindhu Resettlement,* could not have been overruled by a two judge Bench in *Shambhu Nath Goyal.* Therefore, the holding in *Sindhu Resettlement,* in case of any conflict between the two decisions, must prevail. In this view of law, the court held that the making of the demand by the workman on the management, was a *sine qua non* for giving rise to an industrial dispute. In this case, even before the conciliation officer, it was not pleaded that the termination of the service of the workman was unjustified. But the Guwahati High Court, in *Animesh CD Roy*, swung to the other extreme and held:

> since the employer controverted the validity of the reliefs claimed by the workman, firstly, before the chief labour officer and thereafter, before the labour court and since he is persisting in that stand right upto this date, it looks quite evident that there was a dispute between the parties of the nature referred by the lieutenant governor to the labour court.[28]

From these observations, it would appear that even if the workmen had raised no demand, either directly or before the conciliation officer, an industrial dispute will come into existence when the employer controverts the claim of the workmen before the labour court or industrial tribunal. In a dismissal case in *Needle Industries*, the Madras High Court held that a dispute or difference, between the management and the workman, automatically arises, when the workman is dismissed from service. The court further observed that 'it is nowhere stipulated in the Act, particularly in s 2(k), that the existence of the dispute as such, is not enough, but then there should be a demand by the workman on the management, to give rise to an industrial dispute.[29] The Calcutta High Court, in *Andrew Yule*, held that the contest of an application filed by the employer, under s 33(2)(b), for the approval of the action of dismissal, would itself give rise to an 'industrial dispute' with the management. No doubt, for the existence of an industrial dispute, there should be a demand by the workmen and a refusal to grant it by the management.[30] In *Ramakrishna Mills*, it was observed:

> How the demand should be raised cannot be a legal notion of fixity and rigidity. The grievance of the workmen and the demand for its redressal must be communicated to the management. The means and mechanism of the communication adopted are not matters of much significance, so long as the demand is that of the workmen and it reaches the management.[31]

Nowhere does the Act contemplate that an industrial dispute can come into existence in any particular, specific or prescribed manner. Nor is there any particular or prescribed manner in which the refusal should be communicated. For an 'industrial dispute' to come into existence, a written claim is not a *sine qua non*; except, in the case of public utility service, because s 22 forbids going on a strike without giving a strike notice. To read into the definition, the requirement of a written demand, for bringing an 'industrial dispute' into existence, would tantamount to re-writing the section. In other words, an oral demand and its rejection will as much bring into existence an industrial dispute as a written one. If the facts and circumstances of the case show that the workmen had been making the demand, which the management had been refusing to grant, it can be said that there was an 'industrial dispute' between the parties.[32] Merely because the dispute referred was not included by the workmen in their charter of demands, it could not be concluded that there was no dispute subsisting on the basis of which a reference could be made.[33]

An 'industrial dispute' need not be a 'conflict of interest' or an economic dispute; it may also be a 'conflict of rights' or a 'legal' dispute. This is to say, while an 'industrial dispute' is most usually thought of as a dispute concerned with what the terms of employment ought to be, ie, with the negotiation of New terms of employment (conflict of interest,) a dispute is equally 'connected with' the terms of employment if it is concerned with the interpretation of the existing terms or with their enforcement (conflict of rights). However, the expression 'dispute or difference' is not intended to include mere metaphysical, theoretical or philosophical controversies between employers and employees or between workmen and workmen; it will also not include mere ideological contests or differences.[34] Thus, 'a workman may have ideological differences with the employers, a workman may feel sympathetic for an employee in his own industry or in another industry; a workman may feel seriously agitated about the conditions of Labour outside our own country; but it is absurd to suggest that any of these factors would entitle a workman to raise an 'industrial dispute' within the meaning of s 2(k) of the Act.[35] A dispute about whether a particular union alone, is competent to represent them, is obviously not an industrial dispute.[36] If the dispute is indefinite or vague, it might disqualify itself as an 'industrial dispute', 'by reason of its own extravagance'.[37]

In England also, from the interpretation of the expression 'trade dispute' as used in Trade Disputes Act 1906, in *Conway v Wade* ,[38] and *Huntley v Thornton* ,[39] it appears that a dispute falling literally within the four corners of the statutory definition, but having racial, religious or national discrimination as its true predominant purpose, will not be a 'trade dispute'. This, of course, is deduction; no case is directly on the point.[40] Occasionally, it may be difficult to divorce political activities from industrial activities. However, this difficulty is partly overcome by interpreting the term 'industrial dispute' by distinguishing between a political and an 'industrial dispute', as the disputes with a predominantly political purpose cannot be given the protection of the Act. However, it must be emphasised that in complex situations, found near the borderline between industrial and political disputes, the decisive legal factor is the nature of the available evidence, of the predominant purpose of either or both the disputants. In the words of Prof Grunfield:

> It need clearly be said how profoundly difficult the elucidation of a motive may be, especially when the dispute is at the heart of an economic or social crisis. It is as well that such elucidation has not yet proved necessary.[41]

A dispute not covered by anyone of the items enumerated in the Second Schedule or the Third Schedule, by itself, would not mean that it is not an 'industrial dispute'. An industrial dispute not covered by any of the items in these schedules shall be covered by the residuary item No 6, in the Second Schedule.[42] The question, whether a particular dispute is an 'industrial dispute' or not, is a question of fact.[43] The further question, whether the demand had, in fact, been made by the workmen on the employer, at the appropriate time, or the dispute was properly espoused by an adequate number of workmen etc, are also questions of fact. Such points cannot, for the first time, be raised in judicial review, but should be raised before the tribunal so that the opposite party has an opportunity to meet them and the tribunal may record a finding on the determination of facts.[44] However, such facts are jurisdictional facts, and the jurisdiction of the tribunal will depend upon their correct determination. It is well settled that a tribunal cannot give itself jurisdiction by erroneously deciding such a question of fact[45] and the determination of such facts is always open to judicial review.

In *ANZ Grindlays Bank*, the facts were: A long-term settlement was entered into between the Bank and All India Grindlays Bank Employees Association, which was a majority union having a membership of 66% of the employees, admittedly under s 18(1). The minority union, ie, All India Grindlays Bank Employees Federation (second respondent) did participate in the negotiations, but backed out in the last minute and refused to sign the settlement, with the result the management signed the settlement on 18-8-1996 with the majority union, ie, the Employees Association. On 6 December 1997 Grindlays Bank Employees Union, Calcutta, a constituent of the Employees Federation representing 13% of the workmen of the Bank accepted the terms of the settlement dated 18 August 1996 by signing a separate settlement on 6 December 1997. The Bank offered to extend the benefits of the said bi-partite settlement to the employees, who were not members of the Association, subject to the condition that they accept the terms of settlement in writing. The Federation thereafter

informed the conciliation officer on 19 August 1996 that it had not signed the settlement and that the signing of the settlement by the Bank with the Association (third respondent) amounted to unfair labour practice The Government referred the dispute raised by the Federation for adjudication in December 1998 in terms: "*Whether the terms of bipartite settlement dated 18-8-1996, between the management of ANZ Grindlays Bank Limited, and All Indian Grindlays Bank Employees Association which bound withholding of benefits of settlement to workmen who are not members of All India Grindlays Bank Employees Association until the individual gives acceptance of the settlement in the given format is legal and justified? If not, what relief are the workmen entitled to?*" The writ petition filed by the Bank challenging the said reference was dismissed at both the tiers of the Bombay High Court. The contention of the Bank before the Supreme Court centred round, *inter alia*, the question was *whether there was any dispute or difference at all between the parties as defined in s 2(k), which calls for a reference and adjudication?*

It is considered expedient to discuss this case in some detail, if for nothing else, to expose the gross abuse of power by the government, while functioning under s 10(1) in vital matters which affect the lives of workmen and the industrial community, not to speak of industrial peace and harmony. The case disclosed a complex set of facts, such as: (i) multiple unions in the Bank; (ii) negotiations between the Bank and the unions and the consequent settlement arrived at under s 18(1) with the majority union, ie, the Employees Association; (iii) the minority union, ie, the Employees Federation, backing out in the last minute and refusing to sign the settlement; (iv) management's offer to extend the increases agreed to in the settlement even to the employees who are not members of any union, subject to their giving individual letters (receipts) to the effect that they accept the terms of settlement as binding on them; (v) contrary to the stand taken by the Employees Federation, one of its constituents, ie, Employees Union, representing 13% of employees, accepting the terms of settlement by signing a separate settlement with the Bank in December 1997; (vi) a substantial number of employees, who were not members of either union, also accepting the terms of settlement by granting individual receipts to the Bank; (vii) in all, some 99% of the Award staff accepting the settlement and/or granting the receipt and receiving the benefits accruing therefrom; and (viii) a small minority of 29 employees, out of the total complement of the Bank, refusing to sign the settlement and raising objections thereto. Adverting to the issues raised in the case: the Bank expressed its willingness to extend the benefits agreed to under the settlement to even the workers not belonging to any union including the members of the Federation. In order to facilitate the extension of said benefits, the Bank prepared a draft undertaking, which ran thus:

> To
>
> The Manager
>
> ANZ Grindlays Bank Limited.
>
> Sir,
>
> The terms and conditions of the settlement dated August 18, 1996 between the Management of ANZ Grindlays Bank and their workmen represented by All India Grindlays Bank Employees' Association in respect of the various demands have been perused by me. I accept the settlement and the same will be binding on me. I undertake to receive the benefits in terms of the conditions set out in the settlement. I, therefore, request you to release the benefits accruing to me under the same.
>
> This may be construed as my receipt towards payment/receipt of grant under the subject settlement.
>
> Sd/-
>
> SIGNATURE

This draft undertaking proposed by the management, though perfectly reasonable, was contested by the Employees Federation, which informed the conciliation officer that, in signing a settlement with the Employees Association (which was the majority union), the Bank committed an unfair labour practice. *On the failure of the conciliation, the Central Government made a reference of the so-called dispute in a mechanical fashion with absolutely no application of mind and*

without assessing whether, in the first place, any industrial dispute existed at all between the parties. What dispute could be there in a situation where a settlement was signed between the management and the majority union and some 99% of the employees accepted the terms of the settlement? Is it possible that the Government of India was so blind to this glaring fact that it should proceed to make a reference of the so-called dispute, which never existed in substantial terms, given the fact that collective bargaining is one of the modes through which disputes are resolved between the employer and his employees in a spirit of give-and-take? Is it what s 18(1) of the Industrial Disputes Act stands for? While quashing the flawed reference made by the Central Government, which reference struck at the root of collective bargaining and bipartism, Mathur J (for self and Sema J), observed:

> ... learned counsel for the Federation (second respondent), has submitted that under the settlement such employees of the bank, who were not members of the Association (third respondent), were required to give a receipt in writing in order to avail of the benefits of the settlement and this was clearly illegal. We are unable to accept the submission made. As already stated, the settlement was arrived at between the Bank and the Association (third respondent) and by virtue of sub-section (1) of Section 18 of the Act it bound only the members of the Association (third respondent). However, the Bank also extended the benefit of settlement to such other employees, who were not members of the Association. In order to avail of the benefit they had to give a receipt that they were accepting the settlement and the same shall be binding upon them and the format of the receipt, which has been reproduced earlier, does not contain any such term, which may be of detriment to them. To protect its interest the Bank was perfectly justified in asking for a receipt from those employees, who were not members of the Association (third respondent), but wanted to avail of the benefit of the settlement. Therefore, we do not find anything wrong in the Bank asking for a receipt from the aforesaid category of employees. ... *A plain reading of the reference made by the Central Government would show that it does not refer to any dispute or apprehended dispute between the Bank and the Federation (second respondent). It does not refer to any demand or claim made by the Federation or alleged refusal thereof by the Bank. In such circumstances, it is not possible to hold that on account of the settlement dated 18-8-1996 arrived at between the Bank and the Association (third respondent), any dispute or apprehended dispute has come into existence between the Bank and the Federation (second respondent).* The action of the Bank in asking for a receipt from those employees, who are not members of the Association (third respondent) but wanted to avail of the benefit of the settlement, again does not give rise to any kind of dispute between the Bank and the Federation (second respondent). *Thus, the reference made by the Central Government by the order dated 29-12-1997 for adjudication by the Industrial Tribunal is wholly redundant and uncalled for*.[46] (Paras 9 & 11) (Italics supplied).

The above observations are self-explanatory and do not call for separate analysis. It goes to the credit of Mathur J, that he categorically rejected the executive perversions of alarming proportions that manifested in the said reference, which were more frivolous and vexatious than the dispute raised by the Employees Federation. This case was rightly decided and Mathur J, deserves full compliment from the industrial community for upholding the cause of collective bargaining as well as the sanctity of a fair settlement reached in the course thereof. Yet another illustration of arbitrary and callous exercise of power by the government is furnished by *Sindhu Resettlement Corporation* (supra) - in which the government enlarged the scope of the dispute unilaterally by making a reference in terms "whether the retrenchment effected by the management was justified and if not to what relief the workman is entitled", *whereas the dispute raised by the workman was merely confined to the payment of retrenchment compensation and not to the legality or justifiability of retrenchment*. This case has already been discussed above. *ANZ Grindlays Bank* is the second case of abuse of Executive power and is worse than *Sindhu Resettlement Corporation, in so far as the government referred a non-existent dispute for adjudication!*

Parties to the Dispute

Employers and Employees

The words 'employers and employers' have presumably been enacted with a view to widen the scope of the definition of 'industrial dispute', to take into its scope and ambit, the eventualities in certain types of disputes connected with the employment or non-employment, the terms, employment or the conditions of labour of any person, in which there may be some interest; for instance wage war-fare in an area where labour is scarce and disputes of like character.[47] These words appear to have been added *ex abundanti cautela*. In the analogous definitions of 'trade dispute' in the English statutes and 'industrial dispute' in the Australian statutes, these words do not find place. These words did not even occur in the repealed Trade Disputes Act 1929. There is, so far, no decided case on the construction of these words.

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1 *Federated Municipal and Shire Council Employees' Union of Australia v Melbourne Corpn* 26 CLR 508.

2 *Madras GCE Union v Gymbkhana Club* (1967) 2 LLJ 720 [LNIND 1967 SC 292] (SC), per Hidayatullah J.

3 *Des Raj v State of Punjab* (1988) 2 LLJ 149 [LNIND 1988 SC 240], 162 (SC) : AIR 1988 SC 1182 [LNIND 1988 SC 680]: (1988) 2 SCC 537 [LNIND 1988 SC 680], per Ranganath Misra J.

4 *Mgmt of FICCI v RK Mittal* (1971) 2 LLJ 630 [LNIND 1971 SC 573], 635 (SC), per Jaganmohan Reddy J.

5 *State of Bombay v Hospital Mazdoor Sabha* (1960) 1 LLJ 251 [LNIND 1960 SC 19], 257 (SC), per Gajendragadkhar J.

6 *Mgmt of Safdarjung Hospital v Kuldip S Sethi* (1970) 2 LLJ 266 [LNIND 1970 SC 180], 271 (SC), per Hidayatullah CJI.

7 *Mgmt of FICCI v RK Mittal* (1971) 2 LLJ 630 [LNIND 1971 SC 573], 635 (SC), per Jaganmohan Reddy J.

8 *Mazagon Dock Ltd v CIT* (1958) 34 ITR 367 -68 (SC), per Venkataramaayyar J.

9 *National Assn of Local Governmmt Officers v Balton Corpn* [1943] AC 166, 184 (HL), per Lord Wright J.

10 *Halsbury's Laws of England*, 1962, 3rd ed, Vol 38, p 9.

11 *Mgmt of Safdarjung Hospital v Kuldip S Sethi* (1970) 2 LLJ 266 [LNIND 1970 SC 180] (SC), per Hidayatullah CJI.

12 *Bangalore Water Supply and Sewerage Board v A Rajappa* 1978 Lab IC 467 [LNIND 1963 SC 89], 486 (SC), per Krishna Iyer J.

13 *Mgmt of Bihar KG Udyog Sangh v State of Bihar* (1971) Lab IC 466, 478 (Pat) (DB), per SK Jha J.

14 *Madras GCE Union v Mgmt* (1967) 2 LLJ 720 [LNIND 1967 SC 292], 730 (SC), per Hidayatullah J.

15 *DN Banerji v PR Mukherjee* (1953) 1 LLJ 195 [LNIND 1952 SC 85], 199 (SC), per Chandrasekhara Aiyar J.

16 *Bangalore Water Supply and Sewerage Board v A Rajappa* 1978 Lab IC 467 [LNIND 1963 SC 89], 486 (SC), per Krishna Iyer J.

17 *Madras GCE Union v Gymkhana Club* (1967) 2 LLJ 720 [LNIND 1967 SC 292] (SC), per Hidayatullah J.

18 *State of Bombay v Hospital Mazdoor Sabha* (1960) 1 LLJ 251 [LNIND 1960 SC 19], 256 (SC), per Gajendragadkar J.

19 *Partidge v Mallandaine* (1886) 18 QBD 276; *Krishna Menon v CIT* (1959) 35 ITR 48 [LNIND 1958 SC 122] (SC), per Sarkar J.

20 *Bangalore WSSSB v A Rajappa* (1978) Lab IC 467 [LNIND 1963 SC 89], 477 (SC), per Krishna Iyer J.

21 *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Assn* 6 CLR 309, 370 (HCA), per Isaacs J.

22 *Shankar Balaji Waje v State of Maharashtra* (1962) 1 LLJ 119 [LNIND 1961 SC 342] (SC), per Raghubar Dayal J.

23 *Ingham v Hie Lee* 15 CLR 267, per Griffith CJ.

24 *Partridge v Mallandaine* [1886] 18 QBD 276.

25 *Madras Gymkhana Club Employees Union v Gymkhana Club* (1967) 2 LLJ 720 [LNIND 1967 SC 292], 729 (SC) : AIR 1968 SC 554 [LNIND 1967 SC 291]: [1968] 1 SCR 742 [LNIND 1967 SC 291], per Hidayatullah J.

26 *Mgmt of Safdarjung Hospital v Kuldip Singh Sethi* (1970) 2 LLJ 266 [LNIND 1970 SC 180], 272 (SC) : AIR 1970 SC 1407 [LNIND 1970 SC 180]: (1970) 1 SCC 735 [LNIND 1970 SC 180], per Hidayatullah CJI.

27 *DN Banerji v PR Mukherjee* (1953) 1 LLJ 195 [LNIND 1952 SC 85], 199 (SC), per Chandrasekhara Aiyar J.

28 *State of Bombay v Hospital Mazdoorsabha* (1960) 1 LLJ 251 [LNIND 1960 SC 19], 257 (SC), per Gajendragadkar J.

29 *Ahmedabad TI Research Assn v State of Bombay* (1960) 2 LLJ 720 [LNIND 1960 SC 273], 722 (SC), per Wanchoo J.

30 *Corpn of City of Nagpur v Employees* (1960) 1 LLJ 523 [LNIND 1960 SC 32], 531 (SC), per Subba Rao J.

31 *Madras GCE Union v Gymkhana Club* (1967) 2 LLJ 720 [LNIND 1967 SC 292] (SC), per Hidayatullah J.

32 *Mgmt of Safdarjung Hospital v Kuldip S Sethi* (1970) 2 LLJ 266 [LNIND 1970 SC 180], 272 (SC), per Hidayatullah CJI.

33 *Corpn of City of Nagpur v Employees* (1960) 1 LLJ 523 [LNIND 1960 SC 32], 535 (SC), per Subba Rao J.

34 *Bangalore Water Supply and Sewerage Board v A Rajappa* 1978 Lab IC 467 [LNIND 1963 SC 89],475 (SC), per Krishna Iyer J.

35 *Workmen of Indian Standards Institution v Mgmt* (1976) 1 LLJ 33 [LNIND 1975 SC 389], 39 (SC), per Bhagwati J.

36 *DN Banerjee v PR Mukherjee* (1953) 1 LLJ 195 [LNIND 1952 SC 85] (SC), per Chandrasekhara Aiyar J.

37 *Baroda Borough Municipality v Workmen* (1957) 1 LLJ 8 [LNIND 1956 SC 94] (SC), per Das J.

38 *Madras GCE Union v Gymkhana Club* (1967) 2 LLJ 720 [LNIND 1967 SC 292], 725 (SC), per Hidayatullah J.

39 *Bangalore WSS Board v A Rajappa* 1978 Lab IC 467 [LNIND 1963 SC 89], 484 (SC), per Krishna Iyer J.

40 *Workmen of Indian Standards Institution v Mgmt of Indian Standards Institution* (1976) 1 LLJ 33 [LNIND 1975 SC 389], 46 (SC) : AIR 1976 SC 145 [LNIND 1975 SC 389], per Bhagwati J.

41 *Corpn of City of Nagpur v Its Employees* (1960) 1 LLJ 523 [LNIND 1960 SC 32] (SC) : AIR 1960 SC 675 [LNIND 1960 SC 32], per Subba Rao J.

42 *Bangalore Water Supply and Sewerage Board v A Rajappa* 1978 Lab IC 467 [LNIND 1963 SC 89], 488 (SC), per Krishna Iyer J.

43 *Madras GCE Union v Mgmt* (1967) 2 LLJ 720 [LNIND 1967 SC 292], 726 (SC), per Hidayatullah J.

44 *State of Bombay v Hospital Mazdoor Sabha* (1960) 1 LLJ 251 [LNIND 1960 SC 19] (SC) : AIR 1960 SC 610 [LNIND 1960 SC 19], per Gajendragadkar J.

45 *Western India Automobile Assn v IT* (1949) 1 LLJ 245 (FC), per Mahajan J.

46 *National Union of Commercial Employees v Meher* (1962) 1 LLJ 241 [LNIND 1962 SC 66], 247 (SC), per Gajendragadkar J.

47 *Corpn of City of Nagpur v Employees* (1960) 1 LLJ 523 [LNIND 1960 SC 32], 534 (SC), per Subba Rao J.

48 *Ahmedabad Textile Industry's Research Assn v State of Bombay* (1960) 2 LLJ 720 [LNIND 1960 SC 273] (SC) : AIR 1961 SC 484 [LNIND 1960 SC 273], per Wanchoo J.

49 *National Union of Commercial Employees v MR Meher* (1962) 1 LLJ 241 [LNIND 1962 SC 66] (SC) : AIR 1962 SC 1080 [LNIND 1962 SC 66], per Gajendragadkar J.

50 *Harinagar Cane Farm v State of Bihar* (1963) 1 LLJ 692 [LNIND 1963 SC 71] (SC) : AIR 1964 SC 903 [LNIND 1963 SC 71], per Gajendragadkar J.

51 *University of Delhi v Ramnath* (1963) 2 LLJ 335 [LNIND 1963 SC 89] (SC) : AIR 1963 SC 1873 [LNIND 1963 SC 89], per Gajendragadkar J.

52 *Madras Gymkhana Club Employees Union v Gymkhana Club* (1967) 2 LLJ 720 [LNIND 1967 SC 292] (727-32) (SC) : AIR 1968 SC 554 [LNIND 1967 SC 291], per Hidayatullah J.

53 *Cricket Club of India v Bombay Labour Union* (1969) 2 LLJ 775 (SC), per Shelat J.

54 *Mgmt of Safdarjung Hospital v Kuldip Singh Sethi* (1970) 2 LLJ 266 [LNIND 1970 SC 180], 274 (SC) : AIR 1970 SC 1407 [LNIND 1970 SC 180]: (1970) 1 SCC 735 [LNIND 1970 SC 180], per Hidayatullah CJI.

55 *Bombay Pinjrapol v Workmen* (1971) 2 LLJ 393 [LNIND 1971 SC 382] (SC), per Mitter J.

56 *Mgmt of the ICCI v RK Mittal* (1971) 2 LLJ 630 [LNIND 1971 SC 573], 645 (SC) : AIR 1972 SC 763 [LNIND 1971 SC 573], per Jaganrnohan Reddy J.

57 *Workmen of Indian Standards Institution v Management of Indian Standards Institution*, (1976) 1 LLJ 33 [LNIND 1975 SC 389], 39 (SC) : AIR 1976 SC 145 [LNIND 1975 SC 389]: (1975) 2 SCC 847 [LNIND 1975 SC 389], per Bhagwati J.

58 *Workmen of Indian Standards Institution v Management of Indian Standards Institution* (1976) 1 LLJ 33 [LNIND 1975 SC 389], 46 (SC) : AIR 1976 SC 145 [LNIND 1975 SC 389].

59 *Bangalore Water Supply and Sewerage Board v A Rajappa* 1978 Lab IC 467 [LNIND 1963 SC 89] (SC), per Krishna Iyer J.

60 Ibid. 1978 Lab IC 778 (SC), per Jaswant Singh J.

61 Ibid. 780-81 (SC), per Chandrachud CJI.

62 Ibid, 477-78.

63 Ibid, 484.

64 *DN Banerji v PR Mukherjee* AIR 1953 SC 58 [LNIND 1952 SC 85]: [1953] 4 SCR 302 [LNIND 1952 SC 85].

65 AIR 1963 SC 1873 [LNIND 1963 SC 89].

66 AIR 1960 SC 675 [LNIND 1960 SC 32].

67 AIR 1970 SC 1407 [LNIND 1970 SC 180].

68 AIR 1962 SC 1080 [LNIND 1962 SC 66].

69 AIR 1968 SC 554 [LNIND 1967 SC 291].

70 AIR 1963 SC 1873 [LNIND 1963 SC 89].

71 AIR 1975 SC 2032 [LNIND 1975 SC 280].

72 AIR 1960 SC 610 [LNIND 1960 SC 19].

73 *Mgmt of Safdarjung Hospital v Kuldip Singh Sethi* (1970) 2 LLJ 266 [LNIND 1970 SC 180], 273 (SC) : AIR 1970 SC 1407 [LNIND 1970 SC 180]: (1970) 1 SCC 735 [LNIND 1970 SC 180], per Hidayatullah CJI.

74 *National Union of Comml. Employees v M.R. Meher* (1962) 1 LLJ 241 [LNIND 1962 SC 66], 246 (SC) : AIR 1962 SC 1080 [LNIND 1962 SC 66], per Gajendergadkar J.

75 *Madras GC Employees Union v Madras Gymkhana Club* (1967) 2 LLJ 720 [LNIND 1967 SC 292]-21 (SC), per Hidayatullah J.

76 *Cricket Club of India v Bombay Labour Union*, (1969) 1 LLJ 775 [LNIND 1968 SC 198] (SC) : AIR 1969 SC 276 [LNIND 1968 SC 198], per Bhargava J.

77 *University of Delhi v Ram Nath* AIR 1963 SC 1873 [LNIND 1963 SC 89]: (1963) 2 LJ 335 (SC).

78 *Chief Conservator of Forests v JM Kondhare* (1996) 1 LLJ 1223 [LNIND 1995 SC 1252]-25 (SC), per Hansaria J.

79 *Mgmt of FICCI v RK Mittal* (1971) 2 LLJ 630 [LNIND 1971 SC 573], 645 (SC) : AIR 1972 SC 763 [LNIND 1971 SC 573], per Jaganmohan Reddy J.

80 *R Sreenavasa Rao v LC, Hyderabad* 1990 Lab IC 174, 179 (AP), per Jagannadha Rao J.

81 *Umashankar Jaswal v Royalauto Centre* (1998) 2 LLN 755 (Bom), per Lodha J.

82 *Madras Gymkhana Club Employees' Union v Gymkhana Club* (1967) 2 LLJ 720 [LNIND 1967 SC 292], 731, per Hidayatullah J.

83 *Richard Coomber v Justices of the County of Berks* (1883-84) 9 AC 61, 74.

84 *Federated State School Teachers' Assn v State of Victoria* 41 CLR 569, 585, per lsaacs J.

85 *Madras GCE Union v Gymkhana Club* (1967) 2 LLJ 720 [LNIND 1967 SC 292], 726 (SC), per Hidayatullah J.

86 *All India Radio v Shri Santosh Kumar* (1998) 1 LLJ 817 (SC).

87 *State of Punjab v Kuldip Singh* (1983) 1 LLJ 309, 314 (P&H) (FB) : (1982) ILR 2 P& H 544, per Sandhawalia CJ.

88 *Sub-Divisional Inspector of Post, v Theyyam joseph* (1996) 2 LLJ 230 [LNIND 1996 SC 256] (SC) : (1996) 8 SCC 489 [LNIND 1996 SC 256] : AIR 1996 SC 1271 [LNIND 1996 SC 256].

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90 *General Manager, Telecom v Srinivasan Rao* AIR 1998 SC 656 [LNIND 1997 SC 1448]: (1997) 8 SCC SCC 767, per Verma CJI.

91 *GM Telecom Factory v HR Thakur* (1998) 3 LLN 154 (Bom), per Srikrishna J.

92 *Executive Engineer v K Somasetty* (1997) 2 LLJ 698 [LNIND 1997 SC 778]-99 (SC) : AIR 1997 SC 2663 [LNIND 1997 SC 778]: (1997) 5 SCC 434 [LNIND 1997 SC 778].

93 *Dhyaneshwar B Ganwat v Karyakari AGP Vibhag* (2010) 4 LLJ 403 (Bom), per Ms Mhatre J.

94 *State of Gujarat v Maniben Viraji* (2003) 4 LLJ 936 (Guj) per Rathod J.

95 *State of Gujarat v Deenani Bidhaji Thakore* (2003) 3 LLJ 630 (Guj) (DB), per Shethna J.

1 *State of Rajasthan v Judge, LC*, (2003) 4 LLJ 897 (Raj), per Sharma J.

2 *Mohd Rajmohammad v IT-cum-LC*, (2003) 2 LLJ 1149 (AP), per Ramulu J.

3 *Employees' State Insurance Corpn v Hyderabad Race Club*, (2004) 6 SCC 191 : AIR 2004 SC 3972 : (2004) 3 LJ 547.

4 *Bangalore Turf Club v Regional Director, ESIC*, AIR 2009 SC 2965 [LNIND 2009 SC 1021]: (2009) 15 SCC 33 [LNIND 2009 SC 1021] : (2009) 3 LJ 570.

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7 *Tungabhadra Board v Easu* (1999) 4 LLN 1051 [LNIND 1999 KANT 132] (Kant) (DB), per Ashok Bhan J.

8 *ZCE, UP fal Nigam v PO, LC* (2001) 4 LLN 1190 (All), per Anjani Kumar J.

9 *Centre of Indian Trade Unions v State of Madhya Pradesh* (2002) 2 LLN 256 (MP), per Mishra J.

10 *Exec Engineer, YMP Division v Anant* (1999) 1 LLN 155 (Bom), per Rebello J.

11 *Exec Engineer, CPWD v MP Kolharkar* (2000) 2 LLJ 1410 (SC).

12 *Najeema Beevi v Public Service Commission* (1983) 1 LLJ 433, 435 (Ker), per Subramanian Poti Ag CJ.

13 *Umayammal v State of Kerala* (1982) KLT 829 [LNIND 1982 KER 202] (Ker) (FB).

14 *HK Makwana v State of Gujarat* (1995) 1 LLT 801, 816 (Guj) (FB), per MB Shah J.

15 *Vinodrai N Ratnotar v State of Gujarat* (1995) 1 LLJ 388, 392 (Guj) (DB), per P Bhat J.

16 *Hussen M Mhasvadkar v Bombay Iron and Steel Labour Board* 1991 Lab IC 1385 (Bom), per Dhanuka J.

17 *Rathinam v Tamilnadu State Housing Board* (1996) 1 LLJ 155, 159 (Mad), per PS Mishra CJ.

18 *Baljit Singh v State of Haryana* (1996) 1 LLJ 246 (P&H), per GS Singhvi J.

19 *Kanhaiya Lal v State of Rajasthan* (1994) 2 LLJ 474, 477 (Raj), per GS Singhvi J.

20 *Mohanan v State of Kerala* (1994) 2 LLJ 1041 -42 (Ker), per Thulasidas J.

21 *Chief Conservator of Forest v Jagannath Maruti Khondhari* (1996) 1 LLJ 1223 [LNIND 1995 SC 1252] (SC).

22 *Rajendrasinhji Institute v Maharashtra Labour Union* (2003) 4 LLJ 379 (Bom), per Mhatre J.

23 *State of Gujarat v PN Parmar* (2001) 2 LLN 41 (SC).

24 Ibid, 43.

25 *Haribhau v State of Maharashtra* (2002) 2 LLN 689 (Bom) (DB), per Lodha J.

26 *State of Bombay v Hospital Mazdoor Sabha* (1960) 1 LLJ 251 [LNIND 1960 SC 19], 261 (SC), per Gajendragadkar J.

27 (1960) 1 LLJ 523 [LNIND 1960 SC 32]-40 (SC), per Subba Rao J.

28 *Muthayyan v Manager, Kuilur Estate* (1982) 1 LLJ 23, 27 (Ker), per Khalid J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER I Preliminary

S. 2. Definitions.—

Employers and workmen

The definition of 'industrial dispute' expressly states that not disputes and differences of all sorts, but only those which bear upon the relationship of employer and workmen, are contemplated. Except in the last case, ie, a dispute 'between the workmen and workmen', one of the parties to an 'industrial dispute' must be an 'employer' or a 'class of employers'. The first point, therefore, to be noticed, which is perhaps self-evident, is that in the phrase 'employer and workmen', the plural may include the singular, on either side or any permutation of singular or plural, the masculine including the feminine. The expression, employer, has to be understood to mean any industrial employer. The definition of 'industrial dispute' is worded in very wide terms and unless they are narrowed by the meaning given to the word 'workmen', it would seem to include all 'employers', all 'employment' and all 'workmen', whatever the nature or scope of the employment may be.[48] The words of the definition may be paraphrased thus: 'any dispute which has connection with the workmen being in, or out of service or employment'.[49]In order, therefore, to determine whether a controversy, difference or a dispute is an 'industrial dispute' or not, it must first be determined whether the workman concerned or workmen sponsoring the cause, satisfy the conditions of s 2(s) of the Act. workmen have been given the right of collective bargaining with regard to various matters in which they are interested; their terms of service, the security of their service, their pay, their wages, their bonus, etc, which places limitations upon the rights of the employer but the limitation placed upon the employer is not with regard to all his employees. The limitations are confined to a limited class, constituted by the expression 'workmen' as used in the Act, and outside the class of 'workmen', the Act imposes no liability on the employer.[50] In the absence of an employer-employee relationship, between the contract workers and the principal employer, a dispute regarding the regularisation of the service of contract Workers, cannot be brought within the definition of 'industrial dispute' in s 2(k) of the IDA.[51]

In *Rajaji Nagar Co-op Bank*, Bhoruka J of the Karnataka High Court held that a dispute between the employees of a cooperative society and the management of the society, relating to their employment, is clearly excluded from the purview of the definition of 'industrial dispute', within the meaning of s 2(k). Under the ID Act, the reference for the resolution of the said dispute has to be made either to the industrial tribunal or to the labour court, whereas, under the co-operative law, it has to be made to the registrar of co-operative societies.[52] The learned judge distinguished the decision rendered in *Co-operative Central Bank*, in which the Supreme Court had held that, on a close examination of the provisions of the Andhra Pradesh Co-operative Societies Act, it would appear that the registrar could not have granted any relief in respect of the service conditions of the employees and therefore, a reference under the ID Act was maintainable.[53] It is the community of interest of the class as a whole-class of employers or class of workmen who furnish the real nexus between the dispute, and the parties to the dispute.[54] In the words of Isaac J:

> The very nature of an 'industrial dispute', as distinguished from an individual dispute, is to obtain new industrial conditions, not merely for the specific individuals then working from the specific individuals then employing them, and not for the moment only, but for the class of employees from the class of employers ... It is a battle by the claimants, not for themselves alone.[55]

Notwithstanding the fact that the language of s 2(k) is wide enough to cover a dispute between an employer and a single employee, the scheme of the Act appears to contemplate that the machinery provided therein should be set in motion to

settle only such disputes as involve the right of workmen as a class and that a dispute touching the individual rights of a workman, was not intended to be the subject of an adjudication under the Act.[56] The term 'industrial dispute' conveys the meaning that the dispute must be such as would affect large groups of workmen and employers, ranged on opposite sides. Even a single employee's dispute may develop into an industrial dispute, when it is taken up by a union or a number of workers, who make a concerted demand for redress.[57]The applicability of the Act to an individual dispute, as distinguished from a dispute involving a group of workmen, is excluded, unless the workmen, as a body or a considerable section of them, make common cause with the individual workman.[58] But, as Shelat J observed:

> The community of interest does not depend on whether the concerned workman was a member of the union or not, at the date when the cause occurred, for, even without his being a member, the dispute may be such that other workmen, by having a common interest therein, would be justified in taking up the dispute as their own and espousing it.[59]

Workmen and Workmen

Here also, like 'employers and workmen', the plural may include the singular on either side, or any permutation of singular or plural, the masculine including the feminine. But it may happen, though rarely, that the dispute is between two sets of workmen in the same establishment; such a dispute has been brought within the ambit of the industrial dispute.[60] The dispute must be between the workmen as such, for whom trade unions may, of course, act in a representative capacity, but a dispute between trade unions as such, is a pure inter-union dispute and cannot be an industrial dispute.[61] From the decision of the judicial committee of the privy council in *Beetham*,[62] and the decision of the court of appeal in *R v National Arbitration* ,[63] it would appear that the union may take the initiative, provided its workmen subsequently, adopt or ratify its conduct. Lord Sterndale MR, observed:

> A dispute between 'workmen and workmen' in connection with the employment of a person, namely, the plaintiff, the dispute being that the men in the shop insisted that no skilled man should be employed unless he belonged to the currier's union, was a 'trade dispute' within the definition. [64]

The House of Lords held that a controversy between two unions, which was not connected with the employment or non-employment or with the terms of employment or with the conditions of labour of any person, did not fall within the meaning of trade dispute, as defined in s 5(3) of the Trade Disputes Act 1906,[65] but a dispute springing out of the rivalry of one union with another, has been held to be a trade dispute by the court of appeal. In India, so far, there is no decision of any High Court or the Supreme Court, dealing with a dispute between 'workmen and workmen'. The words have been used for providing for contingencies of such disputes arising when the trade union movement in the country gets properly organised, on the lines of that in England, USA and Australia.

Individual Dispute v Industrial Dispute

The concept of 'trade dispute' in England, did not have any uniform or well-settled connotation. It depended upon its definition in each of the statutory enactments, in the light of the scheme of the particular statute. 'Trade disputes' were not the subject-matter of the Common Law of England. The earliest definition of a 'trade dispute' is to be found in the Conspiracy and Protection of Property Act 1875. With minor changes in the punctuation, this definition was adopted in the Trade Disputes Act 1906 and then, in the Industrial Courts Act 1919. In the subsequent legislation, *viz*, the National Arbitration Order 1940 and the Industrial Disputes Order 1951, the same definition was retained. The definition in these orders was considered in *Rex v National Arbitration Tribunal* , where the dispute between a town clerk and the municipal corporation was referred to the national arbitration tribunal, under the Order of 1940. But, under the Industrial Disputes Order 1951, the national arbitration tribunal was superseded by the industrial disputes tribunal, which proceeded with the adjudication of the reference. The municipal corporation applied to the King's Bench Division for an order prohibiting the tribunal from proceeding with the adjudication, on the plea that as the dispute in question was between a single workman and the employer, it was *de hors* the scope of the expression 'trade dispute', as defined in the orders of 1940 and of 1951, hence, the tribunal had no jurisdiction to adjudicate upon the matter. Construing the provisions of the order of 1940, Lord Goddard held that the definition of the term 'trade dispute' had to be read in the light of s 1(1) of the Interpretation Act of 1889 and so, an 'individual dispute' would be included in the purview of the expression 'trade dispute'. Hence, the dispute between one employer and one workman was a 'trade dispute' within the meaning of the order of 1940. But while construing the various provisions of the order of 1951, it was held that an 'individual dispute' was not a 'trade dispute' within the meaning of that order, because the whole tenor of the order of 1951 and the fact that throughout that order, the word 'employer' in the singular is used in conjunction with the word 'workers' in the plural, indicates the intention that these words should be interpreted literally and in consequence, s 1(1) of the Interpretation Act 1889 should not apply. In Australia, sub-s 35 of s 51 gave legislative power with respect to 'conciliation' and 'arbitration', for the prevention and

settlement of 'industrial disputes' extending beyond the limits of any one state. The expression 'industrial dispute' in the context of this entry, was construed to be confined to collective disputes only.[66] In other words, the term 'industrial dispute' was construed in its broad sense, in the context of the constitutional provisions.

In India, the expression 'industrial dispute', contained in this Act, has been construed by the Supreme Court so as to exclude individual disputes because of the scheme of the Act. The view taken by Supreme Court in *Central Provinces Transport Services*, was affirmed in *Newspapers Ltd*.[67] In *Dimakuchi Tea Estate*, the court held that the liberal construction of the expression 'any person', used in the definition of 'industrial dispute', was impermissible, despite the wide amplitude of these words, and evolved the test of community of interest of the workmen of the establishment, with the concerned workman.[68] In *Dharam Pal Prem Chand*, the court said that notwithstanding the width of the words used in s 2(k), a dispute raised by a single workman cannot become an industrial dispute, unless it is supported either by his union or in the absence of a union, by a substantial number of the workmen.[69] This principle was reiterated in *Indian Express*.[70] In *WIMCO*, the court said that after the *Dimakuchi* case, there is no doubt that a dispute relating to 'any person' becomes a dispute where the person in respect of whom it is raised, is one in whose employment, non-employment, terms of employment or conditions of labour, the parties to the dispute have a direct or substantial interest.[71]

A dispute relating to the house rent allowance and revision of the pay-scale of the employees in a particular establishment, is a dispute of a particular category of workmen borne on a staffing pattern. The union which collectively represents the cause of the employees, has an interest in their conditions of service. This interest does not depend upon the association or disassociation of some of the employees who may be affected by such dispute. For being an industrial dispute, the consent or interest of the holder of a particular post is irrelevant. Therefore, the refusal of an individual employee to participate in the industrial dispute, does not affect the validity of the dispute.[72]Section 2A introduces a fiction to the effect that an individual dispute connected with a 'discharge, dismissal, retrenchment or termination', is deemed to be an 'industrial dispute' notwithstanding that no other workman, nor any union of workmen, espouses such a dispute. Hence, a workman who has been discharged, dismissed or retrenched, or whose services have been otherwise terminated, can himself raise a dispute with respect to such dismissal etc but that does not mean that such a dispute can be raised by such workman alone and not by the workmen of the establishment collectively. The workmen of the establishment can always raise an 'industrial dispute' with respect to the discharge or dismissal etc of a workman, if they have a community of interest in his employment or non-employment. However, the distinction that in the former case, the dispute is between the individual workman and the employer and in the latter case, it is between the workmen of the establishment as a class, and the employer is to be borne in mind. In the former case, the concerned workman himself is a party to the dispute and not the workmen collectively, while in the latter case, the workmen collectively, are the party and not the concerned workman, individually. A dispute relating to the termination of service, discharge or dismissal of a workman, referred to adjudication under s 2A, cannot be settled by the union with the management, by entering into a settlement, pending such adjudication, without the consent of the worker.[73]

However, except the disputes relating to the 'discharge, dismissal, retrenchment or otherwise termination of service', all other disputes relating to the terms of employment or conditions of labour of an individual workman, such as transfer, wages, bonus, increments or promotion etc, will require espousal, by a substantial number of fellow workmen, in order to partake the character of an industrial dispute.[74] Similarly, a dispute which does not relate to the action of the employer discharging, dismissing, retrenching or otherwise terminating the service of a workman, but involves the question, whether there was a relationship of employment between the employer and the workman, cannot be the subject-matter of s 2A, and would require a valid espousal.[75] All other disputes, enumerated in Schs 2 and 3, are of, a collective nature and as such, would not call for the espousal of a substantial number of workmen or the union. For instance, a dispute about the necessity to frame a gratuity scheme for the workers of a concern, is from its very nature and from the very outset, a collective 'industrial dispute' and there is no question of the necessity of sponsoring such a dispute, either by the majority of the workmen or by a substantial number of them, before a reference can be made.[76]

Number of workmen required for espousal of a dispute

There is nothing in the Act requiring that the dispute or difference should be raised by all the workmen of the industry, or by everyone of them, or even by a majority of them. It is enough if the controversy is between the employer on the one side and the workmen on the other. So also, there is nothing in the Act to require that the workmen raising the controversy, should form a majority of the employees. If the controversy affects, or will affect the interests of workmen as a class, the law envisages that, in the interests of the industrial peace, it should be examined and decided in one of the modes provided by it. An individual dispute cannot, however, be said to be an industrial dispute, unless the other workmen associate themselves with it. No hard and fast rule can possibly be laid down in such circumstances, to decide when and by how many workmen, an 'industrial dispute' can be raised within the meaning of the Act, or whether a minority union or even an unrecognised union, can raise an industrial dispute. It is enough if there is a potential cause of disharmony, which is likely to endanger industrial peace and a substantial number of workmen raise a dispute about it, for then, it is permissible to take

the view that it is an 'industrial dispute,[77] In order that an individual dispute may become an industrial dispute, it has to be established that it had been taken up by the union of employees or by an appropriate number of employees of the establishment.[78]

A collective dispute, however, does not mean that all the workmen or a majority of them, from the establishment concerned, should sponsor and support the dispute. All that is necessary is that the dispute, in order to become an industrial dispute, should have the support of a substantial section of the workmen concerned in the establishment.[79] But for this purpose, the employees, who have already been dismissed and whose cause is not in question, cannot be taken into account while constituting an appreciable section of the employer's establishment, as they are not members of the employer's establishment at all and cannot be considered as such for the purpose of deciding whether there is an industrial dispute or not.[80] Even a minority group of workmen of an establishment, can make a demand and thereby, raise an industrial dispute which, in a proper case, may be referred for adjudication.[81] However, no hard and fast rule can be laid down as to the number of workmen whose association will convert an individual dispute into an industrial dispute. It must depend upon the facts of each case and the nature of the dispute. The number of workmen must, however, be such as to lead to an inference that the dispute is one which affects the workmen as a class.[82] In *Indian Express* (supra), the Supreme Court held that about 25 per cent of the workmen of the establishment, would constitute the requisite number for a valid espousal of the dispute. But in a case of espousal by a union, it is not sufficient that the union had in its membership, a substantial number of workmen from the establishment in which the concerned workman was employed. It must further be shown that a substantial number of such workmen participated in or acted together and arrived at an understanding by a resolution or by other means, and collectively supported the dispute. The tribunal has, therefore, to consider the question as to how many of the fellow workmen actually espoused the cause of the concerned workman, by participating in the particular resolution of the union. In the absence of such determination by the tribunal, it cannot be said that the individual dispute has acquired the character of an industrial dispute. The tribunal will not acquire jurisdiction to adjudicate upon such dispute.[83]

Espousal by Trade Unions

The unions are generally of two types, the first type consists of the unions of workmen of a particular establishment, and the second type consists of general unions of which the workmen of a particular establishment become members. As far as a union of the workmen of the establishment itself is concerned, the problem of espousal by them generally presents little difficulty, as the workmen who are members of such unions generally, have the community of interest with an individual employee who is one of their fellow workmen. However, the difficulties arise when the cause of a workman, in a particular establishment, is sponsored by a union which is not of the workmen of that establishment, but is one of which membership is open to workmen of other establishments as well, in that industry. In such a case, a union which has only a microscopic number of workmen as its members, cannot sponsor any dispute arising between the workmen and the management.[84] In *The Hindu*, the facts disclosed that the management of the 'Hindu' had *inter alia* three working journalists. Two of the three working journalists, ie, Salivateswaran and Venkateswaran, had become members of the Bombay Union of Journalists. The third working journalist, ie, Tiwari, had not become a member of that union. An 'industrial dispute', with respect to the dismissal of Salivateswaran, was espoused by the union. The Supreme Court observed thus:

> Firstly, the Act excluded its application to an 'individual dispute', as distinguished from a dispute involving a group of workmen, unless such a dispute is made a common cause by a body from a considerable section of workmen, (ii) the members of a union who are not workmen of the employers against whom the dispute is sought to be raised, cannot, by their support, convert an 'individual dispute' into an 'industrial dispute'.

The court further observed that, in each case while ascertaining whether an individual dispute has acquired the character of an 'industrial dispute', the test is whether on the date of the reference the dispute was taken up as supported by the union of the workmen or by an appreciable number of workmen. In order, therefore, to convert an 'individual dispute' into an 'industrial dispute', it has to be established that it had been taken up by the union of the employees of the establishment or by an appreciable number of employees of the establishment. The dispute in question being an individual dispute, could only be converted into an industrial dispute by espousal by a union of the employees or by an appreciable number of the employees of the 'Hindu', as the Bombay Union of Journalists was a union of the employees in the industry of journalism in Bombay, it was not a union of employees of the 'Hindu', Bombay. On this view of the matter, the court held that the support of Bombay Union of Journalists could not convert the 'individual dispute' into an 'industrial dispute'. The members of such a union could not be said to be the persons substantially and directly interested in the dispute between the workman concerned and his employer.[85] In *Dharampal Premchand*, however, Gajendragadkar CJI observed that the *'Hindu'* case should not be read as laying down any hard and fast rule:

(i) Notwithstanding the width of the words used in section 2(k) of the Act, a dispute raised by an individual workman cannot become an 'industrial dispute' unless it is supported either by his union or in the absence of a union, by a substantial number of workmen;

(ii) a union may validly raise a dispute though it may be a minority union of the workmen in an establishment;

(iii) if there is no union of workmen in an establishment, a group of employees can raise the dispute, which becomes an industrial dispute even though it is a dispute relating to an individual workman; and

(iv) where the workmen of an establishment have no union of their own and some or all of them have joined a union of another establishment, belonging to the same industry, if such a union takes up the cause of the workmen working in the establishment, the dispute can become an 'industrial dispute', if such a union can claim a representative character in a way that its support would make the dispute an industrial dispute.[86]

The learned Chief Justice held that a dispute of 18 workmen, could validly be espoused by the union in which only these 18 workmen of the employer were members, as these workmen could raise a dispute by themselves in a formal manner, because 18 out of 45 is a substantial number. The rationale of this holding is that, if a large number of workmen of a particular establishment become members of a union which is not strictly speaking, a union of that establishment, such union can espouse the cause of an individual workman who is its member, provided that a substantial number of his co-workers have espoused his cause through that union. It is thus clear that the sponsoring of an individual dispute by any union is not enough to convert it into an 'industrial dispute'. In *Nellai Cotton Mills*, the Madras High Court held that the mere fact that a substantial number of the workmen of the establishment in which the concerned workman was employed, were also members of the union, would not constitute an espousal. It must be shown that they participated in or acted together and arrived at an understanding by a resolution or by other means and collectively supported the dispute. The tribunal has, therefore, to consider the question as to how many of the fellow workmen actually espoused the cause of the concerned workman by participating in the particular resolution of the union. In the absence of such determination by the tribunal, it cannot be said that the individual dispute acquired the character of an industrial dispute, and the tribunal will not acquire jurisdiction to adjudicate upon the dispute.[87] What a substantial or considerable number of workmen would be, in a given case, would depend on the particular facts of the case. The fact that an 'industrial dispute' is supported by other workmen will have to be established either in the form of a resolution of the union of which the workman may be a member, or of the workmen themselves, who support the dispute or in any other manner. From the mere fact that a general union, at whose instance an 'industrial dispute' concerning an individual workman is referred for adjudication, has on its rolls, a few of the workmen of the establishment as its members, it cannot be inferred that the individual dispute has been converted into an 'industrial dispute'.[88] Nevertheless, in order to make the dispute an 'industrial dispute', it is not necessary that there should always be a resolution of a substantial or an appreciable number of workmen. What is necessary is that there should be some expression of collective will of a substantial or an appreciable number, of workmen, treating the cause of the individual workman as their own cause.[89] A retired workman cannot raise an industrial dispute against his former employer, it would however be open to the trade union to raise a dispute, and the workmen could espouse the cause of a person, who at one point of time had been workman and only ceased to be so on retirement.[90]

The decision of Supreme Court in *Forbes Gokak*, is a standing illustration of the misconceptions that creep so frequently into the judicial decision-making process. Before analysing the decision, it is necessary to state the facts in brief: the workman, who was employed in the company, claimed promotion as a clerk. When this was not granted, the appellant raised an industrial dispute, which was referred for adjudication. In their written statement before the tribunal, the management denied the workman's claim for promotion on merits, apart from contending that the individual dispute raised by the appellant was not an industrial dispute within the meaning of s 2(k), as the workman was neither supported by a substantial number of workmen nor by a majority union. On the other hand, the workman claimed that his cause was espoused by the Gokak Mills Staff Union. Before the tribunal, apart from examining himself, the General Secretary of the Union was examined as a witness in support of the workman's claim. The General Secretary affirmed that the appellant was a member of the union, duly supported by documentary evidence. The tribunal came to the conclusion that in view of the evidence given by the General Secretary and the documents produced, it was clear that the appellant's cause had been espoused by the union which was one of the unions of the company. It also noted that no record had been produced by the respondent to show that the management had taken into account the workman's production records, efficiency, attendance or behaviour while denying him promotion. The tribunal concluded that the act of the respondent in denying promotion to the appellant amounted to unfair labour practice. An award was passed in favour of the appellant and the respondent was directed to promote the appellant as a clerk from the date his juniors were promoted and to give him all consequential benefits. A single judge of Karnataka High Court dismissed the writ petition by the employer, which was reversed by a Division Bench in appeal. The Division Bench came to the conclusion that an individual dispute is not an industrial dispute unless it directly and substantially affects the interest of other workmen. Secondly, it was held that an individual dispute should be taken up by a Union which had representative character or by a substantial number of employees before it would

be converted into an industrial dispute neither of which had happened. The Division Bench held that there was nothing on record to show that the workman was a member of the union or that the dispute has been espoused by the union by passing any resolution in that regard. In appeal by the workman, Ms Ruma Pal J (for self and Thakker J) observed thus:

> In the present case, it was not questioned that the appellant was a member of the Gokak Mills Staff Union. Nor was any issue raised that the Union was not of the respondent establishment. The objection as noted in the issues framed by the Industrial Tribunal was that the Union was not the majority Union. Given the decision in *Dharam Pal's* case, the objection was rightly rejected by the Tribunal and wrongly accepted by the High Court (para 6) ... As far as espousal is concerned there is no particular form prescribed to effect such espousal. Doubtless, the Union must normally express itself in the form of a resolution which should be proved if it is in issue. However proof of support by the Union may also be available aliunde. It would depend upon the facts of each case. The Tribunal had addressed its mind to the question, appreciated the evidence both oral and documentary and found that the Union had espoused the appellant's cause. (para 7) ... The Division Bench misapplied the principles of judicial review under Article 226 in interfering with the decision. It was not a question of there being no evidence of espousal before the Industrial Tribunal. There was evidence which was considered by the Tribunal in coming to the conclusion that the appellant's cause had been espoused by the Union. The High Court should not have upset this finding without holding that the conclusion was irrational or perverse. The conclusion reached by the High Court is therefore unsustainable. (para 8). ... For all these reasons the decision of the High Court cannot stand and must be set aside.[91] (para 9).

The above decision merits some analysis. *In the first place*, the reliance placed on the decision in *Dharampal Premchand*,[92] itself is misplaced for the reason that the said case was about the dismissal of some 18 workmen. *Secondly*, at the time of deciding that case, s 2A was not there in the ID Act, with the result an individual workman could not get any relief even in the case of dismissal and discharge, if the dispute raised by him was not espoused by a union or a group of workmen. *Thirdly*, the said section was inserted in 1965 with a view to rectify a major lacuna surfaced in *Central Provinces Transport Services*,[93] in which a dismissed workman was denied relief on the ground afore-stated, in the face of the plural orientation of s 2(k). *Fourthly*, the language of s 2A is clear in so far as it covers a case of discharge, dismissal, retrenchment or termination, and does not take into its fold other industrial actions such as promotions, transfers, etc. *Fifthly*, even while acting under s 11A, a labour court has no jurisdiction to adjudicate a dispute, other than discharge or dismissal, and grant relief. *Sixthly*, the facts of the case disclose that it is a case of individual promotion to a higher grade position, which calls for an evaluation of the relative skill, competency and merit of the candidates *vis-à-vis* the demands of the higher grade job carrying higher responsibilities. *Seventhly*, it is a well settled law, as laid down in several cases including *Brooke Bond*, in which Gajendragadkar J held:

> There can be no doubt that promotions to which industrial employees are entitled normally would be treated as the function of the management…in the absence of *mala fides*, normally it must be left to the discretion of the management to select which of the employees should be promoted at a given time subject of course to the formula to which we have just referred…interference by Industrial Tribunal with the order of management in regard to such promotion must be held to be unjustified… In dealing with these disputes, however anxious industrial adjudication may and must be to protect the legitimate rights of the employees, regard must always be had to the fact that in matters of promotion, discretion has primarily to be left to the employer.[94]

The above principles have been followed in several decisions by courts in India in respect of transfers and promotions, which are essentially managerial functions, except in cases where there was material in the possession of a workman to show that the management was actuated by *mala fide* considerations or there was victimization on its part. *Eighthly*, barring a bald and nude allegation that it was a case of unfair labour practice, no evidence was let in by the workman before the tribunal. *Ninthly*, given that the workman alleged unfair labour practice against the management, the burden of proof was on him, which he did not discharge. *Tenthly*, the tribunal misdirected itself in drawing the conclusion that there was 'unfair labour practice' *de hors* any evidence led before it to that effect. *Eleventhly*, mere putting in a given number of years in a grade and position is no indication of 'promotability' and, by the same token, seniority plays little role in promotion to higher grade positions. *Twelfthly*, the question, 'who is having potential to discharge higher order functions should be left to the decision of the employer, who alone has the opportunity of observing his employees from close quarters and is capable of assessing their overall abilities. At any rate, such decisions should not be wrongfully - repeat, wrongfully - interfered with by tribunals, High Courts and the Supreme Court by relying on misplaced notions and irrelevant considerations. *Thirteenthly*, the issue in the instant case was not so much '*whether the union had passed a resolution or not*' in favour of espousing the cause as '*whether the company, having invested a few Crores, had the legitimate right to manage its affairs in a competitive business environment or should that function be delegated to labour courts and tribunals, which are neither qualified nor competent to discharge that function*'. Here is yet another decision of late 1950s on the issue from SS Dhavan J of Allahabad High Court, *which, it is hoped, would be an eye-opener to the Higher Judiciary*:

> Promotion generally necessitates a consideration of comparative suitability of the eligible workmen and such a selective process would require a consideration not only of the best performance of those eligible, but necessitates the making of a comparative estimate of their skill, sometimes of a technical nature, their personality, capacity to discharge heavier responsibilities and similar other factors... If the choice of the management is not *malafide* and no element of victimisation has entered into it, there would be no scope in such cases for interference... If those not suited to discharge the function of higher posts are promoted by industrial adjudicators who do not possess the requisite background qualifying them to undertake the task of making selections, industrial progress is bound to be jeopardised to the detriment of national economy.[95]

The above decision is not only a masterpiece of judge-made law, but also a proposition which brings to bear a high degree of professionalism upon industrial relations management. Whatever may be the compulsions of 'social justice' and 'state regulation', industrial jurisprudence cannot be stretched to a point where the power to promote and transfer is delegated to labour courts and tribunals which are, in the context of an industrial undertaking, pre-eminently incompetent to perform the task. And lastly, could it be canvassed, even from a common sense point of view, that the union or a group of workmen can have a direct and substantial interest in the promotion or the non-promotion of an individual workman? This point can be illustrated by a specific example: take, for instance, there is a dispute between an individual workman and the management on (i) whether House Rent Allowance is payable only on his basic pay or on the dearness allowance also; or (ii) on the rate at which production incentive has to be calculated in the event of down-time due to machinery breakdown or power-cuts, resulting in a fall in output. A dispute of this kind, though essentially 'individual' at its start, assumes the character of an 'industrial' dispute in view of the fact that all workmen, who are placed in the same grade and scale or are working in the same production operation, will be affected by the outcome. In such an event, it is not necessary that there should be a trade union in existence for transforming the 'individual' dispute into an 'industrial' dispute. Those few co-workmen of the same grade and scale or, as the case may be, those working in the same production shop, can come together and raise an industrial dispute for the reason that they have a direct and substantial interest in the issue relating to the percentage of HRA or the rate at which the production incentive has to be calculated. And that verily is the acid test for the espousal of an individual dispute. The only exception is that of dismissal, discharge, etc., which have been provided for in s 2A, as an exception to the general rule. Applying this test to the facts of the case, the answer is too obvious to need elaborate elucidation. On this point, the Division Bench very rightly held that the union or a group of workmen could not be said to have a direct or substantial interest in the individual promotion in the instant case. The decision of Division Bench is consistent with the letter and spirit the law relating to s 2(k). Is it possible to conceive a situation in which the Supreme Court digresses from the core criteria of the issue and deals with peripheral aspects in an attempt to justify an otherwise unjust and mediocre decision? With great respect, the learned judge did not apply her judicial mind to the weighty questions which have a significant bearing on organizational efficiency and comparative advantage of business organisations. The Division Bench of Karnataka High Court was right, whereas the tribunal, the learned single judge of the High Court and the Supreme Court were patently wrong. This decision needs to be reviewed by a larger bench and overruled.

It is not necessary that the sponsoring union is a registered trade union or a recognised trade union. Once it is shown that a body of a substantial number of workmen, either acting through a union or otherwise, had sponsored the workman's cause, it would be sufficient to convert it into an industrial dispute.[1] The definition of an industrial dispute is not restricted to a dispute between an employer and a recognised majority union, but it takes within its wide sweep, any 'dispute or difference' between the employer and the workmen, including a minority union of workmen which is connected with the employment or the terms of employment or the conditions of labour of the workmen.[2] In *Pradip Lamp Works*,[3] the complaints regarding the dismissal of 10 workmen were filed before the conciliation officer by the individual workmen themselves. But their cause was subsequently taken up by a new union formed by a large number of the co-workmen, if not a majority of them. Since this union was not registered or recognised, the workmen elected five representatives to prosecute the cases of the 10 dismissed workmen. Thus, the cases of the dismissed workmen were espoused by the new union, as yet unregistered and unrecognised. The Supreme Court held that the fact that these disputes were not taken up by a registered or recognised union, does not mean that they were not 'industrial disputes'. The mere fact that some workmen had not paid the subscription would not bar them from sponsoring the dispute, in the absence of proof that they had ceased to be members of the union for the non-payment of the subscription dues.[4]

A single judge of the Allahabad High Court, in *Imperial Electric*, took the view that a general union of which all the workmen of the company were members, could not raise an 'industrial dispute' with respect to the payment of 'bonus', because the nature of the trade of the company was different from the trade which the union represented.[5] This holding is inconsistent with the decision of the Supreme Court in *Dharampal Premchand*. On the other hand, in *Miss Kotval*, the Calcutta High Court took the view that the dispute of an individual employee became an 'industrial dispute' on being espoused by a union representing the employees engaged in the industry of air transport, even though no other employee of the company was a member of the union. In taking this view, the court interpreted the word 'industry' occurring in the

definition of 'workman' in s 2(s) of the Act, to mean the entire air transport industry, in contrast to the particular establishment of the employer company.[6] This construction is far-fetched and is not warranted by the language of the statute, as it loses sight of the word 'employed' used in that definition. Furthermore, this view is inconsistent with *Dharampal Premchand* and the *Indian Express*, and is diametrically opposed to the decision rendered in *The Hindu*, which was not overruled in *Dharampal Premchand*, but was only distinguished on its facts. Another Bench of that court, in *Reckitt & Coleman*, took the view that a dispute relating to the service conditions of 12 car drivers of a company employing about 1000 workers, was validly raised by a union in which no other workman than the 18 drivers employed by the company was a member.[7]

It is not necessary that the same union should remain in charge of that dispute till adjudication. In this connection, the distinction between espousal and representation is to be borne in mind. The dispute may be espoused by the workmen of an establishment through a particular union, for making such a dispute an industrial dispute, while the workmen may be represented before the tribunal, for the purpose of s 36, by a member of the executive or office-bearer of an altogether different union. The crux of the matter is that the dispute should be a dispute between the employer and his workmen. It is not necessary that the dispute must be espoused or conducted only by a registered trade union. Even if a trade union ceases to be a registered trade union during the continuance of the adjudication proceedings, that would not affect the maintainability of the order of reference.[8] A new trade union, by amalgamation or otherwise, may come into existence which, from that date, may represent the workmen of the industry and in such a case, if the new union takes over the dispute, then the dispute does not cease, to be an 'industrial dispute'.[9] It may happen in some cases, that a number of workmen of an establishment, may take up the dispute of an individual workman and thus, make it an 'industrial dispute'. A trade union may be organised representing the workmen of that establishment, and may take up the dispute further before its settlement. The dispute would not thereupon, become a new 'industrial dispute'. The whole point is, whether the employer is fighting a dispute with a large number of his workmen or not, but until this test is passed, an individual dispute cannot be transformed into an industrial dispute.[10]

In *Paarthy Ratnam*, the AP High Court held that a dispute simpliciter, between an employer and a workman, might develop into an industrial dispute, if the cause is espoused by a union of which the latter is a member and that the membership of the union which would give it the jurisdiction to espouse his cause, must be anterior to the date of dismissal and not subsequent to it.[11] A similar view was taken by the High Court of Kerala in *Shamsuddin*,[12] and by the Punjab High Court in *Khadi Gram Udyog*.[13] In *Muller and Phipps*, the dispute related to the retrenchment of a workman and the failure of the employer to re-employ him, in spite of its having re-employed two other employees out of their turn, as against the turn of the concerned workman. The High Court rejected the employer's contention, that the espousal of the union was not valid as it was made after the retrenched workman had ceased, on his being retrenched, to be a member of the union, on the ground that if that contention were to be upheld, it would mean that no union could ever espouse the cause of a retrenched workman.[14] A similar view was also taken by the Patna High Court, in *Jamadoba Colliery*, in which the union which espoused the cause of the workman, came into existence after his dismissal. The workman naturally became its member after his dismissal. The High Court disagreed with the tribunal, which had rejected the reference, and held that even if on the date of the dismissal of the workman, the dispute was an individual dispute, but may, under some circumstances, become an industrial dispute on the date of the reference; that the validity of the reference was to be judged on the facts as they stood on the date of the reference and not on the date of the workman's dismissal. Therefore, even if there was no union on the date of the workman's dismissal, to espouse his cause, if such a union comes into existence before the reference and the dismissed workman becomes its member and the union then espouses his cause, that would be sufficient. It was also held that there was no principal in support of the view that the union must be in existence at the time of the dismissal.[15]

Time of espousal

In *The Hindu*, the Supreme Court observed:

> In each case, on ascertaining whether an individual dispute has acquired the character of an industrial dispute, the test is whether on the date of the reference, the dispute was taken up as supported by the union of the workmen of the employer against whom the dispute is raised by the individual workman, or by an appreciable number of workmen.[16]

In other words, the validity of the reference of an industrial dispute must be judged on the facts as they stood on the date of the reference. This is because a reference can validly be made only if an industrial dispute exists or is apprehended and an 'individual dispute' becomes an 'industrial dispute' only when it is supported by a union, or a considerable number of workmen. That support must necessarily precede the reference and act as a foundation for it.[17] In other words, the existence of the interest of the workmen as a community, evidenced by the espousal of the cause, must be on the date when the reference is made and not necessarily on the date when the cause occurs, otherwise, in some cases, a dispute which was

originally an individual one may never be able to become an industrial dispute.[18]

Effect of Subsequent Support or Withdrawal of Support to Dispute

In *Working Journalists of the 'Hindu'*, the Madras High Court observed that:

> ...having regard to the statutory provisions, as interpreted by us, the jurisdiction of the labour court, to proceed with and adjudicate upon an 'industrial dispute', stems from and is sustained, until it makes an award and the same becomes enforceable, by the reference itself which has been made on the basis of an 'industrial dispute' existing or 'apprehended' on the date of the reference and that the jurisdiction of the labour court to proceed in the matter is not in any way affected by the fact that subsequent to the date of the reference, the workers or a substantial section of them, who had originally sponsored the cause, had resiled and withdrawn from it. [19]

These observations were cited with approval by the Supreme Court in *The Hindu*, as correctly setting out the effect of a subsequent withdrawal of support by the workmen, to a cause previously espoused by them. For determining the question as to whether an individual dispute has acquired the character of an 'industrial dispute', in this case, the court laid down the crucial test that on the date of reference, the espousal and support of the dispute by the union of workmen or by an appreciable number of them, must be present. A corollary to this was that a subsequent withdrawal of support will not take away the jurisdiction of the industrial tribunal. Conversely, on the same reasoning, subsequent support too, will not convert what was an individual dispute at the time of the reference, into an industrial dispute. In the words of Veeraswami J,

> ... it will be subversive of industrial justice, labour relations and fair-play, if the jurisdiction of the labour court to proceed with the matter referred to it for adjudication, is to depend on the shifting convictions, exigencies and strength of the rival parties, to the industrial dispute.[20]

Besides, it will also not be in consonance with the object and policy of the Act, namely, to conserve and promote industrial peace and welfare. A request by the worker to reconsider or withdraw the dispute also, will have no relevance, because the dispute being raised by the union, the mere fact that subsequently, the workers request for a withdrawal or reconsideration, will not make the dispute any less than industrial dispute.[21] The principle is that when an industrial dispute is raised by union or a group of workmen, in respect of the grievance of an individual workman, and a reference is made by the Government, the dispute is not between the management and the individual workman concerned. The legal position is that when an individual Worker is a part to an industrial dispute, he is a party not independently of the union which has espoused his cause and the main parties to the industrial dispute before the labour court are, therefore, the employer and the union or the workmen, as a class, who took up the cause of the individual workman.[22] Hence, the individual workman is at no stage, a party to the individual dispute, independently of the union. The union or those workmen who have, by their sponsoring, turned the individual dispute into an industrial dispute, can, therefore, claim to have a say in the conduct of the proceeding before the tribunal.[23]

Burden of Proof

There is some conflict of judicial opinion on the question of whether it is for the workman to prove that the dispute in question is sufficiently and properly sponsored, so as to convert it into an industrial dispute, or it is for the employer to show that the dispute is not properly or sufficiently sponsored and as such, is not an industrial dispute at all. The Madras,[24] Andhra Pradesh[25] and Mysore[26] High Courts have taken the view that when the validity of a reference relating to a single workman is challenged on the ground that what is referred is only an individual dispute and not an industrial dispute, it is for the workman to show that the cause has been sponsored by his union or by a number of workmen of his class, before the order of reference. In other words, it is for the party who contends that the dispute is an industrial dispute, to establish that fact, upon which the jurisdiction of a tribunal rests. On the other hand, the Labour Appellate Tribunal,[27] the Punjab,[28] Calcutta,[29] and Allahabad,[30] High Courts have taken the view that there must be a presumption that when the union takes an action, it is as a representative of, and with the support of, its members, and that it is for the employer to prove that the facts are otherwise and the members of the union are not behind it in its action. Thus, the onus to prove, according to this view, that the dispute raised is not an 'industrial dispute', is on the employer. There is no case of the Supreme Court directly on the point, so far, though there are some obiter dicta, which also appear to be conflicting. In *Newspapers Ltd*, Kapur J, observed that:

> In spite of the fact that the making of a reference by the Government under the Industrial Disputes Act, is the exercise of its administrative powers, that is not destructive of the rights of an aggrieved party to show that what was referred was not an

> 'industrial dispute' at all ...[31]

On the other hand, in *The Hindu*, Shah J, observed that:

> The dispute, in the present case, being *prima facie*, an individual dispute, in order that it may become an industrial dispute, it had to be established that it had been taken up by the union of employees...or by an appreciable number of employees...[32]

In *Rohtak General Transport*, Gajendragadkar J, observed that:

> Before this point is decided in favour of the respondent (employer), it would be obviously necessary to give the appellants (workmen) a chance to prove that their cause had been espoused by the five workmen before the date of reference. [33]

In *Hindustan Lever*, the labour court, dealing with the preliminary issue *whether there was a proper espousal of the dispute*, found that no evidence was adduced by the employer to that effect and, hence, decided the issue against the employer.[34] The Calcutta High Court held that when the authority of a union was challenged by the employer, it must be shown by production of material evidence, before the tribunal to which such a dispute has been referred, to prove that the union was duly authorised, either by a resolution of its members or otherwise, and that it had the authority to represent the workmen whose cause it was espousing.[35] From these observations, it is obvious that the burden of proof to establish the valid espousal is on the workman. This is the correct view of the law. After the insertion of s 2A, a dispute relating to the 'discharge', 'dismissal', 'retrenchment' or otherwise 'termination' of the service of an individual workman, is to be deemed to be an 'industrial dispute' and such dispute will not require espousal by the other workmen or any union. But this statement of law will still hold good in respect of other disputes, such as the disputes relating to promotion, increment, grading, leave hours of work, transfer, etc, of individual workmen, still which would require a valid espousal.

Subject-matter of Dispute

It is only that 'dispute or difference' between 'employers and employers' or between 'employers and workmen' or between 'workmen and workmen' which is connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, of any person, which would fall within the ambit of the definition of 'industrial dispute'. In other words, a dispute or difference must relate to either the employment or non-employment or the terms of employment or the conditions of labour, of any person. Unless a dispute is connected with these matters, it will not satisfy the requirements of law and will not fall within the ambit of industrial dispute,[36] but the phrase, '*any dispute ...which is connected with the employment or non-employment ...of any person*', used in the Act, is of unqualified width. The use of the present tense in the expression 'which is connected', in the definition, is significant and indicates the continuing character of an industrial dispute. It follows that a dispute which, in the past, was an industrial dispute, cannot be a dispute which is connected with ... so as to fall within the ambit of an industrial dispute, as defined in the Act.[37] Where a discharged workman, having settled his claim under an agreement with the company, made after he had obtained a favourable judgment *ex parte* in a writ application, contested the validity of the said agreement in a subsequent writ petition, the Calcutta High Court held that the question as to the legality of the said agreement could be determined by an industrial dispute, as it would come within the purview of s 2(k) of the Act.[38]

Employment

Various matters which may give rise to an 'industrial dispute', have been enumerated in the second and the Third Schedules to the Act. 'Employment or non-employment' constitutes the subject-matter of one class of industrial disputes, the other two classes of disputes being those connected with the 'terms of employment' and the 'conditions of labour'. The words 'employment or non-employment' are of the widest amplitude and have been put in juxtaposition, to make the definition of 'industrial dispute' thoroughly comprehensive. The mere fact that the two terms 'employment' and 'non-employment' are connected by 'or' does not imply that they mean or refer to the same process. The rights and liabilities are different in the matter of raising an industrial dispute and the limitations imposed on the workmen. Hence it is proposed to discuss these two expressions under separate Heads. The concept of 'employment' involves three ingredients.

(1) Employer—one who employs, ie, engages the services of other persons;

(2) Employee—one who works for another for hire; and

(3) Contract of employment—the contract of service between the employer and the employee, where under the employee agrees to serve the employer, subject to his control and supervision. [39]

In *Western India Automobile Assn*, the federal court discussed the import of these words and paraphrased the definition of an 'industrial dispute' as *any dispute which has connection with the* workmen *being in, or out of service or employment*. Mahajan J observed:

> Non-employment' is the negative of 'employment' and would mean that the disputes of workmen out of service, with their employers, are within the ambit of the definition. It is the positive or the negative act of an employer, that leads to employment or to non-employment or it may relate to an existing fact of non-employment. It may relate to the existing employment or to a contemplated employment, or it may relate to an existing fact of non-employment or a contemplated non-employment.[40]

The learned judge further elucidated the point by giving the following four illustrations:

(1) An employer has already employed a person and a trade union says: 'please don't employ him'. Such a dispute is a dispute as to employment or in connection with 'employment'.

(2) An employer gives notice to a union, that he wishes to employ two particular persons. The union says: 'No'—This is a dispute as to 'employment'. It arises out of the desire of the employer to employ certain persons.

(3) An employer may dismiss a man or decline to employ him. This matter raises a dispute as to 'non-employment'.

(4) An employer contemplates turning out employees who are already in his employment. It is a dispute as to a contemplated 'non-employment'.

Employment vs The Doctrine of Legitimate Expectation

In *Sukhnandan Thakur*, Ramaswamy J of Patna High Court (as he then was) observed that 'employment' refers to a condition in which a man is kept occupied in executing any work and it means not only an appointment to any office for the first time, but also the continuity of the appointment.[41] The need for continuity of employment or job security is a basic need of every employed person. The Bombay Textile Labour Enquiry Committee observed:

> *There is no fear which haunts an industrial worker more constantly than the fear of losing his job as there is nothing which he prizes more than economic security*. The fear of being summarily dismissed for even a slight breach of rules of discipline or for interesting himself in the trade union activity disturbs his peace of mind. It is a notorious fact that dismissals of workers have been the originating causes of not a few industrial disputes and strikes. The provision of effective safeguards against unjust and wrong dismissals is, therefore, in the interest as much of the industry as of the workers.[42] (Italics supplied)

Adverting to the definition in s 2(k), a dispute about 'employment', which is the first of the four subject-matters stipulated in the definition in s 2(k), cannot normally be raised by an unemployed stranger against an employer. In order for a claim to be treated as an industrial dispute relating to 'employment', it should, in the first place, be shown that the person was employed in some capacity by the same employer at some point of time in the past or in the present. The desire for a permanent relationship with the employer and uninterrupted income in the form of wage/salary form the foundation of such a claim. To illustrate, persons engaged on daily wages and/or on casual basis intermittently and are continued as such for a few years stake their claim for permanency of their tenure so that they can get the status and benefits available to permanent employees without interruption. This general presumption is, however, subject to one exception. It is not uncommon that the dependents of employees, who died in harness or who suffered permanent total disablement, also prefer a claim for employment in the organisation on compassionate grounds, even though they have never been employed in the past in any capacity. Quite a few organisations - both in public and private sector - have some sort of regulations which provide for employment of the dependents on compassionate grounds in certain circumstances.

In addition, the Government announces from time to time short-term employment schemes to help the rural and urban poor, such as, *Jawahar Rozgar Yojana* (JRY) and the like, with a view to provide succour to the unemployed poor. It is also a fact that the normal rules of recruitment and selection are not followed, in view of the fact that the schemes are purely temporary in nature lasting a few months at the most and the work itself is of casual nature. During the past few decades, several disputes were raised by the persons so employed on daily wages and/or casual basis by different departments of the Government, claiming regularization of their services. In most of these cases, the doctrine of '*legitimate expectation*' was invoked in support of their claim for regular appointment. The expression "legitimate expectation" was first used by Lord Denning in 1969. In the course of time, it has developed into a significant doctrine all over the world.

The Supreme Court employed this doctrine to check the arbitrary exercise of power by the administrative authorities. Thus the doctrine of legitimate expectation belongs to the realm of Administrative Law. In proceedings of judicial review, it applies the ethics of fairness and reasonableness to the situation where a person has an expectation or interest in a public body retaining a long-standing practice or keeping a promise. As per this doctrine, the public authority can be made accountable on the ground of an expectation which is legitimate. For example, if the Government evolves a scheme for providing electric poles in the villages of a certain area but later on changed it so as to exclude some villages from the purview of the scheme then in such a case what is violated is the legitimate expectations of the people living in the villages excluded from the scheme and the Government can be held responsible if such exclusion is not fair and reasonable. Thus this doctrine becomes a part of the principles of natural justice enshrining the right to hearing to a person to be affected by an arbitrary exercise of power by the public and no one can deprive a person of his legitimate expectations without following the principles of natural justice.[43] It is important to note that the courts have repeatedly emphasized that 'legitimate expectation' is not a legally enforceable right. Even so, non-consideration of a plea for legitimate expectation of a person, who has been adversely affected by a decision, may invalidate the decision on the ground of arbitrariness or irrationality. The plea of legitimate expectation relates to procedural fairness in decision-making and forms part of rule of non-arbitrariness.

In *Uma Devi*, counsel for respondent employees, who were engaged as temporary and/or contractual and/or casual basis, pressed *inter alia* the doctrine of legitimate expectation into service in support of the plea for their regularisation in Government service. Rejecting the contention, Balasubramanian, J (for self, Sabharwal, CJI, Arun Kumar, Mathur and Thakker, JJ), observed that the doctrine can be invoked if the decisions of the Administrative Authority affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. The learned judge further held:

> There is no case that any assurance was given by the Government or the concerned department while making the appointment on daily wages that the status conferred on him will not be withdrawn until some rational reason comes into existence for withdrawing it. The very engagement was against the constitutional scheme. … When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.[44] (Paras 37 & 38)

It is submitted that the learned judge had summed up the principle, which constitutes the perfect essence of the doctrine of 'legitimate expectation', brilliantly and candidly, while deciding the above case against the respondents. During the recent past, several such instances of 'back-door' entry in the name and form of 'casual', 'work-charged', 'contractual' and 'temporary' employees had come to the notice of the apex court with the further claim for regularisation in the permanent service of Government and other public bodies on the only ground that they had been working for a given number of years, in derogation of the rules and regulations governing public employment. In almost all these cases, the plea of 'legitimate expectation', where there was none either express or implied, was pushed into the forefront by the employees in support of their contention for absorption in the permanent service. The Supreme Court rightly unearthed the mischief played by the political establishment and the executive, and came down heavily against such malpractices.

Compassionate Appointments

In *Delhi Municipal Workers Union*,[45] Cyriac Joseph J of the Delhi High Court held that a dispute relating to a compassionate appointment, raised by the son of a deceased employee, was an 'industrial dispute' within the meaning of s 2(k). The learned judge relied on the decision rendered in *Kays' Construction Co*, in which it was held that in order to be an industrial dispute, it need not be a dispute directly between the employer and his workmen and that the definition of an 'industrial dispute' was wide enough to cover a dispute raised by the employer's workmen, in regard to the non-employment of others who may not be his workmen at the material time.[46] This is a complete contradiction of the decision rendered in *Kays' Construction.* Joseph J, distinguished 'non-employment' from 'unemployment'. The definition in s 2(k) includes the former and not the latter. There was no policy in the corporation for the appointment of the dependents of workmen who died in harness. The industrial tribunal rightly dismissed the claim for compassionate appointment on the

grounds that: (1) the said person was never in the employment of the corporation, (2) he was not a workman as defined in s 2(s) of the Act, and (3) there could be no industrial dispute between him and the corporation. Another ground, which seems to have been appreciated by Joseph J, was the slender fact that the union raised the dispute, and hence, it was an industrial dispute within the meaning of the Act, notwithstanding the fact that the subject matter of the dispute was outside the scope of s 2(k) and the person who preferred the demand, had no nexus, whatsoever, with the corporation. This ruling is not consistent with the spirit of the Act and, hence, requires review and reversal.

In *Delhi Development Authority*, Khanna J, held that the dispute relating to the compassionate appointment of the son of a deceased workman is an industrial dispute.[47] This decision too, like the one given by Joseph J of the same High Court (supra), is inconsistent with the ratio laid down in *Kay's Construction* (supra) and other cases. The learned judge observed that the definition in s 2(k) was wide enough 'to cover non-employment of others who might not be employed as workmen at the relevant time' (para 8). This very observation exposes the hollowness of his reasoning as well as his conclusion, for the reason that *it implies that the said 'others' might have been employed as workmen by the employer at some point of time in the past*. Applying the said argument to the case at hand, *could it be said that the 'son' of the deceased workman was employed as a workman in DDA at any time in the past? And could it further be argued that, having been so employed in the past, he has been deprived of his right to continue in employment by an act of the employer, which had given rise to the dispute?* At a more basic level, does the definition refer to '*non-employment*' or '*unemployment*'? *Do these two expressions refer to the same thing or different things?*

His further observation (para 12) that the tribunal had the power, in the *interest of industrial peace*, to direct appointment of a candidate on compassionate grounds is no less whimsical and capricious. In what manner could '*industrial peace*' be a relevant factor to a case like this? Can a judge bring into play a consideration, which is so trite on the face of it in order to justify an otherwise tenuous argument founded on a wild interpretation placed on the words '*any person*' to the point of taking into their fold any person and every person of whatsoever standing and legal status under the ID Act? Both Joseph J, and Khanna J, had misdirected themselves and decided the cases in a reckless manner by patently transgressing their legitimate confines, as if they were messiahs sent to solve the problems of the multitude. These two decisions reflect nothing but a patent abuse of judicial power on their part. *Both the decisions deserve to be rejected as being baseless*, apart from being *repugnant to the letter and spirit of s 2(k)*.

In striking contrast, Mukul Mudgal J, of the same High Court, in Municipal Employees' Union,[48] peremptorily held that 'a person in respect of whom employer-employee relationship never existed cannot be the subject-matter of industrial dispute'. The facts of the case were identical to those of Delhi Development Authority, ie, compassionate appointment to the son of a deceased workman, whose cause was espoused by the petitioner-union. The Government declined to refer the dispute the reason being that the person concerned was not a 'workman'. The union challenged the order in this petition. Mudgal J, while dismissing the petition, observed that 'any person' in *s 2(k)* could not be read without limitation and a person in respect of whom the employer-workman relationship never existed and could never possibly exist, could not be the subject matter of dispute between employers and workmen. It goes to the credit of the learned judge that he rightly interpreted the essence and personality of the definition 'industrial dispute' in s 2(k).

In *IDPL*, the union took up the case of appointment of the dependents of the employees who died in harness. The management agreed to consider the request of the union sympathetically, and to start with engage them as contractors for maintenance of records, cleaning, etc. After a few months of carrying on with the arrangement, the management dispensed with the said system. On a reference, the labour court held that they were the workmen of the company and accordingly directed their reinstatement. The writ petitions filed by the company were dismissed by the High Court on the ground that the minutes of the meeting recorded on 12 August 1988 amounted to settlement and in view thereof, the said workers ceased to be contractors and became the workers of the company. Quashing the order of the courts below, Pasayat J (for self and Chatterjee J) held:

> No production is going on in the company since 1994. These are factors which have been completely lost sight of by the Labour Court and the High Court. ... *On bare reading of the minutes of the meeting it is clear that there was in fact no settlement.* The relevant portion reads as follows:
>
> The Union demanded that the widows/dependants of deceased employees should be given employment in the plant as was done earlier. They have written several letters in this regard but no fruitful result has come out. The widows/dependants are waiting for employment for the last 2 years and are at the verge of starvation. Till such time, the decision for their employment is received from the corporation office, the management should employ them as contract labour so that they may earn their bread and avoid starvation. Further, the management should ensure payment of minimum wages. The number of such needy widows/dependants of deceased employees is about thirteen. The management agreed to consider the Union suggestion sympathetically. On the request of

> Union the Management informed that this will be done in a week's time. (para 15) ...
>
> To provide sustenance to the family members of the deceased workmen certain job works were given. The agreements have been placed on record. *The cost of the contract, the nature of the work and the time allowed have been clearly indicated in each of the contracts. It also clearly indicates the number of persons who are to be engaged for carrying out the job contract work. There was no material before the Labour Court to conclude that the contract was not a job contract and in fact employment had been given.* There is no foundation for such a conclusion. (para 16) ... Above being the position, the Labour Court and the High Court were not justified in holding that the respondent in each case was a workman and/or that there was retrenchment involved. The award of the Labour Court and the judgment of the High Court are therefore set aside.[49] (para 17)

Non-employment

The words 'employment' or 'non-employment' have not been defined in the Act but 'employment' refers to a condition in which a man is kept occupied in executing any work and it means not only an appointment to any office for the first time, but also the continuity of the appointment.[50] In other words, the concept of employment brings in the contract of service between the employer and the employee.[51] The real test for deciding whether the contract is of employment or not, is to find out whether the agreement was for the personal labour of the person engaged and if that be so, the questions as to whether the contract was one of employment and whether the work was 'time work' or 'piecework', or whether he obtained the assistance of other persons also for the work, are immaterial.[52] A dispute relating to the non-employment of a workman, raised by a union of which he is a member and relating to his employment by other union is an industrial dispute. The failure to employ or the refusal to employ, are actions on the part of the employer, which would be covered by the terms 'employment or non-employment'.[53]Though 'refusal to employ' is not specified in the second or the Third Schedules to the Act, it would be covered by the residuary item in the Second Schedule, *viz*, item no 6—'all matters other than those specified in the Third Schedule'. Hence, a tribunal will have jurisdiction to adjudicate on an 'industrial dispute' arising out of the 'refusal' of an employer to employ a workman.[54]

In *Crompton Engineering*, Ismail J of Madras High Court held that the question of 'non-employment' will arise only when the employer refuses to give work to a person who is entitled to work. For instance, where certain workmen are appointed only for a specific period or for a particular work, their employment will automatically come to an end as soon as the period is over or the work is over.[55]

The first part of the observation of Ismail J does not appear to be correct. Employment and non-employment are mutually exclusive and are, in a sense, the opposite of each other. Non-employment in the context of s 2(k) presupposes involuntary unemployment caused by an overt act on the part of the employer as, for instance, discharge, dismissal, retrenchment, etc. In other words, it implies a condition of complete severance of employer-employee relationship by an action attributable to the employer, whereas no such involuntary unemployment is predicated in a dispute relating to 'employment'. That precisely is the basic difference between the two expressions 'employment' and 'non-employment'. That takes us to the question, what is meant by the expression 'employment' appearing in s 2(k) ? It simply means that a group of workmen (or the trade union on their behalf) can, *even while being in active employment with the employer as casual workers or on daily wages or even as temporary workmen*, raise an industrial dispute seeking regularisation in the permanent service of the establishment. Thus, in a dispute relating to *employment*, '*termination of service*' by a positive act on the part of employer *is not a condition precedent* for raising an industrial dispute for regularization. In striking contrast, '*non-employment*', as the very expression connotes, implies that the factual *termination of employment* and the consequent *severance of relationship* are the essential pre-requisites for raising a dispute. The second important difference lies in the fact that, whereas an individual workman can raise a dispute in the event of discharge, dismissal, retrenchment or termination under s 2A which will be deemed to be an industrial dispute, there is no such provision in the Act which confers a right on an individual workman to raise an industrial dispute for his own regularization, during the currency of his employment. Such a dispute relating to '*employment*' has to be necessarily espoused either by a trade union or a group of workmen who have a direct and substantial interest in the dispute.

A dispute relating to a termination of service, by discharge,[56] or retrenchment,[57] of workmen and their reinstatement,[58] are disputes connected with their employment or non-employment. Suspension also amounts to a non-employment of a workman.[59] Likewise, a dispute regarding the demand of workmen, that the contract system of labour should be abolished, is also a dispute connected with employment or non-employment[60] but the demand for an equal representation on the Board of Provident Fund Trustees—a statutory body—is not in any way, connected even remotely, with the employment or non-employment of a workman.[61] The dispute regarding the refusal to employ the persons who were promised to be employed, is not connected with the employment or non-employment of any person, within the meaning of s 2(k) of the Act.[62] The refusal of an employer to put pressure on his employees to join a particular union, is not a dispute connected

with the employment or non-employment.[63] Similarly, a dispute between a union and an employer, where the employer induced his employees by legal means, to leave the union, is not a dispute connected with the employment or non-employment of the workmen.[64]

There is nothing, either in the statutory definition of an 'industrial dispute', or in the phrase: 'any dispute or difference ... which is connected with the employment or non-employment ... of any person', to suggest that the word 'dispute' excludes a dispute about the discharge simpliciter of a workman. It is one thing to give words in a statute, a restricted meaning; it is another thing to give them a meaning they do not bear. In the context of Indian labour relations, there is no good reason of policy, to gloss the definition so as to protect the preconceived notion of the employer's right to hire and fire. This view is supported by the decision of the judicial committee of the privy council in *Bird v O'Neal* , a case coming from the Leeward Island. The relevant facts were, that a woman clerk, employed in the employer's drug stores, was lawfully dismissed with a week's wages in lieu of a notice. In determining the legality of the picketing that supervened, one of the questions that arose was whether there existed a 'trade dispute', in furtherance of which, the pickets had acted? It was pointed out that there can be no 'trade dispute' between a dismissed employee and a dismissing employer, if the dismissal was lawful, ie, if the period of notice required by law is given or payment in lieu thereof, made. The trial judge rejected this contention, but it was upheld by the West Indian Court of Appeal. In their turn, however, the judicial committee of the Privy Council held:

> their Lordships ... agreed with the trial judge's rejection of the submission that the lawful dismissal of a workman cannot be the subject-matter of a trade dispute.[65]

No specific reasons were given, as in view of the unqualified width of the wording of the definition, none was really required; in this respect, the Act may be allowed to speak for itself. A dispute about the parties to the process of bargaining for the terms and conditions of employment, or for determining the employment or non-employment of any person, will occur when an employer, though allowing the employees to join a trade union, refuses to negotiate with the union, ie, it refuses to recognise the union as a bargaining agent of its employees. Such a dispute has been described by Lord Denning as a 'recognition dispute'. Can such a dispute be an 'industrial dispute'? This question has been considered by the judicial committee in *Trinidad Cement*, which dealt with the definition of a 'trade dispute', as defined in the Trade Disputes (Arbitration and Inquiry) Ordinance 1950 of Trinidad and Tobago. The judicial committee did not directly answer the question of whether the dispute was connected with the employment or non-employment of any person. It simply held that the recognition dispute was a 'trade dispute'.[66] The acceptance of the principle by the judicial committee in *Trinidad Cement*, that a recognition dispute is a 'trade dispute', was subsequently approved obiter, both by the court of appeal and by the House of Lords in *Stanford*.[67] This rule has again been followed by the court of appeal in *Torquay Hotel*, in which Lord Denning MR said:

> The defendant union claimed that it should be recognised as having authority to negotiate on their behalf. The Torquay hotel refused to recognise them. Such a recognition dispute is, I think, clearly a 'trade dispute' ... and nonetheless so, because, it springs out of the rivalry of one union with another union.[68]

A single judge of the Kerala High Court, in *TCC Ltd*, held that a 'recognition dispute' is an industrial dispute.[69]

Contract of Employment

The contract of employment is the 'corner-stone of the edifice of industrial law.[70] The general principles of the contract law apply to the creation of the contract of industrial employment, and an agreement of service is equally enforceable, whether it be expressed in writing, in a deed, by word of mouth or by conduct. The ordinary principles of contract law, therefore, apply, so that a right to claim remuneration for services rendered, does not arise in law, unless in fact, there is an agreement, express or implied, to pay for them. Hence, no contract can arise until the minds of the parties are brought together in agreement, which is evidenced by the making of an offer by one party (the offerer) and the acceptance of that offer by the other party (the offeree). Unless the process is completed, there can be no binding obligation between the parties. Cooper and Wood observe:

> The law regards the contract of employment as a personal matter between the two parties. It follows, that agreements arising from collective bargaining, between employers and trade unions, do not ipso facto become part of the individual contracts of employment. The terms agreed, however, will be acted upon by the two sides and will then, by implication, be incorporated as terms in each appropriate contract of employment. Only in an indirect sense, does the system of collective negotiation have a legal effect and the lawyer's interest is strictly confined to the agreement between employer and workman.[71]

The contract of service in industrial employment, therefore, can be entered into by the parties having capacity to do so and for a consideration. A contract of service with an infant will be void *ab initio*. A contract not supported by consideration, will also have no force of law. Likewise, a contract, the object of which is illegal, will also be void. But a contract entered into under mistake, by misrepresentation, duress and undue influence will be voidable depending upon the circumstances of the case. In construing a contract of industrial employment, like any other contract of service, the court will, if necessary, supply an implied condition as to reasonableness, where duties are not fully defined. If, on the facts, this cannot properly be done, the contract is not binding.[72]One of the recurring problems in industrial law is, how far the relationship between an industrial employer and his employees is explicable in terms of contract. The relation is partly contractual, in that mutual obligations may be created by an agreement made between the employer and the workman. For instance, the agreement may create an obligation on the part of the employer to pay a certain wage and a corresponding obligation on the workman, to render services. The relation of industrial employment is also partly non-contractual, in that the state, by means of legislation or through industrial adjudication, may prescribe many of the obligations that an employer may owe to his employees. Instances of legislations, prescribing statutory terms and conditions of employment are: the Industrial Employment (Standing Orders) Act 1946; the Minimum Wages Act 1948; the Payment of Bonus Act 1965 and the Payment of Gratuity Act 1972, etc. The payment of dearness allowance, enhanced wages and the employee's right to reinstatement in cases of illegal and wrongful discharge and dismissal, are instances of the obligations created by industrial adjudication, through the machinery of the Industrial Disputes Act 1947 or analogous state statutes. Industrial adjudication 'may involve extension of an existing agreement, or the making of a new one, or in general, the creation of new obligations or modifications of old ones ...[73] but apart from the statutory obligations or the obligations created by industrial adjudication, there is another sense in which the relation of employer and employee is non-contractual, *viz*, the terms agreed upon in a collective agreement. According to Gayler:

> 'The substitution of the collective bargaining for the individual contract, has long since modified the traditional relation of employer and employee. A contract of employment today is, in most cases, a standardised contract'. ... The terms of agreement are adhered to, not only by the member of employers' associations and trade unions-pressure of ten ensures that non-members of associations also conform to the agreement ... even in cases where collective bargaining does not lay down particular terms of employment in an industry, trade usage may be so strong that an individual employer will find it difficult in practice, to deviate some terms universally recognised by other employers in the industry.[74]

Indeed, it is sometimes contended that:

> the contract of employment ... has long since become irrelevant and unworkable ... Only by an open admission of a status of employment, can the law hope to keep pace with the practicability of the industrial scene.[75]

In general, a contract of employment does not require any particular form. It may be made by deed, or in writing, or orally, according to the desire of the parties. In practice, most large-scale establishments have standard terms of employment, for at least their lower grade of workers. The intending workmen will be presented with a form containing the stipulations as to the pay, general conditions, and notice, and will be asked to affix his signatures to the form. If the workman refuses his signatures, the employer will not employ him, as there will be no deviation from the terms contained in the document. On the other hand, if the applicant for a job, appends his signatures to the form, even without reading it, then he will be bound by its terms, except in cases where the agreement has been brought about by a mistake, fraud, duress or undue influence, in which case the contract will be voidable.

Contract of employment v Standing Orders

The contract of industrial employment is quite often constituted by the so-called 'letter of appointment', which, besides being one-sided, rarely states anything beyond the date of employment, probationary period, period of notice of termination of service and the wages. In many industrial establishments, the conditions of service are not uniform and sometimes, are not even reduced to writing. Previously, employees were free to contract different terms and conditions of service, with their employees. As Shelat J pointed out:

> Such a state of affairs led to confusion and made possible, discriminatory treatment between employees and employees, though all of them were appointed in the same premises and for the same or similar work. Such a position is clearly incompatible with the principles of collective bargaining and renders their effectiveness difficult, if not, impossible.[76]

In the words of Desai J:

> In the days of *laissez-faire*, when industrial relation was governed by the harsh weighed law of hire and fire, the management was the supreme master, the relationship being referable to a contract between unequals and the action of the management treated almost sacrosanct. The developing notions of social justice and the expanding horizon of socio-economic justice, necessitated statutory protection to the unequal partners in the industry, namely, those who invest blood and flesh, against those who bring in capital.[77]

This led to conflicts, resulting in unnecessary industrial disputes. For achieving industrial harmony and peace, the Industrial Employment (Standing Orders) Act 1946 was enacted by the Parliament, requiring employers in industrial establishments, to define formally, the conditions of employment under them with sufficient precision and to make them known to the workers. The Act applies to every industrial establishment wherein 100 or more workers are employed or were employed on any day of the preceding 12 months. In *Salem-Erode*, Gajendragadkar CJI observed that the object underlying this Act is to introduce a uniformity of terms and conditions of employment, in respect of workmen belonging to the same category and discharging the same or similar work, under an industrial establishment and to make the said terms and conditions known to the employees before they accept the employment.[78] In *Glaxo Laboratories*, Desai J observed that moving from the days when the whim of the employer was *supreme lex*, the Act took a modest step to compel the employer to prescribe the minimum conditions of service, subject to which the employment is given'.[79]

The Act is a beneficent piece of legislation, its object is to require, as its preamble and its long title lay down, the employers in industrial establishments, to define with sufficient precision, the conditions of employment of workmen employed under them and to make them known to such workmen.[80]The movement was from status to contract, the contract not being left to be negotiated by two unequal persons, but statutorily imposed. The Act makes it compulsory for the establishments to which it applies, to reduce in writing, the conditions of employment and get them certified. Section 2 defines various terms, particularly 'certifying officer', 'employer', 'industrial establishment' and 'Standing Orders', while the expression 'workman' carries the same meaning as is assigned to it in the Industrial Disputes Act. Section 3 makes it obligatory upon every industrial establishment to frame Standing Orders in respect of matters set out in the schedule to the Act and submit the same to the 'certifying officer', who shall, after making the necessary inquiry, certify the same, on being satisfied that they have been framed in accordance with the Act. Upon such certification, the Standing Orders become binding upon both the employer and the employees. They are required to be published in the manner prescribed by the Act. Model Standing Orders have been framed, which are to be effective till the certified Standing Orders are made and published under the Act. A failure to submit or frame Standing Orders by the employer, is made punishable by s 13, while s 13A prescribes the forum for the determination of questions arising with respect to the application or interpretation of the certified Standing Orders. The schedule to the Act specifies the matters which have to be provided for in the Standing Orders. Rules have been made that are called Industrial Employment Standing Orders (Central) Rules 1946. The matters in respect of which, conditions of employment are to be certified, have been specified in the schedule appended to the Act. The schedule contains 11 matters in respect of which Standing Orders have to be made.

Originally, the jurisdiction of the certifying officer and the appellate authority was very limited; they were called upon to consider whether the Standing Orders submitted for certification conform to the model Standing Orders or not. Thus, the original jurisdiction of the certifying authorities was limited to examining the draft Standing Orders submitted for certification and compare them with the model Standing Orders.[81] In 1956, the Parliament affected radical changes in the Act, widening its scope and altering its very complexion. Now s 4 casts a duty on the certifying officer or the appellate authority, to adjudicate upon the fairness or reasonableness of the provisions of any Standing Orders. Thus, after the amendment, the jurisdiction of the certifying authorities has become much wider and the scope of the inquiry also, has become correspondingly wider. The inquiry, when such Standing Orders are submitted for certification, is now two-fold:

(1) Whether the Standing Orders are in consonance with the model Standing Orders? and;

(2) Whether they are fair or reasonable?

The workmen, therefore, can raise an objection as to the 'reasonableness of fairness' of the draft Standing Orders submitted for certification. Section 10(2) gives the right, both to the workmen and the employer, to apply for modifications and by reason of the change made in s 4, a modification has also to be tested by the yard-stick of 'fairness and reasonableness'. The Act provides a speedy and cheap remedy to the individual workman, to have the conditions of his service determined and modified. The Parliament has not only broadened the scope of the Act, but has also given a clear expression to the change in its legislative policy.[82]It has also conferred the right on an individual workman, by amending ss 4 and 10, to contest the draft Standing Orders submitted by the employer for certification, on the ground that they are either not fair or not reasonable. And more important still is the right to apply for their modification, despite the finality of

the order of the appellate authority under s 6. The Parliament thus, deliberately gave a dual remedy to the workmen, both under the Industrial Employment (Standing Orders) Act 1946 as well as under the Industrial Disputes Act 1947.[83]

One of the issues debated extensively was the status of CSOS—are they merely contractual terms governing the day-to-day employer-employee relations or should they be considered as having 'statutory force'. The evolution of judge-made law on this question was by no means scientific or rational. Out of the several decisions, a few important decisions which have a bearing on the question have been identified for discussion here. In *Bagalkot Cement*, Gajendragadkar J, held that IESOA has made relevant provisions for making standing orders which, after they are certified, constitute the statutory terms of employment between the industrial establishments in question and their employees. That is the principal object of the Act.[84] It is important to note that the learned judge clothed the standing orders with 'statutory force'. In *Buckingham and Carnatic Mills*, the learned judge, however, toned down the said view and held that the CSOS represent the relevant terms and conditions of service in a statutory form and they are binding on the parties at least as much, if not more, as private contracts embodying similar terms and conditions of service.[85] In *Dewan Tea*, rejecting the contention that Standing Order 8(a)(i) of the company, which were certified before inserting the definition of 'layoff' in IDA, should be construed in the light of the said definition, the learned judge observed:

> ... Section 10(1) of the Standing Orders Act provides that the Standing Orders finally certified under this Act shall not, except on agreement between the employer and the workmen, be liable to modification until the expiry of six months from the date on which the Standing Orders or the last modification thereof came into operation. If the *Standing Orders thus become the part of the statutory terms and conditions of service, they will govern the relations between the parties* unless, of course, it can be shown that any provision of the Act is inconsistent with the said Standing Orders.[86] (italics supplied)

In a later case involving *Buckingham and Carnatic Mills*, the Labour Court took the view that the certified standing orders, though binding on the employer and workers, had no statutory force and that they were merely directive and not mandatory. Quashing the said order, Vaidialingam J, held that CSOS become part of the statutory terms and conditions of service between the employer and his employees.[87] In *DK Yadav*, Ramaswamy J, held that CSOS have statutory force and do not expressly exclude the application of the principles of natural justice.[88] In *RSRTC*, the question raised was: 'whether the CSOS could be elevated to the status of a statutory provision or do they have statutory force so as to be amenable to a decree by a civil court in the event of their violation by the employer'. Justice Jeevan Reddy (for self, Sen and Nanavati JJ) summed up the legal position thus:

> The Act does not say that on such certification, the Standing Orders acquire statutory effect or become part of the statute. It can certainly not be suggested that by virtue of certification, they get metamorphosed into delegated/subordinate legislation. ... The consensus of these decisions is: the certified Standing Orders constitute statutory terms and conditions of service. Though we have some reservations as to the basis of the above dicta as pointed out supra, we respectfully accept it both on the ground of *stare decisis* as well as judicial discipline. Even so, we are unable to say that they constitute "statutory provisions" within the meaning of the dicta in *Sukhdev Singh*,[89]...if it is held that certified Standing Orders constitute statutory provisions or have statutory force, a writ petition would also lie for their enforcement just as in the case of violation of the Rules made under the proviso to Article 309 of the Constitution. Neither a suit would be necessary nor a reference under Industrial Disputes Act. We do not think the certified Standing Orders can be elevated to that status. It is one thing to say that they are statutorily imposed conditions of service and an altogether different thing to say that they constitute statutory provisions themselves.[90]

The above decisions, when read together present a foggy and even clumsy picture, conveying all things to all people, and for that very reason merit some analysis. As discussed in the preceding paragraphs, standing orders are merely a set of 'express' and 'general' terms governing employment relationship in the industrial realm. They imply nothing more than an extended individual contract of employment, the only difference being that they apply across-the-board to all 'workmen' employed in the establishment, whereas the former may, and often do, contain special terms as negotiated and contracted between the employer and the individual workmen. The second important difference lies in the fact that while the contract of employment is a negotiated instrument between the employer and an individual workman, the CSOS are certified by an independent officer representing the Government under the provisions of the IESOA.

The decision of Gajendragadkar J, in *Bagalkot* that certified standing orders constitute statutory terms of employment seems to be an extreme view as the expression 'statutory' has its own heavy-weight connotation in contra-distinction to 'contractual'. *The mere fact that the standing orders are certified by the certifying officer cannot transform the otherwise 'contractual' terms into those having 'statutory force', any more than the signing of a 'settlement' by the conciliation officer u/s 12(3) of the IDA can transform it into an 'award'*. With great reverence to the eminent judge, it is submitted that this ruling is misconceived and is wrong. His observation in *Buckingham and Carnatic Mills* is, though milder than that of *Bagalkot Cement*, still not free from 'statutory' overtones. What is meant by the expression 'statutory form', if not

something having the force of a statute? Is it possible to differentiate, qualitatively, the expression '*statutory form*' from '*statutory force*', which are inseparable like 'word and meaning' or 'fire and heat'? The subsequent decisions of Vaidialingam J, and Ramaswamy J, had only aggravated the uncertainty. Between the two, Vaidialingam J, was more moderate in his observation that the CSOS become part of 'statutory terms and conditions of service', whereas Ramaswamy J., went thus far as to hold that they have 'statutory force'. With great respect for the learned judges, all these expressions are nebulous and obscure.

It was Jeevan Reddy J, who rightly observed that, though the Bench had some reservations as to the basis of the above dicta, it was respectfully accepting them on the ground of *stare decisis* as well as judicial discipline. The learned judge further held that it is one thing to say that certified standing orders are 'statutorily imposed conditions of service' and quite another to suggest that they constitute 'statutory provisions' themselves. The correctness of the view of Jeevan Reddy J, can be testified from another angle also. Since the issue related to a State Road Transport Corporation, which is a public sector undertaking amenable to writ jurisdiction, let us take the illustration of public sector undertakings for the purpose of analysis. Let us assume that there are two public sector undertakings 'A' and 'B' located side-by-side with 'A' having less than 100 workmen and 'B' employing more than 100. As required by the Act, 'B' has to frame the standing orders and get them certified, whereas in respect of 'A' there is no such requirement, which means there are no standing orders at all. Let us also assume that the two units dismissed a few workmen for certain acts of misconduct. If the court were to rely on *Sukhdev Singh* as contended by counsel for respondent, it would produce an anomalous situation *inter se* in so far as the workmen of unit 'B' could get relief of reinstatement by knocking at the doors of civil court or by directly approaching the High Court under Art. 226, whereas the workmen of unit 'A' will be left with no relief, as there were no standing orders with the so-called 'statutory force'. Justice Jeevan Reddy had in fact highlighted this absurdity. It is not out of place to mention that the majority decision in *Sukhdev Singh* itself was wrong, which is plagued by a battery of misconceptions and perverse reasoning. It is not within the scope of this book to analyse the perplexing observations made by Ray CJI in that case, hence it is left at that. It is submitted that the CSOS constitute merely general terms and conditions of service formulated under IESOA and certified or, more appropriately, 'sanctified' by the certifying officer; nothing more and nothing less. It is also necessary to note that the CSOS are neither exclusive nor exhaustive, and that they operate coextensively with the special terms and conditions between the employer and the individual workmen, some of which may involve a deviation from, or exception to, the CSOS. Viewed thus, the decision of Jeevan Reddy J in *RSRTC* is right in so far as the legal status of the CSOS is concerned, and those of the earlier judges are clearly wrong.[91] However, the other part of the decision of Jeevan Reddy J, which touches upon the concurrent jurisdiction of civil courts in respect of industrial disputes, is clearly out of step with the spirit of industrial relations law and is inconsistent with *Premier Automobiles*,[92] which is an authority for the proposition that the jurisdiction of civil courts stands ousted by necessary implication. Thus, the decision of the learned judge in so far as it related to the so-called concurrent jurisdiction of civil courts is wholly repugnant to the scheme and objects of the ID Act.

The terms of the certified Standing Orders will prevail over the terms of a contract which conflict with the Standing Orders.[93]The Act being a socially beneficent Act and enacted for ameliorating the conditions of the weaker partner, the conditions of service prescribed thereunder must receive such interpretation as to advance the intention underlying the Act and to defeat the mischief.[94] In *Hindustan Steel*,[95] Desai J observed that a Standing Order which confers arbitrary, uncanalised and drastic powers to dismiss an employee, by merely stating that it is inexpedient or against the interest of security, to continue to employ the workman, is violative of the basic requirements of the principles of natural justice, inasmuch as that the employer cannot impose a penalty of such a drastic nature as to affect the livelihood and put a stigma on the character of a workman, without recording the reasons as to why the disciplinary inquiry was dispensed with and what the misconduct alleged against him was. Though in this case, the court did not consider it necessary to go into the *vires* of the relevant Standing Order, because the order of dismissal in terms of the Standing Order itself was found to be unsustainable, it exhorted the management, which was a public sector undertaking, to bring the Standing Order in tune with the philosophy of the Constitution, failing which the *vires* of the Standing Order may be examined in a proper proceeding. In *Tulsiram Patel*, a Constitution Bench upheld the validity of a similar provision under Art. 311 of the Constitution.[1] In *Hari Pada Khan*, the Supreme Court upheld the validity of a Standing Order of the Indian Oil Corporation, which permitted the removal or dismissal from service, without following the procedure of inquiry etc. The Standing Order provided that where a workman had been convicted of a criminal offence or where the general manager was satisfied for reasons to be recorded in writing, that it was not expedient or in the interest of security to continue the workman, the workman may be removed or dismissed from service, without following the prescribed procedure. The court observed that:

> The doctrine of principle of natural justice has no application when the authority concerned is of the opinion that it would be inexpedient to hold an enquiry and that it would be against the interest of security of the Corporation to continue in employment the offender workman when serious acts are likely to affect the foundation of the institution. In *Tulsi Ram Patel v Union of India* .... a Constitution Bench of this Court upheld the validity of the similar provisions under Article 311 of the Constitution. Recently, in SLP [C] No.11659/92 ... where the validity of *pari materia* provision was questioned. This Court upheld the validity stating that

> the above clause will operate prospectively. ... A contention has been raised by Mr. Krishnamani that in *Tulsi Ram Patel's* case [supra] this Court had upheld the validity of the Rule subject to the principle of natural justice. It is needless to mention that the principle of natural justice requires to be modulated consistent with the scheme of the Rules. It is settled law that the principle of natural justice cannot supplant but can supplement the law. In that view of the matter, the Rule having been made to meet specified contingency the principle of natural justice by implication, stands excluded. We do not think that the Rule is *ultra vires* of Articles 14 and 21 as stated earlier.[2]

Determination of the Contract of employment

There is a variety of modes in accordance with which, the contract of employment gets determined. An employer may terminate the contract of employment according to the terms of the contract itself or he may terminate the contract as a measure of punishment, inflicted by way of a disciplinary action, for an act of misconduct. Apart from the death of one of the parties,[3] the contract of employment may be determined by impossibility,[4] frustration or voluntary retirement. The contract may also be determined on a transfer or closure of the undertaking. The employee, may, on the other hand, terminate the contract of employment by voluntarily retiring, ie, resigning or abandoning the job. The contract may also be determined on reaching the age of superannuation or by the continuous ill health of the employee. In cases where the contract is determined by the volition of the employee, it is not a termination of the contract by the employer. In such cases, the employer is merely acceding to the employees' request or action.[5] The determination of a contract is the major cause of industrial disputes and has produced a good bit of judicial grist. These topics, therefore, are being discussed in detail:

By the Employee

The employee may determine the contract of employment by voluntarily retiring from service, *viz*, by resigning his job or abandoning the job. Voluntary retirement means the determination of the contract of employment by the volition of the employee himself, in contradistinction to an act on the part of the employer, to terminate the service. 'Termination of service' and 'voluntary retirement' are two different concepts. A mere submission of the employee to the termination of his service by the employer, is not a 'voluntary' act on the part of the former. By and large, an employee is said to have determined the contract of employment voluntarily, when he resigns his job or abandons the same. The expression 'voluntary retirement' has been used in the exclusionary sub-cl (a) of the definition of retrenchment in cl (oo) of s 2 of the Act. This expression comprehends both the topics, *viz*, 'resignation' and 'abandonment of the job'.

(i) Resignation:

It is the common law right of an employee to determine the contract of service by resigning his job. In the language of Madon J:

> By entering upon a contract of employment, a person does not sign a bond of slavery and a permanent employee cannot be deprived of his right to resign. A resignation by an employee would, however, normally, require to be accepted by the employer in order to be effective.[6]

If on the other hand, the resignation is not accepted, then in the absence of any other terms to the contrary, the law implies that the contract of service could be terminated by a reasonable notice and unless the employer complies with this implied term of law, it cannot be said that the contract of service has been put to an end to and consequently, the resignation will not be effective, but before a resignation could be effective, it must terminate the contract of service in a legally defined mode. If the resignation is accepted, then the contract of employment will be discharged by the consent of the parties. The view that the moment an employee tenders his resignation, it becomes effective and the bond of service is completely snapped, is likely to introduce chaos in the sector of employment.[7] In *JK Cotton*, Ahmadi J observed that the resignation is not complete until it is accepted by the appropriate authority. In other words, 'before such acceptance, an employee can change his mind and withdraw his resignation, but once the resignation is accepted, the contract comes to an end and the relationship of master and servant stands snapped. The learned judge further observed:

> If an employee makes his intention to resign his job known to the employer and the latter accepts the resignation, the contract of employment comes to an end and with it stands severed, the employer-employee relationship.[8]

The general rule regarding resignations is that when an employee has invited by his letter of resignation, the determination of his employment, his services normally stand terminated from the date on which the letter of resignation is accepted by

the appropriate authority or from any other date in the letter of resignation. In the absence of any law or rule governing the conditions of service to the contrary, it will not be open to the employee to withdraw his resignation after it has been accepted by the appropriate authority or after the date indicated in the letter of resignation. Till the resignation is accepted by the appropriate authority, in accordance with the rules governing the acceptance or on the expiry of the date indicated in the letter of resignation, the employee has *locus poenitentiae*, but not thereafter.[9] Any undue delay in intimating the acceptance of the resignation, may justify an inference that the resignation has not been accepted.[10] However, in the case of a resignation which remains unaccepted, the employee cannot be deemed to be in service for months or years together. After the lapse of a reasonable period of notice, the contract would be deemed to have come to an end, whether the resignation is accepted or not.[11] A resignation by an employee can be validly withdrawn before its acceptance by the employer is communicated[12] but he cannot be permitted to withdraw the resignation after it has been accepted by the employer, because after the acceptance, the contract of employment gets determined and the employee thereafter, is no longer in service.[13]The legal position is that the resigner has a right to resign, but the resignation can be effective only after its acceptance as it is a bilateral act. In other words, the resignation is by the employee, while the acceptance is by the employer. Unless the two acts are completed, the transaction remains in an inchoate form. Thus, a resignation sent by the employee is no resignation in the eye of the law until accepted by the employer and so long as it is not an effective resignation, there is no bar on withdrawing the same.[14]

In *Sudha Nagaraj*, the employer tendered his resignation due to domestic reasons but the acceptance was not communicated to him till he applied for a withdrawal of the resignation. A single judge of the Andhra High Court held that a mere oral information regarding the acceptance of the resignation, was not sufficient and valid. Hence, he was entitled to withdraw his resignation.[15] In *JK Cotton*, the Supreme Court held that the determination of the contract of employment by the resignation of the employee himself, was not retrenchment, because it was not brought about by the employer. The court discountenanced the holding of the High Court that by accepting the resignation of the employee, the employer had brought about the termination of his service. The principle will squarely apply to the cases of abandonment of job as well, as both resignation and abandonment of job are species of the same genesis, *viz*, voluntary retirement.[16]

If the employee resigns *in praesenti*, the resignation terminates his office tenure forthwith, on an acceptance by the employer and cannot be withdrawn or revoked after acceptance but if the employee chooses to resign from a future date, the act of resignation is not complete, because it does not terminate the tenure of his service forthwith on acceptance and the employee can, before the arrival of the prospective date on which it was intended to be effective, withdraw the resignation. In other words, in the absence of a legal, contractual or constitutional bar, a 'prospective' resignation can be withdrawn at any time before it becomes effective and it becomes effective when it operates to terminate the office tenure of the resigner.[17] In a case where the resignation is withdrawn before being accepted and the withdrawal is effective, the result would be that the resignation shall be deemed to have been not in force at any time and the employee shall be deemed to have been in service throughout the period. The consequential order that he is entitled to the arrears of salary, need not be specifically mentioned in the order. It is a claim which flows from the relief of a deemed declaration that the employee has been in service throughout and, therefore, he shall be entitled to the wages and all the other benefits for that period.[18]

In JN Srivastava, the Supreme Court held that even if a voluntary retirement notice is moved by an employee and it gets accepted by the authority within the time fixed, then, before the date of retirement is reached, the employee has *locus penetentiae* to withdraw the proposal for voluntary retirement.[19] The Supreme Court reiterated the same view in *Nand Keshwar Prasad*.[20] In *Shambhu Murari Sinha*, the facts were: the employee gave a letter exercising his option of voluntary retirement, on 18 October 1995, which was accepted by the management vide their letter dated 30 July 1997 but the employee was not relieved from service and was allowed to continue in service till 26 September 1997. In the meantime, the employee withdrew his letter opting for voluntary retirement vide his letter dated 7 August 1997, which was refused by the management. Allowing the appeal, the Supreme Court held that for all practical purposes, 26 September 1997 was the effective date on which he was supposed to be relieved, and that the employee could withdraw the option exercised by him before the effective date.[21] In *State of Haryana*, the Supreme Court, referring to rr 2.2 and 5.32(B) of the Punjab Civil Service Rules, held that if a permission to retire was not refused within the period specified in sub-cl (1) of r 5.32(B), the retirement would become effective from the date of expiry of the period and that there was no provision in the rules to withhold the permission in certain contingencies and the voluntary retirement would take effect automatically, on the expiry of the period specified in the notice. The court further held that there was no need to communicate the acceptance of the notice to the employee, nor could it be said that non-communication of the acceptance should be treated as amounting to a withholding of the permission.[22]

In *KSRTC*, the facts were: the employee submitted his resignation of 5 February 1994. The same was accepted by the management on 8 February, but the employee withdrew the resignation on 9 February, ie, before the acceptance was communicated to him and before it became effective. The management, however, relieved him on 11 February, by communicating the order of acceptance. The Karnataka High Court held that the resignation could become effective only

on communication and from the date on which the communication was received, and hence, the relieving of the employee by the management was illegal.[23] The resignation, if tendered voluntarily, can be withdrawn by the employee before it is accepted.[24] Where the employee gave the letter of resignation voluntarily, which was accepted immediately and the same was communicated to him orally, on the same day, and the employee also understood it that his resignation was accepted and, therefore, he did not return to duty from that date onwards, the argument that the contract cannot be brought into existence or terminated except in writing, could not be accepted. Once the offer of resignation has been accepted, the termination of service is complete.[25] Where the employee submits his resignation letter, to be effective on a future date, the employer would not be entitled to relieve the employee before the date fixed by him, that the request, for resignation remains inchoate till the date fixed by the employee and that he has the right to withdraw the resignation at any time before the effective date.[26]

The above rulings warrant an examination. Where an employee offers to resign from a future date, and if the employer is willing to pay the employee the wages for the remainder of the notice period and relieve him immediately, there is no justification for the court to permit such employee to continue. The courts have yet to realise the fact that an employee, who has decided to leave the services of a company for whatever personal or official reasons or other frustrations, could cause irreparable damage to the company's interests, as for instance, by passing on classified information or trade secrets or formulae to a competitor or to his prospective employer, or tampering with the records and other sensitive documents, or canvassing among his colleagues, against the company and so forth. The employer has the inherent right to accept the resignation and relieve him forthwith, without having to wait for the period of notice to expire, however, he should pay the employee the wages or salary for the unserved portion of the notice period. The proposition, that the employer should necessarily retain an employee till the expiry of the period of notice, revolts against common sense and borders on tyranny, apart from seriously imperiling the security of the employer's business in the context of a highly competitive environment.

In *Haryana SCD Federation* (supra), the High Court applied the ratio evolved by the apex court in *Gopal Chandra Misra*,[27] and *Balram Gupta*,[28] both of which were wrongly decided. The learned judges of the Supreme Court grossly failed to appreciate the highly sensitive issues touching upon the interest and security of the employer and his business, and proceeded to decide the cases in a casual manner. All the above decisions require to be reviewed and correct legal position laid down consistent with the settled law governing the determination of the contract of employment. In *Jayakodi Jacob*, the Madras High Court held that once the option in favour of voluntary retirement has been exercised and the benefits have been received by the employee, nothing remains to be done by the employer, in view of the fact that the employee has accepted the compensation without any protest, reservation or demur.[29]

In the absence of any Standing Orders, bye-laws or rules governing the resignation of employees in a company, it has to be judged with reference to the ordinary law of the land, that is the law of contract. A resignation submitted by an employee is in the form of an offer. It is open to the management to accept the offer or reject it but it is not open to the management to accept the resignation with effect from a date different from the one indicated in the letter of resignation. Such an acceptance would not really be the acceptance of the offer, but would amount to a counter-offer, which must again be accepted by the employee. If the employer accepts the resignation from the date indicated in the letter of resignation, it would not amount to a termination of service by the employer. However, if the resignation is accepted from a date different than the one indicated in the resignation letter; the termination of the service from such date would be deemed to be an independent action, which would amount to a termination of the service by the employer.[30] The termination of the service of an employee, by accepting his resignation, cannot tantamount to a discharge as a punishment,[31] but, if before accepting the resignation, the employer starts disciplinary proceedings against the employee and dismisses him, the resignation will have no effect in the event of the dismissal being held wrongful, as the contract of service would not have been discharged.[32] By voluntarily resigning his job, an employee himself determines the contract of employment. Hence, he cannot validly raise an industrial dispute with respect to a termination of his service and reinstatement[33] but cases do arise where employees allege that the resignation had been obtained under coercion, duress, misrepresentation or fraud or is a forged one. In such cases, what is normally in issue is the genuineness of the resignation. If the resignation has been procured by such methods or threats or intimidation, the consequential termination of service will be invalid, because such a resignation is no resignation in the eye of law.

In *JK Cotton*, the employee had determined the contract of his employment by a resignation but subsequently, he raised an 'industrial dispute' with respect to the termination of his employment, which was referred to the labour court for adjudication. The labour court held that the resignation of the employee was not voluntary and, therefore, the termination of his service was illegal. Consequently, the labour court awarded a reinstatement. In a writ petition though, the High Court came to the conclusion that the resignation tendered by the employee was voluntary and without any threat or coercion. On a construction of the definition of 'retrenchment', it was held that the termination of the employment amounted to retrenchment, as the service was terminated by the employer, by accepting the resignation of the employee. Setting aside the orders of the courts below, the Supreme Court held that it was a case of 'voluntary retirement' on the part

of the employee and not a case of termination of his service by the employer.[34]

(ii) Abandonment of Job:

The contract of service comes to an end where the workman abandons his job but 'abandonment of service' has not been defined in the Act. Etymologically, the word 'abandonment' has been explained to mean 'to leave completely and finally'; forsake utterly; to relinquish, to renounce, to give up all concern in something;[35] relinquishment of an interest or claim;[36] abandonment when used in relation to an office means 'voluntary relinquishment'.[37] In order to constitute an 'abandonment', therefore, there must be a total or complete giving up of the duties, so as to indicate an intention not to resume the same. Abandonment must be total and under circumstances which clearly indicate an absolute relinquishment. A failure to perform the duties pertaining to an office, must be with an actual or imputed, intention on the part of the officer to abandon and relinquish the office. In *Buckingham & Carnatic*, Gajendragadkar CJI held that abandonment or relinquishment of service is always a question of intention and, normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. A temporary absence is not, ordinarily, sufficient to constitute an 'abandonment of an office'. Under common law, an inference that an employee has abandoned or relinquished service, is not easily drawn, unless from the length of absence and from the other surrounding circumstances, an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon his service. However, where the parties agree upon the terms and conditions of service or they are included in the certified Standing Orders, the doctrine of common law or considerations of equity would not be relevant. It is then, a matter of construing the relevant term itself.[38] However, the 'intention may be inferred from the acts and conduct of the party'. The question as to whether the job, in fact has been abandoned or not, is a question of fact which is to be determined in the light of the surrounding circumstances of each case.[39] A mere absence of a workman from duty, cannot be treated as an 'abandonment' of service. The word 'absent', according to the dictionary meaning, means 'not present' or 'not being in a particular place at a particular time'. 'Absence' therefore, would mean to be 'absent from a specified position and not physically present'. The meaning of the word 'abandoned' depends upon the context in which it is intended to be used.[40]

The presumption of the employee having abandoned the job on his own accord, on account of an absence from duty, for a period exceeding a certain number of consecutive days, without leave or permission, may be made rebuttable by a Standing Order or a rule. In such a situation, it would be open to the workman to contend, in the first instance, that in fact, he was not absent for the prescribed number of days. It is further open to him to satisfactorily explain the reasons for his absence from work.[41] When an employee loses his lien on the job upon the happening of a contingency, ie, absenting without leave for a certain number of days, under the Standing Orders, that would bring an automatic termination of the contract of service. On a construction of the relevant Standing Order, which provided that a workman who does not report for duty within eight days of the expiry of the sanctioned leave, will lose his lien on the appointment, the Wanchoo CJI held that the service of the concerned workman stood automatically terminated when he did not appear for eight days after the expiry of his leave.[42] In *Indian Iron and Steel Co*, the concerned workmen were taken in police custody and they applied for leave from the custody, which was refused by the employer. On the construction of the relevant Standing Order, which provided that any workman who was absent for 14 consecutive days without permission, will be automatically discharged from service, the Supreme Court held that on the facts and in the circumstances of the case, the automatic discharge of the workmen was unassailable. The court pointed out that:

> ... if the workmen are arrested at the instance of the company, for the purpose of victimisation and in order to get rid of them on the ostensible pretext of continued absence, the position will be different. It will then be a colorable or *mala fide* exercise of power under the relevant Standing Order...[43]

In *Binny*,[44] the workman was held to have himself left the service, terminating his contract under the relevant Standing Order, for 'absenting himself without leave for eight consecutive working days' but a single judge of the Delhi High Court, in *Delhi Cloth Mills*, held that where the absence of the workman from work, was due to any reason beyond his control and it was possible for the employer to grant leave without pay, it would be unreasonable and *mala fide* for the employer to decline to grant leave to the 'extent necessary'.[45] In this case, the workman had been detained under the Defence of India Rules and the employer refused to grant leave without pay, for an indefinite period of about six months or so. In the circumstances of the case, the court held that the refusal of the employer to grant leave without pay was unreasonable and amounted to an act of victimisation or unfair labour practice.

The Gujarat High Court, in *Bata India*, where the workman, suffering from a protracted illness due to a fracture of a leg, in a foreign country, could not join duty as required by the Standing Order, before the expiry of the granted leave, because after a further check up, he was advised further rest and the certificate of such advice was received by the employer after the order of termination, held that since the workman was prevented from joining duty for a sufficient cause, the termination of service on the basis of the Standing Order was not sustainable.[46] In *Dabur*, the workman had applied for an

extension of his sanctioned leave but the employer neither granted nor refused to grant the leave. In this situation, the Calcutta High Court held that it was a case of an automatic termination of service under the relevant Standing Order.[47] In *Shambhu Nath Mukherjee*, the relevant Standing Order provided that where a workman absents himself for 'more than eight consecutive days', his name will be automatically struck off the rolls of the company. The workman first attended the work on 14 August 1965 and 15 August 1965 was a holiday. His name was struck off the rolls of the company on 24 August 1965. In the circumstances, the court observed that the Standing Order was not attracted, because the workman was not absent for more than eight consecutive days.[48].

On the other hand, in *Shambhoo Singh*, in the circumstances of the case, the Madhya Pradesh High Court held that the workman concerned, had lost his lien on his appointment due to an over-stay of the granted leave, in terms of the relevant Standing Order.[49] Similarly in *Freewheels India*, where the workman remained absent for eight consecutive days, without offering any explanation for his absence and only submitted a certificate of fitness, he was deemed to have left the service of the employer, in terms of the relevant Standing Order. The court observed that the certificate of fitness, without anything more, could not be said to amount to an explanation or an absence without leave as envisaged in the relevant Standing Order, particularly when the provision therein was that such explanation had to be to the satisfaction of the departmental head.[50] The Bombay High Court, in *Baba Saheb Devgonda Patil*, held that striking off the name of a workman from the rolls, who had remained absent for about three years without any justification, would not constitute retrenchment. The court observed that though striking the name of a workman off the roll, without anything more, would constitute retrenchment, every striking off of a name from the rolls would not constitute retrenchment. The intention to abandon the job is normally not to be attributed to an employee. It would ultimately depend on the established facts and circumstances of each case. It is not possible to lay down a universal proposition, that a long and continuous absence for years together, without any reasons or justification whatever and without anything more, cannot give rise to an inference of abandonment.[51] In *WB Board of Secondary Education*, the employee absented himself without notice and did not resume duties in spite of requests. Consequently, he was discharged from service. Another employee was appointed in his place. After a lapse of seven years, he filed an appeal under the relevant regulations. The appellate committee rejected the prayer for a reinstatement and the consequential reliefs. The committee, however, directed the employer to pay gratuity to the employee, calculated at the rate of one month's salary, for each year of the completed service; this direction was upheld by the Calcutta High Court.[52]

In cases where an employer company seeks to terminate the service of a workman, in terms of a Standing Order or a regulation, it has to give effect to the whole of the Standing Order or the regulation and cannot close its eyes to the restrictions prescribed in such Standing Order or regulation. For instance, where, in addition to providing that a workman who remains absent for a certain number of days without leave, shall be deemed to have abandoned the service without notice, thereby terminating his contract of service, the Standing Order further provides that if the workman gives a satisfactory explanation of his absence, his absence shall be converted into leave, the whole of the Standing Order has to be given effect to.[53] Occasionally, there are alternative provisions in the Standing Orders, dealing with the absence of a workman beyond a certain specified period of time. In *Travancore Rayons*, one of the Standing Orders of the company provided that a workman who is absent without permission, for more than 20 days in aggregate in a year, and for eight days continuously, will be deemed to have voluntarily left the company's service, even though he has applied for leave and his leave had not been sanctioned while, another Standing Order provided that an absence without leave, for more than eight consecutive days, was also a misconduct in respect of which a penalty could be imposed by the management. The Kerala High Court held that the correct way to understand the scheme of the Standing Order was that in case where an employee is found to have been absent from duty without leave, for eight consecutive days, the management has the option to enforce the provisions of the former Standing Order and treat the employee as having voluntarily left the services, or treat him as still continuing in the service of the company and to impose a penalty on him regarding his absence, treating it only as a misconduct.[54]

In *Hamdard Dawakhana*, a single judge of the Delhi High Court held that if a workman overstays his leave by the period prescribed by the Standing Orders, he loses his lien on the appointment and his services stand automatically terminated and if there is any other clause for treating his absence as a misconduct, the management is entitled to proceed against the workman under either of the clauses. In other words, it is open to the management to take recourse to one or the other provision, according to its discretion. If there is a provision for rejoining, the workman can rejoin duty within the period prescribed, after the expiry of his leave, if he offers an explanation that satisfies of the management, as required by the Standing Order.[55] The absence of workmen from work, when they go on a strike, with the specific object of enforcing the acceptance of their demand, cannot lead to the conclusion that they have abandoned their employment, as a strike, in law, does not bring the contract of industrial employment to an end.[56]*There is no such thing as a lien on service. A lien is always on a post. Lien is the right of an employee to resume or return to duty, a substantive or acting appointment, from which he was relieved*. But once a workman has terminated the contract of employment by abandoning his job, the question of lien would not arise.[57]

The abandonment of job by an employee is also comprehended in the expression 'voluntary retirement', used in the definition of retrenchment in s 2(oo). The words 'voluntary retirement' in the context, is accentuated. In other words, in such cases, the determination of the contract of employment must have been brought about by a voluntary abandonment of the job. In common law, an inference that an employee has abandoned or relinquished his job, is not easily drawn, unless from the length of his absence and from other surrounding circumstances, an inference to that effect can be legitimately drawn and it can be assumed that the employee intends to abandon his service.[58] The measure of the length of the time required before making such inference, may vary in accordance with the facts and circumstances of each case. In order to obviate uncertainties, provisions are made in the service rules or the Standing Orders of the commercial and industrial establishments, to the effect that an absence of the employee, for a certain number of days, will be deemed as an abandonment of the employment, unless otherwise explained by him. The certified Standing Orders of an industrial establishment would have the force of statutorily imposed conditions of service. In such cases, the doctrine of common law or the consideration of equity would be relevant. It would be a matter of construction of the relevant terms of the Standing Orders themselves, that would matter.

In *Robert D'Souza*, the management struck the name of an employee, off its rolls, stating that 'you have absented yourself from 18 September 1974 and hence, your services are deemed to have been terminated from the day you have absented yourself'. From the language of this order, the court inferred that the service was terminated by the employer and as such the act came under retrenchment.[59] In *Ram Samujh Maurya*, the employee remained absent for more than two years without leave and despite a number of letters sent to him, he neither cared to join, nor contacted the employer. From such long absence, without any rhyme or reason, the court inferred that the workman had abandoned his job. As such, his services stood terminated automatically, which termination was brought about by the workman himself and not by the employer and, hence, it would not fall within the definition of retrenchment. The learned single judge of the Allahabad High Court, observed:

> In cases where services stand terminated automatically, principles of retrenchment cannot be applied. Abandonment of job is one such instance. If the workman himself willingly abandoned his job, it cannot be said that he has been retrenched and the question of paying compensation in these circumstances, does not arise.[60]

In *DK Yadav*, the relevant clause of the certified Standing Orders of the employer company provided that if a workman remained absent without sanctioned leave or beyond a period of leave granted or subsequently extended, 'he shall lose his lien on the appointment, unless he returns' 'within 8 calendar days of the commencement of the absence, or the expiry of the leave originally granted or subsequently extended' and he 'explains to the satisfaction of the manager or the management, the reasons of his absence or his inability to return on the expiry of the leave'. In the absence of a compliance with these requirements, the workman shall be deemed to have 'automatically abandoned the service and lost his lien on his appointment. Thereafter, his name will be struck off from the muster rolls'. In this case, the employer, by its letter dated 12 December 1980, which was received by the workman on 19 December 1980, intimated to him that he had wilfully absented from duty continuously, for more than eight days, from 3 December 1980, without leave or prior information or intimation or previous permission from the management and therefore, he was 'deemed to have left the service of the company' on his account and lost lien on his appointment with effect from 3 December 1980, in terms of cl 13(2)(iv) of the certified Standing Order of the company. On the other hand, the workman averred that despite his reporting on duty on 3 December 1980 and every day continuously, thereafter, he was prevented from entering through the gate and he was not allowed to sign the attendance register, without assigning any reason. In these peculiar circumstances, a three judge Bench of the Supreme Court held that the procedure adopted by the employer was not just, fair and reasonable, inasmuch as no opportunity was given to him and no inquiry was held. The court further observed that the principles of natural justice must be read into the relevant Standing Orders, otherwise, they would be arbitrary, unjust and unfair. Hence, the impugned order was liable to be struck down. In the peculiar circumstances of the case, the court ordered reinstatement, with only fifty per cent back wages.[61] On the other hand, on the facts and in the circumstances of *Amgauda Sidram Hakke*, a single judge of the Bombay High Court held that the inference of a voluntary abandonment of service was justified and even assuming that the termination was for an act of misconduct, without having held an inquiry, it was not a fit case for a judicial review, because the petitioner's case of sickness was not true.[62] In *Gouranga Acharjee*, a single judge of the Calcutta High Court held that the right guaranteed to the management, to terminate the services of a workman, in this case a probationer, for a continuous, unauthorised absence or overstaying of leave, was not absolute and the principles of natural justice, which have to be read into the offending clause, must be complied with, and that past absence should not be a ground for invoking the relevant rule of the Standing Orders, for terminating the services of a workman.[63] In *Syndicate Bank*, the Supreme Court had to interpret a provision of Sastri Award. The said provision stipulates: "in the event of an unauthorised absence from duty for 90 or more days beyond the sanctioned leave, the management may at any time thereafter give a notice to the employee to report for duty within 30 days of the notice; that, if, the employee does not report for duty or offer a satisfactory explanation within 30 days, he should be deemed to have

voluntarily retired." The Supreme Court held that it does not amount to a punishment for misconduct, but is only a recognition of the realities of the situation and *does not result in the violation of the principles of natural justice*, and that the termination order passed by the management was valid.[64]

In striking contrast, Venkatarama Reddi J, in *National Aluminium*, held that there could be nothing like an 'automatic termination' of service in law (in the instant case, for unauthorised absence), without inquiry or even a show-cause notice. Where the employee remains absent with impunity, without prior sanction or approval, for days and months together, it is rather for the court to hold that the employer should patiently wait till the employee reports for duty, at his own convenience.[65] Where did the learned judge get the material from in order to sustain his observation, '*there can be nothing like an automatic termination*'? Was it from the Act or any legal treatise or a judicial precedent or from his own fertile imagination? *If such misplaced benevolence was to be extended to a situation in which a substantial number of employees handling vital operations remain absent for days together without authorisation, the employer would be left with no alternative than to shut down the operations and close down the undertaking till such time the absconding workers resume duties at their sweet will!* That would be the terrible consequence of this decision. *Secondly*, the aforesaid observation is repugnant to the standing orders, in so far as the Model Standing Orders (appended to the Standing Orders Act) and the Certified Standing Orders (certified under the provisions of the said Act) both of which stipulate in terms: '*unauthorised absence or overstay of leave without permission, for more than 8 consecutive days, amounts to a loss of lien on appointment and the workman shall be deemed to have left the services on his own accord, and his name shall stand struck off from the muster rolls of the establishment.*' If Model Standing Orders, which are an inseparable part of the Act, were not to be regarded as law or as rules having the force of law, what else could they be? To say the least, the decision rendered in *National Aluminium* is wholly perverse, capable of producing great public mischief, and deserves to be rejected without a second look. It is well-settled in a host of decisions that the principles of natural justice could have operation only in unoccupied interstices of law and not in a case where the provisions clearly spell out the rights, duties and obligations of the parties and also the consequences of their actions or omissions. It is disquieting that the apex court should have applied two diametrically opposite standards, while dealing with cases involving an identical set of facts, as is disclosed in *Syndicate Bank* and *National Aluminium Co.* If the principles of natural justice had no application to a case of a continued unauthorised absence, as held in the former case, by what standard of logic or law, could they be applied to the latter? In *Balbir Singh*, the facts were: the workman applied for leave for a period of six months, for being treated for a stomach ailment and also tendered his resignation in the alternative, stating that the same was conditional. The employer did not communicate any decision on the leave application and the workman went on applying for leave. A single judge of the Punjab and Haryana High Court held that the events indicated that the resignation tendered in the first instance stood withdrawn, the employer could not thereafter, inform the workman that his resignation was accepted, and the workman was deemed to be in service.[66]

(iii) Retirement on Superannuation:

Meaning of—The word 'retire' has been defined in the *Concise Oxford Dictionary* as 'cease from or give up office or profession or employment'. The meaning of the word, therefore, postulates a voluntary act on the part of the employee. Generally, the age of retirement is fixed, either in the standing orders applicable to the establishment or the service rules of the employer. It is open to the employer and the workmen, to raise an industrial dispute with respect to the fixing of the age of retirement and the tribunals have jurisdiction to fix the age of retirement, after taking into consideration the relevant factors. But where, in an establishment, the age of retirement is not fixed at the time of employing a workman, he cannot successfully contend that a subsequent fixation of the age of retirement will not apply to him. It is not open to a workman to continue to serve the employer at his own sweet-will, till whatever age he likes.[67] In *Guest Keen Williams*, the Supreme Court has laid down the following important factors that industrial adjudication has to take into consideration, for fixing the age of superannuation:

i. nature of the work assigned to the employees in the course of their employment;

ii. nature of the wage structure paid to them;

iii. the retirement benefits and other amenities available to them;

iv. the character of the climate where the employees work;

v. the age of superannuation fixed in comparable industries, in the same region; and

vi. the practice prevailing in the industry in the past, in the matter of retiring its employees.[68]

All these and all other relevant factors have to be weighed by the adjudicator in every case, while fixing the age of superannuation in an industrial dispute but as to what factor should be given more weight and importance, would depend upon the facts of each case. No hard and fast rule can be laid down for fixing the age of retirement. The decision on the

question would always depend on a proper assessment of the relevant factors, which may conceivably vary from case to case. Some of the considerations which may be relevant while fixing the age of retirement of factory workers, may not necessarily apply in fixing the age of retirement for the clerical and subordinate staff.[69] It is generally recognized, in industrial adjudication, that where an employer adopts a fair and reasonable pension scheme, that would play an important part in fixing the age of retirement at a comparatively younger age. If a retired employee can legitimately look forward to the prospects of earning a pension, then the hardship resulting from an early compulsory retirement is considerably mitigated; that is why, cases where there is a fair and reasonable scheme of pension in vogue, would not be comparable or even relevant in dealing with the age of retirement in concerns where there is no such pension scheme.[70] However, in *British Paints*, the Supreme Court observed that:

> ...generally speaking, there is no reason for making a difference in the age of retirement as between clerical and subordinate staff on the one hand and factory workmen on the other, unless such differences can be justified on cogent and valid grounds. It is only where the work in the factory is one of a particularly arduous nature, that there may be reason for fixing a lower age of retirement for factory workmen, as compared to clerical and subordinate staff.[71]

In view of the fact that the work in the paint factory was not considered to be arduous, as compared to the work of the clerical and subordinate staff, the retirement age at sixty was considered fair and proper, both for the clerical and the subordinate staff, as well as for the factory workmen (existing as well as future). This rule was reiterated in *Jeewanlal*, where the court observed that:

> ... the present day tendency is to fix the age of superannuation generally, at 60, unless the tribunal feels that the work of the operatives is particularly arduous or hazardous, where workmen may lose efficiency earlier.[72]

However, in the absence of materials on record, the court could not assess the actual nature of the work of the operatives, to find out whether it was really arduous or hazardous, so as to lead to the conclusion that the proper age of superannuation should be left at 58 years. Hence, the case was remanded for inspecting the conditions in the factory, for deciding the question as to whether the age of superannuation should be left at 58 years or whether it should be raised to 60 years.

(iv) Region-cum-Industry Basis:

In *Guest Keen Williams*, the Supreme Court laid down, *inter alia*, the regional practice as one of the factors for fixing the age of superannuation. This formula was applied in *Dunlop*,[73] while fixing the age of retirement for the clerical staff at 60 years consistent with the trend prevailing in the Bombay region. In *Imperial Chemical Industries* (supra), the court again emphasised that region-cum-industry formula is one of the important material considerations while fixing the retirement age. In *GM Talang*, it was observed that in the delicate task of adjusting the needs of the employees, to the interests of the employers, and, what is even more important, to the general interest of the country at large, industrial adjudication has to pay special attention to the prevailing practice in the industrial region concerned. In this case, the Supreme Court, while raising the age of superannuation fixed by the tribunal from 58 to 60 years, held:

> If in any particular region, employees have been successful in their claim for fixing the age of retirement at 60, this very success is bound to raise in others in the region, similar expectations. Refusal of similar relief to them is likely to create discontentment. It is the endeavour of industrial adjudication to prevent this. That is why, on questions of age of retirement and hours of work and to other similar matters, industrial tribunals attach much weight to what has been done in the industrial concerns in the neighbourhood, in recent times—whether by agreement or by adjudication.[74]

In *Balmer Lawrie*, the court observed:

> We feel that the time has now come for increasing the age of retirement in the case of clerical staff and the subordinate staff generally, from 55 to 58. [75]

In *British Paints*, the facts were: the tribunal fixed the age of retirement for the clerical and subordinate staff at 58 years and for the workmen in the factory, at 55 years. The Supreme Court, modified the award fixing the age of retirement for the clerical, subordinate staff and factory workmen at 60 years. Wanchoo J observed:

> Considering that there has been a general improvement in the standard of health in this country and also considering that longevity has increased, fixation of the age of retirement at 60 years, appears to us to be quite reasonable in the present circumstances. Age

> of retirement at 55 years was fixed in the last century, in Government service, and had become the pattern for fixing the age of retirement everywhere. But time, in our opinion, has now come, considering the improvement in the standard of health and the increase in longevity in this country during the last fifty years, that the age of retirement should be fixed at a higher level, and we consider that, generally speaking, in the present circumstances, fixing the age of retirement at 60 years, would be fair and proper, unless there are special circumstances justifying a fixation of a lower age of retirement. [76]

However, in *Bengal Chemicals*, relying on the holding of the court in *Jessop & Co's* case, the court declined to increase the retirement age of the workmen in the West Bengal region, from 58 to 60 years.[77] In *Hindustan Times*, the Supreme Court fixed the age of retirement at 58 years for the employees working in the Delhi region.[78] In *Burmah-Shell*, the court reviewed the earlier dicta with reference to the trend obtaining in the Delhi area where there were as many as 22 concerns in which the age of superannuation of workmen had been fixed at 60 years, either by settlements or by industrial awards. Accordingly, the court raised the age of superannuation to 60 years. Hegde J observed:

> In fixing the age of superannuation, the most important factor that has to be taken into consideration is the trend in a particular area ... in the matter of fixing the age of superannuation, the trend in a particular area was the most important factor, though in the matter of determining the other conditions of service of workmen, the principle of region-cum-industry is by and large, the determinative factor ... The needs of a workman are likely to be greater between the age of 50 to 60 years, as during that period, he has to educate his children, marry his daughters, in addition to maintaining his family. If one looks at the world trend, it is obvious that the age of superannuation is gradually being pushed up ...[79]

In *Bharat Petroleum*, the court, by a majority, reiterated the same principle while fixing the retirement age of clerical staff in its refinery division situated in Bombay at 60. Apart from noticing the factors in favour of raising the retiral age to 60 years, the court clearly noticed the countervailing factors as well. One of such factors is the effect on the employment of the younger generation. The court posed the question: *Can the nation afford to have an army of unemployed young men, necessarily leading to bitterness and frustration? Can the nation afford to allow them to fritter away their energies in unhealthy pursuits, to which they may be tempted?* Then, the court observed that these questions require deep investigation, research and study, which could not be undertaken in the absence of the relevant evidence on these points.[80] In *Tejinder Singh*, the management staff of BPCL moved the Supreme Court under Art. 32 challenging the fixation of their retirement age at 58 years as against 60 years for clerical staff. Repelling the contention, it was held that the clerical staff and the officers of the management staff belonged to separate classifications; that the classification made on the basis of reasonable differential was not reviewable; that, while exercising writ jurisdiction, it did not have the adjudicatory jurisdiction. The court finally held that the differential age of superannuation fixed for workmen and officers did not amount to discrimination.[81]

(v) Superannuation under the Standing Orders

In *Guest Keen Williams* (supra), one of the issues was: if the system of forced retirement of workmen at the age of 55 as introduced by the management in May 1954 is justified? The company was an ongoing company and the draft standing orders were certified in December 1953 in terms of which the retirement age was fixed at 55 years. In terms of the said standing order, the company retired some 47 workers in May 1954. The labour court upheld the action of the management, which was reversed by the LAT. The Supreme Court observed that the tribunal had to consider not only the propriety, reasonableness and fairness of the rule, but it had also to deal with the question as to whether the said rule could and should be made applicable to the employees, who had already been employed without any limit as to the age of retirement. Hence, the court, while affirming the age of superannuation as fixed at 55 years, for the future entrants, itself fixed a superannuation age of 60 years for the employees who had joined service before the relevant Standing Orders came into force.

In *Kettlewell Bullen*, the court reiterated that the age of superannuation, as fixed by the rules framed by the company, would have no application to its employees who had joined service prior to the promulgation of the rules.[82] The age of superannuation fixed by the Standing Orders or rules if accepted or acquiesced in by the previously employed workmen, would be perfectly valid.[83] In *Salem-Erode*, the court observed that the matters covered by the certified Standing Orders, including the age of superannuation, would be uniform and would apply to all the workmen who were employed in an industrial establishment.[84] However, in *Agra Electric Supply*, Shelat J candidly said that the view in *Guest Keen, Williams*, that the certified Standing Orders would not bind the workman previously employed, 'was not a correct view of law, as clarified in *Salem-Erode*, removing any possible misapprehension'. He further observed that the Act was meant for making the Standing Orders binding not only on those who were employed subsequent to their certification, but also on those who were already in employment, and if any other result were to follow, there would be different conditions of employment for different classes of workmen, which would render the conditions of their service as indefinite and diversified, just as

before the Act.[85] Accordingly, in *Dunlop*, the court held that the workman concerned, who had entered the service of the company before the Standing Orders of the company were framed and certified, will be bound by the Standing Orders.[86] In *UP Electric Supply*, the court reiterated that the view in *Guest Keen Williams* was no longer good law. Grover J said that it was not the intention of the Legislature, that different sets of conditions should apply to the employees, depending on whether a workman was employed before the Standing Orders were certified or after, which would defeat the very object of the legislation and 'in the very nature of thing, a great deal of irritation and annoyance between the employees *inter se*, could result, if any such discrimination is made in any of the items of the schedule.[87] The principles laid down in these cases were again followed in *Avery (India)*.[88]

In *British Paints*, the age of superannuation was fixed by the industrial tribunal. Prior to that, there was no retirement age in the company and the workmen were entitled to work as long as they were physically and mentally fit. In appeal, dealing with the question as to whether the retirement of future workmen should also be fixed at the same level as of that existing workmen, the Supreme Court observed that, generally speaking, there should be no difference in the age of retirement for the existing workmen and that for the others, to be employed in the future, unless there are special circumstances justifying such difference and in the absence of any valid and cogent reasons for having different ages of retirement for the existing and future workmen, it was held that the future workmen should also have the benefit of the same superannuation age.[89]Neither the schedule to the Industrial Employment (Standing Orders) Act 1946, nor the model Standing Orders, contain any provision regarding superannuation or retirement on attaining a certain age. The question as to whether, in the absence of any provision in the schedule or the model Standing Orders, relating to superannuation, the certifying officer could certify a provision relating to superannuation, in the Standing Orders of an industrial establishment, has given rise to a divergence of judicial opinions. A single judge of the Madras High Court, in *The Hindu*, took the view that the expression, 'termination of employment', in item No 8 of the schedule, is wide enough to include retirement of any employee at the age of superannuation. In support of this, reliance was placed on para 16 of the model Standing Orders, which stated that, 'every permanent workman shall be entitled to a service certificate at the time of his dismissal, discharge or retirement from service'.[90]

On the other hand, in *Saroj Kumar Ghosh*, the Orissa High Court held that, in the absence of a provision relating to the age of superannuation in the schedule to the Act or in the model Standing Orders, the certifying officer could not validly certify a Standing Order relating to superannuation under s 4 of the Act. The court observed that the expression 'termination of employment', in item No 8 of the schedule, cannot be equated with the word 'superannuation', because 'superannuation' is an event which comes more or less, by an automatic process, as on reaching the fixed age, the holder of the office has no option but to go out of the office and there is no volition involved in that act. It was further observed that the employer and the employee have notice of the matter long before the event is to occur and the event is such that it cannot be arrested by either one of them, if the rule is to be followed, while a termination of employment, on the other hand, is a positive act by which one party, even against the desire of the other, can bring the employment to an end.[91] The question came for consideration before the Supreme Court in *UP Electric Supply Co* (supra), the court observed that after the insertion of the item in the schedule, which made a provision for the age of retirement and superannuation, the certifying officer had validly certified the clause relating to retirement and superannuation, and fixed the retirement age at 58. Consequently, the workmen concerned, though they could not have been retired on the ground of superannuation in 1959, could be validly retired on or after April 1961, in accordance with the modified Standing Orders. Therefore, those out of the workmen, who had attained the age of 58 years in April 1961, were regarded as having been validly retired, having reached the age of superannuation on that date, under the clause.

In *SP Dubey*, the age of superannuation of the employees, in the service of the Central Provinces Transport Services Ltd, was 60 years. The company was taken over by the state Government by a notification, stating that the service conditions of the employees would not be adversely affected. But, after the take-over of the company, the corporation framed certain regulations and by regulation 59, it purported to fix the retirement age of all the employees, including those who were employed in the former company, at 58. In accordance with this regulation, the corporation sought to retire the appellant on completion of the age of 58. But in view of the assurance given to the employees of the company, that their conditions of service would not be adversely affected, which was incorporated in the directions issued by the Government under s 34 of the Road Transport Corporations Act 1950, the Supreme Court held that the corporation could not frame regulations which were contrary to the directions issued by the state Government. Therefore, regulation 59, framed by the corporation, was not applicable to the appellant and he was entitled to continue in service upto the age of 60 years.[92]

(vi) Proof of Age:

When the age of retirement and superannuation are fixed by the Standing Orders, rules of the establishment or by industrial adjudication, it is incumbent on the workman to furnish adequate proof of his age, as it is a matter within his knowledge. But the employer has the right to rebut this proof. In *IGN Rly*, a workman had subscribed to an agreement containing a declaration about the day and date of his birth, for the purpose of provident fund accounts. The employer treated such date

as conclusive and on the strength of the same, retired the workman. Before the industrial tribunal, the workman neither pleaded that the day and date of birth declared by him was the result of some inadvertence or mistake, nor did he go into the witness box to explain the admission made by him in the declaration. The correctness of the exact age was also not properly proved before the tribunal, from an examination of the school register produced on behalf of the workman. But, completely ignoring these aspects of the matter, the tribunal accepted the contention of the workman and held that such date and day must have been given by the workman from memory only and ordered his reinstatement. The award of the tribunal was set aside by the Supreme Court.[93]

In *UP State Sugar Corpn*, the relevant Standing Order provided that the 'entry of the date of birth, in records pertaining to the provident fund scheme, was presumed to be correct'. The Allahabad High Court held that the authority concerned, called upon to adjudicate upon the age of the workman, would have jurisdiction to consider the date of birth on any other relevant material or materials.[94] If a person is retired on a wrong date, he would be entitled to reinstatement and to all the service benefits which were wrongfully denied to him and the adjudicator may even award interest on such benefits.[95] In *Punjab and Sind Bank*, the Delhi High Court held that the date of birth entered in a cut list, was valid evidence and the mere fact that the surname of the employee was not mentioned in the matriculation certificate produced by him, was no ground to doubt his identity.[96] In *Ahmed Hussain*, the date of birth of the employee was shown as being in the year 1929, in the record. Giving a benefit of doubt to the weaker side, a single judge of the Allahabad High Court presumed that the last day of the year, ie, 31 December 1929, could be taken as the date of birth of the employee, because even if he is continued for sometime more, no harm would be caused. The court accepted the certificate issued under the signature of the deputy inspector of schools, as the correct date of birth.[97] Normally, when an industrial award increases the age of retirement, the benefit of such increase takes effect prospectively, from the date when the award becomes operative. Hence, in a case where certain workmen had already retired and had received all their retirement benefits, before the date on which the award became operative, they were not held to be entitled to the benefit of the increase in the age of retirement.[1]

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48 *National Assn of Local Govt Office v Bolton Corpn* [1943] AC 166, 185 (HL), per Lord Porter.

49 *Western India Automobile Assn v IT* (1949) LLJ 245, 248 (FC), per Mahajan J.

50 *NK Sen v Labour Appellate Tribunal* (1953) 1 LLJ 6, 7 (Bom) (DB), per Chagla CJ.

51 *Indian Oil Corpn Ltd PO, IT* (1999) 2 LLJ 904 (Gau) (DB)), per Biswas J.

52 *Rajaji Nagar Co-op Bank Ltd v PO, Labour Court* (2001) 4 LLN 1214 (Kant) (DB), per Bhoruka CJ.

53 *Cooperative Central Bank Ltd v Addl Industrial Tribunal* AIR 1970 SC 245 [LNIND 1969 SC 152]: (1969) 2 LLJ 698 [LNIND 1969 SC 152] : (1969) 2 SCC 43 [LNIND 1969 SC 152].

54 *Workmen of Dimakuchi Tea Estate v Dimakuchi Tea Estate* (1958) 1 LLJ 500 [LNIND 1958 SC 1], 510 (SC), per SK Das J.

55 *George Hudson Ltd v Australian Timber Workers Union* 32 CLR 413, 441, per Isaac J.

56 *Central Provinces Transport Services Ltd v Raghunath Gopal Patwardhan* (1957) 1 LLJ 27 [LNIND 1956 SC 91] (SC), per Venkatarama Ayyar J.

57 *DN Banerji v PR Mukherjee* (1953) 1 LLJ 195 [LNIND 1952 SC 85], 199, per Chandrasekhara Aiyar J.

58 *Bombay Union of Journalists v 'Hindu'* (1961) 2 LLJ 436, 439 (SC), per Shah J.

59 *Western India Match Co Ltd v Western India Match Co Workers' Union* (1970) 2 LLJ 256 [LNIND 1970 SC 4], 261 (SC), per Shelat J.

60 *Y Mohanakumaran Nair v Hindustan Latex Ltd* 1987 Lab IC 950,952 (Ker), per KT Thomas J.

61 *Statford v Lindley* (1965) AC 269, 326, 330, 341-42; *Conway v Wade* (1909) AC 506, 517.

62 *Beetham v Trinidad Cement Ltd* (1921) 1 All ER 274 (PC), per Lord Denning.

63 *R v National Arbitration, ex p, Keable Press Ltd* (1943) 2 All ER 633 -34,636 (CA).

64 *White v Riley* (1921) 1 Ch D 1.

65 *JT Stratford & Son Ltd v Lindley* (1964) 3 All ER 102 (HL).

66 *Jumbunna Coal Mines v Victorian Coal Miners' Assn* 6 CLR 209, 375, per Isaac J.

67 *Newspapers Ltd v State Industrial Tribunal* (1957) 2 LLJ 1 [LNIND 1957 SC 28] (SC) : AIR 1957 SC 532 [LNIND 1957 SC 28], per Kapoor J.

68 *Workmen of Dimakuchi Tea Estate v Mgmt of Dimakuchi Tea Estate* (1958) 1 LLJ 500 [LNIND 1958 SC 1]-01 (SC) : AIR 1958 SC 353 [LNIND 1958 SC 1], per SK Das J.

69 *Workmen v Dharam Pal Prem Chand* (1965) 1 LLJ 668 [LNIND 1965 SC 83], 670 (SC) : AIR 1966 SC 182 [LNIND 1965 SC 83], per Gajendragadkar CJI.

70 *Workmen of Indian Express Newspaper Pvt Ltd v Management* (1970) 2 LLJ 132 (SC) : AIR 1970 SC 737 [LNIND 1968 SC 355]: (1969) 1 SCC 228, per Shelat J.

71 *Western India Match Co v WIMCO Workers' Union* (1970) 2 LLJ 256 [LNIND 1970 SC 4], 260-61 (SC) : AIR 1970 SC 1205 [LNIND 1970 SC 4]: (1970) 1 SCC 225 [LNIND 1970 SC 4], per Shelat J.

72 *Branch Manager, Lipton India Ltd v State of Maharashtra* 1992 Lab IC 1090 (Bom), per AS Desai J.

73 *Hari Fertilizers v State of Uttar Pradesh* 1992 Lab IC 1877, 1880 (All), per Katju J.

74 *Praga Tools Ltd v Govt of Andhra Pradesh* 1976 Lab IC 190, 192 (AP), per V Shastri J.

75 *Swapan Das Gupta v First LC* 1976 Lab IC 202, 206 (Cal), per Sabyasachi Mukharji J.

76 *Southern India Tannery v IT* (1969) 2 LLJ 157 (Mad), per Ramakrishnan J.

77 *Indian Oxygen Ltd v Workmen* 1979 Lab IC 585 [LNIND 1979 SC 4], 588-89 (SC), per Singhal J.

78 *Bombay Union of Journalists v 'Hindu'* (1961) 2 LLJ 436, 439 (SC), per Shah J.

79 *Working Journalists of the 'Hindu' v 'Hindu'* (1961) 1 LLJ 288, 294 (Mad) (DB), per Veeraswami J.

80 *Gondhara Transport Co Pvt Ltd v State of Punjab* AIR 1966 Punj 354, 362, per Narula J.

81 *Associated Cement Companies Ltd v Workmen* (1960) 1 LLJ 491 [LNIND 1960 SC 60], 496 (SC), per Gajendragadkar J.

82 *Indian Cable Co Ltd v Workmen* (1962) 1 LLJ 409 [LNIND 1962 SC 100], 415 (SC) : (1962) Supp (3) SCR 589, per Venkatarama Ayyar J.

83 *Nellai Cotton Mills v LC* (1965) 1 LLJ 95 (Mad), per Ramakrishnan J.

84 *Wingswear Pvt Ltd v Workmen* 1988 Lab IC (NOC) 50 (Del), per Balui J.

85 *Bombay Union of Journalists v 'Hindu'* (1961) 2 LLJ 436 [LNIND 1961 SC 316], 443 (SC) : AIR 1963 SC 318 [LNIND 1961 SC 316], per Shah J.

86 *Workmen of Dharampal Premchand v Dharampal Premchand* (1965) 1 LLJ 668 [LNIND 1965 SC 83], 672-3 (SC) : AIR 1965 SC 182, per Gajendragadkar CJI.

87 *Nellai Cotton Mills v LC* (1965) 1 LLJ 95 (Mad), per Ramakrishnan J.

88 *Tirupathi Cotton Mills Ltd v LC* (1968) 2 LLJ 723, 727 (AP), per Kumarayya J.

89 *P Somasundaram v LC* (1970) 1 LLJ 558 (AP), per Chinnappa Reddy J.

90 *Eastern Coalfields Ltd v Niranjan Chatterjee* (2008) 3 LLJ 438 (Cal).

91 *JH Jadhav v Forbes Gokak Ltd* AIR 2005 SC 998 [LNIND 2005 SC 133]: (2005) 3 SCC 202 [LNIND 2005 SC 133] : (2005) 1 LLJ (1089), per Ms Ruma Pal J.

92 *Workmen of Dharampal Premchand v Dharampal Premchand* AIR 1966 SC 182 [LNIND 1965 SC 83]: (1965) 1 LLJ 668 [LNIND 1965 SC 83] (SC), per Gajendragadkar CJI.

93 *Central Provinces Transport Services Ltd v RG Patwardhan* AIR 1957 SC 104 [LNIND 1956 SC 91]: (1957) I LLJ 27, per Venkatarama Ayyar J.

94 *Brooke Bond (India) (Private) Ltd v Workmen* (1963) I LLJ 256(SC), per Gajendragadkar J.

95 *LH Sugar Factories & Oil Mills Ltd v State of Uttar Pradesh* (1961) I LLJ 686 (All) : AIR 1962 All 70 [LNIND 1961 ALL 21], per SS Dhavan J.

1 *Newspaper Ltd v State IT* (1960) 2 LLJ 37, 38 (SC), per Gajendragadkar J.

2 *Tata Chemicals Ltd v Workmen* 1978 Lab IC 637 [LNIND 1978 SC 113],642 (SC) per Jaswant Singh J.

3 *Pradip Lamp Works v Workmen* (1970) 1 LLJ 507 [LNIND 1969 SC 299] (SC), per Shelat J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER I Preliminary

S. 2. Definitions.—

(vii) Continuing in Service after Superannuation:

In *Guest Keen Williams*, the demand of the workmen, for an option to continue in service, even after the age of superannuation, was held by the Supreme Court to be wholly unreasonable and entirely inconsistent with the notion of fixing the age of superannuation itself. Gajendragadkar J observed:

> Once the age of superannuation is fixed, it may be open to the employer, for special reasons, to continue in its employment, a workman who has passed that age; but it is inconceivable that when the age of superannuation is fixed, it should be in the option of the employee to continue in service thereafter.[2]

In *Hindustan Antibiotics*, while raising the age of superannuation, the tribunal gave discretion to the employer, to continue the employee in service or not, even after the age of superannuation. But the court did not think it proper to give discretion to the employer, to raise the age of retirement or not, because vesting him with such uncontrolled power might have led to manipulation or victimisation.[3] The effect of *Guest Keen Williams* and *Hindustan Antibiotics* is that after the age of superannuation, neither the employer can have the discretion to retain the employees in service, nor can the employees have the option to continue in service.

By the Employer

It is to be borne in mind that the service of an employee cannot be terminated either in terms of the contract or as a measure of punishment, merely because the other employees do not like him to be in the employment. In other words, even if the other employees boycott an employee, this will not provide a justifiable ground to the employer, to terminate the service of such an employee. In *Atlas Copco*, the Bombay High Court observed that if the services of an employee are not satisfactory, the employer can get rid of him in accordance-with the law. Likewise, if he is guilty of any misconduct, the employer will be entitled to take the appropriate disciplinary proceedings and dismiss him from service. But the fact that the other employees or the union do not pull on with him, can be no reason to justify the termination of the service of the employees.[4] Some of the modes of determining the contract of employment by the employer, have been discussed in the following heads:

(i) Discharge under Contract-Discharge Simpliciter:

The expression discharge simpliciter, as understood in industrial law, is used in contra-distinction to a punitive discharge or a discharge by way of punishment. In common law, in the absence of any contract to the contrary, subject to certain exceptions, either of the parties to the contract of employment, is ordinarily, entitled to terminate the contract at any time, by giving notice to the other. In theory, this principle governs industrial employment as well and the guarantees provided by various labour laws and the safeguards evolved by industrial adjudication, do not abrogate the right of an industrial employer to terminate the employment of his workmen. Such safeguards are meant for regulating that power, so that it is

not abused.[5] The contract of industrial employment, therefore, can also be ordinarily terminated, in accordance with the terms of the contract of service. In the words of Gajendragadkar J:

> If the contract gives the employer, the power to terminate the services of his employee, after a month's notice or subject to some other conditions, it would be open to him to take recourse to the said term or condition and terminate the services of the employee.[6]

A contract may be indefinite as to the time during which it is to endure, and yet stipulate the length of notice to be served. Such stipulation must be observed and a deviation from its terms will constitute a breach of the contract. Where, however, there is no stipulation as to notice, the contract is terminable by a reasonable notice.[7] It is, however, necessary to note that a termination of employment, whether of a permanent or of a temporary nature, cannot be effected with retrospective effect.[8] Discharge under the contract may be effected for various reasons and under various circumstances, as may be provided for in the contract of service, Standing Orders, or a statute or rules thereunder, governing such service.

An employer has two distinct and independent powers. One is the power to punish an employee for an act of misconduct, while the other is the power to terminate simpliciter, the service of an employee in accordance with the contract, without any adverse consequences. As far as possible, neither should be construed so as to emasculate the other or to render it ineffective. In other words, a discharge simpliciter is not punitive in character. Conversely, if the termination is punitive in character, for an act of misconduct, it is not a discharge simpliciter. The termination simpliciter must be for relevant and valid reasons. This power should not be exercised arbitrarily, capriciously or for any irrelevant or extraneous reasons. The mere fact that the employer is required to give reasons for terminating the service of an employee, under the contract, does not necessarily, in every case, make the order of termination punitive in character, ushering in the requirement of holding a domestic inquiry etc. Otherwise, the power of termination of the service of an employee, under the contract, would be rendered meaningless and futile, for in no case would it be possible to exercise it. Of course, if a misconduct of the employee constitutes the foundation for the termination of his service, then, even if the order of termination is purported to be discharged simpliciter, it may be liable to be regarded as punitive in character.[9] The test to find out whether the impugned termination is innocuous or punitive is to inquire as to whether the vitiating cause was the foundation for the action or was it merely a motive for action. If it was the foundation for the action, the order is *mala fide* and punitive; if it was only a motive for the action, it is not.[10] If two factors co-exist, an inference of punishment is reasonable, though not inevitable. In the words of Krishna Iyer J:

> If the severance of service is effected, the first condition is fulfilled and if the foundation or *causa causans of s* uch severance is the servant's misconduct, the second is fulfilled ... If the basis or foundation for the order of termination is dearly not turpitudinous or stigmatic or rooted in misconduct or visited with evil pecuniary effects, then the inference of dismissal stands negated and *vice versa*.[11]

Where the termination of service puts a stigma on the competence of the employee, the order is by way of punishment. On the other hand, if the employer proceeds against the employee in a direct way, without casting any aspersion on his honesty or competence, his discharge would not have the effect of removal by way of punishment.[12] The consequence of a discharge simpliciter is, that though the employee loses his present employment, apart from the protection of his terminal benefits, his future prospects of employment are not affected.[13] In the absence of a lawful order terminating the services of an employee under the contract, there can be no automatic termination of the services of an employee, unless the procedure recognised under the law for termination of employment is resorted to and the workman will be entitled to continue in service.[14] Once the service of a workman has been terminated by an order, no second order of termination of service can be passed, unless the former order of termination is withdrawn by the employer, or that order of termination has been set aside by an adjudicator and the workman is reinstated.[15] Though the right of the employer, to manage his own affairs in the best way he chooses, has been recognised and it has not been considered proper to trespass on that right or in the field of management functions, unless compelled by overriding considerations of social justice, this right has been subjected to control by industrial adjudication, when social justice and industrial peace require such regulation,[16] to see whether the employer has acted *bona fide*. The right of an employer to discharge an employee is, therefore, no longer absolute and it is subject to severe restrictions. In cases of wrongful termination of service, purporting to be under the contract, industrial adjudication is competent to grant relief, on the ground that the exercise of Power was *mala fide* or colourable. Krishna Iyer J pointed out:

> It is not unknown that an employer resorts to camouflage, by garbing or cloaking a punitive discharge in the innocuous words of a discharge a simpliciter ... In such situations, courts have to interpose in order to ascertain whether the discharge is simpliciter or a punitive discharge, and in doing so, the veil of language is lifted and the realities perceived. [17]

In such cases, industrial adjudication can award, by way of relief to the concerned employee, either reinstatement or compensation.[18] 'All this obviously, is aimed at ensuring that protection and the security of service afforded to the employee, under the industrial legislation, is not subverted by making a pretence of the discharge being innocent'.[19] The doctrine of absolute freedom of contract, has thus, to yield to the higher claims of social justice; the right to discharge an employee has, therefore, been controlled, subject to the well-recognised limits, in order to guarantee security of tenure to industrial employees.[20] Industrial adjudication tries to protect the security of service of industrial workman by regulating the claim of the employer 'to hire and fire' an employee, as he pleases.[21] In *Assam Oil Co*, Gajendragadkar J held that industrial adjudication has, therefore, made the *bona fides* of the employer, a *sine qua non* for regulating the exercise of the power under the contract, if his action in terminating the service of an industrial employee is to be unassailable. The learned judge observed:

> just as the employer's right to exercise his option in terms of the contract has to be recognised, so also the employee's right to exercise his option in terms of the contract has to be recognised; so also the employee's right to expect security of tenure has to be taken into account.[22]

The continuity of service of an industrial employee, cannot be made dependent upon the contingency of the happening of some stringent conditions of service, stipulated in the contract of service and 'it is too late in the day to stress absolute freedom of an employer, to impose any condition which he likes.' It is, therefore, open to industrial adjudication to consider the conditions of employment of labour and to vary them if it is found necessary, unless the employer can justify the extraordinary condition.[23]Thus, the right of the employer, to terminate the service of an industrial employee under the contract of employment, has been subjected, by industrial adjudication, to the requirements of job security, social justice and industrial peace. On the construction of the words 'for any reason whatsoever', in the definition of 'retrenchment' in s 2(oo) of the Act, some smaller benches of the Supreme Court deviated from the law laid down by a Constitution Bench in *Barsi Light Rly*,[24] and have held that every termination of service, except the case excepted by the definition of 'retrenchment', will fall within the ambit of 'retrenchment'. The consequence of this holding is that even for terminating the service of a single employee, under the terms of the contract or the Standing Orders, an employer will have to comply with the requirements of s 25F or s 25N, and s 25G. The requirements of r 76A and forms PA and PB makes it well-nigh impossible to terminate the service of an individual workman, either under the contract or in terms of a Standing Order. For toning down the hardship caused by these dicta, the Legislature stepped in by inserting cl (bb) in the definition of 'retrenchment', excluding the termination of the service in the terms of contract from the purview of retrenchment'. But this statutory provision has been castrated by the ratio of the under noted dicta of the Supreme Court,[25]holding that a clause providing for a termination of service by giving notice for a specified period of time, will be void as being arbitrary and as such, violative of the guarantees of Arts. 14 and 16 of the Constitution and also repugnant of s 23 of the Indian Contract Act 1872, being opposed to the public policy. Though the termination of service of a workman due to his absence from duty for a certain number of days, in terms of a Standing Order, on account of his arrest by the police under s 120B, read with s 489(a) and (b) of the Indian Penal Code, would not amount to retrenchment, such termination will not be justified because the workman would be absent for circumstances beyond his control and the situation was not of his creation.[26] Apart from a termination of the service of an employee in terms of the stipulation provided in the contract, the contract of employment can also be determined by frustration of the contract or impossibility to perform the contract. In the language of Lord Radcliffe:

> Frustration occurs whenever the law recognizes that without default of either party, a contractual obligation had become incapable of being performed because the circumstances in which the performance is called for, would render it a thing radically different from that which was undertaken by the contract.[27]

Frustration operates automatically. The most usual circumstance that produces a frustration of the contract of employment is that of illness. *Anand Bihari*, provides a rich illustration of frustration of contract on account of illness. The facts of the case were: the services of some bus drivers were terminated by the Rajasthan SRTC, on the ground that they had developed eye sight below the standard required to drive the buses. The Supreme Court held that the termination of the service of such drivers was on account of 'continued ill-health', as contemplated by sub-cl (c) of s 2(oo) of the Act and was, therefore, not 'retrenchment'. The court, however, held that the termination was not justified as it was discriminatory *vis-a-vis* other employees. In view of the fact that the workmen had put in long years of service and most of them were above 40 years of age, the court proposed a scheme of compensatory relief for such workmen, suitable to the peculiar loss that they had suffered on account of premature retirement, necessitated by their unfitness to work as drivers.[28] In a similar case, where the labour court ordered the reinstatement of a driver, whose services were terminated on the basis of a medical report to the effect that his vision was defective as a result of cataract, a single judge of Bombay High Court upheld the order of the labour court, and held that, subsequent to his termination, the driver had his cataract removed by surgery and judicial notice could be taken of the fact that cataract can be removed and the eye-sight can be restored.[29]

The genesis of the law relating to adjudication of discharge simpliciter is to be found in the decision of the labour appellate tribunal in *Buckingham* & *Carnatic*, where it had the occasion to consider the right of an industrial employer, to discharge his workman by notice or in lieu thereof, by payment of wages for a certain period, without assigning any reason. Though the labour appellate tribunal recognized the right of an employer to discharge an employee from his service in accordance with the contract of service, it accentuated the requirements of acting *bona fide*. If the termination of service is a colourable exercise of the power or is a result of victimisation or an unfair labour practice, the industrial tribunal would have the jurisdiction to intervene and set aside such a termination. Further, it was held that where the termination of service is capricious, arbitrary or unnecessarily harsh on the part of the employer, as judged by the normal standard of a 'reasonable man', that may be cogent evidence of victimisation or unfair labour practice.[30] If the order of termination is, in fact, punitive or vindictive or arbitrary in character, such a termination, though appears to be discharge simpliciter under the contract of employment,[31] or under the standing orders,[32] would amount to a colourable exercise of power. In such cases, the order of discharge is not conclusive and the industrial adjudicator can examine the substance of the matter and determine for himself, the real nature of the discharge, despite the veil of innocence of a discharge simpliciter, covering the face of the order, and may discard such an order, if it is a colourable exercise of the power under the contract. The form of the order would not be conclusive and the adjudicator will have jurisdiction to go behind the order, to find out the actual reason which led to the order and then consider whether the termination of service was a colourable exercise of the power, resulting in victimisation or an unfair labour practice.[33] In *Gujarat Steel Tubes*, Iyer J observed:

> The court will find out from other proceedings or documents connected with the formal order of termination, what the true ground for the termination is. If, thus scrutinized, the order has a punitive flavour in course or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law, to terminate with an innocent order, under the Standing Order or otherwise. Whether, in such a case, the grounds are recorded in a different proceeding from the formal order, does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the inquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service, the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used. On the contrary, even if there is a suspicion of some misconduct, the master may say that he does not wish to bother about it and may not go into his guilt, but may feel like not keeping a man he is not happy with. He may not like to investigate, or take the risk of continuing a dubious servant. Then, it is not dismissal, but a termination simpliciter, if no injurious record of reasons or punitive pecuniary cut-back on his full terminal benefits, is found. For, in fact, the misconduct is not then the moving factor in the discharge. We need not chase other hypothetical situations here. What is decisive is the plain reason for the discharge, not the strategy of a non-inquiry or clever avoidance of stigmatizing epithets. If the basis is not misconduct, the order is saved.[34]

In *Ravindra Kumar Misra*, Ranganath Misra J noted:

> In several authoritative pronouncements of this court, the concepts of 'motive' and 'foundation' have been brought in for finding out the effect of the order of termination. If the delinquency of the officer in temporary service, is taken as the operating motive in terminating the service, the order is not considered as punitive, while, if the order of termination is founded upon it, the termination is considered to be a punitive action. This is so on account of the fact that it is necessary for every employer to assess the service of the temporary incumbent, in order to find out as to whether he should be confirmed in his appointment or his services should be terminated. It may also be necessary to find out whether the officer should be tried for some more time, on temporary basis. Since, both in regard to a temporary employee or an officiating employee in a higher post, such an assessment would be necessary merely because the appropriate authority proceeds to make an assessment and leaves a record of its views, the same would not be available to be utilised to make the order of termination following such assessment, punitive in character. [35]

The principles so stated, appear to be quite simple, but their application by the courts, particularly the Supreme Court, leaves one in a maze of bewildering perplexity. Hardly one case can be said to be a precedent for a subsequent case, even in similar fact-situations. It may, therefore, be apposite to analyse some of the leading cases and discuss their *ratio decidendi.* In *Assam Oil Co*,[36] the question was: whether the industrial adjudicator has no jurisdiction to deal with the validity, propriety or legality of the order terminating the service of an employee, purporting to be under the contract of service? The facts were: the employer found that the work of the concerned employee was thoroughly unsatisfactory, as there was a long series of instances of bad work and failure to carry out orders of insolence, untruthfulness and disobedience. It was also thought that the employee, being in a confidential position in the office, should not have become a member of the union. In the circumstances, the services of the employee were terminated in terms of the contract of service, which provided that the employment may be terminated on one month's notice, on either side. In the order of

termination, it was also stated that the employee had not matched up to the standard of work required by the job, by correcting the faults that the employer had pointed out. In view of the fact that the services of the employee were terminated in terms of the contract, no domestic inquiry was held. The Supreme Court, on the basis of the evidence of the manager of the employer company, came to two conclusions, firstly, that the employer was thoroughly dissatisfied with the work of the employee, and secondly, the employer did not approve of the employee's conduct in joining the union. In this situation, the court was inclined to the view that the order of discharge, passed against the employee, proceeded on the basis of a misconduct, hence the discharge was of a punitive nature, as it amounted to punishment for the alleged misconduct. The employer, therefore, was not justified in discharging the employee without holding a proper inquiry. Furthermore, since the circumstance that the employee had joined the union, had at least, partially weighed in the mind of the employer in terminating the services of the employee, the termination was not justified, as it would not be open to the employer to dismiss any employee solely or principally, for that reason. The plea of the employer, that whenever the employer purports to terminate the services of his employee, by virtue of the power conferred on him by the terms of contract, the industrial adjudicators cannot question its validity, propriety or legality, was specifically rejected. In *Chartered Bank*, Wanchoo J observed:

> There is no doubt that an employer cannot dispense with the services of a permanent employee by a mere notice and claim that the industrial tribunal has no jurisdiction to inquire into the circumstances in which such termination of service simpliciter took place...and approved the rule that in order to judge this, the tribunal will have to go into all the circumstances which led to the termination simpliciter and the employer cannot say that it is not bound to disclose the circumstances before the tribunal. The form of the order of termination is not conclusive of the true nature of that order, for it is possible that the form may be merely a camouflage for an order of dismissal for misconduct. It is therefore, always open to the tribunal to go behind the form and look at the substance; and if it comes to the conclusion, for example, that though in form, the order amounts to a termination simpliciter, it in reality, cloaks a dismissal for misconduct, it will be open to it to set it aside as a colourable exercise of the power.[37]

In this case, the cash department of the bank was headed by the chief cashier, under whom a number of assistant cashiers were working. The chief cashier alone, gave security for the safe working of the cash department. Hence, no individual guarantees or fidelity bonds were taken from the assistant cashiers working in the cash department. The assistant cashiers were entertained in service only on the recommendation of the chief cashier. There was a long-standing practice followed in the cash department, that all the assistant cashiers on duty, should remain present at the end of the day, when the cash was checked and locked up under the supervision of the chief cashier, so that any shortage in cash could be easily checked. There was a department circular issued to the above effect also. The chief cashier reported to the management that the concerned employee was leaving the bank without his permission for some time past, before the cash was checked and locked up, in spite of the circular, hence, he was unable to continue to guarantee him and unless his services were dispensed with, his conduct would affect the security of the cash department. Two courses were open to the bank, it could have taken disciplinary action, as provided in para 521 of the bank award, or it could have resorted to the power vested in it by para 522(1) of the award. But with a view to avoid going into the wrongs and rights of the dispute between the chief cashier and the assistant cashier, the bank terminated the services of the assistant cashier, purporting it to be within terms of para 522(1) of the award. In the course of the adjudication proceedings on the dispute relating to the discharge of the concerned assistant cashier, before the tribunal, no allegations of victimisation or unfair labour practice were made out against the bank, though it was alleged that the bank exercised the power under para 522(1) of the award, *mala fide*. The order of discharge was set aside by the tribunal on the ground that when there were allegations which might amount to misconduct, against the employee of the bank, the procedure of disciplinary action under para 521 of the award ought to have been followed and the procedure under para 522 (1) could not have been resorted to. But, in appeal, the Supreme Court held that, the order of discharge, in the circumstances of the case, was unassailable and it could not be contended that there was a colourable exercise of power by the employer, as the termination of the services of the concerned employee was not on account of any misconduct on his part, and the order of termination could not be considered to be merely a cloak to avoid holding a proper inquiry under para 571 of the award. It was, therefore, held that the bank had no option but to terminate the service of the assistant cashier, under para 522(1) of the award, as it was faced with the report from the chief cashier, otherwise, its system in the cash department, would have required a change, which was not possible. The court declined to infer *mala fides* of the employer from the squabbles between the cashier and the concerned workman or from the fact that the bank had not provided an alternative employment to the concerned employee.[38]

In *UB Dutt & Co*, the facts were: the workman concerned came drunk to the mill and abused the engineer, the secretary and others and threatened them with physical violence. He was caught hold of by other workmen and taken outside. But shortly afterwards, he came back again and abused the same officials of the company. Thereupon, the company served a charge-sheet on him, setting out the above facts and asked him to show cause why his service should not be terminated on account of the grave indiscipline and misconduct. As the workman denied these allegations, he was informed that a departmental inquiry would be held and he was placed under suspension, pending the inquiry. But later on, instead of holding the inquiry, the company terminated his services under the relevant Standing Order. The Supreme Court held that

it was too late in the day for an employer to raise a claim to terminate the services of his employee at any time, by just giving a notice or paying wages in lieu of such notice, for it would amount to a claim 'to hire and fire' the employee, as the employer pleases, and thus completely negate security of service, which, has been secured to the industrial employees, through industrial adjudication, for a long period of time. The explanation of the employer, namely, that the proposed inquiry, if it had been conducted, would have led to further friction and deterioration in the rank and file of the employees in general, and that maintenance of discipline in the undertaking would have been prejudiced if the workman had been retained in service, was discountenanced by the court. Wanchoo J, observed:

> If the employer wanted to take action for misconduct and then suddenly, dropped the departmental proceedings, which were intended to be held, and decided to discharge the employee under r 18(a) of the Standing Orders, it was clearly a colourable exercise of the power under the rule, inasmuch as that rule was used to get rid of an employee, instead of following the course of holding an inquiry for misconduct, notice for which had been given to the employee and for which a departmental inquiry was intended to be held.[39]

In *Jabalpur Electric Supply*, the facts were: the workman was charge-sheeted for substituting certain quantities of coil and cable in the stores of the company and even the inquiry into the misconduct had been held. Then the company discharged the workman from service, on the ground that it did not find it possible to retain him in service. This order was challenged by the workman *inter alia* on the ground that the order of 'discharge' was really an order of dismissal and as such, was bad in law. In the circumstances the, Supreme Court drew a distinction, in fact and in law, between an order of discharge under the contract and an order of dismissal or suspension as punishment and observed that though, from the inquiry, the employer might have been satisfied that the act of misconduct for which the employee was liable to be dismissed had been proved, he took a merciful view of his conduct in view of the previous clean record of the employee and accordingly, proceeded to 'discharge' him from service under the relevant Standing Order instead of dismissing him and in so doing, the employer had, in fact, acted fairly and even generously.[40] Thus, in *Jabalpur Electric Supply*, the Supreme Court resiled and took a softer view as compared to its hard-nosed decision rendered in *UB Dutt*.

It is impossible to reconcile these two decisions. In the former case, the employer had dropped the intended disciplinary proceedings after serving the notice of misconduct on the workman, while in the latter case, though the inquiry had been held and the finding that the act of misconduct had been proved, had, in fact, not been recorded by the inquiry officer, as imagined by the Supreme Court. It is also therefore, probable that the act of misconduct might not have been proved, which prompted, the employer to resort to the power of a discharge simpliciter, under the relevant Standing Order. If the 'merciful view' of the employer, in preferring the discharge simpliciter to the disciplinary dismissal, could prevail in this case, perhaps with more justification, it could have prevailed in *UB Dutt*. However, given that the earlier harder stand had yielded place to a softer view in a later case discloses the fact that the judicial view was becoming more alive to the ground realities and this change can be seen as part of the gradual evolution in the judicial decision-making process.

Then in *Murugan Mills*, where the services of the concerned employee were terminated under the relevant Standing Order without assigning any reason, the Supreme Court held that since the services of the workman, in fact, had been terminated for dereliction of duty and an attitude of go-slow in his work, which clearly amounted to a punishment for misconduct, the order of discharge simpliciter, under the relevant Standing Order, in such circumstances, was clearly a colourable exercise of the powers to terminate the services of workmen, under the provisions of the relevant Standing Order and the tribunal, therefore, was justified in going behind the order and deciding for itself, whether the termination of the workman's services could be sustained.[41] In *Utkal Machinery*, a Bench of five judges of the Supreme Court, again emphasised that the termination of the service of a workman under contract, by an industrial employer, must be in *bona fide* exercise of the contractual rights and then reiterated that in case the power is exercised *mala fide* or as a measure of victimisation or unfair labour practice or it is so capricious or unreasonable as to lead to an inference of motive or a lack of *bona fide*, it would be open to an industrial adjudicator to interfere with such a termination. In the case, the termination of the service, purporting to be in terms of the contract of employment, was found to be of a punitive character and was therefore, held to be *mala fide* and a colourable exercise of power.[42]

In *Tata Oil Mills*, the court again accentuated the *bona fide* aspect of the employer's action. In this case, the services of an employee were terminated after informing him that the company had lost confidence in him. The labour court came to the conclusion that the workman's plea about the *mala fides* of the company, was not proved and that the termination of service could not be said to amount to an act of victimisation or unfair labour practice. In spite of these findings, the labour court held that the discharge was not justified and directed the company to reinstate the workman. In appeal, the court recapitulated the principles enunciated in the earlier dicta, and in view of the definite finding of the labour court, in favour of the company, that the action in terminating the services of the workman was not *mala fide* and did not amount to victimisation, it was held that the employer company was justified in discharging the workman from service, in accordance

with the power vested in it by the relevant rule of service and the holding of the labour court was not sustainable. Speaking for the court, Gajendragadkar J observed:

> The test always has to be, whether the act of the employer is *bona fide* or not. If the act is *mala fide*, or appears to be a colourable exercise of the powers conferred on the employer, either by the terms of contract or by the Standing Orders, then, notwithstanding the form of the order, industrial adjudication would examine the substance and would direct reinstatement.[43]

In *Agra Electric Supply*, the termination of the service of the concerned workman, under the contract of service, without any notice and without assigning any reason, was set aside. It was held that the termination was of a punitive character, for an act of misconduct, *viz*; having used the vehicle of the superior officer without his consent. It was further held that the termination was not *bona fide*, but was a colourable exercise of power, inasmuch as the report of unsatisfactory work of the employee was made at the instance of the superior officer and at any rate, was inspired by the fact that the workman had used the vehicle of that officer without his consent and got it damaged. The court observed that in view of the facts and circumstances of the case, the form and language of the order were of no consequence and it was open to the tribunal to find out whether the order was, in fact, passed with a view to punish the workman.[44] Likewise, in *Jagdish Prasad*, the services of the employee were terminated for the reason that he, at the time of his employment, had concealed the fact that his service had been terminated by his previous employer for his involvement in a corruption case. The Supreme Court held that this order casts a stigma on the character of the employee and since no opportunity to defend himself was given by holding a domestic inquiry, the termination of his service was vitiated and illegal.[45]

In *Brooke Bond*, the workman was charge-sheeted, alleging that he had abused the position of trust and responsibility as the company's employee and had brought down, thereby, its reputation, by committing certain acts. After holding a domestic inquiry into the charges, the workman was dismissed from the service of the company, for the misconduct 'committed and proved' against him. It is thus obvious that the 'discharge' being for an act of 'misconduct', was of a punitive nature. The workman filed a complaint before the labour court, under s 26 of the Bihar Shops and Establishment Act 1953. The labour court took the evidence of the domestic inquiry on to its record and also, itself, recorded certain other evidence, led by the parties. From this evidence, the labour court recorded certain findings on the basis of which it allowed the workman's claim and set aside the order of 'discharge' passed by the management and directed the reinstatement of the workman. In appeal, against the order of the labour court, the employer took the plea before the Supreme Court, that the termination of the service of the workman, was a discharge simpliciter and not by way of punishment, and since the workman had abused his position in the company, it was not possible to continue to repose trust and confidence in him and to continue him in service. But the court noticed that the charge-sheet contained allegations of acts of 'misconduct' against the workman and the findings of the inquiry officer were that the acts of misconduct charged against him, were proved and that the order of discharge consequent upon those findings, in clear terms, stated that it was passed as a punishment and further, that even in the written statement filed by the management before the labour court, it had averred that the workman was found guilty of the charges of misconduct levelled against him and the company preferred to punish him by 'discharging' him from service, instead of dismissing him. In the face of all these facts, the plea of the company, that the order terminating the service of the workman, was of a discharge simpliciter, and not by way of punishment, was held to be inconsistent with the record, and therefore, manifestly untenable. The order of 'discharge', in fact, was by way of punishment and not discharge simpliciter.[46]

On the other hand, in *Tata Engg*, the discharge simpliciter was held to be proper. An officer of the company had been grievously assaulted. The police charge-sheeted the delinquent workman and the committal order passed by the magistrate, recited that the relations between the workman and the assaulted officer were strained before the incident of assault. From this, the management inferred that the workman had, in one way or the other, a hand in the assault, and decided that it was not in the interest of the company to retain him in service, particularly in view of the fact that he was a terror in the division where he was employed. In these circumstances, the management discharged the workman from service, in exercise of the contractual power vested in it, under the provisions of the relevant Standing Order. The Supreme Court held that it was manifestly wrong to say that the company had acted *mala fide*, to victimise the workman, because he was a leading member of the union and observed that to hold so, would tantamount to saying that even if the employer was satisfied that it was prejudicial to the interests of his concern, to continue the workman in his service, the order of discharge must be deemed to be *mala fide* or passed to victimise him, merely because he was an active union worker. Furthermore, from the mere fact that certain other workmen concerned with some other acts, had been reinstated, it would not follow that the management had the intention to victimise the concerned workman, or that the order of discharge was a colourable exercise of power, to discharge under the Standing Orders. In the circumstances of the case, a grievous assault of the officer by those working under him, could be seriously viewed by the company, as against the acts committed by other employees. If the management, therefore, preferred to discharge the workman under the relevant Standing Order, instead of holding an inquiry into the alleged act of misconduct, parallel to criminal proceedings, it would not be reasonable to say, as the tribunal held, that the company could have charged the workman with misconduct and held an

inquiry. The fact that it did not hold an inquiry, but exercised its power under the relevant Standing Order, could not render the order *mala fide* or one passed in colourable exercise of the power to discharge the workman from service. Relying on *Jabalpur Electric Supply Co*, in the circumstances of the case, the court held that the company had properly and justifiably exercised its power to terminate the service of the workman and there was no warrant for the tribunal to come to the conclusion, that it had acted *mala fide* or so as to victimise the workman.[47]

Likewise, in *Gujarat MDC*, the validity of a discharge simpliciter was upheld. The services of the concerned workman were terminated, as the management considered him to be arrogant, careless, negligent and having scant respect for the management, in view of certain events that had happened. The Supreme Court set aside the award of the labour court, which had held that the discharge was in pursuance of the threatened disciplinary action, for acts of misconduct and did not amount to a discharge simpliciter and, in fact, the real nature of the action taken against him was for the misconduct and was punitive. Since the requirement of holding a domestic inquiry was not complied with, the action of discharge was violative of the rules of natural justice. While quashing the findings of the labour court as perverse, the supreme court observed:

> If the corporation has been merciful in terminating his services by discharging him simpliciter, that is not a fault to be laid at their door, nor can it be a ground for imposing on them, the services of the respondent, who was indisciplined and arrogant—a conduct subversive of the smooth functioning of any commercial or industrial undertaking.[48]

In *Municipal Corpn of Greater Bombay*, the facts were: under the relevant Standing Orders, the employer corporation had a two-fold power; one, to impose punishment for misconduct after a disciplinary inquiry, under Standing Orders 21 and 23; and the other, to terminate the service of an employee by one month's written notice or pay in lieu thereof under Standing Order 26. The proviso to Standing Order 26 required the employer to give reasons for termination of the employment, in writing to the employee. The services of the concerned employee were terminated on the ground that her 'record of service was not satisfactory', though in the communication, it was stated that she would be paid 'one month's wages in lieu of notice and would also be eligible for all the benefits as may be admissible under the Standing Orders and service regulations of the undertaking'. While upholding the validity of the termination, the Supreme Court observed that merely because the reasons for terminating the service of the employee were required to be given and the reasons must not be arbitrary, capricious or irrelevant—it would not necessarily make the order of termination punitive in character, so as to require the compliance of the disciplinary procedure under Standing Orders 21 and 23; otherwise, the power of termination of service of an employee under Standing Order 26 would be rendered meaningless and futile, for, in no case, would it be possible to exercise it. It was further pointed out that:

> If the misconduct of the employee constitutes the foundation for terminating his service, then, even if the order of the termination is purported to be made under Standing Order 26, it may be liable to be regarded as punitive in character and hence, attracting the procedure of clause (2) of Standing Order 21, read with Standing Order 23, though, even in such a case, it may be argued that the management has not punished the employee, but has merely terminated his service under Standing Order 26.[49]

In a similar fact-situation, in *Gujarat Steel Tubes*, a majority of a three judge Bench took a diametrically opposite view. In this case, the workmen had gone on an illegal strike and they continued to be on strike despite all efforts of the management, in the face of the threat of the mill being taken over by the Government, having been declared a sick unit. In these circumstances, the management discharged 853 workmen and recruited some freshers to take their place, to keep the wheels of production moving. The management in this case, also had a two-fold power with respect to a workman guilty of misconduct, under the model Standing Order No 25(1), *viz*, to discharge a workman under sub-cl (l)(f) of cl 4 of model Standing Order 23, by giving him one month's notice or by payment of one month's wages in lieu thereof, while cl 4(A) of model Standing Order No 23 required the employer to record and communicate the reasons to the workman, for the termination of his service; and, to dismiss the workman by following the procedure of charge-sheet and inquiry etc. The management preferred the former course in the prevailing circumstances. Krishna Iyer J, who delivered the majority opinion, took the view that it was a case of dismissal, rather than of a discharge simpliciter, because the background of the illegal strike was the real foundation for the termination of the service of the workmen and the resort to the discharge simpliciter was a colourable exercise of the relevant model Standing Order.[50] But Koshal J, took the view that it was a clear case of a discharge simpliciter, as made out by the order and could not be a case of dismissal. Instead of focussing its attention on the relevant Standing Order, the majority pursued a rather prolix process of reasoning. The model Standing Order 25(1) gave the employer an option under cl (f), to 'discharge under Standing Order 23,' by giving the workman one month's notice or wages in lieu thereof, or under cl (g), to 'dismiss without notice', by complying with the disciplinary procedure under Standing Order 25(4). In case he adopts the former option, he is required to indicate his reasons for the termination of the service of the workman by cl 4(A) of model Standing Order 23. In case the reasoning of the majority is correct, the first option of discharge simpliciter gets emasculated and ineffective. The employer had exercised its option by

giving valid reasons, the arbitrator had on facts, found that the order was not founded on the misconduct of strike, but on the intransigence of the workmen in not returning to work, which led the management to discharge the workmen *en bloc*. So also, on the basis of the evidence led by the management, the arbitrator came to the conclusion that it was a case of discharge simpliciter. The High Court, therefore, was wrong in interfering with the arbitral award. *A priori*, the majority opinion was absolutely perverse and clearly wrong, while the dissenting view of Koshal J was right.

In *MK Ravi*, the services of the employee were terminated in terms of the contract of employment without assigning any reason. Before the labour court, the employer justified the termination of service as a discharge simpliciter and also alternatively, took the plea that the termination, though apparently a discharge simpliciter, in fact, was a punishment for misconduct. The labour court held that if it was a case of a termination simpliciter, the termination, being in the nature of retrenchment, was not valid for non-compliance with the requirements of s 25F of the Act. But dealing with the alternative plea, the labour court permitted the management to adduce independent evidence to justify the order and also allowed the workman to lead evidence to rebut the case of the employer. On the basis of such evidence, the labour court held that the dismissal of the workman was justified. A single judge of the High Court upheld the validity of the award and held that the workman, having acquiesced to the hearing of the alternate case and also let in evidence to demolish the same, raised the plea against the labour court considering the alternate case of the management on after the verdict went against him.[51]

In *Ruby General Insurance*, the order of discharge simpliciter, under the contract, was set aside by the tribunal, as it took the view that the order punishing the workman, amounted to a dismissal. In coming to this conclusion, the tribunal was impressed by two allegations made by the workmen; firstly, that the management felt resentful against him for his having complained to the authorities against their failure to issue the letter of appointment, and secondly, that they were annoyed with him for his having demanded extra payment in respect of the work he was made to do in relation to certain concerns, in which the company was interested. Since the order of termination was passed without holding any inquiry, the tribunal held it to be invalid and directed the reinstatement of the workman. The award of the tribunal was affirmed in appeal by the Supreme Court, because the point was not pressed.[52] Likewise, in *Hindustan Steel*, the tribunal held that though the order of the termination of the service of the workmen was, in form, one of termination of service in terms of the contract, it was, in fact, punitive in nature and it was a case of victimisation. It was not in a *bona fide* exercise of the employer's right to do so, as it was based on the adverse report of the police. Consequently, the tribunal held the order to be illegal and unjustified and directed the reinstatement of the workmen, with full back wages. In writ proceedings, the High Court affirmed the holding of the tribunal, that the termination of the service of the workman was not in a *bona fide* exercise of the power of the employer to terminate the employee's service and that it was punitive in character. The High Court also held that the relief of reinstatement was the appropriate relief, as the case did not fall in one of the exceptions to the normal rule of reinstatement. In appeal, the Supreme Court did not consider it proper to interfere with the holding that the order terminating the service was not in a *bona fide* exercise of the power of the employer and was punitive in character and it limited the appeal only to the question, whether the tribunal should have granted the relief of reinstatement or compensation.[53]

In *Bihar SRTC*, the facts of the case were: the workman concerned was discharged from service in accordance with the terms of the contract to the effect that 'the appointment was purely temporary and was terminable without notice and without assigning any reason'. The labour court relied on a letter addressed by the management to the conciliation officer in which it stated that the service of the workman was terminated as it was found that he had committed various irregularities in the discharge of his duties. Accordingly, the labour court held that the said termination was illegal as no enquiry was conducted into the irregularities alleged, and accordingly ordered reinstatement. The Supreme Court upheld the award of the labour court.[54] It is pertinent to note that both *Bihar SRTC* and *Tata Engineering*, were decided by the same judge. From the juxtaposition of these cases, it would appear that diametrically opposite stands were taken in the two cases, having similar fact-situations.

In *Sudder Office*, the workman concerned was charged with removing some used pulleys from the company's godown and loading them in the godown lorry and for instructing the driver to drop them at the godown of some one else. Subsequently, some sort of investigation was made by the management, which was loosely called an inquiry. Then an order was passed, stating that the charges had been satisfactorily proved against the workman and the management had lost confidence in him, as it was unsafe to retain him in the post of trust and responsibility occupied by him, in the interest of the company, and it was decided to terminate his service under the contract, as provided in the relevant Standing Order. The labour court held that the enquiry conducted by the management was not valid, because no evidence was adduced before it by the management, to prove the charges against the workman, and held that the said termination was a camouflaged dismissal. On this view of the matter, it ordered reinstatement of the workman with full back wages and continuity of service. The High Court held that the order terminating the service of the workman was an order of discharge simpliciter and not one of dismissal and the award of the labour court, therefore, was erroneous. The Supreme Court upheld the order and observed that the High Court had acted within its jurisdiction, in setting aside the order of the labour court, especially so, when no finding of victimisation, unfair labour practice or *mala fide*, was recorded against the

management. The court, therefore, upheld the order terminating the service of the workman, for loss of confidence, who was at the relevant time, holding a very responsible post, where integrity and honesty were quite essential.[55] In *Motipur Sugar Factory*, in cases of dismissal, 'no inquiry' or 'defective inquiry' situations stand on the same footing. It is further stated that even in cases where no inquiry has been held, it is open for an employer to satisfy the tribunal, by adducing evidence about the validity of the order of discharge or dismissal. In other words, even in cases of a discharge simpliciter, it is open to an employer to satisfy the tribunal that the services of the employee were terminated in a *bona fide* exercise of the powers under the contract or for a loss of confidence in him.[56].

Where an employer terminates the service of a workman who shows a consistent indifference to work and discipline and gets annoyed when he is asked to give an explanation, an inference of *mala fides* cannot be justified. The fact that the workman happens to be an office-bearer of a union will make no difference. There is no ambiguity in law on this highly sensitive question of 'discharge'. The employer may have a right to discharge his employee under the contract or rules. But the existence of a good reason, based on objective facts, is indispensable for a discharge. There can be a myriad of reasons for discharging including an act or omission, amounting to a misconduct. The employer is not bound to hold an inquiry and visit the employee with penal action, even if such reason happens to be a misconduct of the employee. It is only the absence of such reason, and not a mere failure to hold an inquiry, that would render such discharge *mala fide* or an act in colourable exercise of power, raising an inference of victimisation. Not the law, but its application to the facts of each case, presents the real difficulty. The possibilities for an employer seeking to eliminate the thorn of an active trade union worker, or for an employee, seeking to cover his misconduct under his trade union activity, always exist. The assessment of evidence becomes difficult when a guilty employee happens also to be an active trade union worker and the employer takes recourse to a discharge simpliciter, rather than to a long winding, and dilatory course of inquiry and punitive action. The dividing line between the motive for and the basis of the order, becomes very thin in such cases. The law is also liable to be misapplied, when a few observations in a judgment intended to emphasise some peculiar features of any particular case, are misread or misunderstood, by tearing them from their context.[57]

In *Sadasivan*, Raju J for a Division Bench of the Madras High Court, held that a termination of service in terms of a clause in an agreement, providing that the 'management can terminate the service of an employee, without giving reasons, by giving one month's notice or salary in lieu of notice', was void and unenforceable, being *ultra vires* of Art. 14 of the Constitution, apart from being opposed to public policy and violative of s 23 of the Indian Contract Act 1872.[58] This decision calls for some analysis. *In the first place*, according to the admitted facts, it was not a case of termination of service of a public servant and hence, the observation of Raju J that such a clause would offend Art. 14 of the Constitution, is without any merit whatsoever. *Secondly*, the right of an employer, to terminate the service by invoking a term of the contract of employment and by giving one month's notice or paying wages in lieu thereof, is coextensive with the right of an employee to resign and leave the service by giving one month's notice or paying wages in lieu thereof. In terms of such a contract, neither the employee, nor the employer was required to give reasons for the resignation or the termination, respectively. *Thirdly*, given the fact that the certified Standing Orders, as well as the contract of employment, provided for the determination of the contract by giving the prescribed notice or wages, could it be said that such a contract fell within one of those forbidden contracts enumerated in s 23 of the Indian Contract Act 1872? Could it, by any stretch of imagination, be canvassed that an employment contract of this nature is opposed to public policy or that it defeats the provision of any law or that it causes injury to any person or his property or is immoral or fraudulent?*Would it be wrong if one draws an adverse inference to the effect that the learned judge was absolutely ignorant of the fact that there is nothing in industrial law, or in any branch of law, like a 'compulsive life-time employment', bordering on slavery and serfdom, with neither party having the right to terminate a contract once made?* It is only when the termination of service is found to be punitive and a colourable exercise of powers on the part of the employer, that the issue acquires a different complexion, giving a right to the courts to lift the veil and set the order aside, if it is found that it was not a case of a termination simpliciter, but one of a camouflaged dismissal. This much is the settled law, as laid down in a catena of decisions by the Supreme Court, for instance, *Assam Oil Co*,[59]*Municipal Corporation of Greater Bombay*,[60]*Shamsher Singh Gujarat Steel Tubes*,[61] and others. For that matter, even in a case involving a public servant, who is governed by the provisions of Art. 311 of the Constitution, Sinha CJI, speaking for a Constitution Bench of the Supreme Court, held that if the Government proceeds against the employee, in the direct way, without casting any aspersions on his honesty or competence, his discharge would not, in law, have the effect of a removal from service by way of punishment and the employee could have no grievance to ventilate in any court.[62] Viewed thus, the decision rendered by Raju J in *Sadasivan* is wholly misconceived, perverse, clumsy and is wrong. In *Chandra Prakash Gautam*, the Supreme Court reiterated the earlier *judicial dicta* on the subject and held that if a person is appointed on a temporary basis and the order of termination is not casting any stigma, then such order would be an order of termination simpliciter and the same cannot be challenged on the ground that no opportunity to show cause was given.[63] In *Dainik Navbharat,* a single judge of the MP High Court held that the termination of a workman, who was appointed on the specific understanding that his appointment was for the Bhopal office only, on the ground that he refused to report at the Jabalpur office, would not amount to defiance of any lawful order on his part and the termination of his service on that count, was illegal.[64]

(ii) Loss of Confidence:

In VA Rebellow, the court upheld the validity of the termination of the service of an employee of the Air India Corporation, in terms of the relevant regulation framed under the Air Corporations Act 1953, by paying his salary for thirty days in lieu of the notice. The relevant regulation did not lay down any pre-requisite for invoking its application. Action under this regulation could be validly taken by the employer corporation at its sweet-will, without assigning any reason and it was not bound to disclose why it did not want to continue in service, the employee concerned. The order of termination of the service of the workman, did not, therefore, refer to any act of misconduct on the part of the workman. But the written statement filed by the corporation before the labour court, disclosed the fact that the corporation had lost confidence in the workman, due to a grave suspicion regarding his private conduct and behaviour with the air hostesses employed by the corporation. The labour court, therefore, held that the discharge of the workman was not a discharge simpliciter, but was of a punitive nature. In appeal, Dua J observed:

> It may be conceded that an employer must always have some reason for terminating the services of his employee. Such reason, apart from misconduct, may, inter alia, be a want of full satisfaction with his overall suitability in the job assigned to the employee concerned. The fact that the employer is not fully satisfied with the overall result of the performance of his duties by his employee, does not necessarily imply a misconduct on his part. The only thing that remains to be seen is, if in this case, the impugned order is *mala fide*. ... Once *bona fide* loss of confidence is affirmed, the impugned order must be considered to be immune from challenge. The opinion formed by his employer, about the suitability of the employee for the job assigned to him, even though erroneous, if *bona fide*, is in our opinion, final and not subject to review by industrial adjudication. Such opinion may legitimately induce the employer to terminate the employees' services; but such termination can, on no rational grounds, be considered to be for misconduct and must, therefore, be held to be permissible and immune from challenge.[65]

It was, therefore, held that the labour court was not right in holding that the termination of the service of the workman, for an act of misconduct, was not a discharge simpliciter. From this decision, it appears that the court assumed the *bona fides* of the employer corporation in the discharge simpliciter of the workman, under the relevant regulation, by accepting its plea of loss of confidence in the workman. The court did not address itself to the specific contention of the workman, that the discharge, though purported to be under the relevant regulations, in fact, was for the misconduct of his alleged misbehaviour towards the air hostesses. This yardstick has not been adopted and applied in many other cases already discussed. In *Binny Ltd*, the plea of loss of confidence by the employer was again given more credibility than the plea of the workman that the discharge was of a punitive character.[66] The concerned workman took leave for eight days for going to his native place to settle a land dispute. But in fact, he did not go to his village. During the period of such leave, he, as a matter of fact, participated in a hunger strike before the Government secretariat. The management, therefore, cancelled his leave and directed him to join duty forthwith. The workman, however, did not comply with this direction. Consequently, the management terminated his services, under the relevant Standing Order, for being absent from duty for more than eight consecutive days. Though the labour court found that the workman took leave on a false pretext and the management had not acted *mala fide*, with the object of victimisation or as an unfair labour practice in discharging the workman, still, it ordered his reinstatement with Rs 5,000 by way of back wages, as it took the view that the management had no right or power to revoke the leave once granted to the workman. In appeal, the Supreme Court set aside the award of the labour court and held that the management could not possibly have any confidence in the workman for the future, because he had taken leave on a false pretext and observed, that in view of the well-settled law, neither reinstatement, nor backwages could have been ordered.

In *Johnson Pumps*, the facts were: the services of the concerned workman were terminated by a notice in terms of the contract of service. This order was challenged by the workman in industrial adjudication, as *mala fide*, and calculated to victimise him for his trade union activities. His case was that although he was efficient and the management had given him merit increments, his services were terminated because he took active part in the formation of an employees' union, of which he became a treasurer. Furthermore, the termination of service was wrongful and illegal, because the workman had not been given an opportunity to defend himself. The counter case of the management was that since the workman had not been dismissed from service for any act of misconduct, it was a case of discharge simpliciter, which required no inquiry. In other words, the action being a simple termination without a stigma, the process and consequence of a disciplinary action were not attracted. Hence, there was no illegality invalidating the order. Furthermore, the allegations of the workman, that the termination of his services was on account of his trade union activities, was a concoction in self-defence, made more 'to create ground for the workman's claim and levelled as a matter of habit and routine', and the management did not even have the knowledge of the formation of the union. The management's further plea was that it had lost confidence in the workman, because he had misused his position by passing on 'very important and secret information about the affairs of the company, to certain outsiders' and also made attempts to 'elicit information from the section, with a view to pass it on to the outsiders'. The order terminating the services of the workman was, therefore, sought to be sustained as *bona fide*, on the ground of unreliability of the workman. In view of the suspicion, that the workman was passing information regarding

certain tenders to some outsiders, lurking in the mind of the employer, which motivated the termination of the service, the labour court accepted the plea of loss of confidence advanced by the employer and upheld the validity of the order of discharge. In appeal, against the order of the labour court, the Supreme Court posed to itself the questions: Whether the order of termination in this case, was innocuous and *bona fide* or an oblique circumvention of the processual protection the law provides, to a workman before he is dismissed for misconduct and whether the *ipse dixit* of the employer, that he had lost confidence in the employee, was sufficient justification to jettison the latter, without leveling and proving the objectionable conduct which had undermined his confidence, so that the tribunal may be satisfied about the *bona fides* of the 'firing', as contrasted with the colourable exercise of power, hiding a not so innocuous purpose. From the fact that the employer had not informed the worker or the union about the loss of confidence, nor had it taken this plea before the conciliation officer, the court drew the inference of a lack of *bona fides*. It also went into the evidence and held that the increments given to the workman in the relevant period, militated against the plea of loss of confidence, apart from taking the view that the evidence on record, was not sufficient to establish the *bona fides* of the plea of loss of confidence. Consequently, the discharge simpliciter on the basis of loss of confidence, was held to be *mala fide*.[67]

The decision in *Johnson Pumps* is diametrically opposed to the approach of the court in *Jabalpur Electric Supply Co, Tata Engineering, Hindustan Steel, VA Rebellow, Gujarat MDC and Municipal Corpn of Greater Bombay*. No effort was made to reconcile the conflicting dicta. Rather curiously enough, the court 'discerned' 'harmony' and 'consistency' in the case law from the *Chartered Bank* case to the *Air India Corpn* case. But this 'discernment' of harmony is not borne out by any analytical scrutiny of those dicta. Instead of noticing the glaringly irreconcilable inconsistencies in its approach in the various cases, the court contented itself by referring to three cases and with the observation that 'the plethora of precedents need not be covered in extenso, as the law laid down is the same, except that judicial response to each case situation leads to emphasis on different facets of the principle'. The law in this vexed area requires restatement, with precision and clarity. The Bombay High Court, in *Siddhanath Kadam*, observed that *Johnson Pumps* only registered a warning against accepting a plea of loss of confidence, when it is unsupported by any material and proves to be a mere pretence for getting rid of an unwarranted employee. The attack was directed not against the doctrine of 'loss of confidence' itself, but against the indiscriminate use thereof, without investigation to whether the same is a cover for a capricious, arbitrary and fanciful 'hire and fire' strategy and without regard to whether it is a colourable exercise of the power.[68]The High Court held that the plea of a loss of confidence is not liable to be rejected when it is based on good grounds and dependable material, as found by the tribunal. It is not open to an employer in despair, as a last resort, to raise the plea of loss of confidence, when he finds that the finding of guilt entered in the domestic inquiry, on the basis of which the order of dismissal was passed by the management, was bound to be set aside by the tribunal. In other words, the action initiated on grounds other than a loss of confidence, cannot to converted into or developed into a case of loss of confidence, to suit the convenience of the employer, so as to sustain the act of termination, which the tribunal, on the facts established, found to be illegal. Furthermore, the success or failure of the plea of loss of confidence, essentially depends upon the assessment of the facts and circumstances, considering the nature of the duty of the workman, the trust reposed by the management on the workmen, and the fiduciary relationship, if any, involved between the management and the workmen, in the day-to-day work of the workmen.[69] The plea of a 'loss of confidence' need not necessarily be confined only to the employees holding confidential posts and not to others. Every contract of employment implies trust and confidence as its ingredients. Some posts, no doubt, happen to be of a highly confidential nature. But that does not mean that confidence in an employee is a dispensable element in the other posts.

In *Rable v Green* , it was held that an employee is expected to promote the employer's interests, in connection with which he has been employed and a necessary implication which must be engrafted on such a contract is, that the servant undertook to serve his master with good faith and fidelity.[70] In *Tata Engineering*, the workman was not holding 'any such' position of confidence and still, his discharge was held justified on the ground of loss of confidence. It is not possible to underestimate the element of such confidence in the harmonious, smooth and effective working of any undertaking. The court has, however, to ensure that any such claim of 'loss of confidence' is genuine and is based on objective facts, lest the protection afforded to the workman becomes illusory. However, well-founded suspicions against employees holding posts of a high confidential nature, may be considered enough for a loss of confidence, while in other cases, proof that the workman has done some act or omission, should be required for the employer's loss of confidence in him. The questions as to in what respect the employee was found by the employer, to be unreliable and how his business was liable to be affected adversely, or how any loss was caused to him, are matters of rational inference and prudent calculations, from the facts discovered, for the employers and cannot be matters of pleadings and evidence. On a review of some of the above cases, a single judge of the Gauhati High Court,[71] has stated the following principles of adjudication:

(i) A loss of confidence is still a valid ground of termination, though not applicable to all categories of workmen.

(ii) the plea of a loss of confidence cannot, however, be used as a cloak, but must be *bona fide*.

(iii) An order of termination would not cease to be so, if reasons for the same, even casting aspersions, are given in those cases where it is required by the Standing Orders.

(iv) Where reasons are not required to be given by the Standing Orders, it is, to put it mildly, doubtful that the termination order would be regarded as one of discharge, if it casts a stigma.

(v) If the order be due to victimisation or an unfair labour practice, it would be bad in the eye of law.

(vi) The form of order is never decisive in such cases.

(vii) An order founded on misconduct would be punitive in nature and not a termination simpliciter.

(viii) The management could lead evidence to prove the misconduct, even if it had not held any inquiry into the misconduct, as required by the relevant Standing Orders.

In *Chandulal*, the Supreme Court disagreed with the findings of the labour court, that when a service is terminated on the basis of a 'loss of confidence', the order does not amount to one with stigma and does not warrant a proceeding as contemplated by law, preceding the termination. Speaking for the court, Ranganath Misra J said:

> Want of confidence in an employee does point to an adverse facet in his character, as the true meaning of the allegation is that the employee has failed to behave up to the expected standard of conduct, which has given rise to a situation involving a loss of confidence. In any view of the matter, it amounts to a dereliction on the part of the workman and therefore, the stand taken by the management, that a termination for loss of confidence does not amount to a stigma, has to be repelled. [72]

In this case, the court deviated from the trodden path, that the service of an employee could be terminated in terms of the contract for a loss of confidence. In other words, the plea of 'loss of confidence' in the employee, casts a stigma on the character of the workman. In the absence of a statutory definition of the word 'stigma', in *Kamal Kishore Lakshman*, the same judge, referring to the etymological meaning of the word, held that a stigma is:

> something that detracts from the character or reputation of a person, mark, sign etc, indicating that something is not considered normal or standard ... blemish, defect, disgrace, disrepute, imputation, mark or disgrace of shame ... a mark, a label, indicating a deviation from a norm ... a matter for moral reproach.[73]

In these cases, the court has given a penal hue to the termination of service for a 'loss of confidence'. Consequently, when an employer terminates the service of a workman, for loss of confidence in him, such termination is not innocent in terms of the contract. It casts a stigma on the character of the workman. Therefore, the requirement of having disciplinary proceedings before dispensing with the service of the employee, is attracted. These requirements have been elaborated in an illuminating opinion by the Delhi High Court, in *Amarjeet Singh*, in which Anand J, observed:

> It is well-settled that in determining the challenge to the validity of an order, which purports to be an order simpliciter, the language is not determinative and the court has the power, as indeed, the obligation, to go behind the order and examine the circumstances antecedent and subsequent to the impugned order ... If the impugned order is, therefore, stigmatic, either on the face of it or in any event, in the context of the circumstances antecedent and subsequent to it, it would be liable to be void on the simple ground that such an order could not have been made without giving the petitioner a reasonable opportunity of being heard, on the principle of *audi alteram partem.*[74]

In *D Seeralan*, of the Madras High Court held, that the termination of the service of the employee for 'loss of confidence', being of a punitive character, was invalid for 'non-compliance' with the relevant Standing Orders, prescribing the procedure for inflicting the disciplinary punishment. However, in view of the fact that the termination of service was not *mala fide*, the court awarded compensation in lieu of reinstatement.[75] In *Jagatpal Dhuria*, where the labour court, despite holding that the order of termination, passed against the workman, without conducting an inquiry, was illegal, noted the fact that there was a shortage of stock when the workman was in charge of the cash collections, and ordered a payment of compensation in lieu of reinstatement. A single judge of the Bombay High Court accepted the management's plea, that it had lost confidence in the workman and approved the award passed by the labour court.[76]

(iii) Discharge of Probationers:

The purpose of placing a person on probation is to try him during the period of probation and to assess his suitability for the job concerned. It is settled that an order of discharge is not an order of punishment and, therefore, there is no question of giving a hearing before a termination of his service.[77] If an employee who is on probation or holding an appointment on

a temporary basis, is removed from the service with stigma, because of some specific charge, then the plea that his service was temporary or his appointment was on probation, is not sustainable. In such a case, it is necessary to hold an inquiry, affording him an opportunity to show that the charge levelled against him is either not proved or is without any basis. But when the service of an employee is terminated during the period of probation or while his appointment is on a temporary basis, by an order of termination simpliciter, after some preliminary inquiry, it cannot be said that some inquiry had been made against him before the issuance of the order of termination. It really amounted to his removal from service on a charge and as such, the termination was penal in nature.[78] The principle of law relating to discharge under the contract of discharge simpliciter, was extended to the discharge of probationers as well, by the Supreme Court in *Express Newspapers*. The probationer in this case, was appointed as a journalist on a probation for six months and had to be confirmed if he was found suitable for the job during this period. But before the expiry of the probationary period, the employer terminated his service on the ground that his work was unsatisfactory. The discharge was challenged by the workman as *mala fide* and a measure of unfair labour practice. The plea of the management was that the journalist, having been appointed only as a probationer, the termination of his service for unsatisfactory work, was well within the rights of the management. Speaking for the Supreme Court, Das Gupta J stated the law in the following words:

> There can, in our opinion, be no doubt about the position in law, that an employee appointed on probation for six months, continues as a probationer even after the period of six months, if at the end of the period, his services had either not been terminated or he is confirmed. It appears clear to us that without anything more, an appointment on probation for six months, gives the employer no right to terminate the service of an employee before the six months have expired, except on the ground of misconduct or other sufficient reasons, in the which case, even the services of a permanent employee could be terminated. At the end of the six months' period, the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer, either by way of confirmation or by way of termination, the employee continues to be in service as a probationer. [79]

From these observations, it appears that the court maintained the distinction between the cases of termination of employment of a probationer, before the period of probation have expired and the cases where the employer exercises his inherent right, either to confirm or to terminate the employment of the probationer, at the end of the period of probation.[80] The employer's right to terminate the service of a probationer, at the end of the probationary period, without anything more, was recognised. It is also clear that when the first appointment is on probation for a specific period and the employee is allowed to continue in the post after the expiry of that period, without any specific order of confirmation, he continues in his post as a probationer only and acquires no substantive right to hold the post in the absence of any indication to the contrary, in the original order of appointment or promotion or the service rules. When, therefore, after the period of probation, an appointee is allowed to continue in the post, without an order of confirmation, the only possible view to take is that by implication, the period of probation has been extended. The fact that an appointee is allowed to continue after the end of the period of probation, cannot lead to the conclusion that he should be deemed to have been confirmed. An express order of confirmation is necessary to give the employee a substantive right to the post, and from the mere fact that he is allowed to continue in the post after the expiry of the specified period of probation, it is not possible to hold that he should be deemed to have been confirmed. The reason for this is that where, on the completion of the specified period of probation, the employee is allowed to continue in the post without any order of confirmation, the only possible view to take, in the absence of anything to the contrary in the original order, appointment, promotion or the service rules, is that the initial period of probation has been extended, by necessary implication. Where the service rules fixed a definite time beyond which the probationary period cannot be extended and the employee appointed or promoted to a post on probation was allowed to continue in that post after the completion of the minimum period of probation, without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. In such a case, the implication is negatived by the service rules, forbidding the extension of the probationary period beyond the maximum period fixed by it and it is permissible to draw an inference that the employee allowed to continue in the post on completion of the maximum period of probation, has been confirmed in the post, by implication.[81]

The only difference between a probationer whose term of probation has not expired and the one who is continuing in the service after the expiry of the stipulated period of probation, without any order of confirmation having been passed, is, that the former has the guaranteed period of trial, namely, the probationary period during which he is not liable to be discharged on the ground of unsuitability, whereas the latter is liable to be discharged any time. It will be totally meaningless to refer to a person's employment on probation, if the management has a right to terminate his services only on the ground of proved misconduct. It is of the very essence of the concept of probation, that the person is on trial, regarding his suitability for a regular appointment and is liable to be discharged on being found to be unsuitable for permanent absorption, on the expiry of the probationary period.[82] In *Utkal Machinery*, where the terms of employment of the probationer provided that the employer could terminate the services of the employee during the probationary period, without notice and without assigning any reason, the Supreme Court said that when the validity of such termination is challenged in industrial adjudication, it would be competent for the industrial tribunal to find out whether the order of

termination was a *bona fide* exercise of the power conferred by the contract. In such a case, like the case of a permanent employee, it would be open to the tribunal to consider whether the order of termination is *mala fide* or whether it amounts to victimisation or an unfair labour practice or is so capricious or unreasonable as would lead to the inference that it had been passed with an ulterior motive and not in a *bona fide* exercise of the power arising out of the contract, and to afford a proper relief to the probationer employee.[83] In *Brooke Bond*, the facts were: the workman was appointed in the first instance, for a probationary period of six months, extendable for a further period of three months or more. The letter of appointment further provided that the company had the right to terminate the services of the probationer, 'during the period of probation or the extended period of probation or before confirmation in writing, without notice and without assigning any reasons whatsoever'. The industrial tribunal held that the employer was not justified in discharging the probationer workman from service, without holding a proper inquiry. Jaganmohan Reddy J, observed:

> While there may be some justification on the terms of appointment in the case, for the court to observe that the employer had no right to terminate the service before the expiry of the six months, it makes no difference to the principle that the employer cannot terminate the services, even of a probationer, on any grounds which have not been recognised as a justification for such termination. [84]

Applying the rule laid down in *Utkal Machinery*, the court held that the order terminating the services of the probationer, was capricious and unreasonable and the termination was not justified. Affirming the direction of the tribunal, the court observed that on the reinstatement of the workman, the employer will have an opportunity of watching his work and 'will have the right and freedom to make up its mind as to whether the services of the respondent should be retained or dispensed with, on justifiable grounds'. The effect of the *Utkal Machinery* and the *Brooke Bond*, is that despite a provision in the contract of employment, to the effect that during the period of probation, an employer has the right to terminate the services of the probationer without any notice and without assigning any reason, it would be open to the industrial adjudicator to consider whether the order of termination is *mala fide* or whether it amounts to victimisation or an unfair labour practice. From the observations of the court in the *Brooke Bond* case, extracted above, one is left with an impression that even on the expiry of the probationary period, the employer can dispense with the services of the probationer only 'on justifiable grounds' but this observation has to be understood to be confined to the particular facts of that case alone. This cannot be understood to lay down a general proposition of law, because it would cut at the very root of the concept of probation. In *Gujarat MDC*, where the validity of the termination of the service of a temporary employee was upheld, which employee was discharged from service in view of the misconduct of 'malingering' and 'other acts subversive of discipline'. It is a well-settled law that at the end of the probationary period, it is open to the employer to continue the employee in his service or not, as per his discretion, otherwise, the distinction between a probationary employment and a permanent one will be wiped out.[85] Even if on the expiry of the probationary period, the work of the employees has been satisfactory, it does not confer any right on them to be confirmed. Furthermore, the extension of any facilities to such employees, during the period of their probation or extension thereof, or their being treated as confirmed, will not *ipso facto* make them confirmed, which can only be done by a valid order of confirmation.[86] The law on the termination of the services of probationers has been elaborately stated by a Constitutional Bench of the Supreme Court in *Shamsher Singh*.[87]The same principles will apply to probationers in industrial employment as well. The only difference is that in the case of Government employees, the requirement of Art. 311 of the Constitution have to be complied with, whereas, in the case of industrial employees, the rules of natural justice have to be complied with, when the termination of service is for an act of misconduct. The principles discernible from *Shamsher Singh* are:

i. The termination of the service of a probationer in the Government will not, ordinarily and by itself, be a punishment, because the Government servant so appointed, has no right to continue to hold such a post any more than a servant employed on probation by a private employer, is entitled to do so.

ii. Such a termination does not operate as a forfeiture of any right of a servant to hold the post, if he has no such right, because such a termination cannot be described as a dismissal, removal or reduction in rank by way of a punishment.

iii However, if the right exists, under a contract of service, rules to terminate the service, and the motive operating on the mind of the Government, are wholly irrelevant. The reason is that it inheres in the state of mind, which is not discernible.

iv. On the other hand, if the termination of service is sought to be founded on misconduct, negligence, inefficiency or any other disqualification, then it is a punishment. In such a case, the motive becomes relevant, since the termination is founded on misconduct, it is objective and manifest.

v. But no abstract proposition can be laid down, that where the services of a probationer are terminated without saying anything more, in the order of termination, than that the services are being terminated, it can never amount to punishment.

vi If a probationer is discharged on the ground of misconduct or inefficiency or for similar reasons, without a proper inquiry and without him getting a reasonable opportunity of showing cause against his discharge, it may in a given case, amount to a removal from service.

vii Before a probationer is confirmed, the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any rules governing a probationer in this respect, the authority may come to the conclusion that on account of his inadequacy for the job or for any temperamental or other object, not involving moral turpitude, the probationer is unsuitable for the job and hence, must be discharged. No punishment is involved in this.

viii The authority may, in some cases, be of the view that the conduct of the probationer may result in a dismissal or a removal, on an inquiry. But in such cases, the authority may not hold an inquiry and may simply discharge the probationer, with a view to giving him a chance to make good in his walk of life, without a stigma at the time of the termination of his service. Thus, if the Government proceeds against the probationer, in a direct way, without casting any aspersions on his honesty or competence, his discharge would not have the effect of punishment.

ix. If, on the other hand, the probationer is faced with an inquiry, on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311 (2), then he can claim protection. Even the fact of having held an inquiry is not always conclusive. What is decisive is whether the order is really by way of punishment.

x. If there is an inquiry, the facts and circumstances of the case will have to be looked into, in order to find out whether the order is of dismissal, in substance. The probationer whose terms of services provided that it could be terminated without any notice and without any cause being shown, cannot claim the protection of Article 311.

xi. A preliminary inquiry to satisfy that there was reason to dispense with the service of the probationer, would not tantamount to an inquiry into the acts of misconduct, alleged against the employee. On the other hand, a statement in the order of termination of a probationer, that he is undesirable, would impart an element of punishment. If, therefore, the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment, then the probationer is entitled to the protection of Article 311 of the Constitution.

xii. In other words, the substance of the order, and not the form, would be decisive. The order terminating the services of a probationer under the rules of employment and without anything more, will not attract Article 311.

xiii. Where a departmental inquiry is contemplated and if an inquiry is not in facts proceeded with, Article 311 will not be attracted, unless it can be shown that the order, though unexceptionable in form, is made following a report based on a misconduct.

In *Prakash Mishra*, the Madhya Pradesh High Court held that though a probationer can be weeded out without an inter-party inquiry, his service cannot be terminated without inquiry, if the termination is by way of punishment for an act of misconduct. The termination of the service of a probationer in a public sector undertaking, though appearing to be innocuous, was made in the background of an act of misconduct. The impugned order was, therefore, quashed.[88] The principle will apply to industrial adjudication as well. In *K Veerasha*, the Kerala High Court held that an order of dismissal of an employee for misconduct, is entirely different in nature from an order terminating the probation of such an employee.[89] An order of termination in innocuous terms, which does not cast any stigma on the employee, nor does it visit him with any evil consequences and is also not founded on any act of misconduct, is not, open to challenge.[90] Likewise, in the absence of the rules which equate a termination of service during or at the end of the probation, with removal, no proceeding is necessary to terminate the service of a probationer.[91] If the contract of service provides that the probation can be terminated if the work of the employee is found to be unsatisfactory, the probation can be terminated after calling for an explanation from such an employee and after giving him a reasonable opportunity of being heard, and to explain himself. In such a case, the discharge would be based on the contractual terms and would not be an order of dismissal.[92] But the Patna High Court, in *Indian Oil Corpn*,[93] had taken the view that if a probationer has not been taken in service substantively or his service has been terminated in terms of the contract, the principles of natural justice are not automatically attracted, because an appointment on probation is meant to assess the capacity of the probationer and if he is not continued in the service, it would inferentially indicate that his work was not found satisfactory. An assessment of satisfactory work is inherent in the probationer's employment.

The period of probation, however, in excess of the period provided in the Standing Orders, would not be valid in law, as the Standing Orders have statutory force.[94] In *Agra Electric Supply Co Ltd v Alladin* , the employee was taken on probation for a period of six months. However, in the letter of his appointment, it was provided that even during the period of probation, his services could be terminated without notice and without assigning any reason. The Supreme Court held that

the provisions in the letter of appointment, with respect to the termination of the service of a probationer, must be read to mean that the appointment was subject to the management's power of termination, as provided in the Standing Orders.[95] In *Western India Match Co*, the facts were, the workman was appointed as a watchman and in his letter of appointment, a period of six months was stipulated as the probationary period, while the certified Standing Orders defined a 'probationer' as a workman who was 'provisionally employed to fill a permanent vacancy and has not completed two months service'. After the expiry of the period of probation of six months, the probationary period of the employee was extended by two months retrospectively, and, during this extended period, his services were terminated. The labour court found that the discharge was neither *mala fide*, nor an act of victimisation for trade union activities. Nevertheless, it set aside the order of discharge, holding that the term regarding the six months probation, in the letter of appointment, was inconsistent with the definition of a 'probationer' in the Standing Orders, and therefore, was invalid. After the completion of the probationary period of two months, as provided in the relevant Standing Orders, the workman had become a permanent employee. Affirming the holding of the labour court, in appeal, the Supreme Court observed that 'the terms of employment specified in the Standing Orders would prevail over the corresponding terms in the contract of service in existence, on the enforcement of the Standing Orders'. On a parity of reasoning, it was observed:

> If a prior agreement, inconsistent with the Standing Orders, will not survive, an agreement posterior to and inconsistent with the Standing Orders, will also not prevail ... and 'the employer cannot enforce two sets of Standing Orders governing the classification of workmen, it is also not open to him to enforce simultaneously, the Standing Orders regulating the classification of workmen and the special agreement between him and an individual workman, setting his categorisation. (infra)

In this case, another fundamental point was submitted to the court. It was suggested that the Standing Orders, certified under the Industrial Employment (Standing Orders) Act 1946, cannot be said to have statutory force, because they can be modified by an industrial adjudicator, on a reference in this regard being made to him under s 10 of the IDA. The argument was that a statutory provision cannot be modified by industrial adjudication on the theory that the courts or tribunals can only interpret the law and not legislate; furthermore, if the terms or conditions of employment, covered by the Standing Orders, could be modified by an adjudicatorunder the Industrial Disputes Act, they could equally well be modified by a private agreement between the parties. It was, therefore, urged that if the subject-matter of the Standing Orders could be amended or modified by industrial adjudication or private agreement, it cannot have statutory force; hence, the contract between the parties, overriding the provisions of such Standing Order, was not invalid. The court does not appear to have grasped or grappled with the import of this argument, and it seems to have contented itself by observing:

> It is true that the labour court may determine the terms and conditions of employment, which may be inconsistent with the Standing Orders. But in the present case, the reference did not give jurisdiction to the labour court, to determine the terms and conditions of the employment of Prem Singh. The reference directed the labour court to decide whether the discharge of Prem Singh from service, was legal or justifiable.[96]

This obviously is no answer to the argument, as there is neither law nor logic to sustain it. What is worse is that the court has not even set out the argument, adumbrated on behalf of the employer, in the judgment.[97] In order to sustain the validity of an order terminating the services of a probationer, before an industrial adjudicator, in terms of the contract, the employer has to specifically plead that his work during the probationary period was found to be unsatisfactory. For instance, in *WIMCO*, on behalf of the employer company, it was contended that even if the order of termination of the services of the probationer, was held to be invalid, in any event, the labour court should not have made an order of reinstatement of the probationer. But in view of the fact that no plea was taken by the employer company, before the labour court, or even in the special leave petition, that the work of the employee was unsatisfactory during the probationary period, nor did it lead any evidence in proof of his unsatisfactory work, the court discountenanced the contention. In *Life Insurance Corporation*, a two-judge Bench of the Supreme Court reviewed the law relating to probationers and held that the services of a probationer could not be equated with that of a permanent employee and no regular departmental inquiry was required before his services were terminated.[98]

In *Dipti Prakash Banerji*, another Bench of the Supreme Court observed that, where the order of termination disclosed a stigma, it could not be ignored, because it would have an effect on the future of the employee. In this case, it was observed that the termination order referred to three other letters issued earlier, one of which explicitly referred to an act of misconduct on the part of the employee and also referred to an inquiry committee's report, which found that the employee was guilty of misconduct. On these facts, the court observed, that the stigma need not be contained in the termination order itself, but could also be contained in an order or proceeding referred to in the termination order or in an annexure thereto and further observed that it would vitiate the termination order, and accordingly, set aside the order.[1] In *VP Ahuja*, the Supreme Court reversed the earlier view expressed in *LIC* and held that a probationer or a temporary servant would also be entitled to certain protection against an arbitrary termination or a punitive termination, without complying with the

principles of natural justice. On this view of the matter, the court held that a termination order, founded on the ground that the 'probationer failed in the performance of his duties, administratively and technically' was *ex facie*, stigmatic; that such an order could not have been passed without holding a regular inquiry and giving an opportunity of hearing to the employee; and that the plea that the probationer had no right to the post, as his services could be terminated at any time during the period of probation, without notice, as set out in the appointment, was not acceptable.[2]

This particular decision of the Supreme Court deserves some critical analysis, in view of the fact that the perplexing range of arguments advanced by the court are capable of inducing grave misconceptions about 'probation' and the rights of a 'probationer'. 'Probation' means 'trial' and a probationer is an employee who has been provisionally employed to fill a permanent vacancy and whose probation, ie, fitness for the post, has not been confirmed or declared. The concept of 'fitness for the post' includes three main ingredients, *viz*, performance or productivity, discipline or conduct and attendance. Whether a particular probationer has measured up to the required standards, in terms of performance, discipline and attendance, is a matter which has to be judged by the employer, who has to put up with him for 35-38 years after confirmation, ie, until he attains the age of superannuation. Under no circumstances can this responsibility be delegated to a judge of any court or tribunal, whatever may be his intellectual credentials, for the simple reason that he is neither familiar with, nor has the occasion to closely monitor, the way a particular probationer is progressing and performing during the period, nor is he competent to superimpose his own private notions of good and bad, fairness and unfairness, upon an employer who has much higher stakes in the confirmation or termination of a probationer, than the judge himself. To hold that 'an order to the effect that the probationer failed in the performance of his duties is stigmatic', is a judicial pronouncement without a parallel. What stigma does an intimation of a 'failure in the performance of one's duties' presumably cast to such an extent, as to affect the future of the probationer? It is understandable that where a probationer was to be terminated for an act of misconduct, such termination would cast a stigma and adversely affect his employment prospects, and hence, he should be given an opportunity to explain and defend himself, before his services are dispensed with. But why should an opportunity be given in case a probationer is not able to measure up to the required job standards? What does the Supreme Court propose to achieve by directing the employer to go through with such a 'useless, bureaucratic formality'? Assuming that an opportunity has been given, would it help the probationer to unshackle himself from the so-called 'stigma'? As a matter of fact, what the Supreme Court proposed was in the nature of converting an otherwise invisible simple termination, into a prolonged inquiry commencing with a show cause notice, followed by a domestic inquiry and finally, by a termination order, all of which together, will give a wide publicity, thereby condemning the probationer forever and adversely affecting his employment prospects.

This defective decision was followed by a single judge of the Karnataka High Court, in *Parimala*, where the facts disclosed that the workman was appointed as a typist on probation, in a bank. While on probation, she was placed in judicial custody in connection with a complaint filed against her, in her earlier employment. She was charged with misconduct and disciplinary proceedings were initiated against her. Subsequently, her services were terminated on ground of unsatisfactory performance, and the disciplinary proceedings were dropped. Shetty J, held that the said termination was punitive in nature and cast a stigma on the petitioner.[3] This is a wholly misconceived decision on the part of Shetty J. What stigma could presumably have been cast on the probationer, in the face of the fact that the disciplinary proceedings were dropped by the employer, and the termination order did not contain even a whisper about her past record of discipline, except mentioning that her services were being terminated on ground of 'unsatisfactory performance'? If the termination of a probationer, for 'unsatisfactory performance' were to be prohibited on the flimsy ground of it casting a stigma, what other ground is available, which falls outside the range of the so-called 'doctrine of stigma' and which does not require an opportunity being given to the probationer before dispensing with his services? The law on probation was laid down clearly and firmly by a catena of decisions of the Supreme Court, during the 1960s itself, and there is no reason for the judges of the Supreme Court, to display their judicial heroics or dispense uncalled for charity, and produce judicial chaos in respect of a matter that had been settled conclusively. In *JF Awardai*, another single judge of the same High Court, held that the termination of a probationer-conductor, on the ground of unsuitability, was illegal, and directed the management to reinstate him.[4] In *Bharat Fritz Werner*, the same judge upheld a patently disturbing direction of the labour court, granting 'last drawn wages' as interim relief to a probationer, on the ground that the dispute relating to his termination was pending for over three years.[5] The granting of last drawn wages as interim relief, while the adjudication proceeding was still pending, amounted to granting the whole relief, which the labour court, or even the High Court cannot admittedly order, in the face of settled law on the subject. Is it possible that a High Court judge was operating from a position of abject ignorance of the rudimentary legal principles? It is all the more disquieting that this ruling comes from the learned judge, despite the specific plea raised by the counsel for the petitioner-employer, that the labour court had granted the whole relief in the guise of an interim relief, against all canons of law. Gururajan J was blissfully silent on this vital aspect and gave a decision, which reflects anything but law or justice. The decisions rendered in *VP Ahuja, Parimala*, *JF Awardai* and *Bharat Fritz Werner* are products of self-misdirection on the part of the learned judges, and cannot be supported on any principle known to law. These decisions need a review by a larger bench. In *Pavanendra N Verma v SGPGIM Sciences* , Ms Ruma Pal J posed the question: '*what language in a termination order would amount to a stigma*', and answered it thus:

> Generally speaking, when a probationer's appointment is terminated, it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although, strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order, which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic … In order to amount to a stigma, the order must be in a language which imputes something over and above a mere unsuitability for the job. [6]

The learned judge held that, in this view of the matter, the language used in the termination order, ie, the employee's 'work and conduct has not been found to be satisfactory', was almost exactly the same as that in *Dipti Prakash Banerji*, and thus, clearly fell within the class of non-stigmatic orders of termination, and thus, the impugned order was not *ex facie*, stigmatic. Though this decision is right, the attempt made by Ruma Pal J, to draw it parallel with *Dipti Prakash Banerji*, is not free from fallacy. For instance, an order of termination which runs in the terms 'your work and conduct has not been found to be satisfactory' falls as much within the class of the so-called 'stigmatic' orders, as held in *VP Ahuja*, as in the class of, non-stigmatic' orders, as held in *Dipti Prakash Banerji*, by two different benches of the same court and, still worse, within an interval of an year or so. In other words, Ruma Pal J, appears to have preferred *Dipti Prakash Banerji*, while rejecting, though succinctly and rightly so, the *ratio* of *VP Ahuja*. In *ABT Parcel*, a single judge of the Madras High Court held that in the case of an employee, who was appointed as a probationer for six months, which was extended by another six months, no hearing was necessary before terminating his probation, as there was no reference to any misconduct in the termination order and hence, no stigma could be said to be attached to such termination.[7]

In *Davender Arora*, another single judge of the Delhi High Court, took a similar view and held that the order terminating the service of a probationer, on the ground that his performance was not up to the expectation, was not *ex facie* stigmatic.[8] In *CR Kuppalli*, the Karnataka High Court held that the termination of a probationer, on the ground of unsuitability, was perfectly within the right of the corporation and there was no need to conduct an inquiry before terminating his services. The Bench further observed that courts should shy away from insisting on proof of the unsuitability of the workman to do a particular job, when the employer, having had the opportunity to weigh his performance individually and in comparison with others of the same ilk, had formed an opinion in that regard.[9] The above cases, ie, *ABT Parcel*, *Devender Arora* and *CR Kuppalli*, have been rightly decided, being consistent with the law relating to the termination of probationers. Even so, in the face of such a bewildering range and variety of rulings, touching upon the same issue, how the apex court expects the employers to mould their own processes and procedures while dealing with probationers is an altogether perplexing question. At a more basic level, the noisily for the Supreme Court to import notions of benevolence into employment relationships is equally baffling. For that matter, the law laid down in *Raghavendra S Kulkarni* expounded the correct law, free from half tones, wavering and wandering.

In *Kusum Products*, the facts were: a workman was appointed as a probationer for six months, which, according to the certified Standing Orders' could be extended by another 9 months, before being terminated. The probation of the workman was terminated at the end of one year from the date of appointment, on the ground that his performance was not satisfactory. The tribunal ordered a reinstatement, holding that in terms of the model Standing Orders, he was deemed to have been confirmed, as he had worked for 240 days. Allowing the writ petition, a single judge of the Calcutta High Court quashed the order of the tribunal and held that the workman was governed, not by the model Standing Orders, but by the terms of the appointment and the certified Standing Orders, which did not contemplate such a deemed confirmation; and that, in view of the fact that no order of confirmation was issued, it should be presumed that the period of probation stood extended. It is submitted that this case was rightly decided.[10] In a case where the termination of the service of a workman purporting to be discharged simpliciter is held to be improper or invalid, the workman will be entitled to reinstatement and backwages, with continuity of service.[11] In adjudicating these reliefs, the same principles will govern as in cases of wrongful punishment of dismissal, which aspect has been covered under s 11A.

(iv) Retrenchment:

Although, every termination of service of an industrial 'workman' may not be 'retrenchment', as defined in s 2(oo), every 'retrenchment', as is obvious from the language of the definition, is a termination of service of a 'workman', by the employer. For validly terminating the service of a 'workman', as a measure of retrenchment, therefore, the employer must comply with the requirements of s 25F, or s 25N and s 25G of the Act. The question, whether the termination of service of a particular workman amounts of 'retrenchment' or not, must be determined on the facts and circumstances of each case.[12]

(v) Discharge on Transfer of the Undertaking:

An establishment or undertaking may be transferred from one owner to another, either by the operation of law or by any agreement between the parties. A contract of service being incapable of transfer, the relationship of employment between a

quondam employer and his employees in such establishment or undertaking, comes to an end upon the transfer of the establishment or undertaking. Section 25FF, therefore, provides compensation to the workman whose services are terminated upon such transfer of the establishment or undertaking. However, the transfer of service from the quondam employer to the new employer of the workman working in the establishment, may be effected by a tripartite agreement between the quondam employer, the workmen and the new employer, the effect of which would be to terminate the original contract of service by mutual contract and to make a new contract between the employees and the new employer.[13] The proviso to s 25FF, therefore, provides that where, by a tripartite agreement, the services of the employee of the establishment or undertaking, are transferred from one owner to another, on the conditions prescribed therein, the provisions of that section will not apply and the quondam employer will not be liable to pay compensation.

(vi) Discharge on Closure of the Undertaking:

The closure of the establishment or undertaking brings about the end of the contract of service between the employer and the employee, as it becomes impossible to perform the contract or nothing remains to be performed. The incidents of closure have been discussed under s 25FFF, which provides for the payment of compensation to the workmen, on the termination of their services as a result of closure.

(vii) Discharge or Dismissal as Punishment for Misconduct:

This topic has been discussed under s 11A post.

Terms of employment or the Conditions of Labour

The 'terms of employment' of any person refer to all the matters covered by the contract of employment, either express or implied.[14] In the language of Lord Denning MR:

> Terms and conditions of employment may include not only the contractual terms and conditions, but those terms also, which are understood and applied by the parties in practice, or habitually, or by common consent, without ever being incorporated in the contract.[15]

Basically, 'terms of employment' include such straightforward industrial issues as bonus, wage rates (in all forms, including dearness allowance and other allowances), hours of works, overtime, holidays with pay, sickness benefits, superannuation benefit, grading and promotion, dismissal and retrenchment procedures. But 'terms of employment' is a wide-ranging phrase, which also extends to aspects of labour relations that are less obvious than these. The juxtaposition of the expressions 'terms of employment' and 'conditions of labour', however, indicates the kinds of conflicts that could arise between those engaged in the industry, on opposite, but cooperating sides. The line of demarcation between the expressions '*terms of employment*' and '*conditions of labour*' is very thin in so far as there is a great deal of overlap between the two. While *terms of employment* include all the *terms and conditions of service*, such as probation, promotion, transfer, wage/salary, allowances, leave, holidays, bonus, termination of employment, etc., the expression '*conditions of labour*' generally refers to the *physical conditions of work*, which include hours of work, spreadover, interval for rest, overtime, hazardous operations, safety, health, welfare, social security, non-monetary benefits and facilities, etc. In this section, however, both the sets have been discussed together. In *Madras Gymkhana Club*, it was held that these words take in disputes as to the share in which the receipts in a commercial venture shall be divided and generally cover hours of work and rest, recognition of representative bodies of workmen, payment for piece-work, wages ordinary and overtime, benefits, holidays, etc.[16] The word 'terms' pre-supposes the existence of a contract of employment. The expression 'terms of employment' has reference to the proposition of premises, in the contract of employment, which, when assented to or accepted, settle the contract between the parties. Where a contract of employment is in existence, all that can form the subject-matter of the contract are the terms of employment.[17]

The Assam and Nagaland High Court, in *Borokai Tea Estate*, took the view that the right of the workers to fish in the tank adjoining the manager's bungalow, to the exclusion of the manager, was a 'term of employment' and as such, formed the subject-matter of an 'industrial dispute'. The correctness of this holding is not free from doubt. The dispute was: 'whether the workers of the Borokai tea estate were justified in claiming that they had traditionally, enjoyed exclusive fishing rights in the tank adjoining the manager's bungalow and that the manager had no right to fish therein.' The labour court held that the particular right was an amenity, coming under the definition of 'wages' under s 2(rr). The award of the labour court was challenged before the High Court by a writ petition, on the ground that the dispute regarding the exclusive fishing right in the tank in question, centered around a civil right, which might be agitated in a civil court, but could not be taken to an industrial forum and the conclusion of the labour court, that the workers were justified in their claim, could not be arrived at in an industrial adjudication. But it does not appear to have been pointed out to the labour court, or to the High Court, that if the said amenity fell within the definition of 'wages' in s 2(rr), the labour court will have no jurisdiction to

adjudicate upon the same, as 'wages' is item No 1 in the Third Schedule of the Act which is a subject-matter under the jurisdiction of the tribunal, rather than that of the labour court. But the High Court, in the writ proceedings, observed, that the dispute would appropriately come under item 4 of the Second Schedule, as the management was resisting the claim of the workmen and asserting its right to the exclusion of the workers' right to fish in the tank. It was, therefore, held that the dispute in question was an 'industrial dispute'. In coming to this conclusion, the High Court appears to have overlooked the language of s 2(k).[18]

Before a dispute can be an 'industrial dispute', it must be connected with 'the terms of employment or the conditions of labour' of any person; it is only then that the question would arise as to under what item of the Second Schedule or the Third Schedule, such a dispute would fall. If a dispute is not connected with the 'terms of employment or conditions of labour' of the workmen, the mere fact that the claim falls under a particular item in the second or the Third Schedules, will not convert it into an 'industrial dispute'. In other words, the connection of the dispute with the 'terms of employment or conditions of labour' of the workers, is a condition precedent. If the dispute is so connected and it falls in any item in the second or the Third Schedule, then alone can it partake the character of an 'industrial dispute'. The mere fact that an item is enumerated in the Second or the Third Schedule, will not be sufficient to make it an industrial dispute.[19] The law does not work the other way around—that every item enumerated in the second and Third Schedule, whether connected or not, with the 'terms of employment or conditions of labour' of the workmen, will *ipso facto*, become an 'industrial dispute'. The High Court did not consider the question as to whether the right to fish in the pond was in any way connected with the 'terms of employment' or 'conditions of labour' of the workmen.

The meaning of the phrase 'conditions of labour', has never been litigated. The word 'conditions' is a word of a wide import and it means 'that which must exist as the occasion or concomitant of something else; that which is requisite in order that something else should take effect: an essential stipulation; terms specified. The word 'condition' includes the idea conveyed by the word 'term', but goes beyond it and is not confined to what is included in the latter. The expression 'conditions of labour' is, therefore, much wider in its scope as compared to the expression 'terms of employment' and it has reference to the amenities to be provided to the workmen and the conditions under which they will be required to work Clearly, 'conditions of labour', or to use the modern expression, 'conditions of employment' mean something different from the 'terms of employment'.[20] In an Irish case, *viz*, *Brendan Dunnae*, 'conditions of employment' were described obiter, as 'the physical conditions under which a workman works, such as those that appertain to matters of safety and physical comfort'. This interpretation appears to be comprehensive enough to include 'safety', 'health', and 'physical comfort' and to include all forms of welfare, like sports clubs, dramatic societies and colour schemes, as well as lockers, seats, showers and canteens, crèches, lighting, heating, air-conditioning, ventilation, overcrowding, rest periods, etc. 'Conditions of labour' would clearly include, too, an off-beat situation like that of dancing instructresses, who refused to obey their employer's order to drink a pint of milk a day, to offset the undue wear and tear due to their employment.[21] The phrase might as well include, the general psychological environment of work, as in the case of the psychological discomfort of the coloured musicians in *Scala Ballroom*, who might have been required to play in a hall from which coloured dancers had been barred by the management. In other words, the 'conditions of labour' of any person, may be said to refer to the safety, health or welfare of any employee, and probably, the psychological environment of the job too, at least where it is within the control of the management and relevant to the efficiency or enjoyment of the employee's work.[22] The combined effect of these two expressions, *viz*, 'terms of employment' and 'conditions of labour', is to bring a very large number of subject-matters of dispute between the employers and employers, between employers and their workmen and between workmen and workmen, within the perimeter of the definition of an 'industrial dispute'. Thus, the disputes and differences regarding bonus, wages, dearness allowance, various other allowances, gratuity, provident fund, residential accommodation, leave holidays, medical facilities, working hours, employment of seasonal labour, uniformity in conditions of service, hygienic and comfortable working conditions, various fringe benefits etc, have been brought within the scope of 'industrial dispute'. Some of these terms of employments or conditions of labour are discussed under the following heads:

Continuity of Service:

In *NJ Chavan*, Tendolkar J of Bombay High Court held that the right of an industrial workman to continue in his employment, has been jealously protected and safeguarded by industrial adjudication. It is one of the most vital and important terms or conditions of industrial employment. Even on the transfer of an undertaking, from one owner to another, its employees will continue to be entitled to all the rights and privileges acquired by them, by reason of their past service, if (a) there is a continuity of service, and (b) there is an identity of business. The learned judge observed:

> By continuity of service, it is not meant necessarily a legal continuity, but only a continuity in fact, ie, the employees must continue to serve the business, without a substantial break in their service. Thus, if the transferor gives notice of termination of service and the transferee makes a fresh appointment, this, by itself, although it may in law, amount to a break in continuity, will not affect the continuity of service for the purpose of determining the industrial relation. Nor does it constitute a break in service, if a short time

> elapses between such termination of service by the transferor and the appointment by the transferee (which are legal forms resorted to by the employers, in an attempt to deprive the employees of the rights and privileges they have acquired by reason of past service), so long as the employees continue to serve the business even after the termination, and before re-employment. ... Regarding the identity of business, what is required is that the same business, which was carried on by the transferor, must be carried on by the transferee. It is not sufficient that the business is similar or of the same nature, if the business carried on by the transferee is a new one. ... Where the object of the lease was to enable the lessee to continue the same cinema business, which the lessor was carrying on, in the same premises, with the same machinery and equipment, with the same licenses and with the same business, the identity of the business was held to be the same and in the circumstances, the workmen were held to be entitled to a continuity of service, *qua* the lessee.[23]

A partnership business was taken over and continued by a private limited company. In the new company, three directors out of five were the old partners, ie, proprietor, his wife and the former manager. It was found that the business was continued in the same style, though under the name of a private limited company and the company was not a different entity in fact. The company, however, refused to continue the workmen employed by the partnership, in service. It was held that the company was not justified in refusing to continue the workmen in service.[24] In *Shankar Textiles*, the factory was initially taken on lease and was eventually purchased by the lessee. The facts disclosed that the workmen employed by the lessor were re-employed by the lessee, though at the time of the purchase, the factory was lying closed. The labour court believed the evidence of the workmen that they had worked in the factory without any break in service. The Supreme Court upheld the conclusion of the labour court, that the continuity of service of the workmen was not disturbed.[25] The business of the company, including its goodwill, trade rights, properties, assets and stock in trade, was taken over by a new company. The services of the workmen under the old company, were treated as having been terminated and their accounts with the old company, including the provident fund etc and the arrears of salaries, were finally settled. The new company entertained such workmen in service, without giving any express or implied undertaking regarding the continuity of their service. The workmen joined the provident fund scheme of the new company afresh. In the circumstances, it was held that the workmen were not entitled to claim a continuity of service.[26]

Permanency of Tenure:

An industrial workman is entitled to job security. Permanency of tenure, therefore, is an implicit condition of industrial employment, unless the employment has expressly been stated to be of a 'temporary', 'casual' or 'seasonal' nature. Where the employment is of a 'temporary' nature, it is normally in the desecration of the employer, as to who should be made permanent and who should not be.[27] In *Jaswant Sugar Mills v Badri Prasad* ,[28] reading the definitions of 'permanent workmen', 'seasonal workmen' and 'temporary workmen', in the Standing Orders, together, the Supreme Court observed that whilst a 'seasonal workman' is one who is engaged in a job which lasts during the particular season only, a temporary workman may be engaged either for work of a temporary or casual nature or temporarily, for work of a permanent nature; but a permanent workman is one who is engaged in work of a permanent nature only.

The distinction between a permanent workman engaged in a work of a permanent nature and a temporary workman, engaged in a work of a permanent nature is, in fact, that a temporary workman is engaged to fill in a temporary need of extra hands for permanent jobs. Thus, when a workman is engaged on a work of a permanent nature, which lasts throughout the year, it is expected that he would continue there permanently, unless he has been engaged to fill in a temporary need. In other words, a workman is entitled to expect permanency of his service. In a later case, ie, *Sone Valley*,[29] the court upheld the industrial award directing the employer to place half of the temporary workmen on a permanent basis, where such temporary workmen were employed on a work of a permanent nature, which went on forever. Likewise, in *Hindustan Lever*, on the facts of the case, the court affirmed the award of the labour court, directing the employer to make the temporary workman as permanent, with the relevant grade and dearness allowance.[30] But a temporary workman would not acquire permanency of tenure merely because he is employed in a permanent department or is given some benefit ordinarily enjoyed by permanent workmen.[31] Permanency of tenure can be claimed only by such employees, as have to work for all the working hours on all the working days, and it cannot be claimed by such workmen as are employed only for a part-time work. For instance, the musicians working in a gramophone company, who were required only when there was a recording of songs, were not held to be permanent workmen.[32] In *Hindustan Aeronautics*, the workmen sought some casual workmen employed in the canteen to be made permanent and the tribunal directed that from a particular date, they should be treated as probationers and appointed in permanent vacancies, without going into the question as to whether more permanent workmen were necessary to be appointed in the canteen, over and above the existing, permanent strength, to justify the making of the casual workmen, permanent, in the canteen where they were working. Neither was there any permanent vacancy in existence nor did the tribunal give any direction for the creation of new posts. In appeal, the Supreme Court held that the tribunal was not justified in making these directions. The workmen could be made permanent only against permanent vacancies, not otherwise.[33]

Transfer

It is now well settled that transfer orders being a managerial prerogative, ought not to be, in the normal circumstances, interfered with by the tribunals or courts.[34] No employee can insist that he must continue at a particular place, except when the transfer is *mala fide*.[35] The right to transfer an employee from one department to another or from one part of the establishment to another or from one branch to another, is incidental to the managerial functions. It is an inherent power of the management of an organisation which has several branches and where there is no indication in the contract of employment that the employee would not be subject to transfer.[36] Transfer of an employee is an implied condition of the contract of industrial employment. Even if transferability from one place to another, in which employment has been secured, is not an express condition of the service, it can be read into the contract as an implied term, if having regard to the very nature of the employment, there is some compulsion to read it into a contract of service by implication. Not otherwise. One must be able to say: what is obvious need not be explicitly stated and may be taken to have been understood by both the sides.[37] Transfers are not to be made on the basis of the seniority of the employees or on the basis of some serial order, to be arranged according to the length of service at a particular place. It is a matter of adjustment and accommodation, to be made by the administrative authority concerned, and is solely within the powers of the executive and it is not to be normally, interfered with by the courts.[38] A transfer of an employee from one department to another or from one place to another is, therefore, in the discretion of the management, provided the terms and conditions of his service are not adversely affected.[39] But once the mode and manner of transfer is provided in the contract of employment, that would be binding on the employer as well as the employee. Any deviation from that will invalidate the transfer. In *L Raghupathy*, the transfer of the employee, in violation of the service rules formulated pursuant to the powers under the articles of association of the company, was held to be invalid. The fact that the workman had accepted the relieving order and had drawn the travelling allowance after the order of transfer, did not amount to acquiescence to the transfer. Speaking for the Madras High Court, Nainar Sundaram J said:

> Acquiescence denotes conduct, which is evidence of an intention of a party to abandon a right legitimately due to him. It may also denote a conduct from which the opposite party is justified in inferring such an intention. Acquiescence is only a form of estoppel, and it is of the essence of acquiescence that the party acquiescing should be aware of his rights; and by words or his conduct, should represent that he assents to what is a violation of his rights and that the person to whom such representation is made, should be ignorant of the other party's right, and should have been deluded by the representation into thinking that his wrongful action was assented to by the other party. The question of estoppel or acquiescence is essentially a question of fact, which is to be decided on proper materials placed before the court. Once the facts are established, acquiescence is a matter of legal inference by the court. It is fundamental that the plea of acquiescence should have been specifically expressed by the party, who wants to build a case on it, and there should be an issue on the point at the appropriate stage, so that the opposite party, who is asked to face the plea of acquiescence, could meet it effectively. Acquiescence cannot be a matter of bare presumption and assumption. It is a question of fact, which has got to be pleaded and further, has got to be proved. The burden of proof of the ingredients of acquiescence is on the party who relies on the same. If there was no plea of acquiescence and if there had been no opportunity for the opposite party to counter plead and place counter evidence on this question, it would not be proper for the court to permit the party, who wants to rely on the theory of acquiescence, to press forth the same, at any stage he likes.[40]

The employer is in the best position to judge how to distribute his employees between different jobs, departments or branches. He is entitled to decide on a consideration of the necessities or exigencies of his business, whether the transfer of an employee should be made from one particular job, department or branch to another. It is for the administration to take the proper decision and such decisions shall stand unless they are vitiated either by *mala fides* or by extraneous considerations, without any factual background or foundation. It is not possible for industrial tribunals or courts to have before them, all the materials which are relevant for this purpose and even if this can be made available, the tribunals and the courts should be very careful before they interfere with the orders of the employers, made in discharge of their managerial functions.[41] The question of such transfers depend on the internal arrangement of the management.[42] In *SSKourav*, the Supreme Court pointed out that courts or tribunals are not appellate forums to decide on administrative grounds and they are not expected to interdict the working of the administrative system, by transferring the officers to proper places.[43] It is not for the industrial tribunal to sit in appeal over the exigencies of business and find out whether they demanded the transfer or not. The issues relating to how best to secure efficiency of service and whether it would be desirable, in the interests of administrative convenience, to effect transfers - are all matters which the management alone can decide.[44]

The orders of transfer and posting are not usually to be examined by the industrial adjudicators or courts in judicial review, unless manifest injustice, gross illegality, absolute arbitrariness etc, are apparent in the proceedings. It is not the subjective assessment of the importance of the posting held by the employee that is determinative in such matters. The far more important consideration is the tangible benefit attached to each of the posts.[45] A transfer is an incident of service. The management has every right to transfer an employee from one place to another, under the same management, on the same

pay scale, etc. The employer is the best judge to decide upon the utilisation and distribution of its manpower. Inconvenience to the transferred employee cannot be a ground for refusing to go on a transfer. The decision of the employer in such cases, is conclusive and, except in the rarest of rare cases, courts should not interfere with transfer orders.[46] In the context of employment under the state, a single judge of the Gujarat High Court, in *JK Dave*, pointed out that the courts would be the least appropriate authority to decide upon the question of transfer or non-transfer of employees. In matters of transfer, other employees are also likely to be affected and the stay of an order of transfer is likely to have a chain reaction. Therefore, the maximum possible restraint is called for, to avoid common damage to public administration, while attempting to redress certain supposed or blown-up hardships of an individual employee. Even if there is some difficulty or irregularity or a lapse in passing certain orders of transfer, it has to be ignored. Unless an order of transfer is *ex facie*, shown to be passed as a measure of penalty or by way of victimisation, the tribunal or the court should not interfere in their adjudicatory or reviewing powers. If a sufficient leeway is not granted to the employer in the matter of the transfer of employees, the administrative machinery may collapse or work of the same, may come to a grinding halt.[47]

Restrictions on the Right of the Employer to Transfer

It would, ordinarily, be proper for industrial adjudication to accept as correct, the submission of the employer that an impugned transfer has been made only because it was found unavoidable. Transfers being a part of the managerial function, it is ordinarily, for the management to determine the time and place of a transfer, having regard to the exigencies of business and where the workmen is transferred in a *bona fide* exercise of such function, such transfer is not open to challenge in industrial adjudication.[48] The right of the employer to transfer an employee from one place to another, may also be governed by a contract or settlement. Any transfer in violation of the terms of the contract or settlement, would be illegal. It is, however, equally well-settled, that the right of the management to transfer a workman in terms of contract, is not untrammeled, though this is one of the areas of industrial relations where there has been minimal judicial interference. However, the tribunals or the courts will be failing in their duty, if they do not interfere when the transfer orders are malicious or *mala fide*. In cases where a transfer is found to be tainted by ulterior motives or is otherwise arbitrary, it is open to judicial scrutiny, in proceedings based on a challenge to its validity or to the validity of the termination of service, based on a refusal to comply with such an order of transfer. Malice, in ordinary common parlance, means ill-will against a person, and in legal sense, a wrongful act done intentionally, without just cause or reason.[49] Industrial adjudication will be justified in scrutinizing the validity of a transfer, where there is reason to believe that the management resorted to the transfer as *mala fide*, by way of victimisation, unfair labour practice or for some other ulterior motive, not connected with the business interests of the employer.[50] Nothing can be more *mala fide* than a transfer order being made by the head of a department, at the behest of another authority, without applying his own mind to it at all. Such transfers cannot be sustained as they are arbitrary and vitiated by malice, in law.[51] An order of transfer made *mala fide*, or for some ulterior purpose, like for punishing an employee for his trade union activities, would be vitiated, because of a *mala fide* exercise of power.[52]

The charge of *mala fides*, whether by way of victimisation or otherwise, has necessarily to be examined by the tribunal for the purpose of finding out whether the transfer is properly made or not.[53]*Prima facie*, therefore, an order of transfer is valid, unless it is shown that it was *mala fide* or was a measure of victimisation or an unfair labour practice. A mere allegation of *mala fide* or discrimination, will not make it either discriminatory or *mala fide*. To make out a case for an interference in matters of transfer, there should be concrete materials, which should be unimpeachable in character.[54] The burden of proof lies on the workman to show that the order of transfer was *mala fide* or was a measure of victimisation or an unfair labour practice.[55] In the absence of a specific contract to the contrary, it is not incumbent upon the employer to consult the union before transferring an employee from one place to another. In *Shankar Ambedkar*, a settlement provided that the transfer of a workman was in the sole discretion of the employer, depending upon the exigencies of the work and it was further provided that 'in the event of any difficulty, the matter shall be sorted out in consultation with the association.' In this case, no such difficulty was expressed by the workman, at any stage. The Bombay High Court held that the transfer was not invalid.[56]

A finding of *mala fide* has to be reached by the industrial tribunal, only after sufficient reliable evidence is led in support of it. Such a finding should not be made light-heartedly, in a casual manner, on flimsy grounds or capriciously.[57] The deployment of labour after an assessment of the aptitudes of each of the employees, involves quite a large amount of managerial discretion. In the very nature of things, it is not possible to prescribe inflexible standards in this regard. If, therefore, an employer feels that a particular employee will be better suited as an executive on one particular job, than on the other, or his performance in the latter was not satisfactory, the consequent posting cannot be treated as punitive. Nor can such measure be treated as victimisation or *mala fide*. An order of transfer and posting from one post to another or from one place to another, can be said to be a 'reduction in rank' when the employee concerned loses emoluments, seniority, chances of promotion and other such discernible advantages attached to a post. In a case where a person is shifted from one post to another, in the same organisation and both posts carry the same emoluments, it would not be

proper to assume that the transfer is punitive in character or tantamounts to a 'reduction in rank'. However, the scale of a salary attached to the post, may not be finally determinative of the question of whether the transfer was *mala fide* or not. A reduction in the status and a change in the duties attached to the post, may also be relevant.[58] The finding of victimisation or *mala fides*, based on no evidence, must be held to be perverse and vitiated in law.[59] But where the tribunal, on sufficient and reliable evidence being led before it, comes to the conclusion that the transfer was *mala fide*, an act of unfair labour practice or victimisation for some ulterior purpose, like punishing an employee for trade union activities, the conclusion would be inescapable, that the transfer was not made for the exigencies of the business. Where such *mala fides* are established, it would be reasonable to hold that if proper business interests of the employer had been considered, the transfer would not have been necessary and could have been avoided. In such a case, the order of transfer would be liable to be set aside.[60]

On the other hand, if the tribunal does not find that the transfer was made with any *mala fide* intention, the order of transfer cannot be assailed. The finding of *mala fides*, unfair labour practice or victimisation or otherwise, is a finding of fact and cannot be interfered with by the High Court in its jurisdiction under Arts. 226 and 227, or by the Supreme Court, under Art. 136 of the Constitution, unless of course, the finding is perverse or is in violation of the rules of natural justice.[61] The mere fact that the workman is an office-bearer of a trade union or a trade union activist, cannot lead to the inference of *mala fides*. If however, the transfer is made solely to prevent him from participating in trade union activities, the transfer will be liable to be interfered with, as being a case of victimisation and a *mala fide* exercise of power. But such trade union activities must be legitimate and in the interest of the trade union. Under the guise of trade union activities, an employee cannot black-mail or coerce the employer to act according to his dictates and threaten to do physical harm to the officers or co-employees and still claim special privileges regarding the transfer, because such activities are not legitimate trade union activities. The order of transfer in such situations, would not be reviewable, either by industrial adjudication or by the reviewing courts. Each order has to be judged on its own particular facts and circumstances, bearing in mind the general principles.[62]

Once the tribunal finds an order of transfer to be legal and valid, it will have no jurisdiction to issue any further direction regarding the payment of arrears of salary or release orders.[63] Even an order of transfer appearing to be innocuous, can be treated as an order of punishment, provided that the allegations or the conduct of the employee is the foundation for the transfer and not a mere motive. The allegations would be the foundation for the order, if the record of the case reveals that, before issuing the order of transfer, the employer came to the conclusion about the truth of the allegations against him and then issued the order of transfer. However, if the employer merely noted the allegations and did not want to go into the truth of the allegations and thought that it would be better if the officer is transferred, it cannot be said that the allegations were the foundation for the order of transfer. In such a case, the allegations were a mere motive for the transfer. In *Kundan Sugar Mills*, the Supreme Court said that an employer has no inherent right to transfer a workman from one place of business to another, if he starts a new business subsequent to the date of employment of the workman, unless it was an express or implied condition of service at the time of the employment.[64] In the field of industrial jurisprudence, the right to transfer a workman from one factory to another, cannot be treated as implicit in the contract of employment and 'there is, it will appear, no recognition given to such right as an abstract proposition, divorced from the facts and circumstances of each case'.[65]

In the absence of any statutory or contractual right, a transfer of the workmen *en masse*, without their consent, would be unjustified. Furthermore, there may be circumstances where industrial adjudication may be called upon to consider whether in the peculiar conspectus of events facing a particular fact-situation, the transfer is justified and warranted. In other words, the exercise of the prerogative of the employer to transfer his servants from one station to another, is not an inexorable rule. Where a lowly paid employee is sought to be transferred from one station to another, where the transfer would have disastrous consequences on his economic and family life, the transfer cannot be said to be a justifiable exercise of the right of the employer.[66] However, the mere fact that the workman would have difficulties in securing accommodation in a far off place or that he may have to look after his family and that the transfer would add to his plight or that he will not be able to make both ends meet, may not, in all cases, be a ground for holding that the order of transfer was actuated by *mala fides*, because every case of transfer involves a certain amount of dislocation and hardship.[67] Likewise, where a workman is asked to discharge duties which do not pertain to his employment, his dismissal for the disobedience of such order cannot be justified.[68] If an unjustified and unwarranted order of transfer results in a termination of the service of a workman, then industrial adjudication is not helpless and it can extend its arm of justice to meet a particular circumstance or situation.[69] However, if the conditions of service provide that the employee can be transferred, from one place to another or from one company to another, under the same management, such order of transfer cannot be questioned, unless it is *mala fide*.[70] For instance, in *KSR Datta*, the employee was transferred from the post of principal of a college to the department doing editing of sanskrit works. It was held that there was no loss of prestige and no humiliation in the transfer and on the other hand, it was a recognition of his merit. In this situation, the transfer was held to be valid.[71] The Calcutta High Court has laid down the following principles regarding transfer of workmen:

(a) A transfer of a workman from one department to another or from any job to another, cannot be made if his service conditions or terms of service contract expressly negate the right of such transfer or if the Standing Orders of the employer prohibit such transfer;

(b) a transfer must not operate to the prejudice or detriment of a workman, unless expressly authorised, in other words, the transfer must not occasion to a workman, economic loss in wages, bonus or other monetary benefits;

(c) a transfer must not be made by way of a punishment, that is to say there must not be a colourable exercise of a power of transfer of a workman, so as to victimise him;

(d) a transfer of an employee to an inferior position and the imposition of an unaccustomed and onerous duty, must not be allowed to be made, particularly, where there is an unexplained co-incidence in the employee's involvement in trade union activities; and

(e) it is never an implied condition of service of a workman, that the employer has the right to transfer him to a new concern, started by the employer subsequent to the date of the employment of the workman.[72]

Where a transfer of employees is found to be tainted, the tribunal has the jurisdiction to grant the interim relief of a stay of the transfer.[73] The employer cannot transfer an employee from one place to another, in the absence of a provision to that effect, either in the Standing Orders or in the contract of employment.[74]

Transfer to Another Employer

Though an employer has the right to make internal transfers of his employees, no workman or employee can, however, be transferred from one employer to another, because an employee has always the right to choose his employer and no one can be compelled to serve a master whom he does not like.[75] The general rule, in respect of the relationship of master and servant, is that a subsisting contract of service with one master, is a bar to service with another master, unless the contract otherwise provides or the master consents. A contract of employment involving a personal service, is incapable of transfer. A contract of service being thus incapable of transfer unilaterally, the transfer of service of an employee from one employer to another can only have effect by a tripartite agreement between the employer, the employee and the third party, the effect of which would be to terminate the original contract of service, by mutual consent, and to make a new contract between the employee and the third party. Therefore, so long as the contract of service is not terminated, a new contract cannot be made and the employee continues to be in the employment of the original employer, even if the employer orders the employee to do certain work for another person. The employee still continues to be in his employment. The only thing that happens in such cases is that the employee carries out the order of the master; hence, he has a right to claim his wages from the employer and not from the third party to whom his services are lent or hired from. It may be that such third party may pay his wages during the time he was hired for his services, but that is because of his agreement with his real employer. However, that does not have the effect of transferring the service of the employee, to the other employer. The hirer may exercise control and direction in the doing of the thing for which he has hired the employee, or even the manner in which it is to be done. But if the employee fails to carry out his direction, he cannot dismiss him and can only complain to the actual employer. The right of dismissal vests in the employer.[76]

Adjudication

In adjudicating a case of transfer, it is necessary for the tribunal to consider each case on its own merits. While doing so, it has to consider whether the employee had accepted the employment, knowing that his services are liable to be transferred or whether the agreement between the employer and the employee contained any specific terms regarding transfers, and if so, whether corresponding benefits are given to the employee. No doubt, the adjudicator has the jurisdiction to modify an agreement relating to transfers, but he cannot disregard or omit to take such an agreement into consideration, as a relevant factor in the process of reasoning, to come to his conclusion. The adjudicator, therefore, has to allow the parties to lead evidence on the question of transfer and then only, after considering all the relevant factors on the point, he has to decide that question and make an award accordingly, having stated his reasons.[77]

Hours of Work

A long standing traditional goal of trade unions has been to reduce the existing hours in the standard working day and working week, without loss of wages. Elaborate provisions regarding rest periods, spread over the total number of hours per week, over-time and the manner of intimation of these hours and holidays have been made by various statutes, such as the Factories Act, the Indian Mines Act, various Shops and Establishments Acts, etc. Normally, weekly hours under the existing labour enactments, do not exceed 48 hours. In practice, hours of work in establishments working three shifts daily, amount to 45 per week, as each shift is generally of eight hours' duration, including the half hour rest interval. The trade

unions have been striving to seek and suggest a 40-hour week, a five-day week with eight hours a day. For commercial offices, still shorter hours are demanded. An interesting question, for the near future, is: whether there will be a strong demand for a shorter work week, without reduction in the weekly wage? The recent relatively high unemployment rates have stimulated interest in increasing employment by this device. There is nothing in these statutes which enjoins that these working hours could be changed only by mutual agreement. It is the function of the management of an establishment to adjust or vary their hours of work, within the limits prescribed by law.[78]

It is not the policy of the legislation to leave to mutual agreement, the determination of such vital matters as daily and weekly working hours and holidays and over-time, for in a factory or establishment, where labour is not so well-organised, it is possible to obtain agreements to adverse working conditions, due to pressures of economic necessity. This would be contrary to public policy. But within the prescribed limits, the management has the right to alter the period of work, provided it gives the necessary intimation of the change, as required by the Standing Orders and other provisions of law applicable to it.[79] In *May & Baker*, the working hours of the company were from 9 am to 5 pm, with three rest intervals-one hour for lunch, 15 minutes for the morning tea, and 15 minutes for the afternoon tea. The tribunal changed these hours to 9.30 am to 5 pm with one hour's interval for lunch. Theoretically, there did not appear any reduction in the working hours, but practically, there was one because the tribunal directed that instead of two intervals of 15 minutes each for tea, which was supplied by the company to its workmen, it should see that tea is supplied to the workmen at their tables. The Supreme Court, in appeal, noticed that the tribunal had, in fact, reduced the working hours by half an hour each day, as obviously the workmen will take their time for tea, because they cannot do both-work and take tea, at the same time. In the circumstances of the case, the reduction in the working hours was held to be unjustified.[80]

In *BOAC*, the company, which was an airlines concern, had, for the purpose of weekly hours of work, divided the employees into two categories, *viz*, (i) office staff, with 36 working hours a week; and (ii) operational staff, with a working week of 39-42 hours. Adjudicating upon the dispute relating to wages for overtime, in view of the special nature of the work at the airport, the tribunal directed that the company was entitled to fix 48 hours per week, as normal duty 'hours and the payment for overtime work should be made to the workmen on the basis of work done beyond the normal duty hours of 48 hours in a week. In appeal, in view of the peculiar incidents of the airline industry, the problem of regulating the hours of work, which are quite different from those obtaining in any other establishment, the Supreme Court held that the direction of the tribunal, taking 48 hours as the basis for payment for overtime work to the office staff, was not justified and modified it to the effect that the office staff should be paid overtime work at the rates calculated on the basis of 36 hours a week. But the direction of the tribunal with respect to the operational staff, whose work was directly connected with the arrival and departure of the aircraft of the company, was held to be reasonable.[81]

In *Karamchand Thapar*, the direction of the tribunal, that the subordinate staff should attend office half an hour before the normal time, to be regulated by a system of rotation, subject to over-time wages being paid at the rate fixed by the award, was affirmed by the Supreme Court holding that for a proper working of the office, it was necessary that sweepers and peons should start their work sometime before the other employees come and should stay on for sometime after the other employees depart, as having regard to the duties of the peons and sweepers, it was not practical to observe the same hours for them as for the other employees.[82] In *Remington Rand*, the working hours of the employees of Trivandrum and Ernakulam, as prevalent, were from 9 am to 1 pm and from 2 pm to 5.30 pm on week days and from 9 am to 1 pm on Saturdays. At Madras, the company's workers worked only for five days in a week, from 9 am to 1 pm and from 1.45 pm to 5.30 pm. The total working hours at Madras were, therefore, somewhat less than those at Trivandrum and Ernakulam. The company had, by a circular, fixed the working hours from 9.30 am for clerks and 9 am for mechanics and peons. But, in fact, the circular was not given effect to and the company was extracting half an hour's work per day extra. The direction of the tribunal to the company, to give effect to the circular and to have the clerical staff work from 9.30 am to 1 pm and from 2 pm to 5.30 pm on working days and from 9.30 am to 1 pm on Saturday, was affirmed by the Supreme Court.[83]

In *ONGC*, the facts were: ONGC had a central workshop at Baroda. When the workshop was under construction and there was insufficient accommodation at the site of the workshop, the office and administrative staff used to work in a shed, at a distance of about two kilometers from the workshop. The working hours of the administrative staff, at that time, were from 10 am to 5 pm, with an interval of half an hour. These working hours lasted from December 1964 to June 1965, when, on the completion of the construction at the site of the workshop, the administrative staff shifted there. Consequently, the working hours of the administrative staff were fixed from 8 am to 5 pm, with an interval of an hour. The workmen claimed that the working hours of the administrative staff should continue to be six-and-a-half hours per day and complained that the fixation of eight hours per day, with effect from June 1965, was violative of s 9A of the Industrial Disputes Act. It was further claimed that the fixation of eight hours per day, was not justified from the point of view of convenience and was also at variance with the practice uniformly prevailing in other administrative offices of the workshops of the ONGC. Though the tribunal took the view that s 9A was inapplicable, on the second contention, it held that the change in the hours of work was not justified from the point of view of convenience and the hours should not have been changed from 6½

hours, including the half an hour's rest interval, to nine hours, including the rest interval of one hour. But, in appeal, the Supreme Court held that the tribunal was not justified in interfering with the employers' decision in fixing the hours of work as the view of the tribunal, that reduction in the hours of work from 8 to 6½ hours, would not adversely affect the work of the office, was not only not supported by any evidence on record, but was contrary to it.[84]

Work Load

Work load is a matter which relates to the 'terms of employment' or 'conditions of labour' of the workmen. Disputes quite often arise out of the adjustment of work-loads. A detailed consideration of this subject would be out of place here, as it involves industrial and economic problems, rather than legal questions. The legal questions with respect to work-loads arise when the interpretation of some statutory provision is involved or the principles laid in some cases have to be applied. In *Remington Rand* (supra), in connection with the dispute relating to work-loads, the employees alleged that the method of calculation of work-load was arbitrary and the work-load fixed by agreement between the company and its employees in Delhi and Lucknow, was seven mechanics per day or 150 mechanics per month, while the work-load at Trivandrum was ten mechanics per day. The case of the management was that ten mechanics per day was not too much. The award of the tribunal on the basis of the negotiations between the parties, directing the company to reduce the work-load to seven mechanics per day or 150 mechanics per month, with a rider that 'all the mechanics attended to, whether new or old, whether under the service contract, or not, will be counted for the sake of work-load', was affirmed by the Supreme Court.

Shifts

In *Pfizer*, the Standing Orders enabled the employer to introduce more shifts than one. The Supreme Court found that the evidence on record clearly showed that the pattern of work in similar concerns in the area (Bombay, Poona and Baroda), not confining only to the area in Greater Bombay, where the factory was situated, justified the introduction of a third shift. Besides, the expert evidence adduced on behalf of the company also showed that the manufacture of a particular drug involved a continuous process and the company was incurring loss and was not in a position to cope with the demand for their products in the absence of the third shift. The evidence further showed that the quality and quantity of the particular drug had suffered for want of the third shift. In view of this evidence, it was held that the company had made a clear case for the introduction of three shifts. The plea of social disutility of night work was also rejected as being a theoretical controversy in the context of the emergency in the country. Gajendragadkar J, observed:

> In dealing with industrial adjudication, it would be undesirable to reach conclusions purely on doctrinaire or theoretical consideration ... such a theoretical or doctrinaire approach has, in the context of today, lost some of its validity.

Referring to the question of the additional work-load being imposed on the employees by additional shifts, the court observed that it may constitute a change in the conditions of service. It would, therefore, be open to the industrial tribunal to examine the reasonableness of the change proposed to be made. Both the extreme contentions of the employer and of the employees, ie, on the one hand, that the employer's right under the Standing Orders to adopt more than one shift made it a matter of entire and absolute discretion of the management and on the other hand, that the introduction of three shifts would make a departure from the pattern prevailing in a particular industry, hence, the change could not be permitted, were rejected. The learned judge held:

> After all, the question must be considered in the light of the relevant facts adduced before the court, and in doing so, the importance and the necessity of more production must be borne in mind.[85]

Promotion

Right to Promotion:

In England, the claim for promotion has been held to be connected with the terms of employment of the employee.[86] But in India, the judicial opinion is that promotion, in the course of industrial employment, is the prerogative of the management.[87] In *Brooke Bond*, a Constitutional Bench of the Supreme Court held that it is a matter of discretion of the management, to select persons for promotion. In the words of Gajendragadkar J:

> It may be recognised that there may be occasions when a tribunal may have to interfere with a promotion made by the management, where it is felt that persons superseded have been so superseded on account of *mala fides* or victimisation.[88]

But in *Hindustan Lever*, a three-judge Bench of the court, pointed out that the expression 'terms of employment and conditions of labour', used in s 2(k), would ordinarily include not only the contractual terms and conditions, but also those terms which are understood and applied by the parties in practice or habitually or by common consent, without ever being incorporated in the contract. Accordingly, the court suggested that it was time to reconsider this archaic view of the *laissez faire* days, that promotion is a management function, because the whole gamut of labour legislation is 'to check, control and circumscribe any uncontrolled managerial exercise of power, with a view to eschew the inherent arbitrariness in the exercise of such functions.[89] Whether a particular employee should be promoted from one grade to the higher grade, depends not only on the length of his service, but also on his efficiency and other qualifications for the post, to which he seeks to be promoted. And in the matter of promotion, the intimate knowledge of the higher authority, empowered to promote, has a greater value. If a higher post is created in any department and a new man is to be appointed to it, even the senior most workman working in such department, has got no right to claim promotion to it. Seniority only plays a small part in the matter of promotion.[90] In the absence of any *mala fides*, unfair labour practice or victimisation, the discretion of the management cannot be questioned.[91] Therefore, without recording a finding of *mala fide*, victimisation or unfair labour practice, the adjudicator cannot arrogate to himself, the promotional function of the management.[92] On the other hand, the workers also want that the claim of the employees who are eligible for promotion, should be duly considered. If at a given time, more than one person is eligible for promotion, seniority should be taken into account and should prevail, unless the eligible persons are not equal in merit.[93] Even though promotion or up-gradation is a managerial function, it must not be on the subjective satisfaction of the management, but must be on some objective criteria. If there is no scope for any promotion or upgradation or increase in salary, in a private undertaking, it may be conceivable to think that promotion is not a condition of service. But if, under the Standing Orders, rules or conventions prevailing in an undertaking, there are grades and scopes of upgradation or promotion and there are different scales of pay for different grades and, in fact, promotion is given or upgradation is made, there should be no arbitrary or unjustified and unreasonable upgradation or promotion of persons, superseding the claims of persons who may be equally or even more suitable.[94] There should be no arbitrary or unjust and unreasonable upgrading of some persons, superseding the claims of persons who may be equally or even more suitable. The expression 'victimisation' must be given its normal meaning, of someone being the victim of an unfair and arbitrary action.[95]

Automatic Promotion

A promotion generally necessitates a consideration of the comparative suitabilities of the eligible workmen and such a selective process would require a consideration not only of the best performance of those eligible, but necessitates the making of a comparative estimate of their skill, which could be of a technical nature, their personality, their capacity to discharge heavier responsibilities and similar other factors. Promotion to higher grades, in a large majority of cases, results not only in better wage-scales for the promoted workmen, but usually, if not invariably, necessitates a process of selection from out of those eligible, because the higher post would carry a greater responsibility and would call for keener capabilities. The labour court and industrial tribunals are hardly fit or equipped technically or otherwise, to take upon themselves, the task of making such selections. The entrepreneur, on the other hand, is best equipped to discharge this function. If the choice of the management is not *mala fide* and no element of victimisation has entered into it, there would be no scope in such cases, for any interference, merely because those not selected are dissatisfied and discontented. If those not suited to discharge the function of the higher posts, are promoted by industrial adjudicators, who do not possess the requisite background, qualifying them to undertake the task of making the selections, industrial progress is bound to be jeopardised, to the detriment of the national economy. In cases of this type, the management has no discretion and there is no element of choice involved. Promotions in such cases cannot be characterised as a managerial function.[96]

The decision of the Supreme Court in *River Navigation*, illustrates the adjudication of a dispute relating to automatic promotion. The industrial tribunal revised the B grade as Rs 90-6-138-7-194 (16 years) and recast the A grade as Rs 110-8-174-10-244 (15 years). It then directed that clerks reaching the maximum of grade B, would automatically be promoted to grade A. In an appeal against the award of the tribunal, the employer contended before the Supreme Court, that the A grade consisted of head-clerks, a class doing comparatively more work than the class in the B grade, and that an automatic promotion from B grade to A grade would be destructive of the efficient working of the department. But the court observed that a perusal of the revised scales showed that a person takes 16 years to reach the maximum of the B grade. Hence, a clerk who has worked in the C grade and after a number of years of service therein, passed to the B grade, after 16 years of service therein, could hope to pass into the A grade and after 15 were years therein, he could be promoted to the two special grades. If, therefore, service in the A grade was of a similar nature as that of the B grade, the principle of promotion by selection might work hardships for many experienced workers. The court further observed that the tribunal, presumably on that basis, accepted the principle of automatic promotion from the B grade to the A grade. Further, from the award, it was clear that only senior clerks were to be placed in the A grade and their work would consist mainly of assisting the junior members, with their advice and instructions. In view of this position of the personnel in the A grade, the court held that the tribunal was right in applying the principle of automatic promotion, instead of the principle of promotion by selection. However, it was pointed out that 'which principle will be applicable to a particular situation,

depends upon the facts and circumstances of each case.[97] In other words, it is a matter of discretion to be exercised by an industrial adjudicator, whether to apply the principle of automatic promotion or that of promotion by selection, on the basis of the facts of a particular case. In *Hindustan LM Sabha*, a Division Bench of the Bombay High Court has precisely stated the law, in this connection, in the following words:

> Promotions are normally granted on the basis of performance. Automatic promotion would, therefore, undermine the very *raison d'etre* of promotions. There will be hardly any incentive left to put in good performance, if the promotions are taken for granted, whatever the nature of the performance. Instead, what was in the circumstances necessary, was a monetary compensation in the nature of increments, which the learned judge has rightly granted ... It is, therefore, both in the interest of the welfare of the workmen, as well as in the larger interest of the company, that some additional incentive, in the form of a stagnation increment, is granted to the workmen.[98]

In *Hindustan Lever*, the Supreme Court held that the demand of the workman, for his confirmation in the promoted post, after the lapse of certain time, would be a dispute connected with the terms of employment of the workman. It would not be a dispute relating to promotion.[99]

Adjudication of Promotions

Therefore, the question, whether a person has been superseded or not, or whether he is entitled to the promotion or not, would constitute an 'industrial dispute', as the 'difference' or 'dispute', on this question, would be comprehended in the words 'employment or non-employment'. Hence, it would be within the jurisdiction of the adjudicator to consider the respective merits of the workmen promoted by the employer.[1] However, the promotion, primarily, being a management function, cannot normally be interfered with by industrial adjudication but if it is shown that the management was actuated by malicious considerations in promoting one employee in preference to another or in failing to promote an eligible person, it would amount to an unfair labour practice. Thus, the industrial adjudication can interfere with this exclusive function of the employer only if the promotion given to one and withheld from another, is *mala fide* or an act of unfair labour practice or victimisation.[2] In the absence of a clear proof of *mala fides* or discrimination on extraneous grounds, on the part of the employer, it would be wholly inappropriate for any outside authority to attempt to weigh the relevant merits of the individual who might be holding higher posts and those who are aspiring for the same. It would be laying down a dangerous principle, if an outside authority were to substitute the internal authority, in matters of promotion. Any such attempt on the part of the outside authority, is likely to foster a spirit of distrust, among the employees, in the capacity and authority of the employer to administer fairly and effectively the affairs of his establishment and to maintain discipline. In the absence of a finding of *mala fide* or victimisation of a workman, for trade union activities, or an unfair labour practice, the industrial tribunals, therefore, cannot arrogate to themselves, the promotional function of the management.[3] Therefore, when *mala fide*, unfair labour practice or victimisation is alleged by the workmen, the adjudicator will have to inquire into the allegation.[4] If he finds that the promotions in question, have been made so that they are unjustified on anyone of the above-mentioned grounds, the proper course for him is to set aside the promotions and ask the employer to consider the cases of the superseded employees and decide for himself, whom to promote, after considering the records of all the employees worth consideration, except of course, the person whose promotion has been set aside. In other words, where the tribunal finds that some workers are being superseded on account of *mala fides* or victimisation, it may have to cancel the promotions made by the employer.[5] But even after a finding of *mala fides* or victimisation, it is not the function of a tribunal to consider the merits of the various employees itself and then to decide whom to promote.[6] An award interfering with the promotion of a workman, without giving notice to him, would be invalid inasmuch as it would be violative of the rules of natural Justice.[7]

In case, as a result of the award of the tribunal, the promotion of one person affects the status of another person, that other person must be impleaded as a party to the proceedings and should be given an opportunity of being heard before an award, adverse to him, is made.[8] It is established law that a pendency of disciplinary proceedings against a workman, does not create a bar to his being considered for promotion. In such a situation, the proceedings for promotion in connection with the delinquent workman, are to be kept in a sealed cover, to be opened after the disciplinary proceedings are over and the recommendations of the promoting authority are to be worked out, depending upon the outcome of the disciplinary proceedings. Once an employee is promoted with effect from a retrospective date, on being completely exonerated, he cannot be deprived of the pay and the other benefits, to which he would have been entitled, had he, in fact, been promoted to the said post on the date from which, retrospectively, he had been subsequently promoted. Any condition imposed to the effect, that the employee would not be entitled to the pay and allowances arising from the promotion, would be illegal and unsustainable.[9] Where a workman, having been promoted to a higher grade post and placed on probation, is not confirmed in the promotion position, on the ground of unsatisfactory performance, no inquiry will be required for refusing the confirmation in the promotion post.[10]

The payment of backwages or arrears of salary of the employee, in a case of retrospective promotion, where the case of the employee has been considered after the completion of a disciplinary proceeding, is at the discretion of the disciplinary authority, depending upon the ultimate result of the disciplinary proceeding. If the employee has been completely exonerated and there is no blemish whatsoever, and he is not visited with any penalty, even that of censure, he has to be given the benefit of the salary, from the date on which he would have been normally promoted, but for the disciplinary proceedings. In other cases, where the promotion is given with retrospective effect, after the conclusion of a departmental inquiry, but where there are other factors, such as dragging of the proceedings by the delinquent, exoneration because of technical defects or non-proving of charges due to peculiar circumstances, the question of whether backwages are to be paid, has to be determined by the competent authority, in the light of the facts and circumstances of the case. The grant of backwages is not intrinsically inherent in a retrospective promotion. However, when no punishment is visited and there is no other factor concomitant, the employee is entitled to full backwages. Where a promotion is denied illegally and later on a notional promotion is given, with retrospective effect, without financial benefits, it would be arbitrary, because 'no one can be penalised for no fault of his and the employer cannot take advantage of an illegal action, on his part. However, the claim of a workman of being considered for the next higher post, from the date his junior was considered for the promotion, was held to be not tenable, as the latter had become junior to him in 1985. But the plea of the workman that his case for the promotion should be considered if promotees of 1985, or thereafter, had been considered for the promotion, was accepted by the court. In such a case, the workman should also have been considered from the date his juniors were considered. In *Mcleod & Co*, the facts disclosed that the company was having a practice of re-employing senior, retired clerks, at reduced salaries. Adjudicating the dispute raised by workmen against the practice, on the ground that such re-employment hampered the prospects of junior employees, the tribunal directed the employer to stop re-employment of retired clerks, in the categories of clerks above 'C' grade. This award was affirmed by the Supreme Court, in appeal.[11]

Burden of Proof

In case workmen allege *mala fides*, unfair labour practice or victimisation, they have to prove the allegations by adducing satisfactory evidence, before the tribunal. It would not be sufficient barely to make these allegations or aver that the relations between the employer and the employees have been strained on account of the employees being the members of a trade union. The evidence led by the parties on the question of *mala fides*, etc, has to be considered by the tribunal before recording its conclusions. If the tribunal records its findings without considering the relevant evidence or its conclusions are based on extraneous or irrelevant considerations or on no evidence, such conclusions will be perverse and the resulting award will be liable to be quashed.[12]

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2 *Guest Keen Williams Ltd v PJ Sterling* (1959) 2 LLJ 405 [LNIND 1959 SC 127], 415 (SC) : AIR 1959 SC 1279 [LNIND 1959 SC 127]: [1960] 1 SCR 348 [LNIND 1959 SC 127], per Gajendragadkar J.

3 *Hindustan Antibiotics Ltd v Workmen* (1967) 1 LLJ 114 [LNIND 1966 SC 319], 131 (SC) : AIR 1967 SC 948 [LNIND 1966 SC 319], per Subba Rao CJI.

4 *AG Kher v Atlas Copco (India) Ltd* (1992) 1 LLJ 423, 428 (Bom), per S Manohar J.

5 *Gokulananda Tripathy v Mgmt of Sundardas D Hans Raj* (1975) 1 LLJ 133, 135 (Ori) (DB), per RN Misra J.

6 *Assam Oil Co Ltd v Workmen* (1960) 1 LLJ 587 [LNIND 1960 SC 108], 590 (SC), per Gajendragadkar J.

7 Re *African Assn Ltd and Alien* (1910) 1 KB 396.

8 *Sri Assaram Raibhah Dhage v Executive Engineer* (1990) 1 LLJ 48 -49 (Bom) (DB), per Lentin J.

9 *Municipal Corpn of Gr Bombay v PS Malvenkar* (1978) 2 LLJ 168 [LNIND 1978 SC 157], 172 (SC) : AIR 1978 SC 1380 [LNIND 1978 SC 157]: (1978) 3 SCC 78 [LNIND 1978 SC 157], per Jaswant Singh J.

10 *Divl Supdt, Southern Rly v Sasidharan* 1978 Lab IC 1042, 1044 (Ker) (DB), per Gopalan Nambiyar CJ.

11 *Gujarat Steel Tubes Ltd v GST Mazdoor Sabha* (1980) 1 LLJ 137 [LNIND 1979 SC 464], 149-50 (SC) : AIR 1980 SC 1896 [LNIND 1979 SC 464]: (1980) 2 SCC 593 [LNIND 1979 SC 464], per Krishna Iyer J.

12 *State of Bihar v Gopi Kishore Prasad* AIR 1960 SC 689 [LNIND 1959 SC 209], 692, per Sinha CJI.

13 *Maharashtra SRTC v Madhukar Narayanarao* (1969) 2 LLJ 619, 629 (Bom) (DB), per Abyankar J.

14 *Naihati Electric Supply Co v State of West Bengal* (1974) 2 LLJ 179, 183 (Cal), per Debiprasad Pal J.

15 *Sehkari Upbhokta Wholesale Bhandar Ltd v Pannalal Bordia* (1988) 2 LLJ 123, 126 (Raj), per Lodha J.

16 *RB Diwan Badri Das v IT* (1962) 2 LLJ 366 [LNIND 1962 SC 293], 371 (SC), per Gajendragadkar J.

17 *Gujarat Steel Tubes Ltd v GST Mazdoor Sabha* (1980) 1 LLJ 137 [LNIND 1979 SC 464], 154 (SC), per Krishna Iyer J.

18 *Hindustan Steel Ltd v AK Roy* (1970) 1 LLJ 228 [LNIND 1969 SC 497], 232 (SC), per Shelat J.

19 *Siddhanath K Kadam v DD & Co Pvt Ltd* 1977 Lab IC 602, 604 (Bom) (DB), per Deshmpande J.

20 *RB Diwan Badri Das v IT* (1962) 2 LLJ 366 [LNIND 1962 SC 293], 370 (SC), per Gajendrajadkar J.

21 *UB Dull & Co Pvt Ltd v Workmen* (1962) 1 LLJ 374 [LNIND 1962 SC 33], 376 (SC), per Wanchoo J.

22 *Assam Oil Co Ltd v Workmen* (1960) 1 LLJ 587 [LNIND 1960 SC 108], 591 (SC), per Gajendragadkar J.

23 *Bombay Labour Union v Intnl Franchises Pvt Ltd* (1966) 1 LL J 417, 419 (SC), per Wanchoo J.

24 *Barsi Light Rly Co Ltd v KN Joglekar* (1957) 1 LLJ 243 [LNIND 1956 SC 104], 247 (SC), per SK Das J.

25 *West Bengal SEB v Shri Desh Bendhu Ghosh* (1985) 1 LLJ 373 [LNIND 1985 SC 64], 375, per Chinnappa Reddy J.

26 *Binny Ltd v PO, LC* (1986) 1 LLJ 237 (Kant), per Rama Jois J.

27 *Davis Contractors Ltd v Fareham UDC* (1956) AC 696, per Radcliffe.

28 *Anand Bihari v Rajasthan SRTC* 1991 Lab IC 494 (SC) : AIR 1991 SC 1003 : (1991) 1 SCC 731, per Sawant J.

29 *Divisional Controller MSRTC v PC Kamble* (2002) 3 LLN 193 (Bom), per Kochar J.

30 *Buckingham & Carnatic Co Ltd v Workmen* (1951) 2 LLJ 314 (LAT).

31 *Assam Oil Co Ltd v Workmen* (1960) 1 LLJ 587 [LNIND 1960 SC 108], 590 (SC) : AIR 1960 SC 1264 [LNIND 1960 SC 108], per Gajendragadkar J.

32 *UB Dutt & Co Pvt Ltd v Workmen* (1962) 1 LLJ 374 [LNIND 1962 SC 33] (SC) : AIR 1963 SC 411 [LNIND 1962 SC 33], per Wanchoo J.

33 *Gujarat MDC v PH Brahmbhat* (1974) 1 LLJ 97 [LNIND 1973 SC 318], 102-03 (SC) : AIR 1974 SC 136 [LNIND 1973 SC 318], per Jaganmohan Reddy J.

34 *Gujarat Steel Tubes Ltd v GST Mazdoor Sabha* (1980) 1 LLJ 137 [LNIND 1979 SC 464], 150-51 (SC) : AIR 1980 SC 1896 [LNIND 1979 SC 464]: (1980) 2 SCC 593 [LNIND 1979 SC 464], per Krishna Iyer J.

35 *Ravindra Kumar Misra v UP State Handloom Corpn Ltd* 1988 Lab IC 56, 61 (SC), per Ranganath Misra J.

36 *Assam Oil Co Ltd v Workmen* (1960) 1 LLJ 587 [LNIND 1960 SC 108] (SC), per Gajendragadkar J.

37 *Chartered Bank v CB Employees Union* (1960) 2 LLJ 222 [LNIND 1960 SC 106], 226 (SC), per Wanchoo J.

38 *Siddhanath K Kadam v Dadajee Dhackjee and Co Pvt Ltd* 1977 Lab IC 602, 604 (Bom) (DB), per Deshpande J.

39 *UB Dutt & Co Pvt Ltd v Workmen* (1962) 1 LLJ 374 [LNIND 1962 SC 33] (SC) : AIR 163 SC 411 : 1962 Supp (2) SCR 822, per Wanchoo J.

40 *Jabalpur Electric Supply Co Ltd v SP Srivastava* (1962) 2 LLJ 216 [LNIND 1962 SC 246] (SC) : AIR 1966 SC 1288 [LNIND 1962 SC 246], per Das Gupta J.

41 *Murugan Mills Ltd v IT* (1965) 1 LLJ 422 [LNIND 1964 SC 320] (SC) : AIR 1966 SC 1051 [LNIND 1965 SC 433], per Wanchoo J.

42 *Utkal Machinery Ltd v Shanti Patnaik* (1966) 1 LLJ 398 [LNIND 1965 SC 277], 400 (SC), per Ramaswami J.

43 *Tata Oil Mills Co Ltd v Workmen* (1966) 2 LLJ 602 [LNIND 1965 JNK 9] (SC) : AIR 1966 SC 1672 [LNIND 1963 SC 46], per Gajendragadkar J.

44 *Agra Electric Supply Co Ltd v Alladin* (1969) 2 LLJ 540 [LNIND 1969 SC 261], 548 (SC) : AIR 1970 SC 512 [LNIND 1969 SC 261]: (1969) 2 SCC 598 [LNIND 1969 SC 261], per Shelat J.

45 *Jagdish Prasad v Sachiv Zila Ganna Committee* 1986 Lab IC 1377 (SC), per BC Ray J.

46 *Brooke Bond (India) Pvt Ltd v Chandranath Choudhary* (1969) 2 LLJ 387 [LNIND 1968 SC 255] (SC), per Shelat J.

47 *Tata Engg & Loco Co Ltd v SC Prasad* (1969) 2 LLJ 799 [LNIND 1969 SC 114], 806-08 (SC) : (1969) 3 SCC 372 [LNIND 1969 SC 114], per Shelat J.

48 *Gujarat MDC v PH Brahmbhatt* (1974) 1 LLJ 97 [LNIND 1973 SC 318], 102-03 (SC) : AIR 1974 SC 136 [LNIND 1973 SC 318]: (1974) 3 SCC 601 [LNIND 1973 SC 318], per Jaganmohan Reddy J.

49 *Municipal Corpn of Gtr Bombay v PS Malvenkar* (1978) 2 LLJ 168 [LNIND 1978 SC 157] (SC) : AIR 1978 SC 1380 [LNIND 1978 SC 157]: (1978) 3 SCC 78 [LNIND 1978 SC 157], per Jaswant Singh J.

50 *Gujarat Steel Tubes Ltd v Gujarat Steel Tubes Mazdoor Sabha* (1980) 1 LLJ 137 [LNIND 1979 SC 464] (SC) : AIR 1980 SC 1896 [LNIND 1979 SC 464]: (1980) 2 SCC 593 [LNIND 1979 SC 464], per Krishna Iyer J.

51 *MK Ravi v MD, Kerala State Bamboo Corpn* 1987 Lab IC 355, 357 (Ker), per Menon J.

52 *Ruby General Insurance Co Ltd v PP Chopra* (1970) 1 LLJ 63 [LNIND 1969 SC 333] (SC) : (1969) 3 SCC 653 [LNIND 1969 SC 334], per Shelat J.

53 *Hindustan Steel Ltd v AK Roy* (1970) 1 LLJ 228 [LNIND 1969 SC 497], 232 (SC) : AIR 1970 SC 1401 [LNIND 1969 SC 497]: (1969) 3 SCC 513 [LNIND 1969 SC 497], per Shelat J.

54 *Bihar SRTC v State of Bihar* (1970) 2 LLJ 138 [LNIND 1970 SC 53] (SC) : AIR 1970 SC 1217 [LNIND 1970 SC 53]: (1970) 1 SCC 490 [LNIND 1970 SC 53], per Shelat J.

55 *Workmen of Sudder Office Cinnamara v Mgmt of Sudder Officer* (1971) 2 LLJ 620 [LNIND 1971 SC 493] (SC) : (1972) 4 SCC 746 [LNIND 1971 SC 493], per Vaidialingam J.

56 *Workmen of Motipur Sugar Factory v Motipur Sugar Factory* (1965) 2 LLJ 162 [LNIND 1965 SC 109] (SC) : AIR 1965 SC 1803 [LNIND 1965 SC 109]: (1965) 3 SCR 588 [LNIND 1965 SC 109], per Wanchoo J.

57 *Tata Engineering and Locomotive Co Ltd v SC Prasad* (1969) 2 LLJ 799 [LNIND 1969 SC 114]-808 (SC) : (1969) 3 SCC 372 [LNIND 1969 SC 114], per Shelat J.

58 *V Sadasivan v Binny Ltd* (1998) 1 LLN 235 (Mad) (DB), per Raju J.

59 (1960) 1 LLJ 587 [LNIND 1960 SC 108] (SC), per Gajendragadkar J.

60 (1978) 2 LLJ 168 [LNIND 1978 SC 157] (SC), per Jaswam Singh J.

61 (1980) 2 LLJ 137 (SC), per Krishna Iyer J.

62 *State of Bihar v Gopi Kishore Prasad* AIR 1960 SC 689 [LNIND 1959 SC 209], per Sinha CJI.

63 *Chandra Prakash v State of Uttar Pradesh* (2001) 1 LLN 50 (SC).

64 *Dainik 'Navbharat' v AP Gupta* (1999) 3 LLN 255 (MP), per Kulshreshtha J.

65 *Air India Corpn v VA Rebellow* (1972) 1 LLJ 501 [LNIND 1972 SC 128] (SC) : AIR 1972 SC 1343 [LNIND 1972 SC 128]: (1972) 1 SCC 814 [LNIND 1972 SC 128], per Dua J.

66 *Binny Ltd v Workmen* 1973 Lab IC 1119 (SC), per Grover J.

67 *L Michael v Johnson Pumps Ltd* (1975) 1 LLJ 262 [LNIND 1975 SC 55], 266 (SC) : AIR 1975 SC 661 [LNIND 1975 SC 55]: (1975) 1 SCC 574 [LNIND 1975 SC 55], per Krishna Iyer J.

68 *Siddhanath K Kadam v Dadajee Dhackjee & Co Pvt Ltd* 1977 Lab IC 602, 605-6 (Bom) (DB), per Deshpande J.

69 *Mgmt of the Arya Vaidya Pharmacy (Coimbatore) Ltd v Secretary, Arya Vaidya Pharmacy Employees' Union* 1982 Lab IC 261 -62 (Ker), per Bhaskaran J.

70 *Rable v Green* (1985) 2 QB 315.

71 *Assam Chah Karamachari Sangha v PO, LC* 1981 Lab IC 1026, 1031 (Gau), per Hansaria J.

72 *Chandulal v Mgmt of Pan American World Airways Inc* (1985) 2 LLJ 181 [LNIND 1985 SC 138]-82 (SC) : AIR 1985 SC 1128 [LNIND 1985 SC 138]: (1985) 2 SCC 727 [LNIND 1985 SC 138], per Ranganath Misra J.

73 *Kamal K Lakshman v Mgmt of Pan American World Airways Inc* (1987) 1 LLJ 107 [LNIND 1986 SC 491], 109 (SC) : AIR 1987 SC 229 [LNIND 1986 SC 491]: (1987) 1 SCC 146 [LNIND 1986 SC 491], per Ranganath Misra J.

74 *Amarjeet Singh v Punjab National Bank* (1986) 2 LLJ 354, 371-72 (Del) (DB) : (1987) 54 FLR 261, per HL Anand J.

75 *D Seeralan v Mgmt of Facit Asia Ltd* 1991 Lab IC 362, 366 (Mad) (DB), per Nainar Sundram J.

76 *Jagatpal Dhuria v Madhav Corpn* (2001) 3 LLN 165 (Bom), per Dr Chandrachud J.

77 *Unit Trust of India v T Bijaya Kumar* (1993) 1 LLJ 240 [LNIND 1992 SC 508], 242 (SC) : (1992) 3 SCALE 100.

78 *Governing Council of KMIO v Dr Pandurang Gadwalkar* (1993) 1 LLJ 308 [LNIND 1992 SC 765], 310 (SC), per NP Singh J.

79 *Express Newspapers Ltd v LC* (1964) 1 LLJ 9 [LNIND 1963 SC 303], 11 (SC), per Das Gupta J.

80 *Stanley Mendex v Giovanola Binny Ltd* (1968) 2 LLJ 470, 472 (Ker), per Balakrishna Eradi J.

81 *State of Punjab v Dharam Singh* AlR 1968 SC 1210, 1212, per Bachawat J.

82 *Giovanola Binny Ltd v IT* (1970) 1 LLJ 450, 452 (Ker), per Balakrishna Eradi J.

83 *Utkal Machinery Ltd v Santi Patnaik* (1966) 1 LLJ 398 [LNIND 1965 SC 277] (SC) : AIR 1966 SC 1051 [LNIND 1965 SC 433], per Ramaswami J.

84 *Mgmt of Brooke Bond India Pvt Ltd v YK Gautam* (1973) 2 LLJ 454 [LNIND 1973 SC 244] (457) (SC) : AIR 1973 SC 2634 [LNIND 1973 SC 244]: (1974) 3 SCC 451 [LNIND 1973 SC 244], per Jaganmohan Reddy J.

85 *Gujarat MDC v PH Brahmbhatt* (1974) 1 LLJ 97 [LNIND 1973 SC 318], 102-03 (SC) : AIR 1974 SC 136 [LNIND 1973 SC 318]: (1974) 3 SCC 601 [LNIND 1973 SC 318], per Jaganmohan Reddy J.

86 *Sunilkumar SP Sinha v Indian Oil Corpn Ltd* 1983 Lab IC 1139 [LNIND 1982 GUJ 114], 1145, per Nanavati J.

87 *Shamsher Singh v State of Punjab* (1974) 2 LLJ 465 [LNIND 1974 SC 246], 479 (SC), per Ray CJI.

88 *Prakash Mishra v Sports Authority of India* (1990) 2 LLJ 416, 423 (MP) (DB) : 1989 MPJR 34, per TN Singh J.

89 *K Veerasha v Executive Officer, Feroke Panchayat* (1964) 1 LLJ 573 (Ker) (DB), per Madhavan Nair J.

90 *Ravindra Kumar Misra v UP State Handloom Corpn Ltd* 1988 Lab IC 56, 62 (SC), per Ranganath Misra J.

91 *State of Gujarat v Sharadchandra Manohar Neve* (1988) 2 LLJ 97 -98 (SC), per Ranganath Misra J.

92 *V Durairaj v Neyvelli Lignite Corpn Ltd* (1964) 2 LLJ 158, 159 (Mad), per Veeraswami J.

93 *Workmen of Indian Oil Corpn Ltd v Mgmt* 1982 Lab IC 155, 157 (Pat) (DB), per LM Sharma J.

94 *Behar Journals Ltd v Ali Hasan* (1959) 2 LLJ 536 (Pat) (DB), per Choudhary J.

95 *Agra Electric Suply Co. Ltd. v Sri Alladdin* (1969) 2 LLJ 540 [LNIND 1969 SC 261] (SC) : AIR 1970 SC 512 [LNIND 1969 SC 261]: (1969) 2 SCC 598 [LNIND 1969 SC 261], per Shelat J.

96 *Western India Match Co Ltd v Workmen* (1973) 2 LLJ 403 [LNIND 1973 SC 241], 407, per Dwivedi J.

97 This comment is based on the author's personal knowledge, as he was present in the court throughout the hearing of this appeal and he was not holding any brief for either side.

98 *Life Insurance Corporation of India v Raghavendra S Kulkarni* (1998) 1 LLN 56 (SC) : AIR 1998 SC 327 : (1997) 8 SCC 461 : (1998) 2 LLJ 1161.

1 *Dipti Prakash Banerji v SNBNC for Basic Sciences* (1999) 2 LLN 44 (SC) : AIR 199 SC 983 : (1999) 3 SCC 60 [LNIND 1999 SC 131] : (1999) 1 LLJ 1054 [LNIND 1999 SC 131].

2 *VP Ahuja v State of Punjab* (2000) 2 LLN 47 (SC) : AIR 2000 SC 1080 [LNIND 2000 SC 2073]: (2000) 3 SCC 239 [LNIND 2000 SC 2073] : (2000) 1 LLJ 1099 [LNIND 2000 SC 430].

3 *Parimala v Banking Service Rectt Board* (2001) 4 LLN 589 (Kant), per Shetty J.

4 *North-West Karnataka RTC v JF Awardai* (2002) 2 LLN 207 (Kant), per Gururajan J.

5 *Bharat Fritz Werner Ltd v CG Patil* (2002) 2 LLN 209 (Kant), per Gururajan J.

6 *Pavanendra N Verma v SGPGIM Sciences* (2002) 1 LLN 45, 51 (para 28) (SC) : (2002) 1 SCC 520 [LNIND 2001 SC 2509], per Ruma Pal J.

7 *ABT Parcel Service v PO, I Addl LC* (2002) 3 LLN 580 (Mad), per Rajan J.

8 *Davender Arora v Mgmt of Albert and David Ltd* (2002) 3 LLN 660 (Del), per Sarin J.

9 *Divisional Controller, Karnatka SRTC v CR Kuppalli* (2002) 4 LLN 820 (Kant) (DB), per Srinivasa Reddy J.

10 *Kusum Products v State of West Bengal* (2002) 4 LLN 131 (Cal), per Kundu J.

11 *Navinchandra S Shah v Ahemdabad Coop Deptt Stores* (1979) 1 LLJ 60 [LNIND 1977 GUJ 35] (Guj) (DB), per DA Desai J.

12 *Hindustan Steel Ltd v State of Orissa* (1977) 1 LLJ 1 [LNIND 1976 SC 330], 3-4 (SC) : (1976) 4 SCC 222 [LNIND 1976 SC 330], per Gupta J.

13 *Pyarchand KP Bidi Factory v Onkar Laxman Thenge* AIR 1970 SC 823 [LNIND 1968 SC 299], 827, per Shelat J.

14 *Bredan Dunne Ltd v Fitzpatrick* 1958 IR 29, 37.

15 *British Broadcasting Corpn v Hearn* (1978) 1 All ER 116, 118 (CA).

16 *Madras Gymkhana Club Employees Union v Gymkhana Club* (1967) 2 LLJ 720 [LNIND 1967 SC 292] (SC), per Hidayatullah J.

17 *Ram Nath Koeri v Lakshmi Devi Sugar Mills* (1956) 2 LLJ 11, 18 (All) (DB), per Mootham CJ.

18 *Mgmt of Borokai Tea Estate v Workmen* 1971 Lab IC 1217 (Ass & Nag) (DB), per Goswami CJ.

19 *Mgmt of Safdarjung Hospital v Kuldip Singh Sethi* (1970) 2 LLJ 266 [LNIND 1970 SC 180], 276-77 (SC), per Hidayatullah CJI.

20 *Ram Nath Koeri v Lakshmi Devi Sugar Mills* (1956) 2 LLJ 11, 18 (All) (DB), per Mootham CJ.

21 *Brendan Dunnae Ltd v Fitzpatriek* (1958) IR 29, 37.

22 *Scala Ballroom (Wolver Hampton) Ltd v Ratcliffe* (1958) 1 WLR 1057.

23 *NJ Chavan v PD Sawarkar* (1958) 1 LLJ 36, 40 (Bom) (DB), per Tendolkar J.

24 *Kays Construction Co Pvt Ltd v Workmen* (1958) 2 LLJ 660 [LNIND 1958 SC 124] (SC), per Gajendragadkar J.

25 *Shankar Textile Mills v Workmen* (1963) 2 LLJ 68 [LNIND 1962 SC 344] (SC), per Gajendragadkar J.

26 *Ispahani Ltd, Calcutta v Ispahani Employees Union* (1959) 2 LLJ (SC), per Wanchoo J.

27 *Hindustan Lever v Workmen* (1974) 1 LLJ 94 [LNIND 1973 SC 307] (SC), per Dwivedi J.

28 (1961) 1 LLJ 649 [LNIND 1960 SC 343]-51 (SC), per Gajendragadkar J.

29 *Sone Valley Portland Cement Co Ltd v Workmen* (1962) 1 LLJ 218 [LNIND 1962 SC 31], 229 (SC), per Wanchoo J.

30 *Hindustan Lever Ltd v Workmen* (1974) 1 LLJ 94 [LNIND 1973 SC 307] (SC) : AIR 1974 SC 17 [LNIND 1973 SC 307]: (1974) 3 SCC 510 [LNIND 1973 SC 307], per Dwivedi J.

31 *Rohtas Industries Ltd v Brijnandan Pandey* (1956) 2 LLJ 444 [LNIND 1956 SC 77] (SC), per SK Das J.

32 *Gramophone Co Ltd v Workmen* (1964) 2 LLJ 131 [LNIND 1964 SC 114] (SC), per Wanchoo J.

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34 *Nikhil Chandra Dey v Steel Authority of India Ltd* (1988) 2 LLJ 419 -20 (Cal), per UC Banerjee J.

35 *State Bank of India Staff Registered Congress v Union of India* 1992 Lab IC 1062 [LNIND 1991 PNH 235], 1067 (P&H), per Mongia J.

36 *A Bouzourou v Ottaman Bank* AIR 1930 PC 118, per Thankerton J.

37 *Automotive Manufactures Ltd v Nanalal P Vakharia* 1977 Lab IC 1188 [LNIND 1976 GUJ 27] (Guj) (DB), per Thakkar CJ.

38 *JK Dave v State of Gujarat* (1990) 1 LLJ 95 -96 (Guj), per Ravani J.

39 *Hindustan Lever Ltd v Workmen* (1974) 1 LLJ 94 [LNIND 1973 SC 307] (SC), per Dwivedi J.

40 *L Raghupathy v Addl CWC* (1991) 1 LLJ 364 [LNIND 1990 MAD 34], 367 (Mad) (DB) : AIR 1995 SC 1056 [LNIND 1995 SC 122]: (1995) 3 SCC 270 [LNIND 1995 SC 122] : (1995) 2 LLJ 849 [LNIND 1995 SC 122], per Nainar Sundaram J.

41 *Syndicate Bank Ltd v Workmen* (1966) 1 LLJ 440 [LNIND 1965 SC 298] (SC), per Ramaswami J.

42 *Bareilly Electricity Supply Co Ltd v Sirajuddin* (1960) 1 LLJ 556 [LNIND 1960 SC 83]-57 (SC), per Gajendragadkar J.

43 *State of Madhya Pradesh v SS Kourav* 1995 Lab IC 1574 (SC).

44 *Carvan Goods Carriers Pvt Ltd v LC* (1977) 2 LLJ 199, 210 (Mad), per Mohan J.

45 *PN Bahulayan v Plantation Corpn of Kerala* 1986 Lab IC 1707, 1710 (Ker), per Sivaraman Nair J.

46 *Damodar Prasad v Rajasthan SRTC* (2001) 4 LLN 440 (Raj) (DB), per Dr Lakshmanan CJ.

47 *JK Dave v State of Gujarat* (1990) 1 LLJ 95, 96 (Guj), per Ravani J.

48 *National Buildings Construction Corpn Ltd v MK Jain* 1981 Lab IC 62, 67 (Del), per Anand J.

49 *Nikhil Chandra Dey v Steel Authority of India* (1988) 2 LLJ 419 -20 (Cal).

50 *Canara Banking Corpn Ltd v U Vittal* (1963) 2 LLJ 354 [LNIND 1963 SC 125] (SC), per Das Gupta J.

51 *Om Parkash Sharma v State of Rajasthan* (1992) 1 LLJ 422 -23 (Raj), per NC Sharma J.

52 *Syndicate Bank Ltd v Workmen* (1966) 1 LLJ 440 [LNIND 1965 SC 298] (SC), per Ramaswami J.

53 *Canara Banking Corpn Ltd v U Sridhar Rao* CA No of 1962, decided on 22 April 1963 (unreported).

54 *JK Dave v State of Gujarat* (1990) 1 LLJ 95, 97 (Guj), per Ravani J.

55 *Hindustan Lever Ltd v Workmen* (1974) 1 LLJ 94 [LNIND 1973 SC 307] (SC), per Dwivedi J.

56 *Shankar S Ambedkar v Shakti Insulated Wires Pvt Ltd* (1988) 2 LLJ 416 (Bom) (DB), per Vaze J.

57 *Syndicate Bank Ltd v Workmen* (1966) 1 LLJ 440 [LNIND 1965 SC 298] (SC), per Ramaswami J.

58 *PN Bhulayan v Plantation Corpn of Kerala* 1966 Lab IC 1707, 1709-10 (Ker), per Sivaraman Nair J.

59 *Madhuband Colliery v Workmen* (1966) 1 LL J738, 741 (SC), per Ramaswami J.

60 *Canara Banking Corpn Ltd v U Sridhar Rao* CA No 756 of 1962 (22-4-1963).

61 *National Radio Corpn v Workmen* (1963) 1 LLJ 282 [LNIND 1963 SC 1], 285 (SC), per Gajendragadkar J.

62 *VSN Raju v Non-Conventional EDC Ltd* (1990) 1 LLJ 163, 166 (AP), per Jagannadha Rao J.

63 *Union of India v HN Kirtania* (1989) 2 LLJ 585 [LNIND 1989 SC 337] (SC).

64 *Kundan Sugar Mills v Ziya Uddin* (1960) 1 LLJ 266 [LNIND 1960 SC 31] (SC), per Subba Rao J.

65 *Obeetee Pvt Ltd, Mirzapur v State of UP* 1986 Lab IC 829, 832-33 (All), per BD Agarwal J.

66 *Automotive Manufactures Ltd v Nandlal P Vakharia* 1977 Lab IC 1188 [LNIND 1976 GUJ 27] (Guj) (DB), per Thakkar J.

67 *Caravan Goods Carriers Pvt Ltd v LC* (1977) 2 LLJ 199, 201 (Mad), per Mohan J.

68 *Boots Pure Drug Co (I) Ltd v KC Bastian* (1977) 2 LLJ 113, 115 (Ker) (DB), per Govindan Nair CJ.

69 *Mgmt of Central Fisheries Ltd v LC* 1975 Lab IC 634 -35 (Mad) (DB), per Ramaprasada Rao J.

70 *Madhuband Colliery Ltd v Workmen* (1966) 1 LLJ 738 [LNIND 1965 SC 303] (SC), per Ramaswami J.

71 *Dr KSR Datta v TTD* 1989 Lab IC 648 (AP), per MN Rao J.

72 *New India Flour Mills v Sixth Industrial Tribunal* (1963) 1 LLJ 745, 750 (Cal), per Banerjee J.

73 *First Flight Couriers Ltd v KCCGE Union* (2001) 4 LLN 1221 (Kant), per Chinnappa J.

74 *BDK Process Controls (P) Ltd v BM Sangha* (2002) 1 LLN 288 (Kant), per Chandrasekharaiah J

75 *New India Flour Mills v Sixth IT* (1963) 1 LLJ 745, 750 (Cal), per Banerjee J.

76 *Pyarchand Kesarimal Porwal Bidi Factory v Onkar L Thenge* AIR 1970 SC 823 [LNIND 1968 SC 299], 825, per Shelat J.

77 *Transport Corpn of India Ltd v State of Maharashtra* 1993 Lab IC 507, 510 (Bom), per M Cazi J.

78 *Workmen of Hindustan Shipyard Pvt Ltd v IT* (1961) 2 LLJ 526, 531 (AP), per Jaganmohan Reddy J.

79 Section 9A. Infra.

80 *May & Baker (India) Ltd v Workmen* (1961) 2 LLJ 94 [LNIND 1961 SC 18], 96 (SC) : AIR 1967 SC 678 [LNIND 1961 SC 18]: (1961) 2 FLR 594, per Wanchoo J.

81 *Workmen of BOAC v British Overseas Airways Corpn* (1962) 1 LLJ 257 [LNIND 1962 SC 51] (SC), per Gajendragadkar J.

82 *Karamchand Thapar & Bros Ltd v Workmen* (1964) 1 LLJ 429 [LNIND 1963 SC 178] (SC), per Das Gupta J.

83 *Remington Rand of India Ltd v Workmen* (1967) 2 LLJ 866 [LNIND 1967 SC 226] (SC) : AIR 1968 SC 224 [LNIND 1967 SC 425]: [1968] 1 SCR 168, per Mitter J.

84 *Oil & Natural Gas Commission v The Workmen* (1973) 1 LLJ 18 [LNIND 1972 SC 470] (SC) : AIR 1973 SC 968 [LNIND 1972 SC 470]: (1973) 3 SCC 535 [LNIND 1972 SC 470] : 1973 IC 233, per Dua J.

85 *Pfizer Pvt Ltd, Bombay v Workmen* (1963) 1 LLJ 543 [LNIND 1962 SC 400], 551-52 (SC) : AIR 1963 SC 1103 [LNIND 1962 SC 400]: [1963] Supp (2) SCR 627, per Gajendragadkar J.

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88 *Brooke Bond (India) Pvt Ltd v Workmen* (1963) 1 LLJ 256 [LNIND 1962 SC 251] (SC), per Gajendragadkar J.

89 *Workmen of Hindustan Lever Ltd v Mgmt of Hindustan Lever Ltd* 1984 Lab IC 1573, 1577 (SC) : (1984) 4 SCC 392 [LNIND 1984 SC 235] : [1985] 1 SCR 641 [LNIND 1984 SC 235], per Desai J.

90 *All India RB Employees' Assn v RBI* (1965) 2 LLJ 175 [LNIND 1965 SC 146], 196 (SC), per Hidayatullah J.

91 *Brooke Bond (India) Pvt Ltd v Workmen* (1966) 1 LLJ 402 [LNIND 1965 SC 287] (SC), per Wanchoo J.

92 *Hindustan Lever Ltd v Workmen* (1974) 1 LLJ 94 [LNIND 1973 SC 307] (SC), per Dwivedi J.

93 *Brooke Bond (India) Pvt Ltd v Workmen* (1963) 1 LLJ 256 [LNIND 1962 SC 251]-57 (SC), per Gajendragadkar J.

94 *Workmen of Williamson Magor & Co Ltd v Mgmt* (1982) 1 LLJ 33 [LNIND 1981 SC 452], 38 (SC), per Baharul Islam J.

95 *Ajudhiya SMM Sabha v Ajudhiya Sugar Mills* 1983 Lab IC (NOC) 47 (All), per TS Misra J.

96 *Anand S Misra v Indian Turpentine & Rosin Co* 1977 Lab IC 584, 587 (All) (DB), per Yashoda Nandan J.

97 *River Navigation Co Ltd v Workmen* CA No 691 &692 (1967) (SC), per Subba Rao CJI.

98 *Hindustan LM Sabha v Hindustan Lever Ltd* 1990 Lab IC 950, 978 (Bom) (DB), per Sawant J.

99 *Workmen employed by Hindustan Lever Ltd v Mgmt* 1984 Lab IC 1573, 1575 (SC), per Desai J.

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2 *Brooke Bond (India) Ltd v Workmen* (1963) 1 LLJ 256 [LNIND 1962 SC 251]-57 (SC), per Gajendragadkar J.

3 *Hindustan Lever Ltd v Workmen* (1974) 1 LLJ 94 [LNIND 1973 SC 307] (SC) : AIR 1974 SC 17 [LNIND 1973 SC 307]: (1974) 3 SCC 510 [LNIND 1973 SC 307], per Dwivedi J.

4 *LH Sugar Factories & Oil Mills Pvt Ltd v State of UP* (1961) 1 LLJ 686 (All), per SS Dhavan J.

5 *Workmen of Williamson Magor & Co Ltd v Mgmt* (1982) 1 LLJ 33 [LNIND 1981 SC 452], 38 (SC), per Baharul Islam J.

6 *Brooke Bond (India) Pvt Ltd v Workmen* (1966) 1 LLJ 402 [LNIND 1965 SC 287] (SC), per Wanchoo J.

7 *Shyam Lalli Bir Singh* 1973 Lab IC 957, 959 (Del), per Dalip Kapur J.

8 *Jamwant Singh v State of Uttar Pradesh* 1987 Lab IC 663, 659 (All), per VK Mehrotra J.

9 *Amarendra Kumar Das v Orissa Forest Development Corpn Ltd* 1996 Lab IC 1503, 1505-8 (Ori) (DB), per Dipak Misra J.

10 *Secretary, ESU of South India v PO, LC* (2001) 1 LLN 497 (Mad), per Dinakaran J.

11 *Mcleod & Co Ltd v Workmen* (1964) 1 LLJ 386 [LNIND 1963 SC 272], 388 (SC) : AIR 1964 SC 1449 [LNIND 1963 SC 272]: [1964] 5 SCR 568 [LNIND 1963 SC 272], per Gajendragadkar J.

12 *Brooke Bond (India) Pvt Ltd v Workmen* (1966) 1 LLJ 402 [LNIND 1965 SC 287] (SC), per Wanchoo J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER I Preliminary

S. 2. Definitions.—

Increments

A periodical increment in wages, being a normal incident of industrial employment, is a term of employment. Terms or conditions relating to increments may be implied or expressed in the contract of employment, or provided for in the rules of service or the Standing Orders of the establishment, or they may be provided for in a 'settlement' or an industrial award. A dispute relating to an increment in wages, will fall within the ambit of item No 1 in the Third Schedule to the Act. Where the dispute relating to the introduction of a scheme of increments is referred to an industrial tribunal for adjudication, the tribunal has to apply the same principles as it would apply for a construction or revision of wages. In other words, the principles of the financial capacity of the employer and the region-cum-industry basis, will have to be borne in mind while awarding any incremental scales in the wages. Increments in wages cannot, therefore, be awarded unless the financial capacity of the employer is properly ascertained and before the result of the impact of such increments in the future, is judged.[13] But once it is found that the employer has the necessary financial capacity to sustain the burden of increments, the award of an annual increment is held to be a normal rule. The scales of increments fixed by the employer, by a settlement or by an award, cannot be stopped, unless it is proved that the employer is incapable of bearing the financial burden of such increments.[14] The increments, however, are subject to the efficiency bar in the incremental scales.[15]

The employer has the right to withhold the increments of a workman as a measure of punishment or for proved inefficiency or any act of misconduct.[16] But such punishment can be inflicted on a compliance with the procedural rules of natural justice and in a *bona fide* exercise of the disciplinary power of the employer. However, the increment that can be stopped, can only be the one which has fallen due since the workman has been found guilty, in a proper departmental inquiry. The increment which had already accrued to the workman, before his being found guilty, cannot be withheld retrospectively.[17] A stoppage of increments, in contravention of s 33(1) of the Act, shall also be illegal.[18] Generally, annual increments in the wages of piece-rated workers, are not provided, as these workers are paid by the work which they do, though rates fixed for such payment might legitimately be increased in proper cases. In *Praga Industries*, in view of the peculiar circumstances of the case, the award of the labour court, granting four per cent interim increase in the wage-rates of the piece rated workers, with the annual increments at the same rate, till the wage rate reached a particular level, was held justified with the modification that the future annual increments at four per cent should not be granted to the piece-rated workers, until all the concerned workmen were classified and their scales introduced.[19]

Fringe Benefits

Traditionally, the obligation of an employer to the workmen, was considered complete with the payment of the basic wage-*viz*-the wage for each unit of time spent on the job or each unit of work completed. With increasing industrialisation, rising prices, rising incomes and other historical vicissitudes, the interests of the workmen in compensation have considerably widened, so as to include more than the basic wage payment, and consequently, the employer's liability to provide supplemental items of compensation, has increased. Such supplemental items of compensation have generally come to be known as 'fringe benefits'. It is a term embracing a variety of employees' benefits, paid by the employers and supplementing the workers' basic wage or salary'. There is no universally accepted group of practices embraced by the

term 'fringe benefits'. Broadly speaking, a 'fringe benefit' has to meet a twofold test, *viz*, it must provide a specific benefit to an employee and it must represent a cost to the employer.[20] Various types of allowances, benefits and amenities are comprehended in the concept of 'fringe benefits'. Some such benefits are directly financed by the employer, while some are paid to the workmen, indirectly. The benefit of group insurance falls in the former category, while certain types of allowances fall in the latter. In India, there are various types of 'fringe benefits', given by various employers or industries, in various regions and it is impossible to deal with them all. Some typical types of such benefits are being discussed as illustrative cases, under the following heads:

Leave and Holidays

There is a fundamental distinction between leave and holidays. Holidays are off-days, granted by the employer to the workmen, either voluntarily or compulsorily, under the force of law. On a holiday, the entire business is closed and no one works, while leave facilities deal with leave for individual workers, while the business as a whole is running. In other words, on leave, a workman is entitled to absent himself from duty only with the leave of his employer, for such period of time as the employer may allow or as the rules and conditions of the employment may permit.[21] Holidays are always with pay, while leave may be with or without pay. Section 52 of the Factories Act 1948 requires that every week, workmen should have at least one day as a holiday, either on Sunday or on any other day. Therefore, salary paid to a workman by week or month, includes the salary paid by way of holiday pay, in respect of Sundays and other declared holidays.[22]Further, from item 4 in Sch 3 to the Act, it is clear that holidays stand on a different footing altogether from leave with wages.[23] Thus, 'leave facilities' would neither include 'holidays', nor would 'holidays' be incidental to a dispute regarding leave. Hence, a reference with respect to 'leave facilities', cannot be construed to mean or include 'holidays'.

Leave

Leave with wages, with reduced wages and without wages in certain contingencies, is one of the terms of employment or conditions of labour of the industrial workmen, which occasionally gives rise to industrial disputes. The development of paid leave practices, consisting largely of paid leave and paid holidays, reflects what might be called 'a quest for leisure'.[24] Various enactments have made provisions for leave with wages, for the commercial as well as industrial workmen. For instance, s 79 of the Factories Act, makes provisions for an annual leave with wages. The earned leave provided for in s 79 of the Factories Act, or in other analogous provisions, is the minimum statutory leave to which employees are entitled. The employer or industrial adjudication may provide for additional earned leave to the workmen.

The ultimate object of industrial adjudication is to help the growth and progress of the national economy and it is with that ultimate object in view, that industrial disputes are settled by industrial adjudication, on principles of fair-play and justice. On the basis of these principles, industrial adjudication has made reasonable provisions for leave in respect of workmen, who may not strictly fall within the purview of the Factories Act or the Shops and Commercial Establishment Acts or any other analogous Act.[25] In the words of Das Gupta J, *emphasis in the country should be more on increased production, the absence from work should not be unduly encouraged*.[26] In *Alembic Chemical Works*, the industrial tribunal fixed the quantum of privilege and sick leave for the clerical staff of a manufacturing concern, on a scale more liberal than the one in force for the operators of the same concern and also made directions regarding the accumulation of such leave. The quantum of leave so fixed by the award, was larger than the quantum of leave prescribed by the provisions of s 79 of the Factories Act. In appeal, Gajendragadkar J held that the practice prevailing in the comparable concerns and the trend of industrial awards, both seemed to show that a distinction is generally made between two categories of employees, *viz*, the clerical staff and the operators. Since such distinction was perfectly justifiable, no question of discrimination could arise. It was further observed that in appropriate cases, the tribunal can fix the quantum of leave on a scale more liberal than the one provided by s 79 of the Factories Act. These are matters primarily for the industrial tribunal to consider and decide, as it is more familiar with the trends prevailing in comparable concerns and in deciding what would be a reasonable provision for the privilege leave or sick leave. The tribunal has to take into account all the relevant factors and unless it is shown that the leave rules fixed by an award cannot be sustained on the above considerations or on any reasonable grounds, or they make a violent departure from the prevailing practice or trend, the award cannot be interfered with. The learned judge further observed that, in matters of leave, either in the form of a privilege leave or a sick leave, tribunals should not ignore the consideration that unduly generous or liberal leave provisions would affect production and obviously, the production of essential commodities is in the interests not only of the employers and the employees, but also of the general community.[27]

In *Rai Bahadur Dewan Badri Das*, the workmen in the press section of the tribune, other than the line-operators, were not entitled to any leave, but were only entitled to claim 30 days wages, plus dearness allowance, if they worked for 11 months. Later, the employer modified the leave rule under which the workmen in service on 1 July 1956, were given the benefit of a 30 days' leave and the workmen joining the service after that date, were given leave in accordance with the provisions of s 79 of the Factories Act 1948. The workmen of the press section, therefore, demanded leave facilities, irrespective of the date of their joining the service. The tribunal directed that all the workmen in the press section should be

given the same quantum of leave, *viz*, 30 days leave with wages, irrespective of the question as to whether they took up employment after 1 July 1956 or before that date. In view of the fact that the different provisions with respect to leave in the same concern, when other terms and conditions of service were the same, in respect of both the categories of employees, would lead to dissatisfaction and frustration amongst the new employees, the Supreme Court held that it was not right that there should be such discrimination and affirmed the award.[28]

In *Mohammed & Sons*, the tribunal provided for a ten days' paid casual leave per year, while there was none previously. The Supreme Court affirmed the award, because, the increased burden on the employer by the institution of the ten days' paid casual leave, along with eight festival holidays, resulted in the increase of wages to the extent of 20 per cent, hence, this factor was taken into consideration in fixing the wage-structure for the employees.[29] In *Indian Oxygen*, the tribunal directed that the union representatives should be allowed special leave to attend law courts for matters connected with the workers and the management, to attend to annual conventions of their federation, to attend executive committee meetings of the union federation, and conventions of the central organisation, ie, the INTUC. According to the tribunal, such facilities to conduct the administration of the union, would be in the interest of a proper growth of the trade union movement and the promotion of harmony in industrial relations, as there would be a lesser possibility of outside elements establishing their hold on their union. In appeal, the Supreme Court noticed that the company had been allowing union representatives to attend conciliation and adjudication proceedings with full pay and observed that this was fair. On facts, the court held that it the leave granted by the company with full pay was fair and even liberal. The court held that the tribunal had not taken into account the adverse effect on production, if further absenteeism was allowed. It was, therefore, held that the tribunal was not justified in directing the company to grant the special leave demanded by the union. Shelat J said:

> Industrial adjudication ... cannot and should not ignore the claims of social justice, a concept based on socio-economic equality and which endeavors to resolve the conflicting claims of the employers and the employees, by finding not a one-sided, but a fair and just solution. A demand for special leave has, however, nothing to do with any disparities or inequalities, social or economic. On the other hand, too much of absenteeism harms both the employers and the employees, inasmuch as it saps industrial economy.[30]

In *UP Electric Supply*, the court set aside the award of the industrial tribunal, directing the employer company to pay wages for 30 days for the earned leave not enjoyed by the workmen before the closure of its undertaking, as no such compensation was statutorily payable. So long as the company was carrying on the business, it was obliged to give the facility of the earned leave to its workmen. However, after the closure of its business, the company could obviously, not give any earned leave to those workmen, nor could the workmen claim any compensation for not availing themselves of the leave. In the absence of any provision in the statute, governing the right to compensation for earned leave not availed of by the workmen before a closure or transfer of an undertaking, no compensation was payable.[31]

In *Otis Elevators*, the workmen of the Delhi establishment of the company, claimed that all its employees should be entitled to a 30 days' paid privilege leave for every completed year of service, with a right to accumulate the same up to 90 days and further claimed that the leave should be given in at least, three instalments, if desired by the employees and may be prefixed or suffixed to Sundays and holidays. The tribunal dealt with the claims of the staff and of the hourly rated employees, under two different heads. So far as the staff employed in the company was concerned, the tribunal, upon reference to the provisions of the Delhi Shops and Establishment Act and other material on record, directed that the privilege leave allowable to the staff working in the Delhi office will be the same as that obtaining in Bombay, to its office staff. Regarding the hourly rated workmen at Delhi, the tribunal took into account the practice obtaining at the Bombay office of the company, regarding such workmen and applied the same to the hourly rated workmen at Delhi, on the ground that it was reasonable. These directions were impugned by the workmen in Delhi, in appeal before the Supreme Court, on the ground that they made a distinction in the quantum of leave granted to the two sets of workmen employed in the same establishment, namely, one method of leave applied to the staff and another, to the hourly rated workmen, which was contrary to the uniform practice that had been adopted by the company itself, at Delhi, to all its employees, as was clear from the evidence on record. But, in the circumstances of the case, the court observed that if the practice now in force in the Bombay office, is applied, the quantum of the annual leave to the daily-rated workmen in the Delhi office, will have to be worked out on a basis slightly different from the one adopted by the tribunal. Consequently, the court modified the directions of the tribunal, with respect to the hourly rated workmen in Delhi, entitling them to an annual leave with wages, in a calendar year, in the same manner as was available to the hourly rated workmen in the field, in the Bombay office, in accordance with the prevailing settlement.[32]

Region-cum-Industry basis for Fixing Leave and Holidays

It is well-known that both legislation and industrial adjudication, seek to attain similarity or uniformity in the terms of service in the same industry, existing in the same region, as far as it may be practicable or possible, without doing injustice

or harm to any particular employer or a group of employers. Generally, in the matter of providing leave rules, industrial adjudication prefers to have the same conditions of service in the same industry, situated in the same region.[33] In *Gramophone Co*, the company's rules provided for casual leave for 15 days and privilege leave for 21 days in the year. In addition to the privilege leave, the company also used to grant sick leave for one month, on full pay and for two months, on half pay, per year, which could be accumulated up to 42 days, in accordance with the provisions of the Bombay Shops and Establishments Act 1948. Casual leave, however could not be accumulated. The tribunal increased the privilege leave to 30 days per year, subject to an accumulation of up to 42 days. In appeal, the Supreme Court, on a comparison of the total casual leave and privilege leave allowed in the various comparable concerns in the region, found that the total of privilege leave and casual leave as provided by the award of the tribunal, was higher than in the other concerns, though in some other concerns, the accumulation allowed of the privilege leave, was higher than that of the company. For instance, in some concerns, an accumulation of privilege leave was allowed for more than 42 days, in some concerns it was 56 days and in others 63 days. In some other concerns, an privilege leave was allowed for 28 days per year. In view of the varying patterns prevalent in the comparable concerns, regarding privilege leave, casual leave, and sick leave, the court did not feel inclined to interfere with the award of the tribunal.[34] In *Indian Oxygen*, the industrial tribunal directed that the workmen should get 15 days leave with full pay and 30 days leave with half pay, as medical leave during the year and accumulation should be allowed to the extent of 45 days with full pay or 90 days on half pay. It further directed that the monthly-rated staff of the company, working in the office of the factory, should get 30 days in a year, which could be accumulated to the extent of 90 days in the case of both the categories. Comparing this award with the pattern in the comparable concerns in the same area (Jamshedpur city), the Supreme Court set aside the award in respect of the annual leave and directed that the existing leave, ie, 21 days, should continue and it could be accumulated for 63 days, ie, for three leave periods. However, the direction with respect to medical leave was affirmed, as it was in consonance with other comparable concerns in the region.[35]

In *Buckingham & Carnatic*, in allowing the claim of the workmen regarding annual leave and casual leave, the tribunal compared the establishment of the employer company, which was in the city of Madras, with various textile mills in Bangalore, Bombay and Hyderabad, while accepting the position that Madura Mills was a unit comparable with the Madras establishment of the company. The Supreme Court affirmed the direction that the workmen should be entitled to get wages and dearness allowance when they availed themselves of the specified casual leave. But dealing with the casual leave and the annual leave, the court said that though normally, it does not interfere with the directions given by the industrial adjudicators in such matters, nor meticulously calculates as to what would be the proper number of days that could be granted as leave, in view of the fact that in Madura Mills, the workmen who had put in over five years of service, were entitled to avail themselves of only a period of 33 days as casual leave and privilege leave, it held that after granting 15 days as casual leave to the workmen, they would be eligible only for 18 days as privilege leave with pay and dearness allowance. In the absence of any valid reasons given by the tribunal, it was held that the quantum of leave that could be reasonably claimed by the workmen as annual or privilege leave, could only be 18 days, as against 25 days as fixed by the tribunal and in such a case, the workmen will be getting a total number of 33 days as privilege leave and casual leave, as was available in Madura Mills.[36] In *Dalmia Cement*, dealing with casual leave provided by s 22(1)(b) of the Delhi Shops and Establishments Act 1954 the Supreme Court observed that the pre-emptory direction of the legislature, fixing a maximum of 12 days of total leave for sickness or casual leave, could not be disregarded by the tribunal and held that the award of the tribunal, fixing casual and sick leave at more than the statutory requirement, was illegal.[37]

In *May and Baker*, again dealing with the same provision, the court observed that it is not open to the tribunal to allow accumulation of leave up to 12 weeks, as against the statutory maximum fixed at 30 days. The award was, therefore, accordingly modified and the accumulation of privilege leave was allowed for up to 30 days, as provided by the statute.[38] In *Cinema Theatres*, while following the decision in *Dalmia Cement*, the court went a step further and said that leave cannot be fixed in excess of the maximum fixed by the statute, even on the concession of the employer.[39] In *Alembic Chemical Works*, interpreting s 79 of the Factories Act 1948, the court held that, on the construction of the language of the section, the said provision provided for the minimum, rather than for the maximum leave which may be awarded to the workmen. On this construction, the court upheld the award of the tribunal, fixing the quantum of leave at a higher number than the one prescribed under that section.[40] In *Calcutta Insurance*, the tribunal awarded leave to the employees, in excess of the limits prescribed by s 11 of the West Bengal Shops and Establishments Act, which was more akin to s 79 of the Factories Act than to s 22 of the Delhi Shops Establishments Act 1954. In appeal, the Supreme Court repelled the contention on behalf of the employer, that the tribunal could not direct that the employees should have leave in excess of the limit specified in the West Bengal Shops and Establishments Act 1963.[41] Similarly, in *Remington Rand*, on a construction of ss 14 and 15 of the Mysore Shops and Establishments Act, the Supreme Court affirmed the award of the tribunal, fixing leave in excess of the limits prescribed by the statute.[42]

Sick Leave

Sickness is a serious misfortune to a workman, for it not only prevents him from earning his normal wages, but is a drain

on his meager financial resources by way of additional expenditure on food, nursing and visits to the medical center etc. In awarding sickness leave, the adjudicator has to take into account the relevant factors. The 'region-cum-industry basis' is suitable in the adjudication of sick leave cases.[43] In *Karam Chand Thapar*, the Supreme Court set aside the direction of the industrial tribunal to the effect that, in case of a protracted illness, an employee who had served the company for less than five years, should be allowed leave without pay, for upto six months, as it recognised the difficulty of the employer, that even though such leave would be without pay, for a period of six months, the employer would not be able to engage new men on a permanent basis, in place of such employees.[44] In *Hindustan Times*, the court held that the sick leave and casual leave permissible under the provisions of the Delhi Shops and Establishments Act 1954, should be awarded to all the workmen, as it would not be right to have two separate leave rules for the two classes of workmen, one to whom the Delhi Shops and Establishment Act 1954 applies and the other to whom it does not.[45]

In *Associated Cement Companies*, the industrial tribunal had directed that the employer shall not insist on the production of a medical certificate for obtaining sick leave, when the illness of a workman was of the duration of a day and expressed the hope that the workman would not abuse this concession and that it would be open to the employer to take disciplinary action against the workman, when there was satisfactory proof that the concession had been abused. This direction of the tribunal was challenged by the employer company, before the Supreme Court, on the ground that if, for an illness of the duration of a day, no medical certificate was insisted upon, it will be open to a workman to avail of all the 15 days' sick leave, without producing any medical certificate, by taking sick leave for a day, at intervals. It was also pointed out that there was a provision for a 15 days' casual leave in the employer company and if a workman was indisposed and could not attend to work for that reason, it was open to him to take a casual leave, though sick leave with full pay could be availed of only in case of real sickness and that there was nothing wrong in the company insisting upon a medical certificate for obtaining a sick leave, even if it be for a day and that to dispense with the requirement of a medical certificate would lead to grave abuses. But the court did not accept this contention, just as the tribunal, on a consideration of all the materials placed before it, having regard to the overall picture, had arrived at its conclusion. Speaking for the court, Mathew J, who delivered the opinion of the court, observed:

> Generally speaking, no workman will get himself treated by a doctor on the very first day of an illness. For minor ailments, no workman would go to a doctor for treatment and it would be a great hardship to the workman if a medical certificate from a qualified doctor is insisted upon for sick leave, for a day's illness. From a practical point of view, we do not think that it would be expedient to insist that a workman should produce a medical certificate from a qualified doctor, to avail himself of sick leave for a day, on the ground of illness. We do not say that the apprehension entertained by the appellant, that the workmen would abuse the provision for sick leave with full pay, in some cases at least, if no medical certificate is insisted upon for the leave, even if the duration of the illness is for a day, is unfounded. But, at the same time, one has to consider the practical inconvenience and the hardship to the workmen if a medical certificate is insisted upon for availing of sick leave for illness of the duration of a day.[46]

The court does not appear to have appreciated the difference between the purpose of casual leave and sick leave. Casual leave is meant to cover sudden and emergent situations, which essentially, should include sudden illnesses. In cases of sudden illness, therefore, a workman may take casual leave and then if the illness prolongs, he may take sick leave, on being medically certified to be sick. The purpose of sick leave is to allow a sick workman, time for rest and treatment. It would, therefore, be proper that before availing himself of this type of leave, the workman should be medically certified sick. In such a situation, the possibility of the abuse of sick leave, as apprehended by the employer, would be obviated. But the risk of an abuse of this type of leave is inherent in the view taken by the court. In *Hindustan Times*, the issue related to the absence of any provision for sick leave in the ESI Act 1948 was dealt with. section 46 merely provides for a periodical treatment of an insured person, in case of his sickness, if certified by a duly appointed medical practitioner. Sections 47, 48 and 49 deal with the eligibility of workmen for sickness benefits and the extent of the benefit that may be granted. Section 56 of the Act provides for medical benefits to the insured workmen and in certain cases, to the members of their families. Das Gupta J held that the provisions of this Act do not bar a demand for sick leave by the workmen, as the first proviso to s 49 of the Act states that a person qualified to claim a sickness benefit, shall not be entitled to the benefit of an initial waiting period of two days, except in the case of a spell of sickness, following, at an interval of not more than 15 days, the spell of sickness for which benefit was last paid. It is, therefore, apparent, that the Act does not cover all the contingencies of sickness.[47]Hence, the adjudication of a dispute relating to sickness leave is permissible under the Industrial Disputes Act.[48] In *Alembic Glass*, Singhal J observed that from the scheme of the Act, it appears that the benefits admissible under the Act, cannot be said to cover a workman's demand for sick leave. In other words, the provisions for the benefits to an insured worker, in case of sickness (sickness benefit), of medical treatment, of attendance to him or the members of his family, do not constitute a substitute for the workman's right to get leave on full pay on the ground of sickness.[49]

A provision for the grant of leave is generally made in the Standing Orders or the service rules of industrial establishments. Normally, when leave has accrued to an employee, it is his right to get it. But from what time leave should be sanctioned, has to be determined according to the exigencies of the business of the employer. Unless a leave has been sanctioned, the

employee cannot absent himself from work. Leave cannot be sanctioned as and when it accrues or is applied for, irrespective of any consideration of the business necessities and exigencies. It is apt to dislocate and even paralyse the work of the employer, if, for instance, on a particular day, all the workmen to whom privilege leave has accrued, apply for such leave. Unless leave is applied for, the question of its sanction would not arise. If a workman remains absent from work, without leave having been sanctioned to him, or overstays the sanctioned leave, he exposes himself to disciplinary action. If a workman knows that he has been granted leave up to a particular date and remains absent beyond that date, his absence beyond that date will not be covered by the leave.[50] Judicial dicta have gone to the extent to say that even if a workman could not apply for leave on account of his having been arrested by the police, it may be unfortunate for him, but it would be unjust to hold in such a case, that the employer must always give leave when an application for a leave is made, because if a large number of workmen are arrested by the authorities in charge of the law and order, by reason of their questionable activities in connection with a labour dispute, or otherwise, the work of the employer will be paralysed, if he is forced to give leave to all of the workmen, for a more or less indefinite period. Such a principle will not be just, nor will it facilitate harmony between labour and capital, or ensure a normal flow of production. It is immaterial whether the charges on which the workmen were arrested by the police, were ultimately proved or not, in a court of law; the employer has to carry on his work and in certain cases, may find it difficult to carry on his business if a large number of workmen are absent. It is a matter of the discretion of the employer, to grant leave or not. If, however, the workmen are arrested at the instance of the employer, for the purpose of victimisation and in order to get rid of them on the ostensible pretext of a continued absence, the position will be different, as it will then be a colourable or *mala fide* exercise of power under the relevant Standing Order.[51]

But a single judge of the Delhi High Court has gone to the extent to say that if the absence of a workman from work is due to any cause beyond his control, it would not be reasonable for the management to decline leave to him, to the 'extent necessary'. The refusal to grant leave in such circumstances would be unreasonable and *mala fide*, justifying interference with the order of termination of the service of the workman on the ground of absenting without leave. But this cannot be treated as a general proposition of the law.[52] A corollary to the proposition that leave must always be sanctioned before it can be availed of, is, whether the leave once granted can be cancelled. It is a managerial function to grant leave at a particular time. Likewise, if the exigencies of the business of the employer require it, the leave can also be cancelled. But in case the cancellation of the leave is contested by the workmen, the employer has to make out a strong case to justify the action, based on the non-compliance by the workmen, with the direction cancelling the leave. For instance, obtaining leave on a false pretext, would be a valid justification to cancel the leave, on finding out the true state of affairs. This point is illustrated in *Binny*, in which the workman obtained leave from the employer on the false pretext that he wanted to go to his native place, to settle a land dispute. But, in fact, he participated in a hunger strike called by a trade union, before the Government secretariat. On coming to know of this, the employer company cancelled the leave and directed the workman to resume his duty forthwith. On his failure to comply with the direction, the company took the stand that the workman had left the service, terminating his contract under the relevant Standing Order applicable to the establishment, by absenting himself without leave, for eight consecutive working days. The tribunal held that the employer had no right to cancel the leave once granted and, on this view of the matter, ordered reinstatement of the workman with back wages. The Supreme Court quashed the order of the tribunal and restored the action taken by the employer.[53] The Bombay High Court held that if the service conditions or the Standing Orders of an industrial establishment provide that at the time of his retirement, a workman shall be entitled to the balance of the leave to his credit, he can claim money compensation in terms of the salary, for the leave to his credit, after his retirement.[54] But where an establishment has been closed or transferred, the claim for compensation for the unavailed earned leave, cannot survive, as such a claim is not warranted by any statute. The facility of enjoying leave can be given to the workman, by an employer, only so long as he is carrying on his business.[55] The question as to whether an encashment of leave was allowed from a particular year and in a particular manner, is a question of fact, which cannot be interfered with, in a judicial review.[56]

Holidays

Various states have fixed the number of holidays under the Negotiable Instruments Act 1881. Some of such holidays are national holidays, some are sectional holidays. The holidays declared under the Negotiable Instruments Act 1881 are usually applicable to Government institutions only and they have a certain financial statutory implication, envisaged by the Act itself. Commercial establishments and industrial undertakings do not usually adopt these holidays.[57] Employers generally fix the number of holidays in their Standing Orders or the service conditions. In *Associated Cement Staff Union*, the Supreme Court held that the number of holidays to be given, has to be fixed so as to be consistent with the change in the concept of the country's economic position and the need for more production. On this view of the matter, the number of holidays fixed by the tribunal at 21 was reduced by Supreme Court, to 16, as 21 holidays were held to be too many.[58] Apart from the national holidays and festival holidays, there are weekly holidays. Some employers do not grant paid weekly holidays to their employees. But paid holidays should be the goal of industrial adjudication, bearing in mind, however, the financial burden upon the employer caused due to such paid holidays.[59] The Supreme Court accepted the recommendation made by NCL-I to the effect that every employee shall be allowed in a calendar year three paid national

holidays; *viz*, 26th January (Republic Day), 15th August (Independence Day) and 2nd October (Mahatma Gandhi's Birth Day) and five paid festival holidays, as may be fixed by the appropriate Government in consultation with the representatives of employers and employees.[60]

A reduction in the number of holidays would be a step in the direction of increasing the continuous productivity.[61] In *Pfizer*, the tribunal reduced the number of public holidays from 28 (as under the Negotiable Instruments Act 1881) to 16, and this was upheld by the Supreme Court.[62] In *National Tobacco*, the claim of the workmen was only in respect of the Visvakarama Puja day, which, according to the demand, should be a paid holiday for the daily-rated and weekly-rated workmen. The existing arrangement was that if such workmen wanted to enjoy this holiday, they were allowed to do so, but without wages. However, the Vishvakarma Puja day was not a holiday for workmen who were paid at the monthly rate. The tribunal rejected the claim on the ground that there was no justification for making an exception in the case of daily-rated and weekly-rated workmen, in respect of the holiday. Nor was it proved before the tribunal that other industrial concerns in the region were allowing Vishvakarma Puja day as a paid holiday for the daily-rated and weekly-rated workmen. The direction of the tribunal was affirmed by the Supreme Court.[63] In *Bhiwani Textile*, the industrial dispute was as to whether the workmen could be called upon to work on Sundays, in batches, and if so, would they be entitled to any extra remuneration for such work. From the evidence before the tribunal, it appeared that in other textile mills in the same region, Sunday was a working day and the workmen were not paid any extra remuneration for such work on Sundays. Though the tribunal held that the workmen could be called upon to work on Sundays, it directed the management to pay a 20 per cent extra remuneration, over and above the consolidated wages, for such work on Sundays. In appeal, the Supreme Court set aside the direction and observed that the tribunal erred in not taking into consideration, two relevant factors, *viz*, the financial capacity of the employer to bear the extra burden and the practice prevailing in the industry in the region, and the factors taken into account by it, in awarding the extra payment to the workmen, were of much less importance.[64]

In *Federation of S&ME Industries*, it was held that the tribunal, in the circumstances of the case, was not justified in granting two additional days as festival holidays, departing from the original number of festival holidays granted by the industries.[65] In *Bijli Cotton Mills*, the Supreme Court emphasised the need for increasing production, particularly, in the matter of utility concerns and concerns that produce goods for essential services. In this context, it has been observed that there are too many public holidays in this country and, that when the need for industrial production is urgent and paramount, it may be advisable to reduce the number of such holidays in industrial concerns. In this case, the tribunal directed the employers to pay wages to each one of their daily-rated and piece-rated workmen, for seventeen festival holidays, besides the three national holidays. If the employers substituted festival holidays on a rest day, for that day, they shall pay double the wages. In appeal, the Supreme Court set aside the award and remanded the matter to the tribunal for fresh adjudication; as it had not taken into consideration the fact that the award of seventeen festival holidays would impose a very heavy additional burden on the establishment. Speaking for the court, Dua J, observed:

> Custom, practice and uniformity in the industry, without prejudicially affecting efficiency and increased production, are some of the relevant factors which have to be taken into account in determining the number of paid festival holidays per year. The question affects national economy and the present instance may well be cited in future, in deciding similar questions in other allied concerns in the region. The effect of such instances, therefore, does not remain confined only to the estab1 ishment concerned, but has its impact on other concerns as well. [66]

In *Hindustan Steel*, the demand of the workmen was that the ten holidays sanctioned by the certified Standing Orders of the company, should be increased to eleven, by the addition of May day as a compulsory national holiday. The relevant issue framed by the tribunal, in this connection, read:

> Whether the workmen had acquired the right through custom, usage, etc, to enjoy the May day 1970, as a national holiday, as defined in the certified Standing Orders of the company or as an additional paid holiday in excess of the number of paid holidays prescribed by the said Standing Orders. [67]

The tribunal held that the workmen had acquired a customary right to enjoy May day as a compulsory holiday and also as an additional paid holiday. In appeal, the Supreme Court held that the evidence on record did not show any custom in the matter of recognising May day as a compulsory holiday and set aside the award. In *Saxby and Farmer*,[68] at the instance of the employer company, the appropriate Government referred for adjudication the industrial dispute relating to a 'curtailment of unpaid festival holidays' on the ground that the company allowed nine festival unpaid holidays and the continuance of these holidays would not only entail a loss of wages to the workmen, but also a loss of production, which would prejudicially affect the country's economy. It was also asserted that the system of granting unpaid holidays was no longer being followed in the engineering industry. Moreover, other holidays enjoyed by the workmen of the establishment, along with the workmen of other similar units, were far in excess of what prevailed in other countries. This was contested

by the workmen, who took the position that the curtailment of the holidays would be in disregard of the principle and practice followed so far, in the matter of giving benefits to the industrial workmen. The main ground taken by the workmen was that, in the interests of industrial peace, production and better relations between the workmen and the management, the workmen should be kept contented and any attempt to curtail the existing benefits, according to the time honoured practice, would provoke discontent and labour unrest. The tribunal was impressed by the contention of the workmen, that they had enjoyed the facility of unpaid holidays for a long time and held that there was no good ground to cut down the number of festival holidays by curtailing the unpaid holidays, simply because the overall number of holidays was large. Setting aside the award of the tribunal, the Supreme Court discontinued the system of unpaid holidays and observed that there was no reason or justification for unpaid holidays not being curtailed in this case, particularly when the employer was carrying on a kind of work which required efficiency and increased production and the prosperity of the country depended more upon increased production and efficiency, than on enjoying holidays.

Wage Incentives or Production Bonus

The incentives given to the labour by their employers, for achieving higher productivity, are generally known as incentive bonus or production bonus. In other words, the incentive for increased production is generally known as 'production bonus'. Broadly, the basis of remuneration for work in an industry, is based on two fundamental arrangements, *viz*, (i) payment by time, and (ii) payment by output. In the former case, a worker is paid a predetermined amount for a specified unit of time, which may be an hour, a day, a week, or a month. Under this arrangement, there is no direct control on the amount of work done by the workers, except perhaps, to a certain extent, through supervision, so long as they are engaged on tasks specified by the employer. In the latter arrangement, the worker is remunerated according to his output or the output of the group to which he belongs. It may assume complex forms, such as 'differential piece work, wherein rates of remuneration per unit of output, may be either progressive or regressive. According to NCL-I:

> There are also other types of remuneration that are not directly dependent on production, like bonuses for regular attendance, length of service, quality of production and elimination of waste, all constituting an area of wage incentives.[69]

There are advantages in incentive payments. They serve a double purpose, *viz*, (i) to increase the earnings of workers, and (ii) to improve the efficiency of the unit, thus lowering costs and if properly executed, they may have an effect on prices in a manner which will benefit the community. But on the other hand, the use of a system of payment by results, accentuates the differences between the management and the unions. Such incentives provide additional remuneration for workers, as production proceeds from day to day. There is a wide variety of incentive systems in force in different parts of the world and various countries, for this purpose, have evolved various wage plans, worked out on various bases.[70] The main feature of all such production incentives or production bonuses is that its payment depends upon production and is in addition to the guarantee of the minimum wage. In effect, it is an incentive to higher production and is in the nature of an incentive wage. The name 'incentive bonus' or 'production bonus' indicates that it is given as a cash incentive, for a greater effort on the part of the labour,[71] for more production.

The first and second five year plans recommended the introduction of incentives to promote more efficient work in industries, with due safeguards to protect the interests of workers, through the guarantee of the minimum (fall-back) wage and protection against fatigue and undue speed up. The second plan further recommended that earnings beyond the minimum wage should be necessarily related to results and workers should be consulted before a system of payment by results was introduced in such an establishment. The third plan accentuated the need for higher productivity and reduction in the unit cost of production and put the responsibility on the management, to provide the most efficient equipment, correct conditions and methods of work, as well as adequate training and suitable psychological and material incentives for the workers. These recommendations do not appear to have been implemented, though certain individual employers or group of employers, have endeavoured to do their bit in this connection.[72] There is a base of standard, above which, extra payment is made for extra production, in addition to the basic wage. Such a plan typically guarantees time-wage up to the time represented by standard performance and gives workers a share in the savings represented by a superior performance. But whatever may be the nature of the plan, the payment in effect, is extra emoluments for extra effort put in by the workmen, over and above the standard that may be fixed. Therefore, all these plans are known as incentive wage plans and, generally speaking, have little to do with profits. This type of bonus was recognised by the Supreme Court in *Titaghur Paper Mills*, in which Wanchoo J observed:

> The extra payment depends not on extra profits, but on extra production. The extra payment calculated on the basis of extra production, is in a case like the present, where the payment is made after the annual production is known, in the nature of emoluments paid at the end of the year. Therefore, generally speaking, payment of production bonus is nothing more nor less than a payment of further emoluments, depending upon the production, as an incentive to the workmen to put in more than the standard

performance.[73]

In this case, referring to *Smith's Labour Law* where various plans prevalent in other countries, known as incentive wage plans, have been worked out on various bases, the court observed:

> The simplest of such plans is the straight piece-rate plan, where payment is made according to each piece produced, subject, in some cases, to a guaranteed minimum wage for so many hours' work. But the straight piece-rate system cannot work where the finished product is the result of the co-operative effort of a large number of workers, each doing a small part which contributes to the result. In such cases, production bonus by tonnage produced, as in this case, is given. There is a base or standard above which, extra payment is made for extra production, in addition to the basic wage ... But whatever may be the nature of the plan, the payment in effect, is extra emoluments for extra effort put in by workmen, over the standard that may be fixed ... The extra payment depends not on extra profits, but on extra production ... Therefore, generally speaking, payment of production bonus is nothing more or less than a payment of further emoluments, depending upon production, as an incentive to the workmen to put in more than the standard performance. Production bonus in this case also, is of this nature and is nothing more than additional emoluments paid as an incentive for higher production.[74]

In connection with the question as to whether there should be increased production in a particular concern, the court further observed that it is 'a matter to be determined entirely, by the employer and depends upon a consideration of so many complex factors, namely, the state of the market, the demand for the product, the range of prices, and so on. As to the question of whether a scheme for an incentive bonus should be introduced or not, is, therefore, entirely for the employer to decide. But the further question, as to whether the industrial adjudicators have jurisdiction to introduce a production bonus at all, was left undecided by the court. However, it was held that where there was a scheme of production bonus in existence, the tribunal would have jurisdiction, under the Industrial Disputes Act, to deal with it and to make suitable amendments or modifications to it, where necessary. From the point of view of economics, the employees in non-production departments, like the clerical and subordinate staff in an industry, are deemed to contribute towards the production and on this hypothesis, the scheme of incentive and production bonus should be extended to cover them.[75]

In a case where the management has introduced a scheme for incentive bonus, it is open to the tribunal to vary the terms of the scheme, if the circumstances of the case justify its doing so and the refix the rates of the incentive bonus, if it finds that the targets are too high or the rates are wholly incommensurate to the additional performance put in by the workman. Where necessary, the tribunal may, for the determination of technical matters, take assistance from persons who are familiar with the subject, by appointing them as accessories.[76] The payment of an incentive wage is a payment of further emoluments to the workmen, depending not upon extra profit, but on extra production, as an encouragement to put in more labour than normal incentive bonus or wage cannot be linked with the earning of profits, because profits depend upon many economic factors ruling at the time, for instance, there may be a slump in the market or a fall in the demand of finished goods or non-availability of raw materials and these and such other prevailing factors may affect the earning of profits, with which the workman who increased the output, is not concerned. Likewise, the vehicle drivers of an industrial establishment, partly on this principle and partly on the finding that they put in more than their standard performance, have been held to be entitled to the benefit of the incentive bonus scheme.[77] In this connection, in *Sone Valley* (supra), the court observed:

> It would of course, always be open to the legislature, to introduce any kind of bonus, not so far recognised by industrial law, evolved either by the tribunal or by this court. But that must rest on a solid foundation and express words must be used to that effect. Although it is not necessary to express any final view on the subject, we are inclined to think that apart from a legislation on incentive bonus for increase of production, irrespective of the question as to whether the industry was making profit or not, is one that must be introduced by the particular unit of industry. It would be for the management to fix that incentives should be given to different departments, to step up production. An industrial tribunal would not be justified in holding that merely because there had been an augmentation in the production, the labour would be entitled to make a claim to a bonus, because of such increase. Labour would undoubtedly be entitled to a revision of its wage scales, dearness allowance and other terms and conditions of service, as also profit bonus; but in the absence of any legislation or a scheme for incentive production, industrial tribunals would not be justified in laying down a scheme themselves.[78]

In this case, the workmen demanded a share in the incentive payment allowed by the Government, to the cement producers, claiming it to be an incentive bonus. The tribunal, on an examination of the special circumstances of the case, awarded that the demand of the workmen was justified. In appeal by special leave, the Supreme Court observed that, even if the central control order offered some inducement to the producers to step up their production, the terms thereof did not

entitle the tribunal to treat it as and by way of an incentive bonus, in which the workmen could claim a share. The Court observed that an industrial tribunal could only award that which the law allows. In the absence of any legislation on the subject and in the absence of a scheme for incentive payment, introduced by the management, in the particular facts and circumstances of the case, the court negatived the claim of the workmen. The NCL-I has suggested the following guidelines for the introduction of incentive schemes, which found general acceptance in the industry and labour:

(a) Employers and workers should formulate a simple incentive system at the unit level and implement it on some agreed basis, through collective bargaining. In every case, the introduction of the incentive schemes should be preceded by an agreement with the trade unions.

(b) In evolving wage incentive schemes, it should be ensured that these do not lead to rate-cutting. The worker's normal wages should be protected, where it is not possible for him, for circumstances beyond his control, to earn an incentive.

(c) Individual or group incentives can be framed to cover both direct and indirect groups of workers.

(d) An incentive scheme cannot be evolved without undertaking a work-study, with the co-operation of the workers. Nevertheless, it should always be open to the employers and the workers to evolve a scheme by agreement, or on any other acceptable basis.

(e) Efforts should be made to reduce time-rated categories to the minimum. This will ensure that all employees have an equal chance to increase their earnings, with the increase in productivity.

(f) Wage incentives should generally provide extra earnings only after a mutually agreed level of efficiency has been achieved.

(g) To ensure quality of production, incentive payments should be generally allowed only if the output has been approved on inspection by the management. Relevant norms in this connection should be laid down and made known to the workers.

(h) Incentive earnings should not fluctuate too much. This requires a certain degree of planning, so that material delays, machine-breakdowns, etc, are controlled.

(i) The scheme should itself safeguard adequately, the interest of the worker, if he is forced to remain idle due to circumstances entirely beyond his control, such as non-supply of raw materials, and machine-breakdown.

(j) Apart from financial incentives, non-financial incentives, like better security of employment, job satisfaction, and job status, have also a place in increasing productivity.[79]

In *Raza Buland Sugar*, the company had withdrawn its scheme for payment of incentive bonus, known as premium in the sugar industry, and in adjudicating on the dispute arising out of that, the tribunal effected certain modifications in the scheme. It held that the wage board had not recommended the payment of any particular kind of incentive in sugar the industry, hence, the standardisation by the wage board had nothing to do with the payment of an premium as an incentive for higher production. In appeal by special leave, in the circumstances of the case, the Supreme Court affirmed the award of the tribunal.[80] In *Unichem*, the tribunal suggested certain modifications to the originally existing scheme of incentive bonus, while not accepting most of the recommendations of the assessor appointed on the joint application of both the parties. But, since the tribunal did not have the necessary material for that purpose, before it, it was not possible to devise a scheme, calculated to afford protection to the incentive earned by a workman, at the raised base performance index. In the circumstance, the tribunal directed that a scheme should be worked out, if possible, by the consent of the parties, for the purpose of protecting the interests of the workmen, at the increased base performance index. In appeal, the Supreme Court observed that, though it would have been desirable for the tribunal to have actually evolved a scheme, in the circumstances of the case, the court could not do anything in the matter and the directions of the tribunal were affirmed.[81]

Puja Bonus and Customary Bonus

Puja bonus or customary bonus is quite distinct from the profit sharing bonus, which has now been codified in the Payment of Bonus Act 1965. Section 17(a) of the Act entitled an employer to deduct 'any puja bonus or other customary bonus' paid by him to an employee, in a particular accounting year, from the 'profit sharing' bonus payable to him, under that Act in the year but the Payment of Bonus Act provides no machinery for the qualification of Puja bonus or customary bonus, for the adjudication of which, different considerations arise. The puja bonus or other customary bonus is, therefore, to be adjudicated upon by the tribunal on a reference being made to it under s 10(1), read with item 5 of the Third Schedule of this Act. This has been made specifically clear by the Supreme Court in *Mumbai Kamgar Sabha*.[82] It may, however, not be irrelevant to point out that though the holding of the court in this case is correct, the process of its reasoning is rather arduous and prolix and sounds like an exercise in the rhetoric. Instead of adverting to the clear language of s 17 of the

Payment of Bonus Act, the court unnecessarily got ensnared into the cobwebs of empty phrases and 'the gravitational pull on judicial construction of pt 4 of the Constitution'.

Industrial adjudication has broadly treated puja bonus or customary bonus under two heads: (i) An implied contract between the employers and the employees, creating a term of employment, for the payment of bonus; or (ii) A customary and traditional payment, even though no implied agreement can be inferred. These two heads, on the face, appear to be distinct, but in practice, they overlap to a certain extent. Puja Bonus as an Implied Term of Contract: In the year 1949, there was a dispute between the Bengal Chambers of Commerce, Calcutta and its employees. The industrial tribunal which adjudicated upon the dispute, observed that *Durga Puja* was a national festival and it was customary to make presents to near and dear ones and to relatives at that time. As it was difficult for poorly paid employees to make savings out of this monthly incomes for this purpose, it had become traditional and customary in Bengal, for employers to make a monetary grant at the time of the *Puja.* The Bengal Chambers of Commerce had appreciated this position and had been granting a bonus equivalent to one month's pay, and the tribunal had been assured that there was no intention to discontinue it. In *Mahalaxmi Cotton Mills*, the labour appellate tribunal stated the following tests for determining that there was an implied term of employment, for the payment of bonus at the time of the annual *Durga Puja:*

1. The payment must have been unbroken;
2. It must have continued for a sufficiently long period;
3. The length of the period would depend upon the circumstances of each case and what may be a short period, not justifying an inference of an implied term of employment in one case, may be long enough in another; and
4. The circumstance in which the payment was made should be such as to exclude the ground that it was paid out of bounty.[83]

These tests were approved and applied by the Supreme Court in *Ispahani*.[84] In this case, a company, since its inception in 1934, had been paying one month's wages as *Puja* bonus every year, irrespective of its trading results. A new company was incorporated in 1947, which took over the trading rights and goodwill of the old company and also purchased its properties, assets and stock-in-trade. The new company carried on its business in the same manner, in the same premises, with the same set of workers, on the same remuneration and also continued the payment of one month's wages as *Puja* bonus, till the year 1952. As no bonus was paid in 1953, a dispute arose between the new company and its workmen, which was referred for adjudication, along with other matters. Since it was not established that the *Puja* bonus had been paid at a uniform rate of one month's wages, for a sufficiently long time of unbroken period, the industrial tribunal rejected the claim for a *Puja* bonus for 1953. But the labour appellate tribunal, in appeal, took the view that it had been proved that the *Puja* bonus had become a term of employment and the workmen were, therefore, entitled to a bonus at the rate of one month's wages, for the year 1953. In appeal, against the award of the labour appellate tribunal, the Supreme Court said that such a condition can be implied if it has existed over an unbroken and sufficiently long period, even in years of loss and not paid as a bounty, and it is not essential that it should have been paid at a uniform rate. In the circumstances of the case, it was held that there was an implied term of employment for the payment of the *Puja* bonus, at the rate of one month's wages in a year. The condition of payment at a uniform rate, discarded in this case, was adopted by the court in *Grahams Trading*, and it was further held that there can be a customary bonus, unconnected with a festival.[85] In *Ispahani Ltd*, Wanchoo J held that the question as to whether there exists an implied term of employment, is a mixed question of a fact and law and it is not a pure question of fact. The tribunal would, therefore, have jurisdiction to consider whether on the facts proved before it, it could draw an inference in law, that an implied term of employment for the grant of a *Puja* bonus has been established. If, on the facts proved before it, the tribunal commits an error of law, apparent on the face of the record, in drawing an inference that an implied term of employment for the grant of a *Puja* bonus has been established, such an error of law will be reviewable. With regard to the claim for puja bonus, the learned judge observed thus:

> The claim for a *Puja* bonus in Bengal, is based on either of two grounds. It may either be a matter of a implied agreement between the employers and the employees, creating a term of employment for the payment of the *Puja* bonus, or secondly, even though no implied agreement could be inferred, it may be payable as a customary bonus.[86]

Explaining *Isphani*, the court held that once it is proved that there was an implied condition of service to pay a bonus on a festival, some amount has to be paid under the said implied term. What the minimum would be in that behalf, must be decided as a question of fact.[87] The expression 'customary bonus' has not been defined in law. The dictionary meaning of the word 'customary', as in the *Oxford English Dictionary*, is 'usual, habitual, accustomed', etc, as also a 'commonly used practise'. However, what is customary, can become contractual as well. Therefore, the two expressions are not absolutely exclusive. Cases regarding customary bonus have often been treated as regarding festival bonus and such bonus has a

reference to a special occasion, like a festival, for example, the *Durga Puja* or *Kali Puja* in Bengal and *'Diwali'* in Western India—occasions which are generally utilised by employers, to reward the service of their employees.[88] Thus festival bonus or *Puja* bonus is not exactly synonymous with customary bonus. In *Grahams Trading Co*, the Supreme Court observed that when a question of customary and traditional bonus arises for adjudication, the considerations may be somewhat different from those applicable to a payment of *Puja* bonus as an implied term of employment. In this case, the court stated the following tests for determining the liability of the employer to pay customary or traditional bonus:

1. Whether the payment has been made over an unbroken series of years;
2. whether it has been for a sufficiently long period, though the length of the period might depend on the circumstances of each case; even so, the period may normally, have to be longer to justify an inference of a traditional and customary *Puja* bonus than may be the case for a *Puja* bonus based on an implied term of employment;
3. the circumstance that the payment depended upon the earning of profits, would have to be excluded and therefore, it must be shown that payment was made in the years of loss also;
4. in dealing with the question of custom, the fact that the payment was called ex-gratia by the employer, when it was made, would make no difference in this regard, because the proof of custom depends upon the effect of the relevant factors and it would not be materially affected by unilateral declarations of one party, when the said declarations are inconsistent with the course of conduct adopted by it; and
5. the payment must have been at a uniform rate throughout, to justify an inference that the payment at such and such rate had become customary and traditional in the particular concern.[89]

The court also pointed out that these tests were more stringent than those in the case of *Puja* bonus as an implied term, which need not be uniform, as pointed out in *Isphani's* case. But in *BN Elias*, the court pointed out that it would be difficult to introduce a customary payment of bonus between an employer and his employees, where the terms of service are governed by contract, express or implied, except where the bonus may be connected with a festival, whether a *Puja* in Bengal or some equally important festival in any other part of the country.[90] In *Jardine Henderson*, it was reiterated that customary bonus must always be connected with some festival.[91] Later, in *Tulsidas Khimji* (supra), a majority of the court clarified that the four so-called conditions laid down in *Grahams Trading Co*, are not really in the nature of conditions precedent, but are mere circumstances which have to be taken into account for coming to the conclusion as to whether or not a claim to the customary or traditional bonus has been made out. Hence, 'loss', substantial or otherwise, is not a *sine qua non* for the grant of a *Puja* bonus, as there is no rational ground for holding that 'payment even when there were loses' is a condition precedent, because a company or a firm may have an unbroken record of profits, ever since it started working. It was held that a claim for a customary bonus may be negatived on the proof that the payment was made *ex-gratia* and accepted as such, or that it was unconnected with any such occasion as a festival.[92]

In *Tocklai Experimental Station*, the court again reiterated the tests laid down in *Grahams Trading Co*, that the amount by way of a *Puja* bonus, must be shown to have been consistently paid by the employer, to his employees, from year to year, at the same rate and it should have been paid even in the years of loss and further, that it should have had no relation to the profits made by the employer during the current year.[93] The period of payment might normally be longer to justify the inference of a traditional customary payment of bonus, than in a case of bonus based on the implied terms of employment. It is also necessary to prove that the payments were not dependent on the earning of profits by the management. The fact that the payments were made even in the years of loss, is an important consideration for coming to the conclusion that the payments were not made out of bounty.[94]

In *Tulsidas Khimji* (supra) the court candidly suggested that a claim for bonus may be negatived only on proof that a the payment was made *ex-gratia* and accepted as such. In this case, the union of workmen claimed a share, at the rate of six months' wages, and a traditional or customary bonus, at a rate which was not clear, but which could be said to be either three months' or one month's wages, plus dearness allowance, on the occasion of the *Diwali* festival. According to the tribunal, the workmen had proved that such bonus had been paid at a uniform rate of one month's basic wages plus dearness allowance, on the occasion of the *Diwali* festival, for 15 years commencing from 1940-41 to 1956-57. Referring to the arguments advanced on behalf of the employer company, that the four circumstances mentioned in the *Grahams Trading Co's* case, had not been established, the court remarked:

> ...what is more important to negative a plea for a customary bonus would be proof that it was made *ex-gratia*, and accepted as such, or that it was unconnected with any such occasion like a festival, as laid down by this court in the case of *BN Elias*.[95]

What is relevant for the present discussion is the consistency and predictability of the decisions rendered on the same issue by five successive Benches presided over by the same judge of Supreme Court, ie, BP Sinha CJI. For example, in *Tulsidas Khimji*, the issue related to the nature and scope of 'customary' or '*puja*' bonus and the conditions governing the payment thereof. Counsel relied on the following four conditions laid down in *Grahams Trading Co*: (i) that the payment has been made over an unbroken series of years; (ii) that it has been so made for a sufficiently long period; (iii) that it has been paid even in years of loss, and did not depend upon the earning of profits; and (iv) lastly, that the payment has been made at a uniform rate throughout. Chief Justice Sinha (for self, Subba Rao, Mudholkar and Venkatarama Ayyar JJ, Rajagopala Ayyangar J, dissenting) held that the said four conditions, and particularly condition (iii), were not conditions precedent, but only circumstances which should be taken into account by the court. The observation of the learned Chief Justice ran thus:

> ...it has been contended that according to the judgments of this Court, in order to establish the claim for a bonus of this kinds four conditions must be fulfilled, namely, (1) that the payment has been made over an unbroken series of years; (2) that it has been so made for a sufficiently long period; (3) that the payment has been made at a uniform rate throughout, and (4) lastly, that it has been paid even in years of loss, and did not depend upon the earning of profits. It has been found by the Tribunal that the first three conditions, if they can be so called, have been fulfilled, but that the last one has not been established and could not be established because the firm was singularly fortunate in having an unbroken record of profits, year after year. ...Firstly, *the four so-called conditions are not really in the nature of conditions precedent but are circumstances which have been taken into account by this Court* in ...That those are circumstances, and not conditions precedent, is shown by the fact that this Court has pointed out that the length of the period will depend upon the circumstances of each case.[96] (italics supplied)

Justice Ayyangar J, dissenting, cited *Ispahani*, *Elias*, *Grahams* and *Tocklai* and observed:

> The extracts...from the judgment of this Court in the *Graham Trading Co.* ...where it is referred to as the third condition and the specific reference to loss in the three other decisions, particularly bearing in mind the fact that the same members of the Court had taken part in these several decisions, and Gajendragadkar, J, took part in all the four, I feel unable to hold that the learned Judge did not intend this to be an essential condition. In the *Graham* case ..., the reason for the insistence of this condition is stated, *viz*, that it is only a payment during a year when there is loss that would negative the payment being a bounty. In these circumstances I do not consider it possible to construe these judgments as laying down that payment during a year of loss, was merely a relevant circumstance and not a necessary condition. If ... what the Court is now called on to do is only to construe these decisions, and not consider the question afresh, I feel compelled to hold that in these several decisions this Court did lay down that this was a sine qua non for making good the claim.[97]

The majority judgment delivered by Sinha CJI, in *Tulsidas Khimji* requires detailed analysis *vis-à-vis* the dissenting view of Ayyangar J. For a better appreciation of the law, it is necessary to look at all the landmark cases. It is not in doubt that the law relating to *puja* or customary bonus had evolved over a long time finally culminating in the quadruple test laid down in *Grahams Trading Co.* In fact, Sinha J, as he then was, presided over the three-judge Benches that decided *Ispahani* and *Grahams Trading*. Viewed in this background, the observation of Sinha CJI, in *Tulsidas Khimji* that 'the above four conditions prescribed in *Grahams Trading* were *not really in the nature of conditions precedent*, but were only *circumstances to be taken into account by the court*' not only sounds strange, but also runs counter to the very principles enunciated in the earlier decisions. The further fact that the quadruple test was applied in the subsequent cases in *BNElias* and *Tocklai Experimental Station* bears ample testimony to the proposition that all the four conditions were '*conditions precedent'*, and not merely *'relevant circumstances'*. The dissenting view of Ayyangar J, was consistent with the settled legal principles and was right, while that of Sinha CJI, was not only misconceived but also repugnant to the very principles evolved by him. *With great respect for the eminent Chief Justice, the seeds of inconsistency and unpredictability were sown, though unwittingly, by him in the early 1960s itself, which acquired alarming proportions during the 1970s at the hands of Iyer J, and others.*[1]

In *Vegetable Products*, the facts were: the case of the workmen was that '*puja* bonus' had become either an implied term of employment between them and their employer and, hence it was customary to pay such bonus. On the basis of the evidence, the court found that the payment for the year 1959 was *ex-gratia* and accepted as such by the workmen. For the year 1960-61, the evidence further showed that the payment had been made at the rate of 30 days wages, the workmen had given a receipt stating that the payment was a made as advance, to be adjusted against the profit bonus for the previous year. In these circumstances, the court found itself unable to hold that there had been any payment for an unbroken number of years, before the dispute was referred to the tribunal, for the payment of the customary or traditional bonus, on the occasion of the *Puja* festival. In this case, the court reiterated the tests laid down in *Grahams* case, for determining as to what exactly is a customary or festival bonus.[2] In *Upendra Chakraborty*, the court held that the workmen had not

succeeded in persuading it that the bonus they had received, had the characteristics of a customary bonus, as known to law and that therefore, they were entitled to the quantification of that amount on the basis of the existence of a legal right in them. Payment for a few years past, would not give rise to a continuing obligation to make such payment, particularly when, from the pleadings of the parties, no custom could be spelled out. As a matter of fact, a collection backed by intimidation and threat is most obnoxious in its nature.[3] A third party, who is not the employer of the workers, represented by the union, cannot be liable for continuing the obligation.[4]

In *Churakulam*, there was, at first, an agreement in the year 1946, relating to a bonus for the years 1947, 1948 and 1949. The agreement was extended for the years 1950 and 1951 and there were subsequent agreements as well. But there was no controversy in that the company had paid the bonus for nine years and that it was not at a uniform rate. So far as the year 1952 was concerned, the company's case was that it had not paid any bonus as such, but on the other hand, it had been an *ex-gratia* payment of Rs 3 to each workman. But the tribunal did not accept this plea and held that the said payment must be treated as one having been made towards the bonus. The Supreme Court, in appeal by special leave, came to the conclusion that the tribunal was wrong in holding that an inference could be drawn that the payment of bonus had become an implied condition of service, in the circumstances of the case, when the payment admittedly, was not uniform and was not connected with any festival. The court also negatived the plea of the workmen, to treat the bonus as a customary or traditional bonus, because, apart from the fact that it was not connected with any festival, one of the essential ingredients, *viz*, that the payment should have been at a uniform rate throughout, was admittedly, lacking in the case.[5]

In *Jabalpur BK Punchayat*, the workmen claimed a festival bonus at the rate of 10 per cent of their earnings, which was claimed as an implied term of the contract of employment and as an established practice, it having been paid to them, irrespective of profit or loss, before Diwali, every year, continuously, from 1940-41, without any break. The tribunal found itself unable to allow this claim. In appeal by special leave, from the evidence on record, the Supreme Court found that it was amply clear that although the employees had been receiving at least 10 per cent of their total earnings by way of bonus, for the years 1940-41 to 1959-60, there had been no consistency in the claim to bonus throughout this period, nor had been there any uniformity, either in the amounts paid or the grounds under which the several awards of bonus came to be made. The only award, which indicated that the bonus was to be regarded as a *Diwali* bonus, was that of Bhat J, for the period 1957-58 to 1959-60. For the period 1940-41 to 1956-57, the company never paid the bonus as a festival bonus, on the occasion of *Diwali.* The amount was mostly paid under awards, but in between the awards, there was a period when it was paid by an express agreement between the parties. Nevertheless, it was argued on behalf of the workmen that, since a bonus payment of 10 per cent was made for a long period from the years 1940-41 to 1959-60, it had become an implied term of contract of employment and it was to be regarded as a festival bonus. But the Supreme Court negatived the contention in view of the law laid down in its earlier dicta. The claim of the workmen that they should be paid 10 per cent, either as a festival bonus or under any implied term of employment, therefore, could not be accepted. Thus, for negativing the claim of the workmen to a customary bonus, the following five factors have to be proved by the employer:

(1) The payment was made *ex-gratia*, by the employer;

(2) the payment was accepted by the workman as such, ie, *ex-graita*;

(3) the payment was not connected with the *Puja* or any other festival;

(4) the payment was not strictly made from year to year, at the same rate; and

(5) the payment was not made in the years of loss, it had relation to the profits made by the employer.[6]

The fourth circumstance mentioned in *Grahams Trading* is that the payment should have been made at a uniform rate, throughout. It does not mean that uniformity should be established from the beginning to the end. For instance, take a case where for the first few years, payment at some different, but uniform rate, had been made. However, after those first few years, the payment was made at a new rate, which has been strictly followed till the current year. In such circumstances, the tribunal may very well come to the conclusion that the payment was at a uniform rate, ignoring the first few years. Where, however, it appears, for example, that the payment for a few years was at one rate, say X, for the next few years, at the rate of X minus Y, for another few years at the rate of Y, and for the last years, at the rate of X plus Y and then a dispute arises, it may be said, in those circumstances, that the payment had not been made at a uniform rate.[7] Hence, where an implied condition of service for the payment of a festival bonus is established, but the amounts so paid in the past years are not the same from year to year, the tribunal has to determine the minimum amount which has always been paid, for an unbroken period of time.[8] Once it is proved that there was such an implied condition of service, some amount has to be paid under the said implied term, and what the minimum amount would be in that behalf, must be decided as a question of fact, on the evidence produced by the parties. The amount of the minimum bonus so payable as a condition of service, has to be paid to the workmen, even if there has been a loss in any given year. Likewise, since the payment of such bonus does not have any of the incidents of a profit bonus, even when the profit position of the employer, in any year in the future, is

such as to enable him to pay more, he cannot be compelled to pay anything more, by way of the festival bonus, than the minimum which has been determined.[9]

In *New Maneckchowk*, the Supreme Court was considering the terms of an agreement, the latter providing for the calculation of the bonus for each of the member units of the textile industry, in a manner fundamentally different in some respects, from the manner evolved by the Full Bench Formula. The agreement had expired by afflux of time, but was extended by the Bombay Industrial Court for another period of one year, between the same parties, on the ground that it had worked out satisfactorily and fairly for both the parties. The question, therefore, arose: whether the payment of such goodwill bonus could be imposed by industrial adjudication, on an unwilling employer, on the ground of industrial peace? Wanchoo J, speaking for the majority of the court, observed:

> In particular, by extending the agreement, the tribunal has made it possible for the payment of a minimum bonus, even when there was either insufficient available surplus to pay bonus or no available surplus at all or even an actual loss; the tribunal was thus, definitely going against the industrial law relating to bonus, as laid down by the court.[10]

It was, however, urged on behalf of the union, that there is a fifth kind of bonus, namely, a goodwill bonus and that the agreement, when it provides for a minimum bonus, irrespective of the availability of profits, provides for such bonus in the interests of industrial peace. But the court said that it is enough to say that so far as what is called the goodwill bonus is concerned, it pre supposes that it is given by the employer out of his own free will, without any compulsion by an industrial court. As its very name implies, it is a bonus which is given by the employer out of his free consent, in order that there may be goodwill between him and his workmen; but there can be no question of imposing a good will bonus by industrial courts, as imposition of such a bonus would be a contradiction of its very concept. But Subba Rao J, dissented and said:

> An industrial tribunal can extend an existing agreement or make a new one, if, for good reasons, it comes to the conclusion that such extension promotes industrial peace, if as I have held, the impugned pact was lawful and did not contravene the law as laid down by this court. The industrial court, in the present case, was certainly within its rights, to extend that pact for another year, for the very good reasons given by it for doing so. [11]

Thus, according to Subba Rao J, the tribunal had the jurisdiction to extend the agreement (providing for goodwill bonus) for another year, whereas, according to the majority, the tribunal did not have the jurisdiction. Profit Sharing Bonus: a profit sharing bonus is one of the main fringe benefits. Starting as a gratuitous payment, it has now become a statutory term of employment of a workman. The Payment of Bonus Act 1965, covers the subject-matter of payments and computation of the profit sharing bonus. Any dispute between the employer and his employees, regarding the payment of bonus under the Payment of Bonus Act, with respect to the application of that Act to an establishment in the public sector, is, by virtue of s 20 of that Act, to be deemed to be an industrial dispute within the meaning of s 2(k) of the IDA. For instance, an industrial dispute regarding 'payment of different amounts of bonus, in cash, to employees of the same company, in its different units' would be deemed to be an industrial dispute.[12]

The dissenting judgement of subba Rao J calls for some analysis. As rightly pointed out by Wanchoo J, the formula for calculating the available surplus was substantially different from the Full Bench Formula ('FBF'), and was devised and incorporated in an agreement reached by the parties much before the FBF became the law of the land. The said agreement was to be in operation for a period of five years. In the appeal, the power of tribunal extending the said agreement was challenged. Justice Subba Rao proceeded to deal with the issue on the sole ground that the tribunal had the power to extend an existing agreement and/or create new obligations, which was not disputed by the majority decision delivered by Wanchoo J. What was materially at issue was not so much the power of tribunal to extend an existing agreement as the very formula to be applied for arriving at the 'available surplus'. The said agreement between the parties differed from the FBF in three vital aspects, ie: (a) rehabilitation; (b) payment of bonus even when there is no available surplus and even when a mill had incurred loss; and (c) treating each year as a self-sufficient unit with no provision for set-on and set-off. That being the factual position, the Tribunal had no *locus standi* to extend the agreement for one more year, as it would prejudicially affect the interests of employers, given the fundamental fact that, for the purpose of computing 'profit-sharing bonus', it is only the accounting year which constitutes the unit, and not the performance of the company in the previous years. That apart, such extension of the agreement would run counter to the FBF to the detriment of the employer. This position is further buttressed by the fact that during the period, there was no provision for set on and set off of allocable surplus, and the courts accepted the principle of calculating bonus on the basis of gross profits and available surplus of each accounting year independent of any other factor.

The concern voiced by Subba Rao, J, for maintaining industrial peace was not a relevant factor and, at any rate, not at the

cost and annihilation of one party in favour of the other. Once the FBF was approved by the Supreme Court its totality, which also prescribed the mode of computing gross profits and available surplus, any other formula that was in vogue and was repugnant to it should yield place to the one laid down by the Supreme Court in the larger interests of maintaining uniformity. The very fact that a staggering 58 Special Leave Petitions were filed against the tribunal's award shows the volatile character of 'bonus' and the magnitude of the issue involved. With great respect for the eminent judge, it is submitted that Subba Rao J, *based his dissent on the narrow view of the 'power to extend existing agreements' and 'maintaining industrial peace', to the exclusion of other issues of vital significance, which alone had a bearing on the question of 'profit-sharing bonus'*. His further observation at (4) above to the effect that '*the impugned five-year pact is not contrary to industrial law as laid down by this Court; indeed, it expressly followed the principles laid down in the Full Bench Formula which was subsequently affirmed by this Court*' is equally misplaced and factually incorrect in the face of a glaring departure on three counts, as discussed above. The majority decision is right and that of Subba Rao J, wrong.

General Amenities

The provision for various welfare amenities to be made available to the working class, is enshrined in the Directive Principles of the State Policy in our Constitution, and in its application to the working class, it secures for them, just and humane conditions of work. But what these actually imply, cannot be specified in rigid terms for all times, because the concept of 'welfare' is necessarily dynamic, bearing a different interpretation from country to country and from time to time, and even in the same country, according to its value system, social institutions, degree of industrialisation and general level of social and economic development. Even within one country, its concept may be different from region to region.[13] According to the pre-independence notions, it could cover, apart from known amenities, items like housing, medical and educational facilities, cooperative societies, holidays with pay and social insurance measures.[14] The study team appointed by the Government of India in 1959, to examine the labour welfare activities then existing, divided the entire range of these activities into three groups, *viz*, (i) welfare within the precincts of an establishment-medical aid, crèches, canteens, supply of drinking water, etc, (ii) welfare outside the establishment-provision for indoor and outdoor recreation, housing, adult education, visual instruction, etc and (iii) social security. The committee of experts on welfare facilities for industrial workers, convened by the ILO in 1963, had divided welfare services into two groups, *viz*, (1) those within the precincts of the establishment and (2) those outside the establishment, which are reproduced as follows:

1. Welfare and amenities within the precincts of the establishment. (l) Latrines and urinals, (2) washing and bathing facilities, (3) crèches, (4) rest shelters and canteens, (5) arrangements for drinking water, (6) arrangements for prevention of fatigue, (7) health services, including occupational safety, (8) administrative arrangement within a plant, to look after welfare, (9) uniforms and protective clothing, and (10) shift allowance.
2. Welfare outside the establishment. (1) Maternity benefit, (2) Social insurance measures, including gratuity, pension, provident fund and rehabilitation, (3) benevolent funds, (4) medical facilities, including programmes for physical fitness and efficiency, family planning and child welfare, (5) education facilities, including adult education, (6) housing facilities, (7) recreation facilities, including sports, cultural activities, library and reading rooms, (8) holidays homes and leave travel facilities, (9) workers' co-operatives, including consumers' co-operative stores, fair price shops and co-operative thrift and credit societies, (10) vocational training for dependents of workers, (11) other programmes for the welfare of women, youth and children, and (12) transport to and from the place of work[15]

Though the provision of schools, canteens, crèches and recreation-homes, reading rooms, games, including indoor games, etc, have become a part of the amenities generally provided by the industries to the workmen, industrial adjudication has to take various facts into consideration before directing an employer to provide such facilities. In *Dharangadhara*, the demand that the employer should himself establish a school for the education of the children of the workmen, was rejected by the Supreme Court, as it was impossible to put a permanent structure for a school in the land where the industry was situated, particularly when there was a school already in existence, within a distance of three to four miles and furthermore, when the workmen were getting fair wages and the employer was not in a position to bear the burden of the cost of providing a school. In view of these facts, the court also rejected the demand of the workmen, for being provided with a recreation home with a canteen, a reading room and indoor games for their use.[16] In *IGN Rly*, the company had already provided canteen facilities to the workmen. But the industrial tribunal directed the company to improve and enlarge the arrangements and further, that the workers should be given wholesome food at prices lower than the prevailing market rates. The Supreme Court modified the award and applied the provisions of the Bengal Factory Rules 1949, which contained provisions on the question of accommodation to be provided in r 67 and provisions as regards the prices to be charged in r 69 in ch V, and directed the company accordingly.[17]

Retiral Benefits

Retiral benefits, such as provident fund, gratuity and pension schemes, have been common in certain governmental

employments. Such schemes were also introduced for their employees, by certain enlightened employers. In addition to such benefits, the Industrial Disputes Act also makes statutory provisions for compensation on the termination of the service of an employee by way of retrenchment, on a transfer or closure of an undertaking. Such social security measures have introduced an element of stability and protection in the midst of the stress and strains of modern industrial life. In this connection, the following observations of the national commission on labour are noteworthy:

> It is a major aspect of public policy today and the extent of its prevalence is a measure of the progress made by a country towards the ideal of a welfare state ... social security envisages that the members of a community shall be protected by collective action, against social risks causing undue hardship and privation to individuals, whose private resources can seldom be adequate to meet them. It covers, through an appropriate organisation, certain risks to which a person is exposed. These risks are such that an individual of small means cannot effectively provide for them by his own ability or foresight alone, or even in private combination with his colleagues. The concept of social security is based on the ideals of human dignity and social justice. The underlying ideal behind social security measures is that a citizen who has contributed or is likely to contribute to his country's welfare, should be given protection against certain hazards.[18]

Provident Fund

The provision of provident fund has also been recognised as a term of condition of employment, for industrial workmen. Legislative measures have imposed the requirements of creating a provident fund, on the employers and employees statutorily, in certain types of industries. But in the industries where these statutes do not apply, the provision for provident fund schemes by industrial adjudication on the lines of the Employees' Provident Fund Act, has become almost a normal feature.[19] However, in such cases, the provident fund schemes can only be awarded, if the establishment has the financial capacity to bear the burden. In introducing a retrial benefit like a provident fund scheme, industrial adjudication has, therefore, to consider first and foremost, the financial capacity of the employer to bear the burden imposed. For this purpose, the adjudicator has also to take into account, the future prospects of the concern.[20] But the burden of proof to show that the employer does not have the financial capacity, is on the employer. In other words, it is for the employer to show, by adducing the relevant evidence, that the liability imposed by the introduction of the provident fund scheme is excessive and is beyond his paying capacity. After ascertaining the financial capacity of the employer, he has further to consider the practice prevailing in the other comparable units of the same industry in the region.[21]

French Motor Car, provides an instance where the Supreme Court curtailed the unwarranted enhancement made by the tribunal in the rate of the provident fund contribution to be made by the employer. The company had a scheme of provident fund under which the rate of contribution by the employer was 8½ per cent of the basic pay. But, on the Employees' Provident Fund Act 1952 and the Employees' Provident Fund Scheme 1952 being applied to the motor car industries in 1960, the company changed the rate to 6¼ per cent of the gross earnings, ie, basic pay plus dearness allowance, in accordance with the Act and the scheme. The tribunal fixed the employers' contribution at eight per cent of the gross earning, ie, basic wage plus dearness allowance. The only reason given by the tribunal for raising the contribution was that such a rate was, recommended by the technical committee some time before the award after a thorough study of the problem from all points of view as being fit for adoption by well-established and prosperous concerns like the company, and, legislation on the lines of the committee's recommendations, was under contemplation. While modifying the award fixing the rate of contribution at 6¼ per centum of the gross earnings (basic pay plus dearness allowance), Wanchoo J observed:

> ... but the fact remains that no law has so far been made, making any change in the rate of contribution. We see no reason why simply because some recommendation, which is still to be implemented, has been made by a committee, that the contribution should be increased to eight per centum in the case of the appellant company only, when the general rate is only 6 per cent per centum. [22]

Gratuity

In the early stages of industrial adjudication, gratuity was treated as a gift of payment, gratuitously made by an employer to his employees at his pleasure and the workman had no right to claim it. But gradually gratuity came to be treated as a term of employment and industrial adjudication started treating it as a reward paid to the workmen for the long, good, efficient, faithful and meritorious service rendered by them to the employer, for a fairly substantial and long period.[23] It came to be regarded as a legitimate claim which the industrial workmen could make and which, in appropriate cases, might give rise to an industrial dispute. Thus, industrial jurisprudence came to recognise gratuity as some sort of retrial benefit available to an employee, for his long and continuous meritorious service.[24] The object of so providing a gratuity scheme was to provide a retiring benefit to workmen, who had rendered a long and unblemished service to the employer and thereby,

contributed to his prosperity. It is one of the efficiency devices and is considered necessary for an 'orderly and humane elimination' from industry, of superannuated or disabled employees who, but for such retiring benefit, would continue in employment even though they function in-efficiently.[25] The general principle underlying gratuity was that by virtue of the length of their service, workmen were entitled to claim a certain amount as their retiral benefit.[26] But, since the Parliament passed the Payment of Gratuity Act 1972, which comprehensively covers the law relating to gratuity, most of these decisions do not hold the field. A detailed discussion of the subject of gratuity is beyond the scope of this work.

Retrenchment Compensation

Section 25F makes a provision for the payment of compensation to industrial employees when their services are terminated by way of retrenchment, on their becoming surplusage. Section 25FF makes provision for a similar compensation being paid to the workmen, on the transfer of the undertaking from one employer to another, Likewise, s 25FFF makes a provision for the payment of similar compensation to workmen, on the closure of the undertaking of the employer. Compensation under these provisions has been made a statutory term of employment or condition of labour of the industrial employees. For a detailed discussion, see the notes and comments under those sections.

Pension

Like the provident fund, pension is also a measure of security for old age, inability and death of the bread-winner. The provident fund is not an adequate cover. for the contingencies of death and inability. Hence, in certain industries, where the financial capacity permits, the employers introduce pension schemes for providing such security to their workmen. A scheme of pension is different in scope and content from a provident fund scheme and a gratuity scheme. A provident fund scheme postulates a certain amount of contribution by the employer and equivalent amount of contribution by the employee, payable on his retirement or death. A pension is a periodic payment of a stated sum. These schemes have much in common, as they are all 'efficiency devices', and are considered necessary for an 'orderly and humane elimination' from industry, of superannuated or disabled employees. A single judge of the Assam and Nagaland High Court held that after the scheme has been brought into force by an employer, it is no longer a matter of bounty and the scheme has to be enforced and the management cannot refuse pension as a condition of service to the retired employees. A mere mention of certain period in the hypothetical illustration contained in the scheme, for the purpose of calculation and computation of pension, did not limit the time regarding the pension, and from that it could not be inferred that, the scheme was not for life.[27]

Miscellaneous Service Conditions

It is not permissible for an industrial establishment to have two sets of Standing Orders to govern the relevant terms and conditions of the service of its employees. Such a change would not be permissible under the Industrial Employment (Standing Orders) Act 1946, even if the proposed changes do not affect the existing rights of the employees.[28] The condition of service, that an unmarried woman in a particular department, has to resign on her marriage, was held to be unreasonable and was abrogated in the interests of social justice.[29] On the facts of the under-noted case,[30] certain workmen who were not given employment in a particular season in a sugar factory, as provided in the relevant Standing Orders, were held to be entitled to the compensation awarded by the labour court, and were also entitled to preferred for employment, in the succeeding seasons, over those to whom compensation had been awarded by the labour court, subject, however, in the instance of a preference being given to the workmen to whom compensation had been awarded, over new men, in case such workmen applied for employment in the succeeding seasons. The demand of the workmen that the office-bearers of a trade union should not be transferred, so long as they are office-bearers, can be the subject-matter of an industrial dispute, as it is intimately connected with the conditions of service.[31] Similarly, a dispute relating to a change of the designations of employees and increase of the pay-scales, relate to the terms of employment.[32] 'The badli workmen have no right to claim to be made permanent.[33] The deployment or reduction of cabin crew complement, as also the matter of standard force or pattern of crew scheduling in an airline service, is essentially a managerial function and cannot be interfered with in industrial adjudication.[34] A concession given to some workmen to do full time work for the trade union, will not constitute a term of employment or condition of labour. Nor will it fall within the meaning of item 8 of Sch, IV of the Act.[35] Likewise, duty relief granted to an office-bearer of a trade union, would not constitute a condition of service.[36] A dispute as to who is the elected President of a trade union of workmen, will not fall within the ambit of the definition of an 'industrial dispute', because it is not connected with the employment or non-employment or terms of employment or with the condition of labour of any person. Such a dispute is for the civil court to decide.[37]

'Any Person'

The expression 'any person', in the end of the definition of an 'industrial dispute', is not subject to any qualification, restriction or limitation as to its scope. The word 'person' has not been limited to 'workman', nor is it co-extensive with 'any workman', potential or otherwise. Though the expression must receive a more general meaning, it cannot mean

'anybody or everybody in this wide world'. If the expression is given its ordinary meaning, then the definition will become inconsistent with the objects and other provisions of the Act and also the other parts of the definition itself. The requirement of the definition, that the dispute must relate to the employment or non-employment or the terms of employment or the conditions of labour of 'any person', necessarily, therefore, imports a limitation in the sense that a 'person' in respect of whom the employer-employee relation never existed or can never exist, cannot be the subject-matter of an industrial dispute between the employer and the workmen.[38] It, therefore, cannot include an outsider.[39] In other words, it does not mean any person unconnected with the disputants in relation to which the dispute is not of the kind described in the definition. It is not the intention of the legislature to create a situation where, though the dispute does not concern them in the least, workmen are entitled to fight it out on behalf of the 'non-workmen'.[40]

In *NK Sen*, Chagla CJ of the Bombay High Court illustrated the absurdity of construing these words without any limitation or qualification, whatsoever, and expounded the crucial test of direct and substantial interest of the workmen in the employment, non-employment or the terms of employment or the conditions of labour of the person concerned and further observed that in the absence of such interest, no industrial dispute could be raised with regard to such a person. The dispute, in this case, arose out of the dismissal of the medical officer of a tea estate, who was not a workman as defined in s 2(s). From the context of the definition of 'industrial dispute' and its setting in the Act, the court applied limitations on the construction of the expression 'any person', in the sense that a person in respect of whom the employer-employee relation never existed or can never possibly exist, cannot be the subject-matter of a dispute between the employers and the workmen. It was, therefore, held that 'any person' in the definition clause, means a person in whose employment or non-employment, terms of employment, or conditions of labour, the workmen as a class, have a direct and substantial interest—with whom they have, under the scheme of the Act, a community of interest. It is the community of interest of the class as a whole—the class of employers or class of workmen—which furnishes the clear nexus between the dispute and the parties to the dispute, it was observed that in cases where a party to the dispute is composed of aggrieved workmen themselves and the subject-matter of the dispute relates to them or any of them, they clearly have a direct interest in the dispute. Likewise, where a party to the dispute, composed of workmen espousing the cause of another person, whose employment or non-employment etc, may prejudicially affect their interest, the workmen have a substantial interest in the subject-matter of the dispute. In both such cases, the dispute is an industrial dispute.[41] Thus, the majority not only approved the view of the Bombay High Court, but also, on its own reasoning, reached the same conclusion by approaching the question from a somewhat different standpoint. On a review of the earlier decisions of the labour' appellate tribunal and various High Courts, the court stressed that the crucial test is one of community of interest with the concerned person, and subjected the construction of the expression 'any person' to the following two limitations:

> (1) The dispute must be a real dispute between the parties to the dispute (indicated in the first two parts of the definition clause) so as to be capable of settlement or adjudication by one party to the dispute, giving the necessary relief to the other; and
>
> (2) The person regarding whom the dispute is raised, must be one in whose employment, non-employment, terms of employment or conditions of labour, (as the case may be) the parties to the dispute have a direct or substantial interest.[42]

In the absence of such direct and substantial interest, the dispute cannot be said to be a real dispute between the parties. The person with respect to whom a dispute is raised by the workmen, must be one in whose employment, non-employment, terms of employment or conditions of labour, the workmen as a class, have a direct or substantial interest, though he need not be, strictly speaking, a workman within the meaning of s 2(s) of the Act. The majority decision in the *Dimakuchi Tea Estate* case was approved by a larger Bench of five judges of the Supreme Court, in *Dahingeapara Tea Estate*.[43] In *Kays Construction*, the court reiterated that the expression 'industrial dispute' is wide enough to cover a dispute raised by the employer's workmen in regard to the non-employment of others, also who may not be his workmen at the material time.[44] In *Standard Vacuum*, it was held that the workmen had a community of interest with the employees of the contractor and they had also a substantial interest in the subject-matter of the dispute, in the sense that the class to which they belonged, namely, workmen, was substantially affected thereby and the company could give relief in the matter.[45] In *Bombay Union of Journalists*, the court elucidated that the 'community of interest' must be regarding a direct or substantial interest, *viz*, that the workmen who seek to support the cause of a person, must themselves be directly and substantially interested in the dispute. But what a direct and substantial interest is, would depend on the facts and circumstances of each particular case.[46] In *Reserve Bank of India*, on the construction of the word 'person' in s 2(k), Hidayatullah J, held:

> It may, however, be said that if the dispute is regarding employment, non-employment, terms of employment or conditions of labour of non-workmen, in which workmen are themselves vitally interested, the workmen may be able to raise an industrial dispute. Workmen can, for example, raise a dispute that a class of employees, not within the definition of workmen, should be recruited by promotion from workmen. When they do so, the workmen raise a dispute about the terms of their own employment,

> though incidentally, the terms of those who are not workmen, are involved. But workmen cannot take up a dispute in respect of a class of employees who are not workmen and in whose terms of employment those workmen have no direct interest of their own. What direct interest suffices is a question of fact, but it must be a real and positive interest and not fanciful or remote.[47]

In *Greaves Cotton*, Jaganmohan Reddy J observed:

> The consistent view of this court is that non-workmen as well as workmen, can raise a dispute in respect of matters affecting their employment, conditions of service etc, where they have a community of interest provided they are direct and are not remote.

This statement of law is not only vague, but is positively wrong and runs counter to the spirit of the ID Act and the earlier decisions of the Court. In *Andhra Bank*, an industrial dispute raised by the clerical staff of the bank, who were workmen, relating to the grade III officers, was referred for adjudication. Their grievance was that the promotion made to the category of grade III officers, who were, admittedly, non-workmen, by fitment, was discriminatory. Reversing the holding of the single judge, the Andhra Pradesh High Court held that while raising a dispute about the terms of their own employment, though incidentally, the terms of employment of the grade III officers (who were not workmen) were also involved, the clerical staff were not agitating for a revision of the pay scales of the grade III officers. The clerical staff, therefore, had a direct interest in the matter, for their next stage of promotion, to the category of grade III officers by fitment. In the circumstances, the dispute was validly raised and referred.[48] In *Indian Bank*, the facts were: by an agreement between the bank and the union, the bank was bound to fill a fixed percentage of the posts of officers from amongst the clerical cadre staff. The bank promoted certain members of its clerical cadre staff as officers and posted them in its branches. These officers were not allowed the benefit of two additional increments, which were, however, given to the officers of the same grade, who were not promoted from the clerical cadre staff. This discrimination led to a dispute, between the bank and its workmen, which culminated in a reference of the dispute for adjudication. The tribunal over-ruled the preliminary objection of the bank that the dispute was not an industrial dispute, because the officers whose terms of employment were disputed before it, were not 'workmen'. In writ proceedings, the High Court discountenanced the contention of the employer that the dispute could not be an 'industrial dispute' because it related to the conditions of service of the employees who were non-workmen out and out, and held that the workmen who raised the dispute were really fighting for their own conditions of service ie, the conditions of service which would obtain for them when they would be promoted as officers. Accordingly, the interest of the workmen in the determination of the conditions of service of the promotee officers, was neither remote nor unsubstantial, but was direct and vital in view of the fact that a fixed percentage of the higher posts had to go to them. The court further observed that *Andhra Bank* was based on a misunderstanding of the dicta of the Supreme Court. But the person in whose employment or non-employment etc, the workmen are directly or substantially interested, must be a definite person. Logically, there can be no interest of the workmen in indefinite or vague persons.[49]

In *Hindustan Lever*, a single judge of the Delhi High Court held that there can be no interest or nexus between the workmen and the vacancies resulting from resignations or retirements of the employees under the management. Such interest in filling up the vacancies, was 'fanciful or remote' and was in no sense, direct. The dispute raised by the workmen relating to the filling up of such vacancies, was abstract and amorphous.[50] The Act has used the expression 'any person' and not 'any post', and the workmen could not fight a battle for those nonexistent persons, who might or might not be appointed by the management to the vacant posts. On the other hand, a single judge of the Madras High Court, held that a dispute relating to the fixing of a ratio between the heirs and dependents of the workmen, and the outsiders, in the matter of recruitment, would constitute an industrial dispute, because the workmen as a class, have a substantial community of interest in the employment of their heirs and dependents.[51] In other words, the heirs and dependents of the workmen would fall within the ambit of the expression 'any person'. Therefore, the dispute is an 'industrial dispute'. If this holding is correct, then a demand by the workmen, that nobody other than the heirs or dependents should be employed, would also fall within the ambit of an 'industrial' dispute, which will lead to a logical absurdity. Furthermore, the heirs and dependents of the workmen cannot be definite persons, in whose employment or non-employment, at the time of making the demand of fixing the ratio, the workmen could have been interested. The dispute, therefore, was relating to the employment or non-employment of vague and non-existent persons. This decision is clearly wrong. It was for the employer to plead and prove that there was no 'community of interest' between the person concerned and the other workmen of his establishment, in order to establish that the dispute or question was not an 'industrial dispute' but on general principles of pleading and evidence, the burden of proof should be on the workmen, to show that they have a 'community of interest' with the person concerned, for bringing the dispute within the purview of the definition of an industrial dispute.[52]

Illustrations

A tea estate was sold as a going concern and the purchaser continued to employ the labour and some members of the staff of the vendor. The dispute raised by such workmen, regarding the discharged workmen, was held to be an industrial dispute, as the discharged workmen were the persons in whose employment or non-employment, the actual workmen of the purchaser of the estate, had a direct and substantial interest, though the discharged workmen were not, strictly speaking, workmen of the purchaser.[53] A proprietary business was taken over by a private limited company, in which the former proprietor, his wife and the former manager became directors. The new company refused to take into service, certain workmen employed by the former concern. The dispute raised by the workmen of the company with respect to the non-employment of the workmen of the previous concern, was held to be a dispute in connection with the non-employment of the persons in whose employment and non-employment, the workmen of the company had a direct and substantial interest.[54] The workmen employed in Standard Vacuum Refining Co, raised a dispute that the contract system of labour, adopted by the company, for the cleaning and maintenance of the refinery (plant and machinery) belonging to the company, should be abolished. It was held that, though the persons working under the contractor were not the workmen of the company, the workmen of the company had a real and substantial interest in the question of the employment of contract labour for the work of the company.[55] A dispute between the workmen of a company managed by a managing agency company, regarding the promotion of a person employed as an assistant factory supervisor in another company, managed by the same managing agency company, was held to be an industrial dispute, because the workmen raising the dispute had a real and substantial interest in the dispute, as there was a common register of the employees, for the purposes of granting promotion to the senior most workmen in the common register.[56] A claim put up on behalf of the retrenched employees of an establishment, for additional bonus, was held to be an industrial dispute, because the workmen had a direct and substantial interest in the matter of such bonus being paid in future, to the retrenched workmen.[57] A dispute regarding the employment of casual workmen, taken up by the regular workmen employed in an establishment, was held to be an industrial dispute, as the workmen had a community of interest with the cause of the casual workmen.[58] The cause of a dismissed member of the clerical staff, ie, a time-keeper, in a textile mill, espoused by other non-staff workmen, through their union was held to have assumed the character of an industrial dispute, notwithstanding the fact that the workmen who espoused the cause were not members of the clerical union, because such workmen had a community of interest with the dismissed workman.[59]

In *Mukand Ltd*, the brief facts, to the extent they are relevant to the present discussion, were: The company concluded a Settlement with *Mukand Staff and Officers Association* in 1974 whereby the welfare scheme framed for the *staff and officers*, jointly funded and managed by the company and the Association did not create any condition of service. Admittedly, it appears that the Association is a composite union of employees who answer to the definition of 'workman' and a few other employees, who did not strictly fall within the ambit of the said definition. The company concluded a Settlement in 1982 covering service conditions of all staff and officers including those in grades 01 and 00, and another settlement in 1989, which *inter alia* stipulated:

> It is the Company's contention that a substantial number of the staff, not being 'workmen' under Section 2(s) of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') are not covered by the provisions of the Act. Without prejudice to the rights and contentions of both the parties with regard to the applicability of the provisions of the Act, the parties have reached a comprehensive Settlement covering in addition to the demands made in the said 'Charter of Demands', the issue of annual bonus as well, under Sections 12(3) and 18(3) of the Act read with Rule 62 of the Industrial Disputes (Bombay) Rules, 1957 in conciliation proceedings on the following terms. ...*This Settlement did not cover employees in Grade 01 and 00 who are General Foremen or Senior Officers and Asstt. General Foremen or Officers*. (Italics supplied)

The disposition of the management towards the Association and the quality of drafting manifested in the above settlement, which are considered critical in the overall management of industrial relations in an undertaking, are not being dealt with here. What is relevant for the topic under discussion is that on 4 November 1991, the Association served a Charter of Demands on the Company. Failure report was submitted by Conciliation Officer followed by reference by the Government of Maharashtra on 17 February 1993, which ran thus:

> ...Whereas the Government of Maharashtra has considered the report submitted by the Conciliation Officer under sub-section (4) of Section 12 ... in respect of the dispute between M/s Mukand Ltd. ... and *the* workmen *employed under them*, over the demands mentioned in the schedule appended hereto. ... after considering the aforesaid report is satisfied that there is a case for reference to the dispute to an Industrial Tribunal....[60] (Italics supplied).

Before the tribunal, the management contended that, barring a few employees, the bulk of them were not 'workmen' as defined in s 2(s) and that the tribunal had no jurisdiction to grant any relief to the employees who fell outside the scope of the said definition. Despite this, the tribunal proceeded to pass the award covering all the grades, ie, Grade 12 to Grade 01

& 00 (in the ascending order, the Grades 01 & 00 representing General Foremen/Senior Officers and Asst General Foremen/Officers), directing the company to pay (i) an *ad hoc* amount to Rs 500/- per month to all employees in Grades 12 to 00; and (ii) by its interim Award Part-II, directed payment of employees on the basis of basic pay slab an *ad hoc* amount ranging from Rs 375/- to Rs 1050/- per month to employees who had not been granted additional *ad hoc* payment by the appellant-Company. After prolonged litigation in the High Court, the matter landed in the Supreme Court. Quashing the orders of the lower courts and remanding the matter to the tribunal with a direction to adjudicate the matter in accordance with law, Dr Lakshmanan J (for self and Sabharwal J), held:

> The dispute referred to by the order of Reference *is only in respect of workmen employed* by the appellant-Company. It is, therefore, clear that *the Tribunal, being a creature of the Reference, cannot adjudicate matters not within the purview of the dispute actually referred to it by the order of Reference. In the facts and circumstances of the present case, the Tribunal could not have adjudicated the issues of the salaries of the employees who are not workmen under the Act nor could it have covered such employees by its award*. Even assuming, without admitting, that the Reference covered the non-workmen, the Tribunal, acting within its jurisdiction under the Act, could not have adjudicated the dispute insofar as it related to the 'non-workmen'. ... *In the instant case, the employer and the employees by their conduct in concluding settlements in the past could not create for, or confer upon, an adjudicating authority jurisdiction, where none existed, in respect of employees to whom the provisions of the Act are not applicable*. This apart, the employer had not waived his right to raise the issue of the status of the employees under the Act in any of these settlements. The employer cannot held (*sic*) to have waived his rights regarding the issue of the status of the employees under the Act in the absence of any of the settlements concluded by them with their employees. The High Court has come to the conclusion that there are grave and fundamental errors, including the errors in assessing financial capacity, burden etc. in the award of the Tribunal. ... *The Division Bench has erred in holding that there is a community of interest between the workmen and the non-workmen and holding further that the workmen can raise a dispute regarding the service conditions of non-workmen*. This reasoning, in the absence of any pleading regarding the community of interest, is fallacious. (Paras 23 & 49) (Italics supplied).

It is submitted that this case was rightly decided. The tribunal, while adjudicating the dispute, lost sight of the essential features of the case, and proceeded to decide the issue relating to 'non-workmen', who clearly fall outside the pale of ID Act, thereby exceeding its legitimate confines.

'Industry' and 'Industrial Dispute'

The statutory definition of an 'industrial dispute' makes no mention as to the purpose that an industrial dispute must have. But union affairs and activities have revealed that though certain types of disputes may be urged as falling within the ambit of 'industrial dispute', yet, they cannot be treated as 'industrial disputes'. To meet such cases, the courts have, in effect, established that the word 'industrial' in the phrase 'industrial dispute', implies that a dispute connected with the 'terms and conditions' or the questions of employment of any person is an industrial dispute only if it relates to an 'industry'. In other words, the definition discloses that disputes of particular kinds alone are regarded as industrial disputes. It may be noticed that the definition of 'industrial dispute' does not refer to an 'industry'. But an industrial dispute, on the grammar of the expression itself, means a dispute in an industry.[61] Moreover, the expressions 'employers' and 'workmen' used in the definition of 'industrial dispute', carry the requirements of an 'industry' in that definition by virtue of their own definitions in ss 2(g) and 2(s) of the Act.[62] The definition of 'industrial dispute', therefore, pre-supposes the continued existence of the industry.[63] In *Madras Gymkhana*, Hidayatullah J held that the adjective 'industrial' in the definition of 'industrial dispute', relates the dispute to an 'industry, as defined in s 2(j) of the Act, "industry is the nexus between employers and employees and it is this nexus, which brings two distinct bodies together". The learned judge further observed:

> Primarily, therefore, industrial disputes occur when the operation undertaken rests upon the co-operation between employers and employees, with a view to production and distribution of material goods, in other words, wealth, but they may also arise in cases where the co-operation is to produce material services. The normal cases are those in which the production or distribution is of material goods or wealth and they will fall within the expressions 'trade', 'business' and 'manufacture'. [64]

It, therefore, follows that before an 'industrial dispute' can be raised between employers and employers or between employers and their workmen or between workmen and workmen, in relation to the employment or non-employment or the terms of employment or the conditions of labour of any person, there must first be established a relationship of employer and employees associating together, the former following a trade, business, manufacture, undertaking or a calling of employers, in the production of material goods and material services and the latter following any calling, service, employment, handicraft or industrial occupation or avocation of workmen, in aid of the employer's enterprise.[65] In other words, besides the requirements of s 2(k), unless the dispute is related to an 'industry' as defined in s 2 (j), it will not be an

industrial dispute.

Clause (ka): INDUSTRIAL ESTABLISHMENT OR UNDERTAKING

General

The expression 'industrial establishment', 'undertaking' and 'industry', have been synonymously used at various places in the Act. The expression, was not defined in the Act. The expression 'undertaking' occurs in ss 25FF, 25FFA, 25FFF, 25-O and 25R. Section 25F uses the word 'industry', while s 25G uses the word 'industrial establishment'. Since these two sections are cognate, the word 'industrial establishment' as used in s 25G, has to be understood to mean an 'industry' as used in s 25F. The term 'industry', as defined in s 2(j) of the Act includes, *inter alia*, an 'undertaking'. Thus 'undertaking' is a narrower concept than 'industry'. In other words, 'industry' is a whole of which an 'undertaking' may be a part. The expression 'undertaking' as used in the definition of 'industry' was given a restricted meaning in *Bangalore water Supply*.[66] Thus, reading down this expression as used in the context of s 25FFF, it must mean, a 'separate and distinct business or commercial or trading or industrial activity'. In *Hindustan Steel*, the court pointed out that the word 'undertaking', as used in s 25FFF, appears to have been used in its ordinary sense, connoting thereby, 'any work, enterprise, project or business undertaking'. It is not intended to cover the entire 'industry' or business of the employer.[67] A closure or stoppage of a part of the business or activity of the employer would seem, in law, to be covered by this sub-section. The question, however, is to be decided on the facts of each case. But the expression 'undertaking' cannot comprehend an infinitesimally small part of a manufacturing process.[68] The present definition brings in the ambit of an 'industrial establishment' or 'undertaking', any establishment or undertaking in which any 'industry', as defined in s 2(j), is carried on. Thus, it is the character of an activity as an 'industry', which brings any establishment or undertaking within the ambit of the definition. What was hitherto implicit has now been made explicit by this definition.

Proviso

The proviso contemplates multifarious activities of certain establishments or undertakings, some of which may be comprehended within the definition of 'industry' and some of which may not. In the circumstances:

(a) where the activities of any unit of such establishment or undertaking, which is an 'industry', is severable from the other units of the establishment or undertaking which are not 'industry', such unit shall be deemed to be a separate 'industrial establishment or undertaking', while the rest of the units will not fall within the definition of an 'industrial establishment or undertaking'. For instance, the activities of a university, which may be an establishment or undertaking, being education, will not fall within the definition of industrial establishment or undertaking. But if the University carries on a transport service and also maintains a workshop for the up-keep and repairs of the buses, the unit carrying on the transport activity will be an 'industrial establishment or undertaking', for the purposes of this clause.

(b) if the predominant activity or each of the predominant activities carried on by an establishment or undertaking is an 'industry' and the other activities carried on by such undertaking or establishment are not severable from the predominant activity, the entire establishment or undertaking shall be deemed to be an industrial establishment or undertaking.

Clause (kk): INSURANCE COMPANY

To fall within the meaning of this definition, an 'insurance company' has to satisfy the following two requirements:

(i) It should be an insurance company as defined in section 2 of the Insurance Act 1938 (4 of 1938), and

(ii) it should have branches or other establishments in more than one state.

Clause (kka): KHADI

This clause has been inserted by the Amending Act 46 of 1982.[69] It assigns the same meaning to the expression 'khadi' as in cl (d) of s 2 of the Khadi and Village Industries Commission Act 1956, which reads:

> 'Khadi' means any cloth woven on handlooms in India from cotton, silk or woollen yarn handspun in India or from a mixture of any two or all of such yarns;

Clause (kkb): LABOUR COURT

This clause has been renumbered as cl (kkb) by the Amending Act 46 of 1982.[70]Labour courts are constituted under s 7 of the Act. There may be one or more of such courts in a state. The Second Schedule to the Act specifies the matters within the jurisdiction of the labour courts. But by the first proviso to sub-s (1) of s 10, the 'appropriate Government' has been given the discretion to refer any matter in the Third Schedule also, to a labour court, where the dispute is likely to affect more than one hundred workmen. Besides, the 'appropriate Government' has also been vested with the power to assign certain other functions, to labour courts under the Act. Section 33C(2) confers jurisdiction on such labour courts, as may be specified in this behalf, to determine the amount of any benefit, which is capable of being computed in terms of money. Like industrial tribunals or national tribunals, labour courts are quasi-judicial bodies. Their functions, powers and duties are also similar to those of industrial tribunals or national tribunals.

Clause (kkk): LAY-OFF

The Concept of Lay-off

Under the common law, an employer can terminate the services of an employee at any time, even though his business or his industry may only be temporarily stopped and there is every prospect of a resumption of that business or industry. There is no obligation upon the employer to temporarily, suspend the services of his employee and reinstate him when his business or industry is resumed. He is perfectly free to dismiss him and employ new men when the business or industry was resumed. Nor does the common law impose any obligation upon the employer, to give any compensation to an employee, if his services are retrenched.[71] But now the industrial law has made inroads in the common law right of the employer. Though the Act, as originally enacted, did not contain a definition of 'lay-off', the term 'lay-off' was well-recognised in the industrial arena and disputes were often raised in relation to a 'lay-off' of workmen, in various industries. Industrial adjudicators sometimes awarded compensation for the period of 'lay-off'. But many a time, when the 'lay-off' was found to be justified, workmen were not awarded wage-compensation.[72]

In *Gaya Cotton Mills*, the labour appellate tribunal refused to award compensation, because the Standing Orders of the company provided that the company could, under certain circumstances, stop any machine or machines or department or departments, wholly or partially, for any period or periods, without notice or without compensation in lieu of notice.[73]Even where a compensation for the 'lay-off' was awarded, there was no uniformity. In order to ameliorate the difficulties of workmen who were laid-off in such situations, the legislature made a provision for the payment of compensation for the 'lay-off' period and also defined 'lay-off' by inserting this clause in s 2 of the Act, by the Industrial Disputes (Amendment) Act 1953 (Act 43 of 1953). The provision for compensation to workmen for the 'lay-off' period was made by s 25C in ch VA inserted by the Amending Act. However, s 25A exempts 'industrial establishments' employing less than fifty workmen and establishments of seasonal character or establishments in which the work is performed only intermittently, from the application of the provisions of s 25C to 25 E. The Industrial Disputes (Amendment) Act 1976 (Act 32 of 1976) 'has engrafted ch VB in the Act, which not only narrows down the definition of 'lay-off' as applicable to the industrial establishments covered by that chapter but also subjects a 'lay-off' to certain stringent conditions in such establishments.

Failure, Refusal or Inability - Meaning and Implications

In its etymological sense, a 'lay-off' is a 'period during which a workman is temporarily discharged'. In other words, even according to the dictionary meaning, 'lay-off' means to discontinue work or activity: to dismiss or discharge temporarily. When workers are in employment and they are 'laid-off', that immediately results in their unemployment, however temporary, and such unemployment will fall within the definition of a 'lay-off'.[74] But in its statutory sense, it is not a temporary discharge. It means the 'failure, refusal or inability' of the employer, on account of shortage of coal, power or raw materials, or the accumulations of stock, a breakdown of machinery, or for any other reason, to give employment to a workman.[75] The key to understand the definition is to be found in the words 'failure, refusal or inability of an employer'. From these words, it is clear that the unemployment has to be on account of a cause which is independent of any action or inaction on the part of the workmen.[76] Further, the unemployment must result from a failure, refusal or inability of an employer, on account of the causes enumerated in the definition.[77] 'Lay-off' means the failure, refusal or inability of the employer, to give employment to his workmen, on account of the contingencies mentioned in the definition. It is neither a temporary discharge of a workman, nor a temporary suspension of his contract of service. It is merely a fact of a temporary unemployment of the workmen, in the work of the industrial establishment.[78] Under the general law of master and servant, an employer may discharge his employee, either temporarily or permanently, but that cannot be done without adequate notice. A mere refusal or inability to give employment to a workman, when he returns for duty, on one or more grounds mentioned in this definition, is not a temporary discharge of the workman.

(i) On Account of Shortage of Coal, Power etc

In order to attract the definition of a lay-off, the temporary unemployment must be on account of a shortage of coal, power or raw materials, or the accumulation of stocks, or a break down of machinery. These are the specific causes for which the failure, refusal or inability of the employer to give work to the workmen may the justified and termed as a 'lay-off'.[79] By the Amending Act 46 of 1982,[80] the factor of vis major has been introduced by the use of the words 'natural calamity' to the already specified causes. Now causes such as fire, floods and earthquakes are also comprehended in the definition.

(ii) For Any Other Connected Reason

The Amending Act 46 of 1982, has substituted the words 'for any other connected reason', for the words 'for any other reasons'. The use of the words 'any other reason' indicates that it was not the intention of the legislature to bring within the definition, every possible circumstance which could result in the unemployment of the workers. The Bombay High Court, in *Central India Spg*, though expressed the view that the words 'or for any other reason' should be limited or restricted for the purpose of carrying into effect the provisions of the Act, further observed that:

> If, in point of fact, the 'lay-off' was occasioned because of strikes or go-slow tactics or absenteeism of workers in other section of the mill on which the particular section in which some workers were 'laid-off', was dependent, then their 'laying-off' could not be deemed to fall within the definition of section 2(kkk) of the Act.[81]

But construing the words 'any other reason', the Supreme Court applied the principle of *ejusdem generis* in *Kairbetta*, where it observed that:

> Any other reason to which the definition refers must ..., be a reason which is allied or analogous to the reasons already specified' and 'if there is a strike or slowing down of production in one part of the establishment and if lay-off is the consequence, the reason for which 'lay-off' has taken place, would undoubtedly be similar to the reason specified in the definition.[82]

These observations by implication, overruled the holding of the Bombay High Court in *Central India Spinning.* Even on the plain reading of the language of the definition, read with s 25E(iii), the view of the Bombay High Court is untenable. However, the question as to whether the expression 'any other reason' used in the definition would include a case of 'lay-off' effected on account of the difficulties of the employer to secure financial assistance, was left undecided in *Dewan Tea Estate*.[83] The financial crisis faced by the employer, on account of the refusal of the Government to develop its land and sell it, is absolutely irrelevant for effecting a 'lay-off'. But a single judge of the Madras High Court has taken the view that a temporary stoppage of roving bobbins to the weaving unit of a textile mill, pending the dismantling of the preparatory machines at the mills and the installation of the same at such unit, amounted to a 'lay-off as the reason was allied to or analogous with the other specific reasons mentioned in the definition.[84]The Act 46 of 1982 has made explicit what was implicit in the definition, by the use of the words 'any other connected reason'. The reason for a 'lay-off' must be connected with a reason specified in the definition. Since the financial difficulties of the employer cannot be one of the causes connected with any of the enumerated causes, it will not fall within the ambit of the definition. The Madhya Pradesh High Court, in *Hope Textiles*, held that a financial contingency is not a cause for which a 'lay-off' could be imposed.[85] The Gauhati High Court held that the old age or illness of the managing director, is not a permissible ground for a lay-off.[86] In *SAE Mazdoor Union*, a single judge of the Madhya Pradesh High Court held that the application for a lay-off, on account of 'lack of adequate orders' would fall within the scope of 'connected reasons', and the continuance of production, would only lead to an accumulation of stocks, and that it furnished a sufficient ground for the labour commissioner to consider for, the grant of permission.[87]

Explanation

The explanation introduces a fiction in the definition, according to which, every workman whose name is borne on the muster rolls of the industrial establishment and who presents himself for work at the establishment at the time appointed for the purpose, during the normal hours on any day and is not given employment by the employer within two hours of his presenting himself, shall be deemed to have been 'laid-off' for the day. The explanation along with the two provisos, contains three deeming provisions. The first is that if a worker who has presented himself for work at the commencement, is not given employment within two hours of his presenting himself, he will be deemed to have been laid off for the entire day. The second part of this explanation provides that if the workman, instead of being given employment at the commencement of the shift, is asked to present himself for work during the second half of the shift and is given employment in the second half, he shall be deemed to have been 'laid-off' only for the first half of the day. The third part of the explanation provides that if a workman is not given work even after presenting himself at the commencement of the

second half of the shift, he shall not be deemed to have been laid-off and he shall be entitled to full basic wages and dearness allowance for that second half.[88]

A perusal of the definition, together with the explanation, merely shows that it lays down the circumstances in which a 'lay-off' can come about, but without limiting it to any particular period of time. The three deeming provisions in the explanation, with regard to the mode of calculation of the period of 'lay-off', would either be independent substantial provisions, or would be by way of raising a presumption, and a conclusion with regard to the period for which the 'lay-off' is supposed to have been effective. This explanation has nothing to do with the 'quality of the lay-off'. In other words, without affecting or in any other manner, quantifying the circumstances in which a 'lay-off' would come under the main definition, the explanation purports to raise a quantitative presumption with regard of the extent of the time during which the 'lay-off' is deemed to be effective. In other words, there is nothing in the definition of 'lay-off' which prescribes the presentation of a workman for work during the first two hours or his coming for work again at the beginning of the second part of the shift, as a condition precedent to 'lay-off'.[89]

Workman who can be Laid-off

Workman whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched: the refusal, failure or inability of an employer to give work, refers only to a workman whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched. Section 25D casts a duty on the employer for maintaining the muster rolls of the workmen. If, therefore, an employee's name is not borne on the muster rolls of the establishment or he has been retrenched, even if his name was borne on the muster rolls, the question of his 'lay-off' would not arise.

Employer's Right to 'lay-off' Workman

The Bombay High Court, in *MA Veiyra*, expressed the view that under the general law, the management is free to dispense with the services of a workman, but under the Act, it is under an obligation to lay him off; that being so, the action of 'lay off' by the employer cannot be questioned as being *ultra vires*.[90] In *KT Rolling*, dealing with a case to which the provisions of Ch VA did not apply, as the employer at the relevant time, had employed less than fifty workmen, a majority of the Full Bench of that High Court held that it was not open to the industrial tribunal, under this Act to have awarded 'lay-off' compensation to the workmen employed in an industrial establishment to which s 25C did not apply.[91] A single judge of the Kerala High Court, in *South India Corpn*, also observed that an industrial tribunal will have no jurisdiction to award lay-off compensation to the workmen of an establishment, to which the Act did not apply. In this case, the Standing Orders of the employer company provided that the normal working of the factory would be for 8 or 9 months. Hence, it could not be held that an employer should provide work for 245 days in a year and that he would be liable, on principles of social justice, to pay compensation for any period which falls short of it, and the statute could not be circumvented by calling the claim compensation as unemployment compensation.[92] But in *Dewan Tea Estate*, the Supreme Court held that s 25C does not recognize a common law right of an industrial employer to 'lay-off' his workmen because the laying off under s 25C, refers to a 'laying off' as defined in s 2 (kkk) and so, the workmen who can claim the benefit of s 25C must be workmen who are laid-off and laid-off for reasons contemplated in s 2(kkk), and in the words of Gajendragadkar J:

> If any case is not covered by the Standing Orders, it will necessarily be covered by the provisions of the Act, and 'lay-off' would be permissible only where one or the other of the factors mentioned in section 2(kkk) is present and for such 'lay-off' compensation will be awarded under section 25C. [93]

The last observation was made by the court, in *Firestone*, implies that:

> If the power of 'lay-off' is there in the Standing Orders but the grounds of the 'lay-off' are not covered by them, rather are covered by the provisions of the Act, then, 'lay-off' would be permissible only on one or other of the factors mentioned in clause (kkk).[94]

The court found further support for the proposition from the fact that 'there is no provision in the Act, specifically providing that an employer would be entitled to 'lay-off' his workmen, for the reasons prescribed by s 2(kkk) '. In this case, at the relevant time, the establishment of the employer employed less than fifty workmen. Hence, the provisions of s 25C were not applicable. The question for consideration, therefore, was, whether the management had a right to 'lay-off' their workmen and whether the workmen were entitled to claim wages or compensation for the period of 'lay-off'? In the absence of any power conferred on the employer by the Act to 'lay-off' a workman, the court observed, such power must be found out from the terms of contract of service or Standing Orders governing the establishment. Since the Standing Orders Act was not applicable to the establishment and the contract of employment was silent in this behalf, it was held

that the workmen would be entitled to their full wages for the period of 'lay-off'.[95]

Adjudication

'Lay-off' has to be resorted to by an employer as a trade exigency, when the conditions stated in s 2(kkk) occur. The tribunal, therefore, will undoubtedly have jurisdiction to see whether any of these contingencies, in fact, did exist, due to which the employer was unable or he failed or refused to give employment to the workmen concerned. If the requisite conditions did not exist, the 'lay-off' will not be a 'lay-off' as defined in the Act, but it will be a mere sham. Then the tribunal will have power to interfere and give the necessary relief to the workmen. In dealing with a 'lay-off', it will not be open to the tribunal to inquire as to whether the employer could have avoided the 'lay-off' by being more diligent, more vigilant or more farsighted. That is a matter relating to the management of the undertaking and unless *mala fides* are alleged and proved, the tribunal can have no jurisdiction to sit in judgment over the acts of management of employer and investigate whether a more prudent management could have avoided the situation which led to the 'lay-off'. If the tribunal embarks upon an inquiry as to whether the employer had shown sufficient, farsightedness in managing his affairs, it would exceed its jurisdiction, which will be amenable to be corrected by judicial review. If the 'lay-off' is *mala fide*, in the sense that the employer had deliberately and maliciously brought about a situation where the 'lay-off' became necessary, then it is no 'lay-off' as contemplated by the definition. In other words, *mala fides* of the employer in declaring a 'lay-off', really means that no 'lay-off' has taken place, so a finding as to *mala fides* of the employer in declaring a 'lay-off', naturally takes such lay off out of the definition. Likewise, if a 'lay-off' has been declared in order to victimise the workmen or for some other ulterior purpose, the position would be the same and it would not be a 'lay-off'.[96] But a 'lay-off', which merely exceeds any particular period, is not necessarily illegal, contrary to law or *mala fide*. *Mala fides* of an employer, with respect to his act of 'laying-off' his employees, have necessarily to be specifically alleged and proved before the tribunal. In such a case, the relief provided to the laid-off workmen, under s 25C, would not be the only relief to which they would be entitled. The workmen will be entitled to their full wages for the period of such purported 'lay-off'.

Lay-off *v* Contract of Employment

The very essence of 'lay-off' is that it is a temporary stoppage and that within a reasonable period of time, the employer expects that the business or industry would continue and his employees, who have been laid-off, will be restored to their full rights as employees. In 'lay-off', the *vinculam juris* of the relationship of employment is not broken, though, for the time being, it goes under suspended animation. In other words, when there is a stoppage of work due to any reason specified in this clause, or any other analogous reason, all that the employer can do is to suspend the contract, for the time being. Thus, as soon as the temporary stoppage comes to an end, the employees are entitled to resume their service and receive full wage. It is not open to the employer, under the cloak of a 'lay-off', to keep his employees in the state of suspended animation and not to make up his mind as to whether the industry or business would ultimately continue or there would be a permanent stoppage and thereby, deprive them of their full wages.[1] The employees continue to be in the muster roll of the employer and they have to be reinstated as soon as normal working is resumed.[2]

'*Lay-off*' and '*Lockout*'- Distinction

In *Kairbetta Estate v Rajamanickam* , the Supreme Court considered the concept of 'lay-off', *vis-a-vis* that of a 'lockout' and observed:

> The concept of a 'lockout' is essentially different from the concept of a 'lay-off', and so, where a closure of business amounts to a lockout under section 2(1), it would be impossible to bring it within the scope of a 'lay-off' under section 2(kkk). The points of distinction between a 'lay-off' and a 'lockout' may be broadly stated as follows:
>
> (a) A 'lay-off' generally occurs in a continuous business, whereas, 'lockout' is a closure of business for the time-being.
>
> (b) In the case of a 'lay-off', owing to the reasons specified in section 2(kkk), the employer is unable to give employment to one or more workmen, whereas, in the case of a 'lockout', the employer deliberately closes the business and locks out the whole body of workmen for reasons which have no relevance to the causes specified in section 2(kkk).
>
> (c) In the case of a 'lay-off', the employer may be liable to pay compensation, as provided by sections 25C, 25D and 25E of the Act, but the liability for compensation cannot be invoked in the case of a 'lockout', as the liability of the employer in cases of 'lockout' would depend upon whether the 'lockout' was justified and legal or not.
>
> (d) But whatever the liability, the provisions applicable to the payment of 'lay-off' compensation cannot be applied to the cases of 'lockout'.
>
> (e) A 'lockout' is resorted to by the employer as a weapon of collective bargaining and also, ordinarily, involves an element of malice or ill-will, while 'lay-off' is actuated by the exigencies of the business.[3]

There are also certain points of resemblance between a 'lay-off' and a 'lockout', namely:

(a) Both 'lay-off' and 'lockout' are of a temporary nature and both arise out of and exist during an emergency, though the nature of the emergencies in each case, is different.

(b) Both in 'lay-off' and in 'lockout', the relationship of employment is only suspended and is not severed.

(c) A 'lay-off' resorted to in contravention of the provisions of section 25M is illegal and punishable under section 25Q while a 'lockout' declared in contravention of the provisions of sections 10(3), 10A(4A), 22 or 23 is illegal and punishable under section 26.

'Lay-off' and *'Closure'* - Distinction

The distinction between a 'lay-off' and a 'closure, has been considered by the Madras High Court in *Kaleeswara Mills*.[4] The distinction between the two is clearly evident. A 'lay-off' is a failure, refusal or inability of an employer, due to reasons beyond his control, to give employment to a workman whose name is borne on the muster rolls, while a 'closure' is the closing of the business permanently or temporarily, for an indefinite period by the management. The question as to whether a particular case would come under 'closure', 'lockout' or 'lay-off', would depend on the facts of each case.

Clause (l): LOCKOUT

General

The expression 'lockout' was more comprehensively defined in s 2(e) of the repealed Trade Disputes Act 1929, which is reproduced below:

> 'Lock-out' means the closing of a place of employment or the suspension of work, on the refusal of an employer to continue to employ any number of persons employed by him, when such closing, suspension or refusal occurs in consequence of a dispute and is intended for the purpose of compelling those persons or of aiding another employer, in compelling persons employed by him, to accept the terms or conditions of or affecting employment.

The definition was based on the definition of 'lockout' as defined in s 8(b) of the repealed Trade Disputes and Trade Unions Act 1927, which ran thus:

> Lock-out' to mean 'closing of a place of employment or suspension of work or a refusal by an employer to continue to employ any number of persons employed by him, in consequence of a dispute done with a view to compelling those persons or to aid another employer in compelling persons employed by him, to accept terms or conditions of or affecting employment.

The present definition in Indian statute omits the words 'when such closing, suspension or refusal occurs in consequence of a dispute and is intended for the purpose of compelling those persons or of aiding another employer, in compelling persons employed by him, to accept the terms or conditions of, or affecting employment', from the old definition of 1929 Act. The deletion of these words has left the definition in a mutilated and truncated form of the concept. In Sri Ramachandra Spg Mills, the Madras High Court has vividly pictured the consequences of construing the definition of a 'lockout' as it stands and without reading the effect of the deleted words into it, in the following words:

> As the words of the definition stand, whatever be the circumstances in which he finds himself placed and whatever the strength of the agencies that forced on him the step and however important he may be to avoid the result, if an employer closes the place of employment or suspends work on his premises', a 'lockout' would come into existence. A flood may have swept away the factory; a fire may have gutted the premises; a convulsion of nature may have sucked the whole place under ground, still, if the place of employment is closed or the work is suspended or the employer refuses to continue to employ his previous workers, there would be a 'lockout' and the employer would find himself exposed to the penalties laid down in the Act. [5]

The High Court then read the effect of the deleted words into the definition and observed that where the shut-down, suspension or refusal is used as a weapon corresponding to a strike, then only it will be a lockout and said:

> ...If an employer shuts down his place of business as a means of reprisal or as an instrument of coercion or as a mode of exerting pressure on the employees or, generally speaking, when his act is what may be called an act of belligerency, there would be a 'lockout'. If, on the other hand, he shuts down his work because he cannot, for instance, get the raw materials or the fuel or the power necessary to carry on his undertaking or because he is unable to sell the goods he has made or because his credit is exhausted or because he is losing money, that would not be a lockout.

Similarly, in *Kairbetta* (supra), the Supreme Court also observed that 'the essential character of 'lockout' continues to be substantially the same', and further read the effect of the deleted words into the definition by saying that in 'the struggle between capital and labour, the weapon of strike is available to labour and is often used by it, so is the weapon of a lockout available to the employer and can be used by him'. By the Amending Act 46 of 1982,[6] the word 'temporary' has been inserted before the word 'closing'. The legislature has made it clear that under the present definition, three alternative acts of the employer, in the process of collective bargaining, constitute a 'lockout', namely: (a) a 'temporary' closure of a place of employment, in contradistinction to a 'closure', as defined in s 2(cc), where the closure is of a 'permanent' nature; (b) suspension of work; or (c) refusal to continue to employ any number of persons employed by the employer. The phrase 'refusal by an employer to continue to employ' in the definition, corresponds to the phrase 'cessation of work' or 'refusal to continue to work or accept employment' occurring in the definition of a 'strike'.[7] Just as a 'strike' is a weapon available to the employees for enforcing their industrial demands, a 'lockout' is a weapon available to the employer to persuade by a coercive process, the employees, to see his point of view and to accept his demand.[8] A 'lockout' can, therefore, be described as the antithesis to a strike.[9] It may, however be pointed out that a mention of the strike or lockout aspect of collective bargaining, warrants a note of caution regarding the danger of a distorted perspective. It is a commonly accepted axiom that 'the power to strike and to lockout is the motive force of collective bargaining'. A corollary is that 'there is no bargaining power if there is no freedom and opportunity to refuse to continue the relationship'.[10] As RE Mathews says:

> It is easy to accept this axiom and its corollary too uncritically, as it is to ignore what is at least the percentile truth they incorporate. Collective bargaining is a catch-as-catch-can kind of business in which disdain for such uncouthness as is labelled 'duress' in more polite contract circles, has no place.[11]

There is no doubt that a lockout is an instrument of coercion or a weapon of oppression or a means of reprisal or a pressure-valve to revolve the workmen round, to coerce them to come to terms with the management. Therefore, the possibility of creating artificial circumstances as a justification for a declaration of a lockout, cannot be ruled out. But a lockout by itself, is not an industrial dispute as defined in s 2(k) of the Act. From a juxtaposition of the definitions of a 'lockout' in s 2(l) and that of an 'industrial dispute' in s 2(k), it is evident that a lockout is a unilateral and volitional act on the part of the employer, while an 'industrial dispute' is bilateral in character, as it arises when a demand of the workmen is rejected by the employer.[12] The words 'refusal by an employer to continue to employ any number of persons employed by him' in the definition of a 'lockout', have to be read with the rest of the definition and also the word 'lockout' In other words, these words have to be given a restricted meaning, *viz*, 'refusal by the employer to allow any number of persons employed by him, to attend to their duties, without effecting a termination of service'.[13]

The expression 'refusal to employ' in the context of the definition, does not mean a refusal to find work for the workmen, but it only means a refusal or an intention not to pay. It will not be a 'lockout' if the employer pays the workmen, but does not give them any work.[14] The definition of a 'lockout' postulates the existence of the relationship of employer and employee. In other words, if the relationship of employer and employee does not exist between the parties, there can be no 'lockout'. A 'lockout' can exist only during the continuance of such relationship between the parties. Accordingly, when the contract of employment is (rightly or wrongly) terminated by an employer, the conditions of a 'lockout' cannot continue to exist. Therefore, in cases where the employer sets up a plea of termination of the services of the workman, it would be necessary for the adjudicator to investigate into the facts relating to the termination of service and decide that the termination was binding and legal. In cases in which the termination is found to be binding and legal, it would be impossible for him to hold that the 'lockout' had continued and required to be lifted. If, however, the termination is found to be illegal and not binding on the workmen, it would be open to him to come to the conclusion that the termination being illegal, was of no consequence, hence, the 'lockout' had continued by failure of the employer to continue to employ the concerned workmen.[15]

Lockout *v* Contract of Employment

Hence, as a 'strike' does not contemplate a severance of the relation of the employer and employee; so also, a 'lockout' does not sever the relationship.[16]The Act treats 'strikes' and 'lockouts' on the same basis; it treats one as the counterpart of the other. In a 'lockout', the relationship of employer and employee remains as before; only some links in that chain of

relationship are broken.[17] A 'lockout' is neither an alteration to the prejudice of the workman, of the conditions of service applicable to him, nor a discharge or punishment, whether by dismissal or otherwise, of the workman.[18]

'*Lockout*' and '*Closure*' - Distinction

The distinction between a 'lockout' and a 'closure' has been explained by the Supreme Court in *Express Newspapers*.[19]

In the case of 'closure', the employer does not merely close down the place of business, but he closes the business itself, finally and irrevocably. A 'lockout' on the other hand, indicates the closure of the place of business and not a closure of the business itself, a lockout is usually used by the employer as a weapon of collective bargaining, to compel the employees to accept his proposals, just as a strike is a weapon in the armoury of labour in the process of collective bargaining, to compel the employer to accept their demands. Though the distinction between a 'closure' and a 'lockout' appears to be clear in theory, in actual practice, it is not always easy to decide whether the purported 'closure' is a real and genuine closure, properly so-called, or whether it is a sham or a disguise for a 'lockout'.[20] Closure is a matter of policy of the employer, whether to run his business or not. The employer may close down an industrial activity *bona fide* on such eventualities as suffering continuous loss, no possibility of a revival of the business or an inability for various other reasons, to continue the industrial activity. There may be a closure for any of these reasons. These reasons are not exhaustive, but are merely illustrative. But it cannot be said that a closure must always be permanent and irrevocable, as that would be ignoring the causes which may have necessitated the closure. A change of circumstances may encourage an employer to revive the industrial activity which was really intended to be closed.[21] If, instead of effecting a closure, the employer takes recourse to a lockout, to avoid the statutory liabilities, including payment of compensation or for bargaining, he cannot claim such a right, nor can his action be said to be *bona fide*.[22] To merely say that there was no 'lockout' is quite different from saying that it was a case of a 'closure'. It may or may not be a case of a 'lockout', that is a matter which the tribunal has to decide; but it cannot be a case of closure unless a closure has been specifically pleaded by the employer. If, however, a case of closure is pleaded, that has to be decided by the tribunal as a jurisdictional issue, because the jurisdiction of the tribunal to adjudicate the points of reference will depend upon the decision of this jurisdictional issue. In other words, on the finding, the tribunal may record on this preliminary issue, it may decide whether it has jurisdiction to deal with the merits of the dispute or not. But if closure has not been pleaded, the tribunal is under no obligation to decide this as a preliminary issue.[23] If it is a closure, then the matter ends there. The court cannot go into the question of the propriety of such an order. The finding whether a particular case is a case of 'closure' or of a 'lockout' is not a pure question of fact, but it is a mixed question of fact and law. Such a finding is amenable to a writ jurisdiction, if it is perverse.[24]

Illustrations

The closure of a place of business for a short duration of three days, which was done in retaliation to certain acts of workmen, was held to be a lockout.[25] A temporary suspension of work, necessitated by a lack of stock, was held not to constitute a lockout.[26] Likewise, a temporary stoppage of work for a lack of raw material, was held not to be a lockout.[27] A closure of a section of an industry carried on by an employer, on account of trade reasons, was held not to be a lockout and the closure of another section also, as a result of the refusal of the workmen to work in sympathy for the workmen of the former section, was not held to be a lockout.[28] The suspension of certain workmen, with the ultimate view of the termination of their services, for misconduct, was held not to constitute a lockout.[29] Likewise, retrenchment and discharge of workmen have been held not to be a lockout.[30]

Legality *v* Justifiability of Lockouts

Sections 22 & 23 impose certain restrictions on the commencement, and ss 10(3) & 10A(4A) prohibit the continuance of a lockout. Section 24 lays down that a lockout commenced or continued in contravention of these provisions, would be illegal. Likewise, there are restrictions in state statutes, the contravention of which renders lockouts illegal. Apart from these statutory restrictions, there is nothing in law that prohibits employers from locking out workmen as a measure of collective bargaining. The prevalent view appears to be thus:

> In the absence of a prohibitory statute or a contract governing the situation, the employer has the legal right to lockout his employees or to close down or to remove his factory, because of a labour dispute or to avoid anticipated labour difficulties.[31]

Although, there are cases which tend to indicate that 'such a statement is too broad and should be confined in its application, to the facts involved'; because in general, public policy is, opposed to the closing or removal of factories for the purpose of discouraging, intimidating or punishing employees for union activities.[32] In other words, a lockout may be legal inasmuch as it is declared in compliance with the statutory requirements, but it may be unjustified, as it might have been declared with the ulterior motive of victimising workmen for their trade union activities, or it may be unjustified for having been continued for an unreasonably long time. Whether a lockout is legal or illegal is a question of law. But the

question as to whether a lockout is justified or unjustified, is a mixed question of law and fact. In the cases referred to above, the court has not adverted to the statutory definitions of 'wages' in s 2(rr) and of 'lockout' in s 2(1) of the Act. From a juxtaposition of these two definitions, it is evident that by 'closing a place of employment' or a 'suspension of work' or a refusal 'to continue to employ any number of persons', the employer disables the workmen from fulfilling the 'terms of employment', which would have entitled them to wages. Having himself disabled the workmen to fulfill the terms of employment, the employer cannot disentitle them to the wages which they would have earned. The questions of legality or illegality, justifiability or unjustifiability of the 'lockout' are relevant for the entitlement of the workmen to wages during the period of a lockout. The principle, as applicable to the entitlement of the workmen, to wages for the period of 'strike', will equally apply to the entitlement of the workmen for the period of a 'lockout'.

Note: *For a detailed discussion, see notes and comments under s 2(q), 'Wages for the Period of Strike'.*

Illustrations

In one case, the workmen assembled near the office of the establishment during the recess period, stayed away from their work, and continued there till late in the evening, shouting slogans, so much so that the members of the office staff and some workers who wanted to return home after the working hours, were prevented from leaving the factory premises, till the police arrived on the scene and dispersed the workmen. In these circumstances, it was held that the lockout declared by the employer from the following day, was justified as the action on the part of the workmen was a strike. Similarly, a lockout necessitated by the 'go-slow tactics' or 'improper conduct of the workmen', was also held to be justified.[33] A lockout declared as a result of a hunger strike by certain workmen of a factory, who held key-posts, was held to be legal and justified, despite the fact that notice as required by section 22, was not given.[34] The management declared that instead of Sundays, Saturdays would be off-days, because the State Government had imposed restrictions on the use of electricity and curtailed the supply of electricity on Saturdays. The workers not only remained absent on a Saturday, but refused to work even on Sunday, which constituted a strike and the work of the factory consequently, came to a standstill. The lockout declared by the management consequent upon such strike, was held to be justified.[35] On the other hand, a lockout, declared as a consequence of the refusal of the workmen to do additional work, which the employer had no right in law, to ask them to do, by altering the conditions of service, in the implementation of the rationalisation scheme, was held to be unjustified and the workmen were held to be entitled to wages for the period in question.[36] Locking out the workmen without any prior notice by the employer to them, as a retaliatory measure to terrorise them, was held to be an illegal and unjustified lockout. It was illegal because no prior notice, as required by law, was given, and unjustified, as it was retaliatory in nature.[37] Some of the workmen staged a stay-on-strike and subsequently, came to join their duties, but they were asked to sign a good conduct bond, which the workmen refused to sign, as they objected to the use of the words 'at the instigation of others' in the bond. The refusal of the employer to give work to the workmen in the peculiar circumstances of the case, was held to be an unjustified lockout.[38]

Wages for the Period of Lockout

The Act imposes certain prohibitions and restrictions on 'lockouts', as well as on 'strikes'. Chapter V; s 10(3), s 10A(4A), s 22 and s 23 impose certain prohibitions on the commencement or continuance of 'strikes' and 'lockouts' and s 24 renders the 'strikes' or 'lockouts' continued and commenced in contravention of these prohibitions, illegal. Chapter VI prescribes the penalties for illegal strikes and lockouts. But unlike 'lay-off', 'retrenchment', 'transfer of the undertaking' or 'closure of the undertaking', there is no provision in the Act providing for any compensation to the workmen affected by a 'strike' or a 'lockout'. The reason is plain. 'Layoff', 'retrenchment', 'transfer of the undertaking' or 'closure of the undertaking' arise out of trade exigencies. None of these acts is a measure of collective bargaining. But 'lockouts' and 'strikes' are weapons of collective bargaining, in which both the sides stand to gain or lose, depending upon various circumstances. Hence, in using these weapons of collective bargaining, the party using them takes its own risk in the process of pressurising the other to concede to its demands. Thus, if a 'lockout' is legal and justified, for instance, it is precipitated by certain acts on the part of the workmen themselves, the employer will not be liable to pay and the employees will not be entitled to receive wages for the duration of the 'lockout'. In *Hindustan Steel*, the Orissa High Court held that mere change in hours of work from 7 am to 8 am would not amount to lockout of workmen, as none of the elements indicated in the definition of a 'lockout' was satisfied, particularly, when the place of the employment had not been closed, nor had the work been suspended.[39]

But if, on the other hand, the 'lockout' is illegal, the employer will be liable to pay full wages to the workmen. Even if the lockout is legal, but it is unjustified, for instance, it is declared with a view to victimising the workmen, or is continued for an unduly protracted period of time, the employer will be liable to pay and the workmen will be entitled to receive the full wages and other benefits, for the period of the 'lockout'. The same principle applies when a 'lockout' is declared in consequence of a legal strike. But when an unjustified or illegal strike is followed by a 'lockout', which becomes unjustified on account of its unreasonably long duration, a case of the apportionment of the blame between the employer and the workmen, arises.[40] However, in deciding the quantum of wages, for the period of the lockout, to be paid to the

concerned workmen, their conduct at the relevant time has to be taken into consideration.[41] It is incumbent upon the tribunal, to apply its mind to the question of apportionment of the blame on the two parties and to its effect on the amount of wages to be awarded to the workmen, for the period of the unjustified 'lockout', after allowing the relevant evidence being adduced before it.[42] In case a 'lockout' is illegal or unjustified, it is not necessary for the workmen, for being entitled to wages for the period of the lockout, to show that they had been reporting for work during such period.[43]

Clause (la): MAJOR PORT

A 'major port' has been defined in s 3(8) of the Indian Ports Act 1908 (15 of 1908), as follows:

> A 'major port' means any port which the Central Government may, by notification in the Office Gazette, declare, or may, under any law for the time being in force, have declared to be a major port.

Clause (lb): MINE

This definition adopts the definition of a mine as in s 2(j) of the Mines Act 1952, which is as follows:

> 'A mine' means any excavation where any operation, for the purpose of searching for or obtaining minerals, has been carried on, and includes, unless exempted by the Central Government by notification in the Office Gazette, any premises or part thereof, on which any process ancillary to the getting, dressing or preparation for sale of minerals or of coke is being carried.

A plant manufacturing tar and industrial coke from coal purchased from outside, has been held to be a mine within the meaning of s 2(lb) of the Act.[44] On the other hand, a cement factory working at a distance of 15 miles from the mines, using limestone quarried from the mines, was held not to fall within the definition of a 'mine' as in s 2, despite the fact that the mine and the cement factory were under the same management.[45]

Clause (ll): NATIONAL TRIBUNAL

By the Industrial Disputes (Amendment and Miscellaneous Provisions) Act 1956 (Act 36 of 1956), a provision has been made for the constitution of a National Industrial Tribunal under s 7B of the IDA. This definition has also been inserted by the amending Act. The amending Act abolished the Labour Appellate Tribunal, established under the Industrial Disputes (Appellate Tribunal) Act 1950. National Industrial Tribunals are constituted to adjudicate upon industrial disputes of concerns having all-India establishments and also to deal with disputes between banks and their employees.

Clause (lll): OFFICE BEARER

Any member or the executive of a trade union is an 'office bearer' for the purpose of s 36(1). But the definition expressly excludes an auditor.

Clause (m): PRESCRIBED

This definition is the same as in s 2(j) of the repealed Trade Disputes Act 1929, under which the rule-making power was given to the government by s 19. Now, s 38 of the Industrial Disputes Act, gives power to the appropriate government to make rules for the purpose of giving effect to the provisions of this Act.

Clause (n): PUBLIC UTILITY SERVICE

Legislation

This clause is based on cl (g) of s 2 of the repealed Trade Disputes Act 1929 and was enacted in the original Industrial Disputes Act 1947, with a view to assure special attention to disputes relating to 'public utility service' industries, for which special provisions have been enacted in the Act. Section 12(1) makes it obligatory on a conciliation officer to hold conciliation proceedings in the prescribed manner, when the dispute relates to a 'public utility service' and notice under s 22 has been given. The proviso to s 10(1) enjoins on the 'appropriate government', that it must make a reference of an industrial dispute, when the dispute relates to a public utility service. With respect to strikes and lockouts in 'public utility' services, s 22 contains special provisions.

Sub-Clause (i): Railway and Air Service

This sub-clause makes the railway and transport services for the carriage of passengers or goods, public utility services. These services being the life arteries of the nation, the legislature thought it fit to make these services, public utility services.

Sub-Clause (ii): Section of an Establishment involving Safety

In each industry or industrial establishment, there is a particular section, on the working of which, the safety of the establishment or the workmen employed therein, depends; for instance, the power house, the sanitation and conservancy section and the watch and ward *etc*. Even if a particular industry or industrial establishment is not a 'public utility service', by the sub cl (ii), the particular section of it, on the working of which its safety or the safety of the workmen employed therein depends, has been made a 'public utility service'.

Sub-Clause (iii): Postal, Telegraph or Telephone Service

The postal, telegraph and telephone services, again being modes of communication of thought and information, have been made 'public utility services', with a view to allow these services to work in an uninterrupted manner.

Sub-Clause (iv): Power, Light and Water Services

Industries supplying power, light or water to the public, are very essential for the living of men in the society and the interruption of the regular flow of power or water is likely to cause disturbance in the normal living of the members of the society. Hence, the establishments supplying power, light or water to the public, have been made 'public utility services'.

Sub-Clause (v): Public Conservancy or Sanitation System

The system of public conservancy or sanitation have been brought within the purview of 'public utility services', because the disruption of these systems again, is likely to cause disturbance to normal human life. The mere fact that instead of the word 'service', the word 'system' has been used in relation to conservancy or sanitation, cannot lead to an inference that a system of public conservancy or sanitation would not be a 'public utility service'.[46]

Sub-Clause (vi): First Schedule Industries

The present First Schedule was substituted for the former First Schedule, by the Industrial Disputes (Amendment and Miscellaneous Provisions) Act 1956 (Act 36 to 1956). The schedule as originally enacted, had only five items. The present schedule is headed: 'Industries which may be declared to be public utility services under sub-cl (vi) of cl (n) of s 2 ', and now, it includes ten, items namely:

(a) Transport (other than railways) for the carriage of passengers or goods, 'by land or water'

(b) Banking

(c) Cement

(d) Coal

(e) Cotton textiles

(f) Foodstuffs

(g) Iron and steel

(h) Defence establishments

(i) Service in hospitals and dispensaries, and

(j) Fire brigade service.

Some of the states have added certain other items to the list by amending enactments. Thus, it is only the 'industries' as specified in the First Schedule, that can be declared to be 'public utility services' under this sub-clause. The proviso to this sub-clause further confines this power with respect to time, ie, any of these scheduled industries can be declared in the first instance, for a maximum period of six months, by a notification in the Office Gazette. In case the period is to be extended, it can only be done again, by a similar notification. For the exercise of the power by the 'appropriate government', to

declare a scheduled industry to be a 'public utility service' for the purpose of this Act, the following requirements must be satisfied:

(i) The activity with respect to which the notification is made, is an 'industry' within the meaning of section 2(j).

(ii) The appropriate government must be satisfied that public emergency or public interest require a particular scheduled industry to be declared a public utility service.

(iii) Such declaration must be made by a notification published in its Office Gazette.

(iv) The notification should specify-the period for which the declaration is made and such period should not exceed six months in the first instance.

(v) After the expiry of the period specified in the notification, in case the government considers it necessary to extend the period, it can do so. But the period can only be extended by a fresh notification, after having applied its mind afresh, to the requirement of public emergency or public interest, in extending the time and the extended period should not exceed six months. There is no limit on the number of times the government can extend the period, provided that the period is extended each time, after considering the requirement of public emergency or public interest and the extension is made for a period not exceeding six months at anyone time and by notification in its Office Gazette.

In terms of cl (i) of s 2(n) 'any railway service' or 'any transport service for the carriage of passengers or goods by air', is comprehended in the definition of a 'public utility service'. Entry 1 in the First Schedule is 'transport other than railways, for the carriage of passengers or goods by land or water'. In other words, any transport (other than railways) for the carriage of passengers or goods, by land or water cannot be a 'public utility service' unless a notification, as required by cl (vi) of s 2(n), has been issued by the appropriate government.[47]

Clause (o): RAILWAY COMPANY

This clause is the same as cl (h) of s 2 of the repealed Trade Dispute Act 1929. It was enacted in the original IDA and it has remained unamended so far. Section 3(5) of the Indian Railways Act 1890 reads as follows:

> 'Railway company' includes any persons, whether incorporated or not, who are owners or lessess of a railway or parties to an agreement for working a railway.

The expression 'railway' has been defined in s 3(4) of the Railway Act. Under s 2(n) of the IDA, a 'railway service' is a 'public utility service'. Under s 2(a) of the Act, the 'appropriate government' in relation to a 'railway company', shall be the Central Government.

Clause (oo): RETRENCHMENT

Evolution of the Concept

'Retrenchment' was not defined either in the repealed Trade Disputes Act 1929, or in the IDA, as originally enacted. The definition was inserted by the Industrial Disputes (Amendment) Act 1953. The definition has to be read with the relevant section in Chs VA and VB. The definition of the term 'retrenchment' is very wide and is in two parts. The first part is exhaustive, which lays down that 'retrenchment' means the termination of the service of a workman by the employer, 'for any reason what-so-ever', otherwise than as a punishment inflicted by way of a disciplinary action. Thus, the main part itself, excludes the termination of the service as a measure of punishment, inflicted by way of a disciplinary action, from the ambit of the definition of retrenchment.[48] The second part further excludes:

(i) a voluntary retirement of the workman;

(ii) a retirement of the workman on reaching the age of superannuation;

(iii) a termination of the service of the workman as a result of non-renewal of the contract of employment; or

(iv) a termination of service on the ground of continued ill health of the workman.[49]

Retrenchment can occur only in a Live Industry

In Pipraich Sugar Mills, the Supreme Court held that 'retrenchment' means a termination by the employer, of a service of a workman, who is a 'workman' as defined in s 2(s), according to which a workman is a person who is employed 'in an industry'. 'Industry' means a 'live industry', and not a closed one. The entire scheme of the Act assumes that there is in existence, an industry and then proceeds to provide for various steps to be taken when a dispute arises in the industry. Thus, the provisions of the Act relating to 'lockout', 'strike', 'lay-off', 'retrenchment', 'conciliation' and adjudication on proceedings', have meaning only if they refer to an 'industry' which is running and not to one which is closed. Therefore, s 2 (oo) and s 25F have no application to a closed or a dead industry. In other words, there can be no 'retrenchment' unless there is a discharge of the surplus labour or staff, in a continuing or running industry.[50] The underlying assumption, of course, is that the undertaking is running as an undertaking and the employer continues as an employer, but where, either on account of a transfer of the undertaking or on account of the closure of the undertaking, the basic assumption disappears, there can be no question of retrenchment, within the meaning of the definition contained in s 2(oo) of the Act.[51] A single-judge of the Calcutta High Court, in *Bharat Coking Coal*,[52] has held that the loss of employment of workers on the closure of an undertaking, will amount to 'retrenchment'. This holding is not correct. From the text of the judgment, it appears that the attention of the court was not drawn to the language of s 25FFF, which specifically says that 'wherever an undertaking is closed down, for any reason whatsoever, every workman who has been in continuous service for not less than one year in the undertaking, immediately before such closure, shall…, be entitled to 'notice' and 'compensation' in accordance with the provisions of s 25F, as if the workman had been retrenched'. From this language, it is evident that upon closure of an undertaking, the workmen who lose their employment, are only entitled to notice and compensation in terms of s 25F. But this language does not lead to the conclusion that the loss of employment of the workmen, on the closure of an undertaking, would constitute 'retrenchment'. If that was the intention of the legislation, it could have been expressed in a clear and unambiguous language.

Judicial Interpretation of 'Retrenchment' - Initial Trends

In *Pipraich Sugar Mills*, dealing with the question of whether the discharge of the workmen on a closure of the undertaking would constitute 'retrenchment' and, hence, the workmen were entitled to retrenchment compensation, the Supreme Court observed:

> Retrenchment connotes, in its ordinary acceptation, that the business itself is being continued, but that a portion of the staff or the labour force is discharged as surplusage; and the termination of the services of all the workmen, as a result of the closure of the business cannot, therefore, be properly described as retrenchment...Retrenchment means, in ordinary parlance, discharge of the surplus, it cannot include discharge on closure of business.[53]

Though these observations were made in connection with a case where the closure took place before the amendment of the Act, the court left open the question as to the correct interpretation of the definition of 'retrenchment'. Glossing on these observations, a five-judge Bench, in *Barsi Light Rly*,[54] observed that they explained 'the meaning of retrenchment, in its ordinary acceptation'. In this case, the court had specifically to interpret the term 'retrenchment' as defined in s 2(oo), while dealing with the two appeals, one relating to a claim for compensation, made by an employee on the transfer of a railway undertaking and the other relating to a claim for compensation, made on the closure of a mill. The question before the court was: Whether the definition of 'retrenchment' merely gives effect to the ordinary accepted notion of 'retrenchment' in an existing or running industry, by embodying the notion in apt and readily intelligible words, or does it go so far beyond the accepted notion of 'retrenchment' as to include the termination of service of all workmen in an industry, when the industry itself ceases to exist, on a *bona fide* closure or discontinuance of his business by the employer? Answering this question on behalf of the court, SK Das J said:

> What, after all, is the meaning of the expression 'for any reason whatsoever'? *When a portion of the staff or labour force is discharged as surplusage, in a running or continuing business, the termination of service which follows, may be due to a variety of reasons, eg, for economy, rationalization in industry, installation of a new labour-saving machinery, etc*. The legislature, in using the expression 'any reason whatsoever', says, in effect: 'It does not matter why you are discharging the surplus; if the other requirements of the definition are fulfilled, then it is 'retrenchment'... What is being defined is 'retrenchment', and that is the context of the definition. It is true that an artificial definition may include a meaning different from or in excess of the ordinary acceptation of the word which is the subject of the definition; but there must then be compelling words to show that such a meaning, different from or in excess of the ordinary meaning, is intended. *Where, within the framework of the ordinary acceptation of the word, every single requirement of the definition clause is fulfilled, it would be wrong to take the definition as destroying the essential meaning of the word defined... For the reasons given above, we hold... that retrenchment, as defined in section 2(oo) and as used in Section 25F has no wider meaning than the ordinary, accepted connotation of the word: it means the discharge of the surplus labour or staff by the employer, for any reason whatsoever, otherwise than as a punishment inflicted by way of a*

> *disciplinary action*, and it has no application where the services of all workmen have been terminated by the employer, on a real and *bona fide* closure of his business...or where the services of all the workmen have been terminated by the employer, on the business or undertaking being taken over by another employer... *On our interpretation, in no case is there any retrenchment, unless there is a discharge of surplus labour or staff in a continuing or running Industry*.[55] (Italics supplied).

On this interpretation, the expression 'for any reason whatsoever', must necessarily be read in conjunction with reasons like economy, rationalisation in industry, installation of new labour-saving machinery *etc*. The essential and basic element of 'retrenchment' is, therefore, surplusage. In other words, when an employer, in an existing and running concern or industry, finds that he has staff or labour which is in excess of the number required and hence, is surplus, the services of such workmen as are in excess, can be terminated and such termination would be 'retrenchment'. Surplusage in a running business or industry, is the very basis of 'retrenchment'. For instance, where an employer wants to cut down on expenditure or he wants to introduce new labour saving devices, he may have to prune the labour or staff found to be in excess, that is the concept of 'retrenchment'. If the termination is for any other reason, it cannot be 'retrenchment'. Thus, the expression 'for any reason whatsoever', even though seemingly wide, must necessarily draw within its ambit, not any act of commission and omission on the part of the employer, but the concept of termination of the surplus workers' services due to reasons such as economy, rationalisation in industry, installation of new labour-saving machinery or device, standardisation or improvement of plant or technique and the like. It is the conjunction with such reasons that the words 'any reason whatsoever' must be read and construed.[56] Consequent upon the decision in *Barsi Light Rly*, the legislature amended the Act by the Amending Act 18 of 1957, substituting the present ss 25FF and 25FFF for the previous s 25FF, which make provisions for notice or payment of wages in lieu of notice and compensation to be given to a workman discharged from service, on a transfer or closing down of an industrial undertaking, 'as if the workman had been retrenched'. But the definition of retrenchment in s 2(oo) was not amended. After this amendment, another five-judge Bench, in *Anakapalle*, affirming the ratio of *Barsi Light Rly*, observed that retrenchment '*necessarily postulates the termination of the employees' services on the ground that the employees had become surplus'*.[57] Thus, even after the amendment by the Amending Act of 1957, the interpretation of retrenchment in *Barsi Light Rly* was affirmed. The Bombay High Court, in *Municipal Corpn of Greater Bombay*, observed:

> It is clear from these observation that in their Lordships' view, the expression 'retrenchment' meant discharge of surplus labour or staff and did not mean a termination of the contract of employment for other causes.[58]

In this case, the discharge of the concerned workmen, for behaviour prejudicial to the interests of the concern, was not considered to be 'retrenchment'. A contrary view was taken by another Division Bench of the same High Court.[59] In *National Garage*,[60] a Full Bench of that High Court, therefore, considered these cases and affirming the holding in *Municipal Corporation, Grt Bombay*, held that a termination of services simpliciter, whether on giving a month's notice under the provisions of the Standing Orders or otherwise, would not amount to 'retrenchment'. It was further observed that the question-whether the termination of service amounts to 'retrenchment' or not-must be determined in each case, on the facts and circumstances of that case and if the termination of service is found to be due to the reason that the workman discharged was surplus, ie, in excess of the requirements of the business or industry concerned, it would amount to 'retrenchment', while the termination of his service due to any other reason, will not constitute 'retrenchment'. A similar view was taken by the Punjab,[61] Calcutta,[62] Patna,[63] Rajasthan,[64] Madras,[65] Orissa,[66] Assam and Nagaland[67] and Kerala[68] High Courts.

Misinterpretation of 'Retrenchment' - Later Trends

But in later decisions, the courts started deflecting from this principle, to suit the exigencies of various fact-situations. In *Digwadih Colliery*, the Supreme Court held that the termination of the service of a badli workman, who had worked for more than 240 days, was 'retrenchment' and he was entitled to the benefits of the provisions relating to retrenchment.[69] Following this decision, in *Wilcox Buckwell*, the court held that even the termination of the services of the a temporary employee, on the ground of surplus labour, amounts to retrenchment.[70] In *Shambhu Nath Mukherjee*, the court went a step further in holding that the striking-off of the name of a workman constituted retrenchment.[71] Likewise, in *State of Punjab*, on the construction of the expression 'retrenchment', which has been defined in s 2(q) of the Payment of Gratuity Act 1972, to mean a 'termination of service of an employee otherwise than on superannuation', a two-judge Bench of the Supreme Court held that except for superannuation, any termination of service would amount to 'retirement' for the purposes of the Act, hence, retrenchment, since 'retrenchment' is a 'termination of service', the court observed: '*It is immaterial that the termination is occasioned by the need to discharge surplus labour*.'[72] The court further observed that 'retrenchment' implies the discharge of surplus labour, as explained in *Barsi Light Rly*, nonetheless, it amounts to a termination of service. This case appears to have put the ratio of *Barsi Light Rly* up side down. Explaining the phrase 'termination by the employer', Balasubramanian J, of the Madras High Court, observed that where an employer directs the

employee to leave the job and quit the place, it is not an act done by the employee, but is an act done by the employer, and hence, it cannot be characterised as a voluntary resignation. In such an event, the employee would be entitled to retrenchment compensation.[73]

The NCL-II recommended that the term 'retrenchment' should be defined precisely, to cover only a termination of employment arising our of a need for a reduction of surplus workers in an establishment, such surplus having arisen out of one or more of several reasons.[74] The Calcutta,[75] Bombay,[76] Punjab,[77] Assam and Nagaland[78] High Courts took the view that a discharge of a workman, in accordance with the terms of the Standing Orders or discharge simpliciter, under the contract, will not constitute 'retrenchment'. Likewise, a single judge of a Madras High Court, in *AS Kannan*,[79] held that the discharge of a casual labourer, on the ground of medical unfitness, would not amount to retrenchment. On the other hand, the High Courts of Kerala,[80] Andhra Pradesh,[81] Madras,[82] and Patna,[83] held that the termination of the service of certain temporary workmen, who were surplus staff, is retrenchment. Another point which has engaged judicial attention is, whether the termination of service on the expiry of the time stipulated in the contract of service, is 'retrenchment'. The labour appellate tribunal, in *Balkrishna Ganpat*,[84] held that such termination would not constitute 'retrenchment', but it did not reason out the decision. In *Hindustan Steel*, the Orissa High Court held that the termination of service in terms of the contract of employment, is also 'retrenchment' and 'no distinction is available to be made...between a termination of service by the efflux of time, in terms of the contract of employment, and a termination of service under a living contract.[85] In this case, the termination of service of the head time-keeper, at the end of the contracted period was, therefore, held to be retrenchment. In *Sundaramony*, the High Court took the view that the temporary hands, drafted in exceptional or extraordinary contingencies or in temporary vacancies, would become surplus on the return of the permanent incumbents to the jobs. In appeal, the Supreme Court based its decision on the construction of the words '*for any reason whatsoever*' as '*very wide and almost admitting of no exception*', and held that the termination of service of a temporary workman, even if employed only for a certain number of days, would constitute retrenchment.[86] Apart from this bare observation, there was no discussion in the judgment, nor was there any reference to the limitations imposed on these words by the larger Benches in *Pipraich Sugar Mills*,[87] and *Hariprasad*.[88]

In *Hindustan Steel*,[89] the Supreme Court held that automatic termination of service, on the expiry of the contractual period of three years would constitute 'retrenchment'. From the proviso to s 25F(a), which provides that no notice required thereunder, shall be necessary if the 'termination is under an agreement which specifies a date for the termination of service', the court inferred that the proviso would have been unnecessary if retrenchment, as defined in s 2(oo), was intended not to include a 'termination of service by efflux of time in terms of an agreement between the parties'. In this view of law, the court held that such a termination would fall within the purview of 'retrenchment'. This, however, was considered as an additional reason. On behalf of the employer, it was conceded that the point was covered by *Sundaramony*, though it was pointed out that that case was in conflict with the decision of a larger Bench in *Barsi Light Rly*. But the court observed that it did not find anything in *Barsi Light Rly*, which was inconsistent with *Sundaramony* and held that giving full effect to the words 'for any reason whatsoever', would be consistent with the scope and purpose of s 25F and not contrary to the scheme of the Act. The decision of the court was actuated by the fact that in order to 'streamline the organisation and to effect economy wherever possible, the company had chosen not to renew the contract of the concerned workman'. The Patna High Court also, for similar reasons, held that the termination of the services of a substituted carriage *khalasi*, who had continued in service for five years, in the circumstances of the case, was 'retrenchment'.[90] But Nambiyar CJ, though subscribing to the view of Eradi J, went a step further and said that the Bench was bound to follow the larger Bench decision in the *Barsi Light Rly*, in preference to *Sundaramony*, *Hindustan Steel* and *Delhi Cloth Mills*.[91]

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13 *Williamsons (India) Ltd v Workmen* (1962) 1 LLJ 302 [LNIND 1962 SC 94], 306 (SC), per Gajendragadkar J.

14 *Yamna Mills Co Ltd v MM Mandai* (1957) 1 LLJ 620 [LNIND 1957 BOM 57] (Bom) (DB), per Tendolkar J.

15 *Uttar Pradesh Electric Supply Co Ltd v Mohd Gause 1970 Lab IC* 438, 440 (All), per Khare J.

16 *Associated Cement Co Ltd v Workmen* (1957) 2 LLJ 559 (LAT).

17 *Workmen of SBI v Secy & Treasurer of SBI* (1984) 2 LLJ 239, 241 (Mad) (DB), per KBN Singh CJ

18 *Rasiklal Mondial joshi v Bank of Baroda* (1956) 1 LLJ 103 (LAT).

19 *Praga Industries Ltd v Workers* (1959) 2 LLJ 379 [LNIND 1959 SC 110] (SC) : AIR 1959 SC 1194 [LNIND 1959 SC 110]: [1960] 1 SCR 161 [LNIND 1959 SC 110] per Gajendragadkar J.

20 *International Encyclopaedia of Social Sciences*, 1968, Vol 16, p 424.

21 *Salkia Transport Agency Pvt Ltd v Fifth IT* (1963) 1 LLJ 722 (Cal), per BN Banerjee J.

22 *Madura Coats Ltd v Mathan* (1987) 2 LLJ 388, 390 (Ker) (DB), per Malirnath CJ.

23 *DCM Chemical Works v Workmen* (1962) 1 LLJ 388 [LNIND 1962 SC 97] (SC), per Wanchoo J.

24 *International Encyclopaedia of Social Sciences*, 1968, Vol 16, p 425.

25 *JK Cotton Spg and Wvg Mills Co Ltd v LAT* (1963) 2 LLJ 436 [LNIND 1963 SC 157], 444 (SC), per Gajendragadkar J.

26 *Indian Oxygen Ltd v Workmen* (1963) 1 LLJ 264 [LNIND 1963 SC 2] (SC), per Das Gupta J.

27 *Alembic Chemical Works Co Ltd v Workmen* (1961) 1 LLJ 328 [LNIND 1960 SC 348], 334 (SC) : AIR 1961 SC 647 [LNIND 1960 SC 348]: [1961] 3 SCR 297 [LNIND 1960 SC 348], per Gajendragadkar J.

28 *RB Diwan Badri Das v Industrial Tribunal* (1962) 2 LLJ 366 [LNIND 1962 SC 293] (SC) : AIR 1963 SC 630 [LNIND 1962 SC 293]: [1963] 3 SCR 930 [LNIND 1962 SC 293], per Gajendragadkar J.

29 *Mohammed & Sons v Workmen* CA No 338 of 1966 (27-7-1967) (SC), per Wanchoo CJI.

30 *Indian Oxygen Ltd v Workmen* (1969) 1 LLJ 235 [LNIND 1968 SC 193], 240-42 (SC) : AIR 1969 SC 306 [LNIND 1968 SC 193]: [1969] 1 SCR 550 [LNIND 1968 SC 193] per Shelat J.

31 *Uttar Pradesh Electric Supply Co v RK Shukla* (1969) 2 LLJ 728 [LNIND 1969 SC 200], 738 (SC) : AIR 1970 SC 237 [LNIND 1969 SC 200]: (1969) 2 SCC 400 [LNIND 1969 SC 200], per Shah J.

32 *Workmen v Otis Elevators Co (India) Ltd* (1972) 1 LLJ 166 [LNIND 1971 SC 543], 168-70 (SC) : (1972) 4 SCC 690 [LNIND 1971 SC 543], per Vaidialingam J.

33 *Rai Bahadur Diwan Badri Das v IT* (1962) 2 Lt J 366, 371-72 (SC), per Gajendragadkar J.

34 *Gramophone Co Ltd v Workmen* (1964) 2 LLJ 131 [LNIND 1964 SC 114], 137-38 (SC), per Wanchoo J.

35 *Indian Oxygen Ltd v Workmen* (1963) 1 LLJ 264 [LNIND 1963 SC 2], 266 (SC) : 1963 Supp (2) SCR 736 : (1963) 3 FLR 196, per Das Gupta J.

36 *Buckingham & Carnatic Co Ltd v Workmen* CA No 674 of 1968 (25-7-1968) (SC), per Vaidialingam J.

37 *Dalmia Cement (Bharat) Ltd v Workmen* (1961) 2 LLJ 130 [LNIND 1960 SC 82], 132-33 (SC) : AIR 1967 SC 209 [LNIND 1960 SC 82], per Das Gupta J.

38 *May and Baker v Workmen* (1961) 2 LLJ 94 [LNIND 1961 SC 18], 98 (SC) : AIR 1967 SC 678 [LNIND 1961 SC 18], per Wanchoo J.

39 *Cinema Theatres v Workmen* (1964) 2 LLJ 128 [LNIND 1964 SC 106], 131 (SC), per Wanchoo J.

40 *Alembic Chemical Works Co Ltd v Workmen* (1961) 1 LLJ 328 [LNIND 1960 SC 348] (SC) : AIR 1961 SC 647 [LNIND 1960 SC 348]: [1961] 3 SCR 297 [LNIND 1960 SC 348], per Gajendragadkar J.

41 *Calcutta Insurance Co Ltd v Workmen* (1967) 2 LLJ 1 [LNIND 1967 SC 36], 10-12 (SC), per Mitter J.

42 *Remington Rand of India Ltd v Workmen* CA No 2105 of 1966 (11-8-1967) (SC), per Mitter J.

43 *Alembic Glass Industries Ltd v Workmen* (1976) 2 LLJ 316 [LNIND 1976 SC 241] (SC) : AIR 1976 SC 2091 [LNIND 1976 SC 241]: (1976) 3 SCC 522 [LNIND 1976 SC 241], per Shinghal J.

44 *Karam Chand Thapar & Bros Ltd v Workmen* (1964) 1 LLJ 429 [LNIND 1963 SC 178], 434 (SC), per Das Gupta J.

45 *Hindustan Times Ltd v Workmen* (1963) 1 LLJ 108 [LNIND 1962 SC 431] (SC) : AIR 1963 SC 1332 [LNIND 1962 SC 451]: [1964] 1 SCR 234 [LNIND 1962 SC 451], per Das Gupta J.

46 *Associated Cement Companies Ltd v CWK Union* (1972) 2 LLJ 40 [LNIND 1972 SC 178], 43 (SC) : AIR 1972 SC 1552 [LNIND 1972 SC 178]: (1972) 4 SCC 23 [LNIND 1972 SC 178], per Mathew J.

47 *Technological Institute of Textiles v Workmen* (1965) 2 LLJ 149 [LNIND 1965 SC 85], 152 (SC), per Ramaswami J.

48 *Hindustan Times Ltd v Workmen* (1963) 1 LLJ 108 [LNIND 1962 SC 431], 117 (SC) : AIR 1963 SC 1332 [LNIND 1962 SC 451]: [1964] 1 SCR 234 [LNIND 1962 SC 451], per Das Gupta J.

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50 *Shambhoo Singh v Central IT-cum-LC* (1981) 2 LLJ 376, 378 (MP) (DB), per GB Singh CJ.

51 *Indian Iron & Steel Co Ltd v Workmen* (1958) 1 LLJ 260 [LNIND 1957 SC 105], 268 (SC), per SK Das J.

52 *Delhi Cloth & General Mills Ltd v Piara Lal* 1976 Lab IC 21, 25 (Delhi), per Rangarajan J.

53 *Binny Ltd v Workmen* 1973 Lab IC 1119 (SC), per Grover J.

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56 *Remington Rand of India Ltd v Workmen* CA No 2105 of 1966 (11-8-1969) (SC), per Mitter J.

57 *Pfizer Pvt Ltd, Bombay v Workmen* (1963) 1 LLJ 543 [LNIND 1962 SC 400], 555 (SC), per Gajendragadkar J.

58 *Associated Cement Staff Union v Associated Cement Co* (1964) 1 LLJ 12 [LNIND 1963 SC 279], 15 (SC) : AIR 1964 SC 914 [LNIND 1963 SC 279], per Das Gupta J.

59 *Mohammed & Sons v Workmen* CA No 338 of 1966 (27 July 1967), per Wanchoo CJI.

60 Government of India (1969), *Report of NCL-I*, Para 9.43, at p 105

61 *Saxby and Farmer (India) Ltd v Workmen* 1975 Lab IC 361 -62 (SC), per Grover J.

62 *Pfizer Pvt Ltd v Workmen* (1964) 1 LLJ 543, 555 (SC), per Gajendragadkar J.

63 *Workmen of NTC of India v NTC of India* , CA No 852 of 1966 (18 October 1966) (SC), per Bhargava J.

64 *Bhiwani Textile Mills v Workmen* (1969) 2 LLJ 739 [LNIND 1969 SC 97] (SC),

65 *Federation of S&ME Industries v Workmen* 1972 Lab IC 1275 (SC) : AIR 1972 SC 2126 : (1973) 3 SCC 374, per Vaidialingam J.

66 *Bijli Cotton Mills Ltd v Workmen* (1972) 2 LLJ 320 [LNIND 1972 SC 182], 327 (SC) : AIR 1972 SC 1903 [LNIND 1972 SC 182]: (1972) 1 SCC 840 [LNIND 1972 SC 182], per Dua J.

67 *Hindustan Steel Ltd v Workmen* (1973) 2 LLJ 250 [LNIND 1973 SC 176] (SC) : AIR 1973 SC 1397 [LNIND 1973 SC 176]: (1974) 3 SCC 182 [LNIND 1973 SC 176], per Mukherjee J.

68 *Saxby and Farmer (India) Pvt Ltd v Workmen* 1975 Lab IC 361 -62 (SC), per Grover J.

69 Government of India (1969), *Report of NCL-I*, p 247.

70 *Smith's Labour Law*, 1954, 2nd ed, p 723.

71 *Mathurdas Kanji v LAT* (1958) 2 LLJ 265 [LNIND 1958 SC 46], 269 (SC), per Subba Rao J.

72 Government of India (1969), *Report NCL-I*, p 247.

73 *Titaghur Paper Mills Co Ltd v Workmen* (1959) 2 LLJ 9 [LNIND 1959 SC 92], 14 (SC) : AIR 1959 SC 1095 [LNIND 1959 SC 372]: 1959 Supp (2) SCR 1012, per Wanchoo J.

74 *Smith's Labour Law*, 1954, 2nd ed, p 723.

75 *Burn & Co v Employees* (1960) 2 LLJ 261 [LNIND 1960 SC 99] (SC) : AIR 1960 SC 896 [LNIND 1960 SC 99]: [1960] 3 SCR 423 [LNIND 1960 SC 99], per Wanchoo J.

76 *National Iron and Steel Co Ltd v Workmen* (1962) 2 LLJ 752 [LNIND 1962 SC 271], 756 (SC), per Mudholkar J.

77 *Hindustan Steel Ltd v State of Orissa* ,CA No 1969 of 1969 (4-4-1975) (SC), per Gupta J.

78 (1972) 1 LLJ 642 [LNIND 1972 SC 140], 652 (SC), per Mitter J.

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81 *Unichem Laboratories Ltd v Workmen* (1972) 1 LLJ 576 [LNIND 1972 SC 127] (SC) : AIR 1972 SC 2332 [LNIND 1972 SC 127]: (1972) 3 SCC 552 [LNIND 1972 SC 127].

82 *Mumbai Kamgar Sabha v Abdulbhai Faizullabhai* (1976) 2 LLJ 186 [LNIND 1976 SC 84] (SC), per Krishna Iyer J.

83 *Mahalaxmi Cotton Mills v Workmen* (1952) 2 LLJ 635 (LAT).

84 *Ispahani Ltd v Employees' Union* (1959) 2 LLJ 4 [LNIND 1959 SC 100], 7 (SC), per Wanchoo J.

85 *Grahams Trading Co (India) Ltd v Workmen* (1959) 2 LLJ 393 [LNIND 1959 SC 103], 396 (SC) : AIR 1959 SC 1151 [LNIND 1959 SC 103]: [1960] 1 SCR 107 [LNIND 1959 SC 103], per Wanchoo J.

86 *Isphani Ltd v Isphani Employees' Union* (1959) 2 LLJ 4 [LNIND 1959 SC 100] (SC) : AIR 1959 SC 1147 [LNIND 1959 SC 100]: [1960] 1 SCR 24 [LNIND 1959 SC 100] per Wanchoo J.

87 *Bombay Co Ltd v Workmen* (1964) 2 LLJ 109 [LNIND 1964 SC 103], III (SC), per Wanchoo J.

88 *Tulsidas Khimji v Workmen* (1962) 1 LLJ 435 [LNIND 1962 SC 160] (SC), per Sinha CJI.

89 *Grahams Trading Co Ltd v Workmen* (1959) 2 LLJ 393 [LNIND 1959 SC 103], 396 (SC) : AIR 1959 SC 1151 [LNIND 1959 SC 103]: [1960] 1 SCR 107 [LNIND 1959 SC 103], per Wanchoo J.

90 *BN Elias and Co Ltd Employees' Union v BN Elias and Co Ltd* (1960) 2 LLJ 219 [LNIND 1960 SC 90], 221 (SC) : AIR 1960 SC 886 [LNIND 1960 SC 90]: [1960] 3 SCR 382 [LNIND 1960 SC 90], per Wanchoo J.

91 *Jardine Henderson v Workmen* (1962) 1 LLJ 405 [LNIND 1962 SC 103], 408 (SC) : AIR 1963 SC 474 [LNIND 1962 SC 103]: 1962 Supp (3) SCR 582, per Wanchoo J.

92 *Tulsidas Khirija v Workmen* (1962) 1 LLJ 435 [LNIND 1962 SC 160] (SC) : AIR 1963 SC 1007 [LNIND 1962 SC 160]: [1963] 1 SCR 675 [LNIND 1962 SC 160], per Sinha CJI.

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94 *Workmen of Modern Tile & Clay Works v IT* (1965) 2 LLJ 657 (Ker), per Mathew J.

95 (1962) 1 LLJ 435 [LNIND 1962 SC 160], 443 (SC), per Sinha CJI for the majority.

96 *Tulsidas Khimji v Workmen* (1962) I LLJ 435 (SC) : AIR 1963 SC 1007 [LNIND 1962 SC 160], *per* Sinha CJI.

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2 *Vegetable Products Ltd v Workmen* (1965) 1 LLJ 468 [LNIND 1964 SC 308], 471-72 (SC) : AIR 1965 S C 1499 [LNIND 1964 SC 308], per Wanchoo J.

3 *Sri Upendra Chandra Chakraborty v United Bank of India* (1985) 2 LLJ 398 [LNIND 1985 SC 157], 400 (SC) : AIR 1985 SC 1010 [LNIND 1985 SC 157]: 1985 Supp SCC 26, per Khalid J.

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7 *Vegetable Products Ltd v Workmen* (1965) 1 LLJ 468 [LNIND 1964 SC 308], 471 (SC), per Wanchoo J.

8 *Bombay Co Ltd v Workmen* (1964) 2 LLJ 109 [LNIND 1964 SC 103] (SC), per Wanchoo J.

9 *Vegetable Products Ltd v Workmen* (1965) 1 LLJ 468 [LNIND 1964 SC 308], 471 (SC), per Wanchoo J.

10 (1961) 1 LLJ 521 [LNIND 1960 SC 321] (SC), per Wanchoo J.

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12 *Rallis India Ltd v IT* 1979 Lab IC (NOC) 98 (Cal), per Sabyasachi Mukharji J.

13 Government of India, *Report of the National Commission on Labour*, pp 111-12.

14 *Labour Investigation Committee*, 1946, (cited in) Govt of India (1969), Report of NCL-I, p 110.

15 Government of India (1969), *Report of NCL-I*, p 112.

16 *Dharangadhara Chemical Works v Workmen* (1962) 1 LLJ 197 [LNIND 1962 SC 19] (SC), per Sarkar J.

17 *India Genl Navigation & Rly Co Ltd v Workmen* (1961) 2 LLJ 372, 375 (SC), per Das Gupta J.

18 Government of India (1969), *Report of NCL-I*, p 162.

19 *Novex Dry Cleaners v Workmen* (1962) 1 LLJ 271 [LNIND 1962 SC 50], 275 (SC), per Gajendragadkar J.

20 *Air Lines Hotel Pvt Ltd v Workmen* (1961) I LLJ 663, 667 (SC), per Das Gupta J.

21 *Novex Dry Cleaners v Workmen* (1962) 1 LLJ 271 [LNIND 1962 SC 50], 274-75 (SC), per Gajendragadkar J.

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26 *Indian Hume Pipe Co Ltd v Workmen* (1959) 2 LLJ 830 [LNIND 1959 SC 185], 832 (SC), per Gajendragadkar J.

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30 *Mahalakshmi Sugar Mills Co Ltd v Workmen* (1961) 2 LLJ 623 (SC), per Wanchoo J.

31 *Darshak Ltd v IT* (1986) 1 LLJ 253, 261-62 (Kant), per Ramajois J.

32 *Punjab State Co-operative Supply and Marketing Federation Ltd v State of Punjab* 1996 Lab IC 1463, 1464-65 (P&H), per NK Sodhi J.

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34 *Air India Cabin Crew Assn v Air India* (1981) 2 LLJ 306, 308 (Born) (DB), per Pratap J.

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36 *Workmen of Indian Bank v Management of Indian Bank* (1985) 1 LLJ 6 (Mad), per Natarajan J.

37 *South Arcot Central Co-operative Bank Employees Assn v Management* 1995 Lab IC 783, 785 (Mad) (DB), per Somasundaram J.

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39 *Vijay Kumar Mills v Vijaykumar Mills National Workers Union* (1964) 2 LLJ 399 [LNIND 1963 MAD 242]-400 (Mad) (DB), per Ramachandra Ayyar CJ.

40 *All India Reserve Bank Employees' Assn v RBI* (1965) 2 LLJ 175 [LNIND 1965 SC 146], 188 (SC), per Hidayatullah J.

41 *NK Sen v Labour Appellate Tribunal* (1953) 1 LLJ 6, 9-10 (Bom) (DB), per Chagla CJ.

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45 *Standard Vacuum Refining Co of India Ltd v Workmen* (1960) 2 LLJ 233 [LNIND 1960 SC 109], 238 (SC), per Gajendragadkar J.

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47 *All India RBE Assn v Reserve Bank of India* (1965) 2 LLJ 175 [LNIND 1965 SC 146], 188 (SC) : AIR 1966 SC 305 [LNIND 1965 SC 146]: [1966] 1 SCR 25 [LNIND 1965 SC 146], per Hidayatullah J.

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61 *Mgmt of Safdarjung Hospital v Kuldip S Sethi* (1970) 2 LLJ 266 [LNIND 1970 SC 180] (SC) : AIR 1970 SC 1407 [LNIND 1970 SC 180]: (1970) 1 SCC 735 [LNIND 1970 SC 180], per Hidayatullah CJI.

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71 *MA Veiyra v CP Fernandez* (1956) 1 LLJ 547 [LNIND 1955 BOM 261], 549 (Born) (DB), per Chagla CJ.

72 *Workmen of Firestone Tyre and Rubber Co of India Pvt Ltd v Mgmt* (1976) 1 LLJ 493 [LNIND 1976 SC 49] (SC), per Untwalia J.

73 *Gaya Cotton and Jute Mills Ltd v GCJML Union* (1952) 2 LLJ 37 (LAT).

74 *Priya Laxmi Mills Ltd v Mazdoor Mahajan Mandal* (1977) 1 LLJ 22 [LNIND 1976 SC 355] (SC), per Goswami J.

75 *H Chinnapan v Kaleeswara Mills Ltd* (1968) 1 LLJ 352, 354 (Mad), per Kailasam J.

76 *Central India Spg, Wvg and Mfg Co Ltd v IC* (1959) 1 LLJ 468 [LNIND 1958 BOM 96], 473 (Born) (DB), per Mudholkar J.

77 *Kairbetta Estate v Rajamanickam* (1960) 2 LLJ 275 [LNIND 1960 SC 92], 277 (SC), per Gajendragadkar J.

78 *Workmen of Firestone TRCI Pvt Ltd v Firestone Ltd* (1976) 1 LLJ 493 [LNIND 1976 SC 49], 497 (SC), per Untwalia J.

79 *Kairbetta Estate Kotagiri v Rajamanickam* (1960) 2 LLJ 275 [LNIND 1960 SC 92], 277 (SC), per Gajendragadkar J.

80 Brought into force on 21 August 1984.

81 *Central India Spg Wvg & Mfg Co Ltd v IC* (1959) 1 LLJ 468 [LNIND 1958 BOM 96], 472 (Born) (DB) : AIR 1958 Bom 225 [LNIND 1957 BOM 77]: (1958) 60 Bom LR 440, per Mudholkar J.

82 *Kairbetta Estate v Rajamanickam* (1960) 2 LLJ 275 [LNIND 1960 SC 92], 277-78 (SC) : AIR 1960 SC 893 [LNIND 1960 SC 92]: [1960] 3 SCR 371 [LNIND 1960 SC 92], per Gajendragadkar J.

83 *Workers of Dewan Tea Estate v Management* (1964) 1 LLJ 358 [LNIND 1963 SC 264] (SC), per Gajendragadkar J.

84 *R Narayanaswami v LC* (1965) 2 LLJ 677 [LNIND 1965 MAD 23] (Mad), per Ramakrishan J.

85 *Hope Textiles Ltd v State of Madhya Pradesh* (1993) 1 LLJ 603 -04 (MP) (DB) : (1992) 65 FLR 770 : (1992) 2 MPJR 44, per Kokje J.

86 *Management of Gauhati Press Pvt Ltd v LC* 1983 Lab IC 824, 827 (Gau), per Saikia J.

87 *SAE Mazdoor Union v Labour Commr* (2001) 4 LLN 1105. 1109-10, (MP), per Kulshreshta J.

88 *RS Rekchand Mohatas Spg and Wvg Mills Pvt Ltd v LC* (1968) 1 LLJ 610 [LNIND 1967 BOM 38], 613 (Bom), per Paranjpe J.

89 Ibid, 614.

90 *MA Veiyra v CP Fernadez* (1956) 1 LLJ 547 [LNIND 1955 BOM 261], 550 (Bom) (DB), per Chagla CJ.

91 *KT Rolling Mills Pvt Ltd v MR Meh* (1963) 2 LLJ 667 [LNIND 1962 SC 315] (Bom) (FB).

92 *South India Corpn v All Kerala CFW Federation* (1960) 2 LLJ 103 (Ker) : AIR 1960 Ker 208 [LNIND 1959 KER 246]: 1960 KLJ 129, per TK Joseph J.

93 *Workers of Dewan Tea Estate v Management* (1964) 1 LLJ 358 [LNIND 1963 SC 264] (SC), per Gajendragadkar J.

94 (1976) 1 LLJ 493 [LNIND 1976 SC 49] (SC), per Untwalia J.

95 *Workmen of Firestone TRCI Pvt Ltd v Firestone Ltd* (1976) 1 LLJ 493 [LNIND 1976 SC 49], 497 (SC), per Untwalia J.

96 *Tatanagar Foundry Co v Workmen* (1962) 1 LLJ 382 [LNIND 1962 SC 110], 385 (SC) : AIR 1962 SC 1533 [LNIND 1962 SC 110]: 1962 Supp (3) SCR 795, per Gajendragadkar J.

1 *MA Veryra v CP Fernandez* (1956) 1 LLJ 547 [LNIND 1955 BOM 261] (Born), per Chagla CJ.

2 *Anusuyabai Vithal v JH Mehta* (1959) 2 LLJ 742, 744 (Born) (DB) : (1959) 61 Bom LR 417, per Chainani CJ.

3 *Kairbetta Estate v Rajamanickam* (1960) 2 LLJ 275 [LNIND 1960 SC 92], 277 (SC), per Gajendragadkar J.

4 *H Chinnapan v Kaleeswara Mills Ltd* (1968) 1 LLJ 352, 354 (Mad), per Kailasam J.

5 *Sri Ramachandra Spg Mills v State of Madras* (1957) 1 LLJ 90, 92-93 (Mad): 1957 ILR 90, per Balakrishna Ayyar J.

6 Brought into force on 21 August 1984.

7 *Mohamed Samsuddin v Sasamusa Sugar Works Ltd* (1956) 1 LLJ 575, 577 (LAT).

8 *Express Newspapers Ltd v Workers* (1962) 2 LLJ 227, 232 (SC), per Gajendragadkar J.

9 *Kairbetta Estate v Rajamanickam* (1960) 2 LLJ 275 [LNIND 1960 SC 92], 278 (SC), per Gajendragadkar J.

10 Taylor, *The Vountary Arbitration of Labour Disputes*, 1951, 49 Mich, L Rev 787, 789-90.

11 RE Mathews, *Labor Relations and the Law*, 1953, p 294.

12 *Andhra Pradesh EEC v APEEC Staff Union* (1987) 1 LLJ 324, 327 (AP), per K Ramaswamy J.

13 *Feroz Din v State of West Bengal* (1960) 1 LLJ 244 [LNIND 1959 SC 208], 249 (SC), per Sarkar J.

14 *Mohamed Samsuddin v Sasamsua Sugar Works Ltd* (1956) 1 LLJ; 575, 577 (LAT).

15 *Shakti Electro Mechanical Industries Pvt Ltd v FN Lala* (1974) 2 LLJ 1, 5-6 (Born) : (1974) 76 Bom LR 42 : 1974 Mhlj 264 [LNIND 1972 BOM 61], per KK Desai J.

16 *Feroz Din v State of West Bengal* (1960) 1 LLJ 244 [LNIND 1959 SC 208], 248 (SC), per Sarkar J.

17 *Mohamed Samsuddin v Sasamusa Sugar Works Ltd* (1956) 1 LLJ 575 (LAT).

18 *Lakshmi Devi Sugar Mills Ltd v Ram Sarup* (1957) 1 LLJ 17 [LNIND 1956 SC 85], 22 (SC), per Bhagwati J.

19 *Express Newspapers Ltd v Workers & Staff Employed* (1962) 2 LLJ 227, 232 (SC) : AIR 1963 SC 569 [LNIND 1962 SC 253]: [1963] 3 SCR 540 [LNIND 1962 SC 253], per Gajendragadkar J.

20 *Express Newspapers Ltd v Workers & Staff* (1962) 2 LLJ 227, 232 (SC), AIR 1963 SC 569 [LNIND 1962 SC 253] per Gajendragadkar J.

21 *General Labour Union (Red Flag), Bombay v BV Chavan* 1985 Lab IC 726, 728 (SC), per Desai J.

22 *Govrepore Co Ltd v Nuddea Mills Co Ltd* (1990) 2 LLJ 245 [LNIND 1989 CAL 262], 247 (Cal), per MK Mukherjee J.

23 *Mgmt of RF Engg Ltd v State of Bihar* 1970 Lab IC 1119, 1126 (Pat) (DB), per Untwalia J.

24 *Kamalalaya Stores Karamchari Samity v Kamalalaya Stores Pvt Ltd* 1977 Lab IC (NOC) 110 (Cal), per Basak J.

25 *Lord Krishna Sugar Mills Ltd v State of Uttar Pradesh* (1964) 2 LLJ 76 (All), per Dwivedi J.

26 *Anamallais Timber Trust Ltd v Chacko* (1952) 2 LLJ 604 (LAT).

27 *Praboo Pandey v JK Jute Mills Co Ltd* (1956) 1 LLJ 588 (LAT).

28 *Industrial and General Engineering Co v Workmen* (1964) 2 LLL 438(Mys) (DB), per Somnath Ayyar J.

29 *State of Bihar v Deodar Jha* AIR 1958 Pat 51, 58 (DB), per Banerji J.

30 *Feroz Din v State of West Bengal* (1960) 1 LLJ 244 [LNIND 1959 SC 208] (SC), per Sarkar J.

31 *Iron Moulders' Union v Allis-Chambers Co* 20 LRA (NS) 315.

32 *Abrams v Alien* 173 AIR 671.

33 *Gobindo Sheet Metal Works and Foundry v Workmen* 11 FJR 363 (LAT).

34 *Pipraich Sugar Mills Ltd v Workmen* 10 FJR 413 (LAT).

35 *Workmen of Sur Iron and Steel Co Pvt Ltd v Mgmt* (1971) 1 LLJ 570, 573 (SC), per Bhargava J.

36 *Northbrook Jute Co Ltd v Workmen* (1960) 1 LLJ 580 [LNIND 1960 SC 87] (SC), per Das Gupta J.

37 *Lord Krishna Sugar Mills Ltd v State of Uttar Pradesh* (1964) 2 LLJ (79) (All), per Dwivedi J.

38 *India Machinery Mazdoor Union v India Machinery Co Ltd* (1956) 2 LLJ 408 (LAT).

39 *Mgmt of Hindustan Steel Ltd v State of Orissa* 1970 Lab IC 1233 (Ori) (DB), per RN Misra J.

40 *India Marine Service Pvt Ltd v Workmen* (1963) 1 LLJ 122 [LNIND 1962 SC 260], 126 (SC), per Mudholkar J.

41 *Northern Dooars Tea Co Ltd v Workmen of Dem Dima Tea Estate* (1964) 1 LLJ 436 [LNIND 1963 SC 184], 440 (SC), per Gajendragadkar J.

42 *Pradip Lamp Works v Pradip Lamp Works Karamchari Sangh* (1956) 1 LLJ 507 (SC), per Dua J.

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44 *Bhowra Coke Plant v Bhowra Coke Plant Workers' Union* (1956) 1 LLJ 195 (LAT).

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46 *Municipal Council, Washim v Manguji Zenduji Dhamane* 1978 Lab IC 881, 888 (Bom) (DB), per Dharmadhikari J.

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48 *Workmen of State Bank of India v State Bank of India* 1990 Lab IC 1750 (SC), per Sawant J.

49 *Avon Services (Production Agencies) Pvt Ltd v IT* (1979) 1 LLJ 1 [LNIND 1978 SC 284], 7 (SC), per Desai J.

50 *Pipraich Sugar Mills Ltd v PSM Mazdoor Union* (1957) 1 LLJ 235 [LNIND 1956 SC 84], 239 (SC) : AIR 1957 SC 95 [LNIND 1956 SC 84]: [1956] 1 SCR 72 [LNIND 1956 SC 9] per Venkatarama Ayyar J.

51 *Santosh Gupta v State Bank of Patiala*, (1980) II LLN 170(SC), per Chinnappa Reddy J.

52 *Bharat Coking Coal Ltd v CGIT* 1995 Lab IC 971, 974 (Cal), per AK Chakravarty J.

53 Ibid, 241-42.

54 *Barsi Light Rly Co Ltd v KN Joglekar* (1957) 1 LLJ 243 [LNIND 1956 SC 104], 247 (SC), per SK Das J.

55 Ibid, 248-52.

56 *Kamleshkumar R Mehta v PO, CGIT* (1980) 1 LLJ 336, 346 (Bom) (DB) : 1979 mh LJ 874 per Lentin J.

57 *Anakapalle CAIS Ltd v Workmen* (1962) 2 LLJ 621 [LNIND 1962 SC 345], 628-29 (SC) : AIR 1963 SC 1489 [LNIND 1962 SC 345]: [1963] supp 1 SCR 730 per Gajendragadkar J.

58 *Municipal Corpn of Greater Bombay v LAT* (1957) 1 LLJ 37, 44 (Bom), per Shah J.

59 *Mst Dewli Bakaram v State Industrial Court* (1959) 1 LLJ 475 [LNIND 1958 BOM 99] (Bom) (DB), per Mudholkar J.

60 *National Garage v J Gonsalves* (1962) 1 LLJ 56 [LNIND 1961 BOM 51] (Bom) (FB) : AIR 1962 Bom 152 [LNIND 1961 BOM 53] per Chainani CJ.

61 *Goodlass Nerolac Paints Pvt Ltd v Chief Commr, Delhi* (1967) 1 LLJ 545 [LNIND 1966 PNH 57] (Punj) : AIR 1962 Bom 152 [LNIND 1961 BOM 53] per Narula J.

62 *Haji Ismail Said & Son Pvt Ltd v Fourth IT* (1966) 2 LLJ 59 [LNIND 1965 CAL 127], 68 (Cal) (DB) : AIR 1966 Cal 375 [LNIND 1965 CAL 127] per PB Mukharji J.

63 *Burrakur Coal Co Ltd v Azimuddin Ashraff* (1960) 2 LLJ 434, 437-38 (Pat) (DB) : AIR 1960 Pat 554 per Kanhaiya Singh J.

64 *Rajasthan SEB v LC* (1966) 1 LLJ 381, 388-89 (Raj) (DB) : AIR 1966 Raj 56 per Kan Singh J.

65 *Mettur Industries Ltd v AR Verma* (1958) 2 LLJ 326 [LNIND 1958 MAD 52] (Mad) : AIR 1959 Mad 479 [LNIND 1958 MAD 52] per Balakrishna Ayyar J.

66 *State Transport Controller v IT* (1965) 2 LLJ 376, 385-86 (Ori) (DB).

67 *SK Neogi v Union of India* AIR 1970 Assam & Nag 131, 137 (DB), per Goswami J.

68 *CVA Hydross & Son v Joseph Sanjon* (1967) 1 LLJ 509 (Ker) : 1966 KLJ 113 per Mathew J.

69 *Digwadih Colliery v Workmen* (1965) 2 LLJ 118 [LNIND 1965 SC 93]-19 (SC) : AIR 1966 SC 75 [LNIND 1965 SC 93]: [1965] 3 SCR 448 [LNIND 1965 SC 93] per Hidayatullah J.

70 *Mgmt of Wilcox Buckwell (India) Ltd v Jagannath* 1974 Lab IC 706 -07 (SC), per Grover J.

71 *Delhi Cloth and Gen Mills Co Ltd v Shambhu Nath Mukherjee* 1977 Lab IC 1695 [LNIND 1977 SC 280], 1698 (SC), per Goswami J.

72 *State of Punjab v Labour Court* AIR 1979 SC 1981 [LNIND 1979 SC 410]: 1980 Lab IC 1084 : [1980] 1 SCR 953 [LNIND 1979 SC 410] per Pathak J.

73 *A Sambanthan v PO Addl LC* (1998) 3 LLN 388, 393 (Mad), per Balasubramanian J.

74 Government of India (2002), *Report of NCL-II*, p 39, para 6.43.

75 *Haji Ismail Said and Son Pvt Ltd v Fourth IT* (1966) 2 LLJ 59 [LNIND 1965 CAL 127], 68 (Cal) (DB) : AIR 1966 Cal 375 [LNIND 1965 CAL 127] per PB Mukharji J.

76 *Devidayal N Sharma v State IC* (1961) 1 LLJ 167 (Bom) (DB) : AIR 1959 Bom 65 [LNIND 1958 BOM 82] per Mudholkar J.

77 *Amritsar Rayon & Silk Mills Pvt Ltd v IT* (1962) 1 LLJ 176 (Punj), per Gosain J.

78 *SK Neogi v Union of India* AIR 1970 Assam & Nag 131,137 (DB), per Goswami J.

79 *S Kannan v Union of India* 1978 Lab IC (NOC) 128 (Mad), per Mohan J.

80 *L Krishnan v Divl Personnel Officer, Southern Rly* (1972) 2 LLJ 568 (Ker) (DB) 1972 KLJ 1001 per Subramonian Poti J.

81 *Divl PO, Southern Rly v GJ Reddy* 1976 Lab IC 115, 120 (AP) (DB), per Chinnappa Reddy J.

82 *State Bank of India v N Sundaramony* (1975) 1 LLJ 453 [LNIND 1975 MAD 66] (Mad) (DB) (1975) ILR 3 Mad 150 per Veeraswamy J.

83 *Basant Lal Sah v DME (C&W) NE Rly* 1976 Lab IC 609 (Pat) (DB), per BD Singh J.

84 *Balkrishna Ganpat v Ruston and Horns (India) Ltd, Bombay* (1956) 1 LLJ 599 (LAT).

85 *Hindustan Steel Ltd v State of Orissa* 1970 Lab IC 345 (Ori) (DB), per RN Misra J.

86 *State Bank of India v N Sundaramony* (1976) 1 LLJ 478 [LNIND 1976 SC 13] (SC) : AIR 1976 SC 1111 [LNIND 1976 SC 13]: 1976 Lab IC 769 [LNIND 1976 SC 13] per Krishna Iyer J.

87 *Pipraich Sugar Mills* (1957) 1 LLJ 235 [LNIND 1956 SC 84] (SC): AIR 1957 SC 95 [LNIND 1956 SC 84] per Venkatarama Ayyar J.

88 *Hariprasad Shivshankar Shukla v AD Divekar* (1957) 1 LLJ 243 [LNIND 1956 SC 104] (SC), per SK Das J.

89 *Hindustan Steel Ltd v State of Orissa* (1977) 1 LLJ 1 [LNIND 1976 SC 330], 3-4 (SC), per Gupta J.

90 *Basant Lal Sah v DME(CW) NE Rly*, (1977) 2 LLJ 154, 161 (Pat) (DB), per BD Singh J.

91 *Asst PO, Southern Rly v KT Antony* (1978) 2 LLJ 254 (Ker) : ILR 1978 (1) Kev 216

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER I Preliminary

S. 2. Definitions.—

Post Sundaramony Phase - Judicial Chaos

The High Courts of Delhi,[92] and Bombay,[93] and a single judge of the Madras High Court,[94] held that there was no inconsistency between the ratio of *Barsi Light Rly* and that of the *N Sundaramony* and *Hindustan Steel*. In other words, the ratio of the *Barsi Light Rly* case, that 'retrenchment' is a discharge of surplus labour by the employer, 'for any reason whatsoever', has remained unshaken by the subsequent decisions, in *State Bank of India* and *Hindustan Steel*, and has not been in any way, departed from. On the other hand, the Madras High Court, in *Raghavachari*, held that the concept of surplusage is no longer sustainable, in view of the definition of retrenchment meaning 'the termination by the employer, of the services of a workman for any reason whatsoever'.[95] But in *Santosh Gupta*, a two-judge Bench of the Supreme Court again discountenanced the contention that retrenchment means a discharge of a workman on account of surplusage, with the observation:

> If this submission is right, there was no need to define the expression 'retrenchment' and in such wide terms. We cannot assume that the Parliament was undertaking an exercise in futility, to give a long-winded definition, merely to say that the expression means what it always meant.[96]

In this case, the service of the employee was terminated after the completion of 240 days of continuous service, before the date of the termination of service, without complying with the requirements of the provisions of s 25F. The termination of service as 'retrenchment' was disputed by the employee on the ground of non-compliance with the provisions of s 25F, which was contested by the employer on the ground that it was not a case of 'retrenchment', because the service was terminated for the reason that the employee had failed to pass the relevant test required for confirmation in the service. It was contended that since it was not a case of surplusage, there was no 'retrenchment' of the employee. The tribunal accepted the pleas of the employer. In appeal by special leave, the Supreme Court distinguished *Barsi Light Rly* on the ground that it was decided before the insertion of the present ss 25FF and 25FFF in the Act. The court also noticed the observations in that case to the effect that a 'termination of service for any reason whatsoever', would mean 'no more and less than the discharge of a labour force which is a surplusage, but glossed that the misunderstanding of these observations resulted in confusion, firstly from not appreciating the real question which was posed and answered in that case and, secondly, the reference to discharge on account of surplusage was 'illustrative, and not exhaustive, by way of contrast with a discharge on account of transfer or closure of business'. Then, the court relied on the observations in *Hindustan Steel*, to the effect that there was nothing inconsistent in *N Sundaramony's* case with *Barsi Light Rly*. In coming to the conclusion that the words 'for any reasons whatsoever', in the definition of 'retrenchment', should be understood to mean 'what they plainly say', the court observed that the expression 'retrenchment' must include 'every termination of the service of a workman, by an act of the employer', unhampered by precedent. In other words, every termination of service of a workman, whether as surplus or otherwise, would be 'retrenchment'. This view was reiterated by a majority of a three judge Bench in *Surendra Kumar*.[1] In *Mohan Lal*,[2] again, a two-judge Bench of the court observed that 'niceties and semantics apart, a termination by the employer, of the service of a workman, for any reason whatsoever, would constitute retrenchment, except in such cases excepted in the section itself'. In this case also, the court emphasised that *Barsi Light Rly* was decided in the context of closure and was not dealing with the definition of retrenchment under s 2(oo) and

adopted the reasoning of Santosh Gupta. Likewise, another two judge Bench of the court, in *Robert D'Souza*,[3] over-ruling the decision of the Full Bench of the Kerala High Courts, reiterated the later view, departing from *Barsi Light Rly.* In *Gammon India*, the termination of the service of the workman, on account of recession and reduction in the volume of work of the employer company, was held to be retrenchment in the traditional sense of the term.[4] The court then added a comment that that view does not hold the field, in view of the subsequent decisions ending with *Robert D' Souza*. Again, in *KSRTC*, another two-judge Bench of the court contented itself with the observation:

> We are inclined to hold that the stage has come when the view indicated in *N Sundaramony's* (supra) has been 'absorbed into the consensus' and there is no scope for putting the clock back or for an anticlockwise operation.[5]

But in all these cases, the court has kept its eyes shut as to the impact of this view on the other provisions of the Act. It is submitted that *N Sundaramony, Hindustan Steel, Delhi Cloth Mills, Santosh Gupta, Surendra Kumar Verma, Mohan Lal* and *L Robert D'Souza* cases were wrongly decided. These decisions are not in conformity with the *ratio decidendi* of the five-judge Bench decision in the *Barsi Light Rly* case, where the court, on the construction of 'retrenchment' as defined in s 2(oo), has unequivocally stated that 'retrenchment means discharge of surplus labour or staff by the employer, for any reason whatsoever...in no case is there any retrenchment unless there is a discharge of surplus labour or staff in a continuing or running industry'. In other words, unless there is discharge of surplus labour or staff, there can be no retrenchment. In *Sundaramony's* case, the employee used to be intermittently employed for a period of nine days and then discharged from service. It was not a case of discharge of surplus labour, but it was a case of discharge of the workman from service under the contract. Evidently, it was a case of an unfair labour practice. The result of striking down the termination of the service of the workman could, therefore, have been achieved directly by holding it to be a case of an unfair labour practice, instead of adopting the dubious path of holding it to be a case of retrenchment and striking it down for non-compliance of s 25F and thus, stultifying the law. The *Hindustan Steel* case again, was not a case of discharge of surplus labour. It was a case of discharge of a workman by efflux of time, under the contract. This may not even be a case of termination by the employer, within the meaning of the definition of 'retrenchment', because the termination of service by efflux of time is by the mutual contract of the parties and cannot be said to be a 'termination of service by the employer'.

In *Delhi Cloth Mill's* case, the name of the employee was struck off the rolls, the act purporting to be under a Standing Order, for having absented himself for more than eight consecutive days. But, in fact, he was not absent for eight consecutive days. This was again a case of a wrongful termination of service, rather than 'retrenchment', because there was no discharge of the workman as surplus. *Santosh Gupta's* case too was not a case of a discharge of the employee as surplus. The employee was discharged from the service for not having taken the test required for qualifying for confirmation. Though in the *Hindustan Steel* case, at least a specious observation was made that *Sundarammoney* had not departed from the ratio of the *Barsi Light Rly* case, however, in the case of *Santosh Gupta*, the majority opinion in *Surendra Kumar Verma, Mohan Lal, KSRTC,* leave no room for doubt that there is a clear departure. The decision of a larger Bench of the court must prevail over the decisions of smaller benches.[6] Now the five judge Bench in *Punjab LDRC*,[7] has reaffirmed the dicta of the smaller benches, deviating from the holding in *Barsi Light Rly*. As pointed out by Lord Hailsham of Marylebone, the Lord Chancellor, in *Cassel & Co Ltd v Broom* :

> ...in the hierarchical system of courts which exist in the country, it is necessary for each lower tier...to accept loyally, the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v Bristol Aeroplane Co Ltd.* ,[8] offers guidance to each tier, in matters affecting its own decisions. It does not entitle it to question considered decision in the upper tier, with the same freedom... [9]

If the court were of the view that *Barsi Light Rly*, did not lay down the correct law, it is desirable to constitute a larger Bench and restate the law. The later decisions have accentuated the literal meaning of the expression, 'the termination by the employer of the service of a workman for any reason whatsoever', without working out the implications and effect of the other relevant provisions of the Act, on the construction of the definitions of 'retrenchment'. The concept of 'surplusage' is implicit in the scheme of the provisions of the act, relating to 'retrenchment', *viz*, s 2A, s 25F, s 25G, s 25H, s 25N, s. 25O, item 10 of the Fourth Schedule and rr 76 and 76A, read with Forms P and PA of the Industrial Disputes (Central) Rules 1957. Though in the *Punjab Land Development & Reclamation Corpn* case, the court did refer to ss 25F, 25G and 25H, instead of working out their implication on the interpretation of the definition, it tangentially slipped into the concept of a harmonious construction, which neither the context nor the text of the definition warrants. While adopting the literal construction, the court has accentuated that the ratio of *Barsi Light Rly* should be understood in the context of its facts dealing with the, question that the termination of the services of the workmen, on closure of an undertaking, did not fall within the definition of retrenchment, while completely losing sight of the clear and candid interpretation of the definition by the earlier bench in *Barsi Light Railway* to the effect that *retrenchment means discharge of surplus labour*

and that, in no case can there be retrenchment, if the discharge is not on account of surplasage. In the face of an unequivocal interpretation of the language of the definition, by a Constitution Bench affirmed by two Constitution Benches and one four-judge Bench *(Hariprasad, Pipraich* and *Anakapalle*), to say that the ratio of *Barsi Light Rly* was confined to its own facts, ie, the termination of the services of the workmen on account of closure was not retrenchment is, to say the least, a judicial perversion of highest order. Furthermore, if the *ratio decidendi* of *Barsi Light Rly* is to be confined to a termination of service of the workman on closure, ignoring the unequivocal interpretation of the definition, then the ratio of the cases like *Bangalore Water Supply*,[10] should be confined to the facts of those cases and the views of the court on other points should be treated no more than an obiter. From an analysis of these provisions, it would appear that it could never have been the intention of the legislature, to make retrenchment synonymous with a discharge simpliciter, ie, 'every termination of the service under the contract'.[11] If the observation in *Santosh Gupta's* case, that 'every termination of the service of a workman by an act of the employer', is 'retrenchment', is correct, then the termination of the service of an individual workman will be virtually impossible and absurd consequences, by applying the provisions of s 25G, s 25H, s 25N and s 25Q, will follow. In *Surendra Kumar Verma*,[12] in a separate judgment, Pathak J has recorded a candid and unequivocal dissent from the holding in *Santosh Gupta's* case, in observing: 'I mention this only because I should not be taken to have agreed with the interpretation of s 2(oo), rendered in *Santosh Gupta v State Bank of Patiala'*. This provides a justification for the court to reconsider and restate the law on the subject, with certainty. Even in English Law, the expression 'redundancy', which is the English counterpart of 'retrenchment', in its statutory definition, refers to three broad categories of redundancy: 'cession of the business or part of a business, moving or changing the place of employment, the employees surplus to the requirements of a business'.[13] While the appeals pending before the Supreme Court were lying dormant under a labyrinth of dust layers, the legislature has provided some relief by inserting sub-cl (bb) to s 2(oo), which excludes 'a contractual termination of service' from the definition of retrenchment'. See notes and comments under s 2(oo)(bb).[14] On the plain language of the definition, 'retrenchment' takes place only where the employer terminates the service of a workman. Despite the use of the words 'for any reason whatsoever', wherever it is claimed that there is retrenchment, it must necessarily be established that there is a termination of service of the workman, by the employer.[15] In other words, if the termination of the service of the workman is not by the employer, but is caused by the workman himself, by resigning or abandoning the job or it takes place due to his death, such termination will not fall within the ambit of the definition of 'retrenchment', because such termination of service is not caused by the employer.[16]

In *Shambhu Nath Mukherjee*,[17] the employer company struck the name of the workman off its rolls, purporting to act under the relevant Standing Order, for remaining absent for 'more than eight consecutive days'. But, in fact, the workman had not been absent for eight consecutive days. In these circumstances, the court held that striking the name of the workman off the rolls of the company, amounted to retrenchment, because the termination was caused by the employer and it was not under any Standing Order. This case, therefore, is not an authority for the proposition that where a workman is deemed to have himself left the service, it will be a case of retrenchment. Likewise, in *Robert D'Souza*,[18] the language of the order was as follows: 'your services are deemed to have been terminated'. From the language too, it would appear that the service was terminated by the employer and not by the employee himself. In *Madhabananda Jena*,[19] no contemporaneous material was placed before the court, to prove that the workman had been treated as an absconder and was dealt with as such. Furthermore, no cogent and plausible reason had been given as to how he could abscond from duty after having put in five years of service. Nor was he informed that if he did not join duty by a specific date, his service would be terminated. Striking off the name of the workman on these facts and in there circumstances, was held to amount to a termination of service by the employer. In *HD Singh*,[20] the Reserve Bank of India struck the name of the workman off its rolls, for the reason that he had passed the matriculation examination, without even giving him any order in writing or otherwise informing him. In this situation, striking the name of the workman off the bank's rolls, was held to be 'retrenchment'. The Andhra Pradesh Electricity Board, in terms of its Regulation 28(3), passed an order declaring that the workman had ceased to be in service, for absenting himself from duty without leave, for over a year. It was held that such an order amounts to retrenchment.[21] A single judge of the Calcutta High Court, in *Naresh Chandra Das* held that an automatic termination of the service of a workman, in accordance with the Standing Orders, will amount to retrenchment.[22] In this decision, the single judge has not considered the fundamental law, but has contented himself by juxtaposing the rival contentions and then, in the end, saying that there was no further scope to hold that 'simply because of the action of the employee, his service stood terminated, and the employer was not responsible for such termination, and the same was not retrenchment within the meaning of s 2(oo) '. Hardly any logical reasoning is discernible from the judgment. This view is incorrect. But if the power under the Standing Order is exercised *mala fide*, it would be a different matter.

For instance, in *Dabur*, in view of the conduct of the employer in not sanctioning or refusing extension of the leave of the concerned workman, as required by the Standing Orders, it was not permitted to treat the service of the workman to have automatically been terminated.[23] The Madhya Pradesh High Court held that the termination of the service of a workman in terms of the Standing Order, on the ground of inefficient and unsatisfactory work, would amount to retrenchment.[24] But the Orissa High Court held that where the Standing Orders provide that if the management is satisfied that it is inexpedient or against the interest of security, to continue to employ a workman, he may be discharged, and such discharge under the Standing Orders would not amount to retrenchment.[25] Likewise, a single judge of the Karnataka High Court, in *Binny Ltd*,

has held that the termination of the service of a workman in terms of the standing orders, for absence from duty for a certain number of days, on his being arrested by the Police under s IPC for certain offences, will not constitute retrenchment.[26] Similarly, the Bombay High Court, in *PSS Kharkhana*, held that a striking off of the name of the workman from the rolls, for remaining absent for about three years, without any justification, would not constitute retrenchment. The court further observed that though striking the name of a workman, off the roll, without anything more, would constitute retrenchment, every striking off of the name from the rolls, would not constitute retrenchment. The intention to abandon the job is normally not to be attributed to an employee. It would ultimately depend on the established facts and circumstances of each case. It is just not possible to lay down a universal proposition that it may generally be observed, that a long and continuous absence for years together, without any reason or justification whatever and without anything more, can give rise to an inference of abandonment.[27] In providing work to a casual workman for a short periods, the consequential breaks in service being unavoidable, they will not necessarily lead to an inference of the termination of employment, as contemplated by the definition of retrenchment. There must be undisputable evidence of the fact that the casual workmen who have put in continuous service of not less than one year, have been unequivocally told that they will never be given work.[28] A single judge of the Bombay High Court held that the termination of the service of a workman for a 'loss of confidence', would amount to retrenchment.[29] But in view of the undernoted *dicta* of the Supreme Court,[30] this holding is no longer good law. A single judge of the Bombay High Court held that a termination of the service of a workman, who had attained the age of 60 years, 'when retrenchment becomes necessary' in terms of the relevant certified Standing Orders of the corporation, will be a retrenchment, requiring compliance with s 25F or 25 M, as the case may be.[31]

The decision rendered by a Constitution Bench, presided over by Mukharji CJI, in *Punjab LDRC,* has been identified for a detailed analysis, not because it had contributed in any commendable way, to the development of the law relating to retrenchment, but because of the host of infirmities manifested in the reasoning, the patent misreading of the ratio of *Barsi Light Railway* and other cases, the misapplication of law to the facts, and the predominantly obnoxious decision that was finally handed down by the Bench. The reasoning of Saikia J, who delivered the judgment, was inconsistent, ambivalent and is flooded with half tones. It is proposed to discuss a few aspects of this monumental decision below. Referring to *Hariprasad Shivshankar Shukla,* he observed:

> ...the court was neither called upon to decide, nor did it decide, whether in a continuing business, retrenchment was confined only to a discharge of the surplus staff and the reference to discharge of surplusage was for the purpose of contrasting the situation in that case, ie, workmen were being retrenched because of cessation of business and those observations did not constitute reasons for the decision. What was decided was that if there was not a continuing industry, the provision could not apply. In fact, the question whether retrenchment did or did not include other terminations, was never required to be decided in *Hariprasad* and could not, therefore, have been, or be taken to have been, decided by this court.[32]

This is a completely tainted reading of *Hariprasad.* The issue raised in *Hariprasad* (along with *Barsi Light Railway* and *Pipraich Sugar Mills)* was, 'whether retrenchment compensation was payable in the event of termination due to transfer or closure of undertaking.' These cases being the first of their kind to come up to the highest court, the Constitution Bench could not have straightaway determined that issue, without first answering the fundamental questions, namely, (i) what is the connotation of the term 'retrenchment' and (ii) what is its denotation, ie, would it cover a case of termination occasioned by a transfer or closure of the undertaking? The court rightly went into the basic issue of the 'definition', on which the derivative issue of the entitlement to compensation was solely dependant. The learned judges answered the basic question by observing that 'retrenchment' could have no wider meaning than the ordinary connotation of the word, according to which, it meant 'the discharge of surplus labour or staff'. They finally held that there could be no retrenchment, in the event of an *en bloc* termination due to a transfer or closure of the undertaking, on the principle that retrenchment presupposes the continuance of the business by the same employer, with the residual labour force. For that matter, the focus of the definition is on 'the' employer and not on 'an' employer. The principle of 'last come, first go', publication of seniority lists and the re-employment of retrenched workmen, richly endorse the ratio of *Hariprasad*, while rejecting *Sundaramony* and other cases decided by smaller benches. It would be as absurd to deny the nexus between these provisions and the definition, as to affirm their applicability to a case of loss of lien or discharge due to efflux of time. Then comes the following observation, which speaks volumes about the concern of Saikia J (or the lack of it) for judicial discipline-an issue that was indeed raised by the counsel:

> In a fast developing branch of Industrial and Labour Law, it may not always be of particular importance to rigidly adhere to a precedent, and a precedent may need to be departed from if the basis of legislation changes.[33]

A vast body of case law was evolved by the Apex Court on the principles of industrial adjudication and on almost every aspect of the employment relationship, during the 1950s and 1960s itself, thanks to eminent judges of the caliber and vision of Dr Gajendragadkar. Labour Law was not in an embryonic stage, as implied by this averment and at any rate,

certainly not in the 1990s. Granted his proposition, still the reasoning hardly lends any support to the conclusion reached, as it calls for an affirmative answer to the further question, 'was there any change in the basis of legislation between *Hariprasad-Anakapalle*,[34] on the one hand and *Sundaramony-Shambhunath Mukherjee* on the other?' The answer is an emphatic 'No'. Thus, the departure heralded by the smaller benches, was without merit. The judicial trend began by Iyer J, and fostered by others, received the clearance of the Constitution Bench in *Punjab Land Development Corporation*, with a cascading effect down the line. Commenting on these disquieting judicial trends, HM Seervai observes:

> ...if judges disregard judgments binding on them, in order to give play to their own attitudes, concepts and ideals, the result can only be judicial chaos... this state of affairs must bring the administration of justice into disrepute by substituting for the certainty of the law, as laid down by the Constitution Bench of the Supreme Court, the uncertainty of the fluctuating opinion of different judges.[35]

This prophetic observation came true very soon in the realm of industrial law. In *Kamaleshkumar*, (decided on 4 September 1979), the Bombay High Court held that retrenchment under s 2(oo), meant only termination on account of surplusage and if the termination was for any other reason, it was not retrenchment. A few observations made by Lentin J, deserve special mention.

> A plain reading of section 2A ... gives a clear and unfailing indication that the legislature itself, had no intention of confusing or identifying retrenchment with other forms of termination of service and that in order to bring the case of an individual workman within the four corners of retrenchment, recourse can only be had to the definition of that word as contained in section 2(oo) .... Section 25G provides for the procedure for retrenchment, which can be summarised by the phraseology 'last come, first go'. Such a procedure would have been inconceivable if termination of service in a case other than surplusage, *viz*, say, for loss of confidence, was intended by the legislature to be categorised as retrenchment. This section also brings to the forefront, that the centrifugal force revolving round the terminology 'retrenchment' is excess or surplusage or superfluity... Section 25H makes this even clearer. That section provides for the re-employment of retrenched workmen and states that where any workmen are retrenched and the employer proposes to take into his employ any person, he shall, in the prescribed manner, give an opportunity to the retrenched workmen to offer themselves for re-employment and such retrenched workmen shall have preference over other persons. ... It would be anomalous to the point of absurdity and would result in a horrifying situation if an employer, who terminates the service of his workman for the loss of confidence or inefficiency or insubordination and the like, is to be expected ... to re-employ that very worker in the same industry or business and that too, in preference to other workmen, whose services are not terminated either for loss of confidence, inefficiency, insubordination and the like...The result would be utter chaos, where industry and business would grind to a halt. (pp 324-23). ... Item No 10 of the Fourth Schedule, which provides for conditions of service, for a change of which, notice is to be given, provides for 'rationalisation, standardization or improvement of plant or technique which is likely to lead to retrenchment of workmen.' Rule 81 of the Industrial Disputes (Bombay) Rules 1957, provides for the maintenance of a seniority list of workmen and states that the employer shall prepare a list of all workmen in the particular category, from which retrenchment is contemplated, arranged according to the seniority of their service in that category and cause a copy thereof to be pasted on a notice board in a conspicuous place, in the premises of the industrial establishment, at least seven days before the actual date of retrenchment. Form XXIV-A-I of form of notice, to be given by an employer under clause (c) of sub-section (1) of section 25N of the Industrial Disputes Act, provides that the employer must state that he proposes to retrench the particular workmen and he has to give a reply against each item mentioned in the annexure. Item 18 of that annexure, to which the employer must give his reply, is: 'anticipated savings due to the proposed retrenchment.' Thus, Item No 10, Rule 81 and form XXIV-A-I are yet further indications that it was not, and could never have been, the intention of the legislature, to make retrenchment synonymous with a termination on grounds like loss of confidence, insubordination or inefficiency. The entire scheme of the Act emphasises this abundant measure.[36]

Lentin J, had correctly analysed the definition, in an orderly and systematic way, with reference to the Constitution Bench decision rendered in *Hariprasad* and other cognate provisions of the Act and the rules made thereunder, and held that retrenchment means a termination on account of surplusage, and it was not the intention of the legislature to confuse or identify it with other forms of termination of service, such as, discharge, dismissal, termination, and so on, appearing in various sections of the IDA. This decision is pre-eminently right, while those rendered by the Supreme Court in *Sundaramony*, *Santosh Gupta*, *Sambhunath Mukherjee*, *Hindustan Steel*, *Surendrakumar Verma*, *Mohan Lal*, *Robert D'Souza*, including that of another Constitution Bench in *Punjab Land Development Corporation*, and others, are wholly misconceived and positively repugnant to the objects and scheme of the Act. Then came *Guest Keen Williams*, (decided in 1992), where the facts were: A workman, having availed an absence due to sickness, granted by ESI Corporation, did not report for duty on the expiry of the period and remained absent without permission. Consequently, the management informed the workman that in terms of the Standing Orders, he must be deemed to have left the services of the company without notice thereby, terminating his contract of service. The High Court held that the termination of service by the

operation of Standing Order No 20, ie, remaining absent without leave for a specific period, resulting in the termination of his services, would not fall under s 2(oo) and hence would not be 'retrenchment'. Repelling the contentions raised by the counsel on the basis of the Supreme Court decisions rendered in *Sundaramony* et al, including that in *Punjab LDRC*, Mohan CJ, observed:

> ...as we have pointed out above, it was not by the act of the management, but it was by the operation of the Standing Order 20, that the workman himself had terminated his contract of service. We are unable to accept the argument advanced on behalf of the workman that the construction of the Standing Orders will have to yield to section 25J of the IDA, since it has an overriding effect. This argument ignores the language of section 2(oo) of the IDA. Only if it falls under section 2(oo), will section 25J come into play. Having regard to the pronouncement in *Venkatayya's* case,[37] we are not persuaded to conclude that in case of the workman terminating his service, it would amount to a 'discharge' within the meaning of section 2(oo) of the IDA.[38]

Leaving aside the jugglery of words and phrases, the facts of the case in *Guest Keen Williams*, were no different from *Shambunath Mukherjee* and *Robert D'Souza.* All the three cases refer to the same phenomenon, ie, continuous unauthorised absence or overstay of leave, for more than 8 or 9 consecutive days, which entails a loss of lien for the workman, the said absence having been treated as a voluntary abandonment of employment on his part. Accordingly, once the intimation has been sent, the name of the employee stands struck off from the muster rolls of the establishment. The observation of Mohan CJ, that the facts of *Guest Keen Williams* were different from *Shambhunath Mukherjee* and *Robert D'Souza*, is, therefore, without force. It is not a case of resignation on the part of the workman. It was a case of a deemed termination, occasioned by an unauthorised absence for a given number of days, and the case was identical to that of the other two cases. Even so, the reliance placed by the learned Chief Justice on *Buckingham & Carnatic*, is refreshing, in the light of the fact that all the later decisions led by *Sundaramony*, were wholly flawed in so far as they misconstrued the definition in s 2(oo) and expanded its sweep beyond the scheme of the Act and the contemplation of the legislature.

The third case was that of *PSS Karkhana*, in which the management invoked the relevant provision of the Standing Orders and struck off the name of a workman, who remained absent for more than 8 consecutive days (in this case, he was absent for nearly three years). Puranik J, of the Bombay High Court, distinguished *Shambhunath Mukherjee* on facts and held that there was no doubt that the workman had abandoned and relinquished his service, and that his removal from the roster was a formality; that nothing survived in the dispute, and he was not entitled to reinstatement, much less continuity of service.[39] The learned judge very rightly followed the decisions rendered by the Supreme Court in *Venkatayya* and *National Engg Industries*,[40] in preference to the perversions manifested in *Sambhunath Mukherjee*, *Sundaramony* and *Hindustan Steel.* The above decision was affirmed by the Bombay High Court.[41] At the first blush, the above three decisions of the Bombay and Karnataka High Courts appear to be a violation of the ratio of *Sundaramony*, *Robert D'Souza* and *Punjab LDRC.* It may also expose the learned judges to the charge of 'judicial indiscipline', for not honouring a binding precedent handed down by a court of a superior jurisdiction, from *Sundaramony* onwards. Such a charge, if at all levelled, deserves to be rejected *in limine*, on the ground that the credit for judicial indiscipline must go to Iyer, Reddy and Desai JJ, who created a Frankenstein's monster by waving the wand of judicial hyper-activism indiscriminately, in all directions. Nevertheless, a detailed examination reveals that the learned judges in *Kamlesh Kumar, Guest Keen Williams* and *PSS Karkhana* preferred to toe the line of reasoning adopted in *Hariprasad*, *Barsi Light Railway*, *Pipraich*, *Anakapalle*, *Venkatayya* and *National Engg Industries*, and rejected outright, that of *Sundaramony* and others. In view of the fact that the smaller benches had departed from a binding decision given by four Constitution Benches, the decisions of the smaller benches should be treated as *per incuriam.* Thus, from this standpoint too, the Bombay and Karnataka High Courts were right in following *Hariprasad*, as against *Sundaramony* and others. The sum-total of this discussion lends support to the view that a judge of a High Court or the Supreme Court, if confronted with the dilemma as to which of the two conflicting ratios to choose, is free to follow either the former, led by *Hariprasad*, or the latter, led by, *Sundaramony*, without being guilty of judicial indiscipline.[42] Adverting to the decision rendered by the Constitution Bench in *Punjab LDRC*, which runs counter to the decision rendered by four Constitution Benches on the same issue, in *Barsi Light Railway*, *Hariprasad*, *Pipraich and Anakapalle*, it is conceded that the Supreme Court is empowered to review its own decision and to lay down the correct law. But the point at issue is "can a bench overrule the ratio evolved or affirmed by four co-ordinate benches? The following observations of Gajendragadkar CJI, in *Shri Bhagawan*, may throw some light on this aspect:

> If a learned single judge, hearing a matter, is inclined to take the view that the earlier decisions of the High Court, whether a Division Bench or of a single judge, need to be reconsidered, he should not embark upon that inquiry sitting as a single judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice, to enable him to constitute a larger bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. [43]

It is equally well settled that if a Bench of a lesser number of judges or a co-ordinate bench is of the opinion that the earlier decision had not laid down the correct law, the only course left to it is to place the papers before the Chief Justice, for constituting a larger bench to go into the matter comprehensively and all over. Assuming for the sake of argument, and without conceding, that the Constitution Bench in *Punjab LDRC* had the power to reverse all the earlier decisions rendered by the four Constitution Benches, in *Barsi Light Railway*, *Hariprasad*, *Pipraich* and *Anakapalle*, at one stroke, the points for consideration would be: (i) Was there any review worth the name, except meekly endorsing the misconstruction placed by the smaller benches? (ii) Was there any analysis of the import of terms such as discharge, dismissal, *etc*, with reference to their similarities and dissimilarities? (iii) Was there any application of judicial mind to the contextual aspects, such as the interaction between the definition and the provisions enshrined in Ch V-A? (iv) And, finally, has the Bench pronounced the law in clear and unequivocal terms? The answer to all these questions is, again, an emphatic 'No'. The arguments advanced by Saikia J, lack conviction, apart from unfolding his struggle to persuade himself that there was nothing inconsistent in the demonstrations of *Sundaramony*, *vis-à-vis Hariprasad*, whereas, the fact remains that *Sundaramony* was a clear case of departure from a binding precedent, coupled with gross judicial in discipline and abuse of judicial power on the part of Iyer J. The Constitution Bench finally held:

> Applying the above reasonings, principles and precedents, to the definition in section 2(oo) of the Act, we hold that 'retrenchment' means the termination by the employer of the service of a workman for any reason whatsoever, except those expressly excluded in the section.

A reading of this verdict takes us as far as square one, and no further! Answers to the following basic issues are as elusive after the decision, as they were before: What is the connotation and denotation of the phrase 'termination by the employer?'—a phrase that was given a wild interpretation by Iyer J and other judges? Does it cover a case of loss of lien on appointment or voluntary abandonment of service, as stipulated in the Standing Orders? In both these cases, the employer is, as a matter of procedure and for putting the records straight, required to inform the workman in writing, of the fact that he has lost his lien on his appointment. Having intimated the workman thus, the next logical step would be to strike his name off the rolls, signaling the severance of the employer-employee relationship, which, if not done, would introduce an obnoxious element into the concept of employment. Should such 'intimation' *per se*, be treated as a 'positive act of termination by the employer', as was held in *Robert D'Souza?*[44]Should the consequential 'striking off of the name of the workman from the rolls' be regarded as a 'positive act of termination by the employer', as was held in *Delhi Cloth Mills?* After going through the lengthy rhetoric, running into twenty-five pages, the reader is still left wondering, 'what is it that the court had ultimately decided?' In several ways, the larger Bench decision was a judicial disaster. With great respect, it is submitted that if *Sundaramony* was just confined to making bad law, *Punjab Land Development Corporation* went a few steps further and made it even worse. This aspect is discussed below. Out of the cluster of 17 appeals, the facts in respect of respondent no 6[45] are as follows:

> [He was employed on probation, along with the other respondents] by the appellant, a partnership firm, on 12 June 1975...Respondent No 6 stopped attending his duties from 9 August 1975 and he left the service of his own accord. The labour court, by its award dated 16 September 1980, held that the termination amounted to retrenchment and was illegal for non-compliance with the provisions of section 25F of the Act and he was entitled to reinstatement, with full back wages. The management's writ petition challenging the award having been unsuccessful, it has appealed.

The following analysis of facts and law betrays the sub-standard quality of this decision:

(i) Respondent No 6 had put in some 60 days of service, which falls far short of 240 days, the minimum qualifying service under Chapter V-A. Even assuming that the company had ostensibly retrenched him, the respondent would still not have been eligible for either notice wages or compensation, because of the shortfall in the requirement of 'continuous service' [section 25F, read with section 25B]; and

(ii) in the second place, according to the facts admitted and recorded, he stopped attending duties and left the services on his own accord, which exclude any positive act of 'termination by the employer' and hence, does not fall within the definition in terms of the ratio evolved in the case, as cited above.

The Bench strangely decided the case by stating: '*the result is that CA Nos...1898 of 1982...are dismissed with costs...*'[46] This virtually means that the final verdict runs spectacularly counter to the principles enunciated by the court and, still worse, in the same case and in the same page. The Bench dismissed the appeal by an innocuous, one-line observation, without realising that its final order was at loggerheads with its own *ratio*. The second case,[47] in the same batch was, according to the admitted facts, a case of dismissal for an act of misconduct, after holding a disciplinary inquiry, upheld by

the labour court, but reversed by the High Court. The Constitution Bench dismissed the appeal by the same order, without discussing the facts, which have nothing whatsoever to do with retrenchment! Was it not the duty of the court to decide the preliminary issue of 'whether a dismissal for an act of misconduct falls at all, within the sweep of the definition of retrenchment', before proceeding further? What justification can the court offer for mixing up a case of dismissal with others relating to retrenchment, when the two are birds of different feathers altogether? The right course for the court would have been to remand the cases involving 'retrenchment', to the respective lower courts, for disposing them of as per the ratio evolved, while de-linking and handling those falling under 'dismissal' separately, than to take upon itself, the task of grouping them together and giving a blanket decision in such a desolate manner.[48]

It is, however, refreshing to note that, even though the Supreme Court has so far, not opted for going into the larger question relating to the connotation of retrenchment, the recent decisions clearly point to a shift in its approach to the definition in s 2(oo). For instance, in *Om Prakash*, the Supreme Court observed that 'retrenchment', as defined in s 2(oo), contemplates an act on the part of the employer, which puts an end to the service, to fall within its ambit. If the workman ceased to report for duty and, even after he ceases to report for duty, it is not his case that at any point of time, he reported for duty and was refused work, it could not be said that it was a case in which the employer had done anything to put an end to his employment. Hence, such a case would not fall will the meaning of s 2(oo) of the Act, nor would it satisfy the requirements of s 25F.[49] Where the services of a workman were terminated as a consequence of his not attending to his duties for more than six months, and it was found that he had remained absent for more than six years, despite an intimation from the management, it was held that if the contract of employment provides for a termination of service in a particular manner, the non-compliance of the provisions of s 25F would not nullify or vitiate the order.[50] In *Indian Airlines*, the Kerala High Court examined the definition of 'retrenchment' [s 2(oo)] in the light of the insertion of sub-cl (bb) therein. Jagannatha Raju J, (for himself and Paripoornan, J), observed:

> Section 2(oo), prior to the amendment of 1984, was in a particular manner. Subsequent to the amendment in 1984 and the introduction of clause (bb), the termination of the service of the workman, as a result of the non-renewal of the contract of employment, on its expiry or of such contract being terminated under a stipulation in that behalf, such termination of the employee will not come within the meaning of 'retrenchment'. This amendment, as indicated earlier, was brought in specifically to rectify the situation created by the wide definition given to 'retrenchment' in *N Sundaramony's* case. ()...In this context, it may be observed that the law, as laid down by the Supreme Court in *N Sundaramony's* case,[51] is no longer good law, in view of the recent Constitution Bench decision of the Supreme Court, in *Punjab Land .... Labour Court.*[52] In this decision, the Supreme Court considered elaborately, the effect of the judgment of Krishna Iyer J, in *N Sundaramony's* case, and as to how that judgment was rendered without referring to the earlier Constitution Bench decisions. The court dealt with these matters in paragraphs 36 to 39 and in paragraph 42, at page 503. It was clearly pointed out that the judgment in *N Sundaramony's* case is bad law, as it did not follow the earlier binding precedent of the Supreme Court and that the Constitution Bench decisions bind smaller divisions of the court. In paragraph 58, the Supreme Court referred to the subsequent decision of Ranganath Misra J, in *Management of Karnataka State Road Transport Corporation...*[53]and then dealt with the question of interpretation of section 2(oo) of the Act, from paragraph 61 onwards..." [54] ().

In this regard, it is necessary to point out that there was nothing in *Punjab LDRC* to suggest that the Constitution Bench held that *Sundaramony* was bad in law, as averred by Raju J, in *Indian Airlines* case (supra). The following passages from the decision of *Punjab LDRC* illustrate the point:

> The question whether the positive content of section 2(oo), restricting the definition of workmen rendered surplus, for any reason, whatsoever, is part of the ratio or not, submits Mr Venugopal, is wholly; an academic question in view of the fact that as many as nine High Courts have restricted the applicability of sections 25F, 25G and 25H to only cases of termination of services of surplus labour for any reason whatsoever and not to other types of termination, whatever may be the reason for such termination. Even if a judgment was to be based on two alternative reasons or conclusions, each one of these alternative reasons or basis, would form the ratio of the judgment. It is also urged that the argument would equally apply to the ratio of *Anakapalle's* case, rendering the judgment in *Sundaramony's* case and the later decisions *per incuriam*, for not having noticed or followed a binding precedent of the Supreme Court itself, as the judgment of the Constitution Bench binds smaller divisions of the court ()...both the earlier decisions of the court, in *Hariprasad* and *Sundaramony*, were considered and it was held that there was nothing in *Hariprasad* which was inconsistent with the decision in *Sundaramony's* case ()...Speaking for the Court, RN Misra J, significantly said:... 'We are now inclined to hold that the stage has come when the view indicated in *Sundaramony* case (supra) has been absorbed into the consensus and there is no scope for putting the clock back or for an anti-clockwise operation' ()...More than a month thereafter, in *Gammon India* ...,[55] a three-judge Bench...said (p 235): 'On a true construction of the notice, it would appear that the respondent had become surplus on account of reduction in volume of work and that constitutes retrenchment, even in the traditional sense of the term, as interpreted in *Pipraich Sugar Mills Ltd v Pipraich Sugar Mills Mazdoor Union* ,[56] though that view does not hold the

field in view of the recent decisions of this court in *State Bank of India v N Sundaramony*. ().

From the above, it is clear that it was more a contention raised by the counsel, that *Sundaramony* should be treated as *per incuriam*, than a conclusion reached by the Bench. The decision of Raju J, in *Indian Airlines* was correct, both on facts and law, but his attempt to base his reasoning and conclusion on the ratio of *Punjab LDRC* was undoubtedly misconceived. Far from holding that *Sundaramony* was *per incuriam*, Saikia J affirmed the views of different judges in cases that fell for decision in *Sundaramony* and thereafter, which aspect has been discussed at some length in the preceding paragraphs.

Excluded Cases

In the light of the phrase "termination ... for any reason whatsoever" appearing in the first part of the definition is susceptible to wide and even 'wild' interpretation, as has been the case with a few extremist judges of the last quarter of 20th century, it is proposed to commence the discussion with a process of elimination, ie, by identifying the kinds of termination, which are excluded from the definition before moving on to the cases which are either expressly or by necessary implication brought within the sweep of the definition.

'Punishment Inflicted by Way of Disciplinary Action'

The definition specifically excludes the termination of service as punishment, inflicted by way of a disciplinary action, from the ambit of 'retrenchment'. The question: whether a particular termination is retrenchment, or is by way of punishment for a disciplinary action, would depend upon the facts and circumstances of each case.[57] In *Lachman Das*,[58] in view of the allegations of the workmen, that they were victimised because of their union activities and participation in a strike, the Delhi High Court inferred that they were really being punished by the employer by way of a disciplinary action. Therefore, the termination of their service was held to be outside the definition of 'retrenchment'. It was further observed that the termination of service by way of a disciplinary action, is directly in conflict with the termination by way of 'retrenchment', as the former is by way of punishment, while the latter is in the interest of economy, or because the employer did not need the services of the workmen, who had become surplus. In *State Bank of India*, the Supreme Court held that the termination of a workman under paragraph 52(10)(c) of the Sastri Award, even though described as a punishment not amounting to a 'disciplinary action', not being discharge simpliciter, would not amount to retrenchment within the meaning of s 2(oo) of the Act.[59] Likewise, in *Anand Cinema*, the Madhya Pradesh High Court held that an innocuous order of termination of service, in fact, founded on misconduct, without the holding of any domestic inquiry, would not amount to a retrenchment.[60]

Likewise, in *Jagdish Chandra Vyas*, the relevant Standing Order provided for a punitive action in case of absence of workmen for 10 days or more, without the permission of the competent authority, and not for a simple discharge. The termination of the service of a workman under such Standing Order, therefore takes such termination out of the purview of the definition of retrenchment.[61] In *Indian Iron and Steel Co*, the Supreme Court held that, where the workman raised a dispute after 13 years after the employer's intimating him about the automatic loss of lien, as a consequence of an unauthorised overstay of leave, the denial of relief to the workman by the tribunal was justified. The termination of the service of a workman for overstaying leave, as per the Standing Orders providing for such automatic termination, would be bad if it did not provide an opportunity of hearing to the workman whose services are treated to have come to an end automatically.[62] The principles of natural justice have to be complied with. In the absence of an opportunity to the workman, such termination amounts to retrenchment, without following the provisions of the law.[63] The termination of a workman, who had put in 240 days of service, for a continuous, unauthorised absence of 20 days, without holding any inquiry and without complying with s 25F, is invalid.[64]

Voluntary Retirement

The termination of the service of a workman, on the ground of voluntary retirement, has specifically been excluded from the definition of retrenchment. Just as the employer can determine the contract of employment by retrenchment, discharge or dismissal, the employee has the right to determine the contract, by voluntary retirement. The expression 'voluntary retirement' used in this clause, would mean that unless the termination of the service is the result of a voluntary move on the part of employee or it is an act of his own independent volition, he cannot be said to have 'voluntarily retired'. The mere submission of the employee to the termination of his service by the employer, is not a 'voluntary' act of the former. 'Voluntary retirement' and 'termination of service' are two different concepts. Termination of service can be brought about by either of the parties to the contract, by determining the contract of employment, while voluntary retirement is an act of volition on the part of the employee alone. Neither apathy, nor a submission on the employee's part would alter the essential character of a termination of service of an employee by the employer and convert it into a 'voluntary retirement'. For instance, a concession shown by the employer to the employee, to extend his service by two months, and the

acceptance by the employee of the same, would not amount in law, to be a case of a 'voluntary retirement' on the part of the employee, on the expiry of the extended period.[65]

The acceptance by the employee of the benefit of the extension that the employer was willing to give, without any condition attached to the benefit, would not make it a case of a voluntary retirement. Where the employee has no choice between retiring or not retiring, he cannot be said to have 'voluntarily retired'. It would, therefore, be a case of a termination of the service of the employee by the employer. In *Bengal Nagpur Cotton*,[66] a workman offered to retire from service, provided he was granted certain retirement benefits, such as pension and gratuity. But the employer was not willing to grant a pension. Consequently, the employee communicated his willingness to continue in service. But the employer subsequently informed the workman, that in case he could cease to be in service from a particular date, gratuity at a particular rate would be sanctioned to him. But on that particular date, the concerned workman, in spite of his protest, was asked to hand over the charge, which he did in protest. In these circumstances, the Supreme Court held that it was not a case of a voluntary retirement of the worker, but it was a clear case of a termination of service by the employer, against the protest made by him. A voluntary retirement comprehends a determination of the contract of employment by the employee, by voluntarily resigning or abandoning his job.[67]The expression 'retire' comprehends a resignation. But the resignation must be voluntarily tendered. If it is tendered on account of duress or coercion etc, it ceases to be a voluntary act of the employee, expressing his desire to quit service. Therefore, when an employee voluntarily tenders his resignation, it is an act by which he voluntarily gives up his job, Hence, such a resignation is covered by the expression 'voluntary retirement' used in this cause.[68] Voluntary submission of resignation by the workman on his own will does not amount to retrenchment.[69] In *Hindustan Lever Ltd*, Savant J, affirming the finding recorded by the tribunal, observed:

> There is, thus, a finding of fact that as a result of the rationalisation and reorganisation, the workers were adversely affected and what was done by way of voluntary retirement, was nothing short of retrenchment.[70]

The above observation of Savant J is as specious and inartistic as that of the finding of the tribunal, and is repugnant to *litera legis* as well as *sententia legis* in the face of sub-cl (a) of s 2(oo), which expressly excludes voluntary retirement from the ambit of the definition of retrenchment. Retrenchment is by way of a positive act of termination, brought about by the employer, in which the workman has no say, and it can never be said to be 'voluntary', whereas 'voluntary retirement', as the name itself suggests, stands on a different footing in so far as the whole initiative, whether to opt for the Voluntary Retirement Scheme (VRS) or not, rests with the workman and not with the employer. The very fact that, in the instant case, not all the workmen had opted for VRS, despite the scheme being attractive in financial terms, goes to prove that the discretion to opt for it or to reject it, solely rested with the workmen and, at any rate, not with the employer. That being the position, to hold that the 'voluntary retirement was nothing but retrenchment', is a travesty of fact and law. *Secondly*, viewed from a very fundamental perspective, why should an employer frame a voluntary retirement scheme at all, offering a hefty amount as compensation, which is several times more than the retrenchment compensation payable under the law, if not for reducing the surplus manpower and effecting economy of operations *en route* to making his product more competitive in the market? Was it the assumption of the learned judge that industrial employers offer attractive voluntary retirement schemes, with a huge financial outflow, merely as a matter of *gratis* or charity, or because there are no better avenues for them to spend corporate funds? In striking contrast, Shah J, of the same High Court, in *New Haven Steel*, categorically held that a voluntary retirement scheme offered with extra monetary benefits (which was opted for by 17 workmen) and the subsequent retrenchment of a few more workmen, were perfectly within the right of the management, and that the tribunal had no power to question the right of the management to reorganise its business as per the market demands.[71] This decision is right and that of Savant J, in *Hindustan Lever*, is absolutely baseless and perverse.

In *Narendra Singh Solanki*, a single judge of the Rajasthan High Court held that where an employee abandoned the employment voluntarily and did not report for duty for nearly four years, it could not be said that it amounted to a 'termination by the employer of the services of a workman', within the meaning of s 2(oo).[72] Where the employee submits his resignation voluntarily, the grant of compensation under s 25 does not arise, and an award of compensation by the labour court, is liable to be quashed.[73] Once it is admitted that the workmen had resigned and their accounts were settled, and the said resignations were on the me of the labour court as exhibits, it is not open to them to turn round and say that they had never submitted there resignations.[74] In *Tata Iron & Steel*, the workman submitted an application on 1 April 1995 for his premature/voluntary retirement with a request to consider his case for payment of *ex-gratia* amount, in view of his long association with the company. The application for voluntary retirement was accepted on the same day ie 1 April 1995 and he was relieved. Later on he approached the management with an application to rescind his voluntary retirement under pressure from his superiors. He also made a further request to reconsider his case and revoke the voluntary retirement, because his entire settlement was adjusted against the building loan with the result, he was not able to manage his family. The management rejected his request vide letter dated 22 June 1995. The labour court held that the appellant is entitled to relief of reinstatement in service with full back wages and other consequential benefits. A single judge of High Court

upheld the order of the labour court, which was reversed by the Division Bench. Dismissing the appeal filed by the workman, Lakshmanan J (for self and Panta J) held:

> We have also perused the Memo of Appeal and other representation made by the appellant. The appellant has made a vague allegation that he was forced to take retirement. Neither he has made it specific nor had given the name of any officer who compelled him to write the letter dt.1st April, 1995 or exercised undue and excessive pressure to sign the letter of premature/voluntary retirement. Though the Labour Court has come to the conclusion that the appellant was compelled to submit the letter of resignation, the same is not supported by any acceptable evidence. It is settled law that suspicion and doubt cannot take the place of evidence. No finding of fact can be given on mere doubt and suspicion or on the basis of baseless allegations. The appellant having written letter of voluntary retirement and after having accepted the retiral benefits without any protest cannot now turn round and say that he was compelled to submit his premature/voluntary retirement. The appeal has absolutely no merits and we, therefore, have no hesitation to dismiss the same and to affirm the order passed by the learned Judges of the Division Bench of the High Court.[75]

Note: *For a detailed discussion of the subject, see notes and comments under s 2(k), under the topic - 'Determination of the Contract of Employment by the Employee'; caption - Resignation & Abandonment of job.*

Superannuation

Cases of superannuation too have been excluded from the definition of retrenchment. For a case to come under this sub-clause, two things are necessary: (1) There must be a stipulation on the point of retirement in the contract; and (2) the stipulation must be with regard to the age of superannuation. The expression 'contract of employment' means a contract under which an employee was accepted in service of the employer. In *Fibre Foam*, the workmen were retired on attaining the age of 58 years. The contract of employment did not specify that the concerned workmen had to retire on attaining the age of 58 years. But the workmen received the gratuity from the employer, under the Payment of Gratuity Act 1972, which fixed the age of superannuation at 58 in cases where the age is not fixed under the contract of employment. In these circumstances, it was held that though technically, the age of superannuation prescribed by the Payment of Gratuity Act could not be applied while adjudging a question of retrenchment, since the workmen themselves had accepted the gratuity money from the employer, based on the Payment of Gratuity Act, it was not open to them to plead that it was a case of retrenchment.[76] In *Jugantar*, in terms of the relevant Standing Order, the working journalist retired from service on attaining the superannuation age of 60 years and drew his gratuity and provident fund dues in acceptance of his retirement, with effect from December 1976. Thereafter, he was re-employed for a period of 12 months only, which expired on 1 December 1977. The Supreme Court discountenanced the contention of the journalist that his service for the further period of 12 months, was a continuation of his previous employment and the termination of his service was retrenchment. On the facts and circumstances of the case, the court held that the re-employment of the journalist was not in continuation of his original service nor could the termination of his service be held to be retrenchment; and that s 25F had no application.[77]

Contractual Termination

Sub-clause (bb) was inserted in cl (oo) of s 2 by the Amending Act 49 of 1984.[78] It purports to exclude the following from the ambit of the definition of retrenchment: (i) *the termination of the service of a workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned, on its expiry*; or (ii) *the termination of the contract of employment in terms of a stipulation contained in the contract of employment, in that behalf*. The first part relates to a termination of the service of a workman as a result of a non-renewal of the contract of employment between the employer and the workman concerned, on its expiry. The second part refers to 'such contract' being terminated under a stipulation in that behalf, contained therein. The expression 'such contract', used in the second part, refers to the 'contract of employment between the employer and the workman', mentioned in the first part. Therefore, *if there is a stipulation in the 'contract of employment between the employer and the workman', providing the mode, manner and date of the termination of service, such termination of service has now specifically been excluded from the definition of 'retrenchment', by this sub-clause*. The cases contemplated under both the parts, therefore, will not be 'retrenchment,[79] Conversely, a case not falling within either of the parts of this sub-clause, will be 'retrenchment', falling within the main part of the definition. In other words, where, in fact, there is no non-renewal of the contract or there is no stipulation in the contract in that behalf, the termination of service will constitute a 'retrenchment'. The Constitutional validity of sub-cl (bb) was challenged in *Ram Prasad*. The Rajasthan High Court held that the provisions of s 2(oo)(bb) are neither arbitrary, nor violative of Arts. 14, 19, 21, 23 and 39(d) of the Constitution.[80] A Full Bench of the Madras High Court, in *Terminated LIC EW Assn*, held that the said clause neither offended Pt III of the Constitution nor did its provisions run counter to the provisions of ss 25F, 25G and 25H of the Act.[81]

If the contract of employment between the employer and the employee, does not specify the period of employment for

which the employment is made or there is no stipulation in such contract, providing the mode and manner of the termination of the service, the provisions of this sub-clause will have no application. For instance, in *Arun Kumar,* it was an essential condition for a temporary hand, to pass a written test before he could be absorbed on a permanent basis. But the employee could not pass the test and his service was terminated. The Patna High Court held that the failure of the workman to pass the examination did not automatically bring his services to an end. The termination of his service, therefore, was retrenchment.[82] The provision of retrenchment in the Act does not provide any security of tenure. It only provides for certain benefits to a workman in the case of termination of his service in a manner falling with in the definition of 'retrenchment'. On complying with the requirement of ss 25F or 25N and 25G, it is open to the employer to retrench a workman.[83]

In *CM Venugopal*, Regulation 14 of the Life Insurance Corporation of India (Staff) Regulations 1962, framed under s 48(2) (cc) of the Life Insurance Corporation of India (Amendment) Act 1981, empowered the corporation to terminate the service of an employee within the period of probation. The employee was put on probation for a period of one year, which was extended by another year. Under the terms of employment, he was required to do a certain minimum quota of business during the period of probation. Since he failed to accomplish that, he was required to achieve the target during the extended period of probation. As he failed to fulfil the prescribed norm to earn the confirmation, he was further advised to improve his performance, before the expiry of the extended period of probation. His service was terminated in terms of Regulation 14 of the corporation, as he could not meet the requirements. A three-judge Bench of the Supreme Court held that the case was covered by the exception contained in sub-cl (bb) of s 2(oo). And as the termination of service was under the specific stipulation provided in Regulation 14, as well as in the order of appointment of the employee, it was not retrenchment.[84] In *Morinda Co-op Sugar,* a sugar factory used to employ certain number of workmen during the crushing season only and at the end of the crushing season, their employment used to cease. The Supreme Court held that despite the fact that the workmen had worked for more than 240 days in a year, the cessation of their employment at the end of the crushing season would not amount to retrenchment, in view of the provisions of sub-cl (bb) of s 2(oo).[85] However, the court directed the employer to maintain a register of workmen engaged during the previous season and to publicise it at the onset of the new season and engage the same workers in accordance with their seniority and the exigencies of the work.

The termination of the service of casual workmen on daily wages, will not fall within the exception contained in sub-cl (bb) of s 2(oo) of the Act, because the 'contract of employment' is referable to contracts other than the engagement of casual workers on daily wages. A 'non-renewal of the contract of employment' presupposes an existing contract of employment, which is not renewed. Even in respect of a daily-wager, a contract of employment may exist, such contract being from day to day. The position however, would be different when such a contract is in reality, a camouflage for a more sustaining nature of arrangement, but the mode of a daily-wager is adopted so as to avoid the rigors of the Act. This clause does not contemplate to cover a contract such as of a daily-wager and is rather intended to cover a more general class of contracts, where a regular contract of employment is entered into and the termination of the service is because of a non-renewal of the contract. This interpretation of sub-cl (bb) is in consonance with the substantive provision of cl (oo) of s 2, defining 'retrenchment' as the termination of service of a workman for any reason whatsoever.[86] Likewise, the termination of the service of a 'badli' workman, in terms of the contract of employment, will not be retrenchment in view of this provision.[87]

In *SGovindaraju v KSRTC* , the Supreme Court did not consider it necessary to decide the point that if the termination of service of a workman by non-renewal of the term of contract of employment or under a stipulation contained in the contract of employment in that behalf, will not amount to 'retrenchment' in view of the provisions of sub-cl 2(bb), it would enable unscrupulous employers to always provide for a fixed term or stipulation in the contract of service, for terminating the employment of employees, to escape the rigor of s 25F or s 25N of the Act. And it would further confer arbitrary powers on the employer, which would be destructive of the protection guaranteed by the Act, to the employees.[88] This ruling is an illustration of judicial hyper-activism on the part of a few judges of the Supreme Court. Instead of addressing the core issue that fell for decision, ie, whether there was a violation of s 25F in the context of s 2(oo)(bb) of the Act, the learned judge dealt with the case in a slovenly manner and infused the doctrine of 'natural justice' in an industrial action to which the said doctrine has no application, whatsoever, in the light of the fact that the said sub-clause *expressly excludes termination as a result of non-renewal of the contract of employment or such employment being terminated under a stipulation contained therein in that behalf.* It is well-settled that the principles of natural justice only supplement the law and not supplant it, and that they operate only in the unoccupied interstices of law. By the same token, they cannot be pressed into service while dealing with a provision which declares the rights and duties of the parties in unequivocal and crystal clear terms, as can be seen from the language of s 2(oo)(bb). Is it possible that the learned judge, with decades of experience at the bar and the bench, was so ignorant of these fundamental canons of interpretation? As per the admitted facts, it was not a case of dismissal for an act of misconduct, and a termination due to efflux of time, which is manifestly excluded from the definition. In a case where a workman was not considered fit for the post, what was it that the workman could presumably explain and against what? Was the judge contemplating an explanation about the circumstances that led to his failure in the test conducted for the post? It does not require a vast experience at the Bar or the Bench to answer the

elementary question as to under what rule of law, can the principles of natural justice come into play in a case like this? Again, what is meant by his observation '*...though no elaborate inquiry is needed'?* 'Inquiry', in industrial relations parlance, has a definite connotation and means a full-fledged inquiry, that has been held in full compliance with the principles of natural justice. The law does not recognise a 'wishy-washy' inquiry of the kind suggested by Singh J. It is amusing to find such platitudes in a judgment coming from the apex court! What is meant by his observation that a fixed tenure contract would be 'destructive of the protection guaranteed by the Act', when the self-same Act provides for exceptions, of which sub-cl (bb) is an integral part? Singh J had transgressed the limits of judicial review by importing irrelevant issues into the reasoning process, which issues were not raised before the appropriate forums below. This decision is a striking illustration of the manner in which judicial power is abused, even at the highest level, not to speak of lower courts and tribunals. The decision of the single judge of the Karnataka High Court, in the same case, is right and that of Singh J is patently wrong.

It can be seen that various High Courts, using interpretative techniques, have mellowed down the rigor of the bare reading of the statute. In *SN Shukla*, the Allahabad High Court observed that sub-cl (bb) is in the nature of an exception to s 2(oo) and has to be construed strictly and in favour of the workmen, as the entire object of the Act is to secure a just and fair deal to them, while adjudicating on the termination of the service of a workman for non-renewal of the contract of employment, on expiry of the time stipulated in it. The nature of employment must be judged by the nature of duties performed by the workman and not on the basis of the letter issued by the employer. Section 2(oo)(bb) cannot be extended to cases where the job continues and the employee's work is also satisfactory, but periodical renewals are made to avoid giving a regular status to the workmen, as it would be an 'unfair labour practice'. If contractual employment is resorted to as a mechanism to frustrate the claim of the employee to become regular or permanent against a job which continues, or the nature of duties is such that the colour of a contractual agreement is given to take it out from s 2(oo), then such agreement cannot be regarded as fair or *bona fide*. In this case, since the workmen had been working for nearly five years continuously and their jobs were not seasonal, casual or of a daily worker and their duties were like that of a regular employee, the termination of their services on the expiry of the stipulated period in the agreement or a non-renewal of their contract of employment, did not come under sub-cl 2(oo)(bb) and amounted to retrenchment.[89] A similar view has been taken by a single judge of a Bombay High Court, in *Dilip Shrike*, holding that the mere fact that the contract of employment provided for termination by efflux of time, would not by itself, be sufficient to take such terminations out of the scope of the definition of retrenchment. The adjudicator has to address himself to the question as to whether the period of employment was stipulated in the contract of employment as a device to escape the applicability of the definition of retrenchment.[90]

A single judge of the Punjab & Haryana High Court, in *Balbir Singh*, has pointed out that this clause, being in the nature of an exception, cannot be given a meaning which will nullify or curtail the ambit of the principle clause, because it is not intended to be an outlet for unscrupulous employers to shunt out workmen in the garb of non-renewal of their contracts, even if the work subsists. The clause, therefore, has to be construed strictly in favour of the workman, as far as possible. This provision cannot be resorted to, to frustrate the claim of the employee against an uncalled for retrenchment or for denying other benefits. In other words, it is not to be so interpreted as to enable an employer to resort to the policy of 'hire and fire' and give unguided power to him, to renew or not to renew the contract, irrespective of the circumstances in which it was entered into or the nature and extent of the work for which he was employed. It has to be interpreted to limit it to the case where the work itself has been accomplished and the agreement of hiring for a specific period, was genuine. If the work continues, the non-renewal of the contract has to be dubbed as*mala fide*.[91] The Gujarat High Court, in *JJ Shrimali*, in view of the stipulation in the contract of employment, that as soon as the scarcity relief work is wound up or comes to an end, the contract of service will also come to an end, it was held that the termination of service did not amount to retrenchment.[92] In *Chakradhar Tripathy*, the workman was appointed in the post of junior assistant, as a matter of urgency, as an ad hoc employee for 89 days, which period was extended from time to time, with short breaks, at the request of the employee, on the basis of his fresh application. Although the workman had put in more than 240 days, pending the recruitment of a regular candidate for the post, the Orissa High Court held that in these circumstance, the non-renewal of the contract was not *mala fide* or colourable. Hence, the termination of his employment will not constitute retrenchment.[93] In *MPBK Sangh*, on a review of the law as laid down by the Supreme Court and by various High Courts, a single judge of the Madhya Pradesh High Court has stated the following principles of interpretation and application of the provisions of this clause—

(i) that the provisions of section 2(oo)(bb) are to be construed benevolently, in favour of the workmen;

(ii) that if the workman is allowed to continue in service by making periodic appointments, from time to time, then it can be said that the case would not fall under section 2(oo)(bb) ;

(iii) that the provisions of section 2(oo)(bb) are not to be interpreted in a manner which may stifle the main provision;

(iv) that if the workman continues in service, the non-renewal of the contract can be deemed as *mala fide* and it may amount to be a fraud on the statute;

(v) that there would be a wrong presumption of non-applicability of section 2(oo) (bb), where the work is of a continuous nature and there is nothing on record to show that the work for which a workman had been appointed, has come to an end.[94]

It is well settled that if a provision is merely declaratory, it may be retrospective. But a remedial provision is only prospective, unless it is expressly made retrospective by the legislature or it is held to be so by necessary implication.[95]For modern purposes, a declaratory Act is one which removes existing doubts as to the common law or the meaning or effect of any statute. But a remedial statute, on the contrary, may either be enlarging or restraining.[96] By inserting cl (bb) in the definition of 'retrenchment', in s 2(oo), the legislature wanted to restrict the meaning of the term 'retrenchment' as interpreted by the Supreme Court. The provision, therefore, is remedial and not declaratory. Such a substantive provision, imposing an additional restriction on the meaning of 'retrenchment', cannot be construed to be retrospective by necessary intendment. It is only prospective in nature.[1] Therefore, a termination effected in pursuance of a condition, that services can be terminated by one month's notice or salary in lieu thereof, before the insertion of this clause, would not be governed by its provisions and would, therefore, be retrenchment.[2] Both the parts of sub-cl (bb) postulate a fixed tenure. The first part refers to a non-renewal of the contract, after the expiry of that period, while the second part refers to the termination of the contract of employment upon giving notice of a certain specified period of time. Therefore, if there is no provision for a period of termination of a contract of service, the provisions of the clause will not be attached. Generally, the contract of employment, or in cases of statutory corporations or government undertakings, the statutory rules or regulations governing the service, provide that the service of an employee can be terminated by giving notice of a specified period of time by either side or a payment in lieu thereof. In some cases, even unilateral provisions, that the service of an employee can be terminated 'at any time without assigning any reason', are inserted. In *West Bengal SEB*, the Supreme Court struck down Regulation 34 of the West Bengal State Electricity Board Regulations, which empowered the board to terminate the service of an employee by giving three months' notice or three months' salary in lieu of the notice, being violative of Art. 14 of the Constitution. Speaking for the three-judge Bench of the court, in a voice charged with anguish and emotion, Chinappa Reddy J said:

> On the face of it, the regulation is totally arbitrary and confers on the Board, a power which is capable of vicious discrimination. It is a naked 'hire and fire' rule, the time for banishing which all together, from the employer-employee relationship, is fast approaching. Its only parallel is to be found in the entry 8 clause so familiar to administrative lawyers.[3]

In *Central Inland Water*, r 9(i) of the service discipline and appeal rules of the corporation provided that the employment of a permanent employee shall be subject to termination on giving three months' notice on either side, or payment of an amount equivalent to three months' basic pay and dearness allowance in lieu thereof. In case the employee failed to give such notice, the corporation had the right to deduct such amount from his dues. A two-judge Bench of the Supreme Court struck down the rule as being violative of Arts. 14 and 16 of the Constitution and also being void under s 23 of the Indian Contract Act 1872, as opposed to public policy. In view of the grossly unequal position of the employer and the employees, the court discountenanced the argument of the corporation, that the 'mutuality clause' was duly accepted by the employees.[4] Another two-judge Bench of the court, in *OP Bhandari*, Thakkar J said:

> This rule cannot co-exist with Articles 14 and 16(1) of the Constitution of India. The said rule must therefore, die, so that the fundamental right guaranteed by the aforesaid constitutional provisions remain alive. For, otherwise, the guarantee enshrined in Articles 14 and 16 of the Constitution can be set at naught, simply by framing a rule authorizing the termination of service of an employee by merely giving a notice. In order to uphold the validity of the rule in question, it will have to be held that the tenure of service of a citizen who takes up employment with the state, will depend on the pleasure or whim of the competent authority, unguided by any principle or policy. And that the services of an employee can be terminated, though there is no rational ground for doing so, even arbitrarily or capriciously. To uphold this right is to accord a *magna carta* to the authorities invested with these, powers, to practice uncontrolled discrimination at their pleasure and caprice, on considerations not necessarily based on the welfare of the organization, but possibly based on personal likes and dislikes, personal preferences and prejudices.[5]

However, in view of the extremely wide coverage of the impugned regulation, the court indicated three categories of employees covered by it, *viz*, 'blue collar' workmen, the 'white collar' or clerical staff and the 'gold collar' or the managerial cadres. With respect to the 'blue collar' and 'white collar' employees, the court unreservedly applied the rule laid down in *Central Inland Water*; but with respect to the 'gold collar' employees, the managerial cadres, the court made a distinction between the private sector and public sector employees. It noticed that the managerial cadres of the private sector undertakings were not governed either by the provisions of the Industrial Disputes Act or by the Constitutional or statutory provisions. Hence, such employers are free to cut 'the dead wood and can get rid of a managerial cadre employee in case he is considered to be wanting in performance or in integrity'.[6] But with respect to the managerial cadre employees,

employed by the public sector undertakings, the court noticed the impediments of Arts. 14 and 16 and suggested law reform. The law stated in the above three cases has been affirmed by a four to one majority of the court in *Delhi Transport Corpn*, holding that Regulation 9(b) of the corporation, which provided for the termination of employment by giving 'one month's notice or pay in lieu thereof, vested absolute, unbridled and arbitrary powers in the employer to terminate the service and as such, was violative of the Constitutional mandate contained in Art. 14 of the Constitution. The majority held that the corporation had no power to make a rule providing for the sacking of the permanent employees on unspecified grounds, by merely giving a month's notice or pay in lieu thereof.[7]

In the cases discussed above, the Supreme Court was dealing with the legal validity of statutory regulations framed by the statutory corporations, providing for the termination of service of an employee by giving him notice of a specified period of time or paying salary in lieu thereof. The court was not considering the legal validity of s 2(oo) of this Act. The effect of these dicta is that any stipulation in a contract of employment, fixing the term of employment or providing for the termination of service by giving a notice for certain specified period of time or payment of wages in lieu thereof, will be void. In case of public sector undertakings, such stipulation will be void as violative of the guarantees of Arts. 14 and 16 of the Constitution, being arbitrary and discriminatory and also being opposed to the public policy under s 23 of the Contract Act. In case of private sector undertakings, such provisions will be void under s 23 of the Contract Act. These holdings, therefore, castrate sub-cl (bb) of s 2(oo). Hence, the provisions made in the contract of employment, rules or Standing Orders, for termination of employment by giving notice for a certain specified period of time or paying wages in lieu thereof or termination of employment by non-renewal of the term of contract, will not have the protection of sub-cl (bb) of s 2(oo) of the Act. A question of pertinent relevance arises, as to whether a statutory provision in an Act of Parliament or of State Legislature, can be abrogated by a judicial pronouncement, without even discussing the legality or Constitutional validity of such provision.

There has, however, been a significant departure of the judicial view, in respect of termination of the contract due to efflux of time or due to non-renewal of the contract on its expiry. For instance, in *Pushpa Srivastava*, the facts were: The employee was appointed as a Research Executive on an ad hoc basis, for a period of three years, on contractual basis. Though the appointment came to an end on 21 March 1990, yet, she was continued beyond the prescribed period. On 13 July 1990 she tendered her resignation, which was accepted on 31 July 1990. Notwithstanding the acceptance of the resignation, the employee made a further request that her services might be continued for some more time. On this request, she was given an ad hoc appointment on a contractual basis, as a Training Executive, on a consolidated salary of Rs 2400/- per month. A few days before the appointment was about to come to an end in terms of the contract, she filed a writ petition in the High Court and obtained a direction to regularise her services within three months. Quashing the order of the High Court, Mohan J, (for himself, Sharma and Venkatachala JJ) held:

> To our mind, it is clear that where the appointment is contractual and by efflux of time, the appointment comes to an end, the respondent could have no right to continue in the post. Once this conclusion is arrived at, what requires to be examined is, in view of the services of the respondent being continued from time to time, on ad hoc basis, for more than a year, whether she is entitled to regularisation. The answer should be in the negative...The appointment was purely *ad hoc* and on a contractual basis, for a limited period of six months, the right to remain in the post comes to an end.[8]

In *M Venugopal*, the issue before the Supreme Court was, whether the termination of an employee at the end of a two-year probation period, amounts to retrenchment within the meaning of s 2(oo)(bb) of the IDA. The question had to be determined in the light of s 48(2)(cc) of the Life Insurance Corporation (Amendment) Act 1981, read with Regulation 14 of the LIC of India (Staff) Regulations 1960. Regulation 14 provided for a probationary period of one year, which could be extended to a maximum of one more year, making it a total of 2 years for employees belonging to classes I & II. Singh J held:

> Regulation 14 aforesaid, has to be read as a statutory term of the contract of employment between the corporation and the appellant. The order of appointment had fixed a target in respect of the performance of the appellant, which admittedly, the appellant failed to achieve within the period of probation, which was extended up to two years. As such, the corporation was entitled not to confirm the appellant in terms of the order of appointment and to terminate his service during the period of probation, without any notice...Any such termination, even if the provisions of the Industrial Disputes Act were applicable in the case of the appellant, shall not be deemed to be 'retrenchment' within the meaning of section 2(oo), having been covered by exception (bb). Before the introduction of clause (bb) in section 2(oo), there were only three exceptions...(a) voluntary retirement; (b) retirement on reaching age of superannuation; and (c) on ground of continued ill health. This court, from time to time, held that the definition of 'retrenchment' being very wide and comprehensive in nature, shall cover within its ambit termination of service in any manner and for any reason, otherwise than as a punishment inflicted by way of disciplinary action. The result was that even discharge simpliciter, was held to fall within the purview of the definition of 'retrenchment'...Now, with the introduction of one

> more exception to section 2(oo), under clause (bb), the legislature has excluded from the purview of 'retrenchment', (i) the termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned, on its expiry; (ii) such contract being terminated under a stipulation in that behalf, contained in the contract of employment, it need not be impressed that if in the contract of employment, no such stipulation is provided or prescribed, then such contract shall not be covered by clause (bb) of section 2(oo). In the present case, the termination of the service of the appellant, as a result of the contract of employment having been terminated under the stipulations specifically provided under Regulation 14 and the order of the appointment of the appellant.*(sic)* In this background, the non-compliance with the requirement of section 25F shall not vitiate or nullify the order of termination of the appellant.[9]

In *Escorts*, the Supreme Court held that the termination of the service of a workman, as a result of a non-renewal of the contract of employment on its expiry, would not constitute retrenchment, in view of sub-cl (bb) of s 2(oo). In *Allahabad Bank*, the workman was employed on a day-to-day basis, by giving employment for one day at a time, with the issuing of successive letters. The Supreme Court quashed the order of the tribunal, holding that the workman shall be deemed to have continued in service and would also be entitled to wages and allowances, and held that the relationship between the parties being contractual, the term of contract was that the services stood terminated at the end of the day, and the status of the workman was, at best, that of a daily-wager, and that being so, the workman could not insist on his being continued to be employed and the Bank was under no legal obligation to employ him.[10] In *Uptron India Ltd*, the Supreme Court, interpreting cl 17(g) of the Standing Orders of the company, held that the services of a permanent employee cannot be terminated by giving him three months notice or pay in lieu thereof, or even without notice, notwithstanding any stipulation in the certified Standing Orders and that any clause in the Standing Orders providing for an automatic termination of service of a permanent employee, would be bad in law. The court, while interpreting the words 'such contract', appearing in sub-cl (bb) of s 2(oo), observed that if the contract was for a fixed term, with a stipulation that the services would be liable for termination on or before the expiry of the said period, in such a case, the termination of the service either before the expiry or the period stipulated or on the expiry of the said period, would not amount to retrenchment.[11]

In *Birla VXL*, where the services of a workman, who was appointed on a temporary basis for a period of two years, were terminated, the Supreme Court held that, having regard to the clear terms of his appointment order, which the workman had accepted by signing at the foot thereof, the employer was entitled to bring the employment to an end at the conclusion of the period of temporary employment.[12] In the absence of a fixed term in the order of appointment, the provisions of s 2(oo)(bb) have no application, and there can be no justification to interfere with the order of the labour court, directing the reinstatement of the workman.[13] Where the rules provided that the service of the workman should be regularised subject to her passing the type test, and her services were terminated after she failed to pass the test, despite several attempts, without complying with s. 25F, it was held that her employment was not contractual in view of the fact that the statutory rule did not prescribe any time limit, and hence, it would not fall within the exception contained in sub-cl (bb) of s 2(oo), and, accordingly, the High Court confirmed the award of the labour court, directing her reinstatement.[14] In *MP Electricity Board*, the Supreme Court held that, where the services of an employee were terminated on her failing to qualify in the test, in accordance with the terms and conditions mentioned in the offer of appointment, such termination would fall within the ambit of the exception in sub-cl (bb) of s 2(oo) of the IDA.[15] In *Nareshkumar Parmar*, the facts disclosed that the respondent-company advertised for a pharmacist on contractual basis in pursuance whereof the appellant workman applied, got selected, signed the contract and joined. After completing 240 days service, he applied for regular selection when called for, but before the selection could be completed, he filed a petition in the High Court claiming regularisation. Rejecting the petition, the Gujarat High Court held that the appellant-workman was engaged as pharmacist on contractual basis and, therefore, the claim advanced by him for regularization on the ground that he should be treated as temporary workman in terms of the Certified Standing Orders was not maintainable.[16]

In *Haryana SFCCW Store*, the facts were: Certain workmen were engaged in May-June 1993 as watchmen on contract basis, with the condition that the appointment would last till the stocks kept in the open area at the Hasanpur *Mandi* were disposed of their services and were terminated in April 1994, after the stock lying in the open yard was cleared. The management did not comply with the provisions of s 25F before terminating the workmen. Mohapatra J held that their appointment being for a specific purpose and for a particular period, there was no retrenchment, as their termination fell within the purview of cl (bb), and accordingly, the question of complying with the conditions precedent to retrenchment, as stipulated in s 25F did not arise.[17] In *Saudi Arabian Airlines*, the facts briefly were: A security guard, who was engaged for a fixed term of two years, filed a complaint alleging unfair labour practice under provisions of MRTU & PULPA 1971, whereupon the industrial court directed the management to make him permanent in terms of Standing Order 4(c) of the Certified Standing Orders of the company, which mandates that '*after continuous employment of 240 days, the incumbent has to be treated as a permanent employee*'. Refusing to interfere with the direction issued by the industrial court, Kochar J, of Bombay High Court held:

> There was no end of the work of the security guards and, therefore, appointment letter issued by the petitioner to appoint the respondent workman for a period of two years was a camouflage or pretext to deprive him of the benefits of permanency and permanent employment. The conclusion is inescapable that the work continued and the post of Security Guard was of permanent nature and therefore, there was no application of section 2(oo)(bb) of Industrial Disputes Act.[18] (Italics supplied)

In *Karnataka Handloom*, the facts disclosed that a person was engaged on contract basis for specific period of 9 months to train the weavers of the society, whereafter his contract was terminated. The labour court ordered reinstatement without back wages, which was upheld by both the tiers of High Court. Quashing the orders of the courts below, Lakshmanan J observed:

> When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post... the respondent was engaged only on contract basis. It is only a seasonal work and, therefore, the respondent cannot be said to have been retrenched in view of what is stated in clause (bb) of section 2(oo) of the Act. Under these circumstances, we are of the opinion that the view taken by the Labour Court and the High Court is not correct and is illegal.[19]

In *Darbara Singh*, the Supreme Court held that where it was found that the respondent-workman was appointed for a specific period on daily wages and the contract contains stipulation that, on the appointment of a regular employee, his temporary appointment would come to an end, it was wrong for the labour court and High Court to direct reinstatement. In another case involving the same Electricity Board, the same learned judge held that persons appointed by the Board as 'meter readers' on contractual basis with payment being made on 'per-meter-reading' basis at a fixed rate coupled with the further fact that no regular employment was ever offered to them by the Board, their termination fell within the exception contained in sub-cl (bb) of s 2(oo).[20] In another case involving the same Electricity Board, an identical issue relating to an identical set of facts as *Darbara Singh* (supra) fell for the decision of Supreme Court. Setting aside the orders of labour court and the High Court, Pasayat J (for self and Chatterjee J) held that the engagement of the workman was for specific period and conditional; that on the appointment of regular meter readers, the engagement of the workman was dispensed with; and that the contracts clearly governed the terms of engagement.[21] A person appointed on *ad hoc* and temporary basis for 29 days on 13 occasions with technical breaks had no right to be absorbed as regular employee, could the termination of his service amount to retrenchment under s 2(oo) attracting s 25F.[22] In *Apparel Export Promotion*, the facts were: the service of the respondent-peon was terminated as per cl 2 of the appointment letter which gave the right to employer to terminate by giving 24 hours notice during period of probation. The Labour Court held the termination valid. A single Judge of the High Court remanded the matter back to the Labour Court for fresh decision. The Delhi High Court comprising Dipak Misra CJ and Manmohan J, while allowing the appeal by the employer-Council, observed that the termination was in accordance with the condition in the contract of employment and fell within s 2(oo)(bb).[23] In a more or less similar set of facts, the Gujarat High Court held that where the employment stood terminated on the expiry of the date stipulated in the offer of appointment, it clearly fell within the purview of s 2(oo)(bb), and hence invoking the provisions of s 25F would not arise.[24]

Continued ill-health

A termination of the service of a workman on the ground of continued ill-health, has also been excluded from the definition of retrenchment. 'Ill-health' means disease, physical defect, infirmity or unsoundness. A person who is not free from disease is certainly not possessing sound health, required for active duties and if that sort of thing continues for a long period, he must be said to be suffering from continued ill-health. The term suggests that the condition of ill-health is prolonged for a considerable period. 'Ill-health' that which is intermittent, cannot be termed as continued ill-health. It should be of a sufficiently long duration and continuous.[25]

According to *Webster's New International Dictionary*, 'health' means the 'state of being hale, sound or whole, in body, mind or soul'. According to the same dictionary, 'hale' means 'free from defect, disease or infirmity, sound, healthy'. *New Collins Concise English Dictionary* defines 'ill-health' as 'not in good health; sick'. *The Concise Oxford Dictionary* (third edn) defines ill-health as 'Out of health; sick; with disease; with anxiety (of health), unsound, disordered, morally bad'.

According to the *Shorter Oxford English Dictionary*, 'ill-health' means, 'unsound, disordered; out of health; not well.' Therefore, according to the dictionary meaning, 'health' does not necessarily mean an absence of organic disease; if a person is infirm or not sound in body or mind, he cannot be said to possess health. 'Ill-health' obviously, means disease, physical defect, infirmity or unsoundness. A person who is not free from infirmity or disease or, in other words, is not possessing sound health for active duties, and if this state of health continues for a long period, he may be said to be suffering from 'continued ill-health'. A person can be said to be suffering from 'continued ill-health' when the disease is spread over for some period of time.[26] The use of the word 'continued' before the expression 'ill-health', suggests that it is prolonged for a considerable period. It should be of a sufficiently long duration as well as continuous. Therefore, ill-health which is intermittent, cannot be termed as continued ill-health. The expression 'continued ill-health' has to be construed to be referable to a state of physical condition of the person concerned, incapacitating him for an indefinite period, though the same need not necessarily be correlated to any organic disease in the system.[27]

The question as to whether an employer can validly retire bus drivers on the ground of their defective or sub-normal eye sight, developed during the course of their employment, was examined by the Supreme Court in the landmark case of *Anand Bihari*, in which the facts disclosed that the workers in question were employed as drivers and had put in a long service, discharging their duties to the satisfaction of the corporation. A medical examination revealed that they had developed a defective eye sight and did not have the required vision for driving heavy motor vehicles. Therefore, the corporation terminated their services. This action of the corporation was challenged by the workmen by a writ petition before the High Court of Rajasthan, on the ground that the termination of their services amounted to 'retrenchment', within the meaning of s 2(oo) of the Act and since the requirements of s 25F were not complied with, the 'retrenchment' was illegal. On the other hand, the corporation contended that the termination of service being on the ground of 'ill-health', was not 'retrenchment'. The High Court upheld the contention of the corporation, that the termination of the service of the workmen in question, was not 'retrenchment'. In appeal, the Supreme Court affirmed the decision of the High Court in holding that the defective eye sight, disabling the workmen from discharging their normal duty of bus driving, fell within the meaning of the expression 'continued ill-health'. Hence, the termination of the service of the drivers was not 'retrenchment'. Speaking for the court, Sawant J said:

> Even otherwise, it can scarcely be disputed that the expression ill-health', used in sub-clause (c), has to be construed relatively and in its context. It must have a bearing on the normal discharge of duties. *It is not any illness, but that which interferes with the usual orderly functioning of the duties of the post, which would be attracted by the subclause. Conversely, even if the illness does not affect the general health or general capacity and is restricted only to a particular limb or organ, but affects the efficient working of the work entrusted, it will be covered by the phrase.* For it is not the capacity in general, but that which is necessary to perform the duty for which the workman is engaged, which is relevant and material and should be considered for the purpose...Therefore, any disorder in health, which incapacitates an individual from discharging the duties entrusted to him or affects his work adversely or comes in the way of his normal and effective functioning, can be covered by the said phrase. The *phrase has also to be construed from the point of view of the consumers of the concerned products and services. If, on account of a workman's disease or incapacity or debility in functioning, the resultant product or service is likely to be affected in any way, or to become a risk to the health, life or property of the consumer, the disease or incapacity has to be categorised as ill-health for the purpose of the said sub-clause*. Otherwise, the purpose of production, for which the services of the workman are engaged, will be frustrated and worst still, in cases such as the present one, they will endanger lives and property of the consumers. Hence, *we have to place a realistic and not a technical or pedantic meaning on the said phrase*. We are, therefore, more than satisfied that the said phrase would include cases of drivers, such as the present ones, who have developed a defective or subnormal vision or eyesight, which is bound to interfere with their normal working as drivers. Such drivers, therefore, were held to be suffering from 'continued ill-health' and the termination of their services for that reason, therefore, was not 'retrenchment'.[28] (Italics supplied)

However, despite holding that the termination of the service of the drivers in question, did not amount to 'retrenchment', the learned judge held that the said termination was unjustified, inequitable and discriminatory.[29] The learned judge observed that the service conditions of bus drivers must provide for adequate safeguards, because they had developed defective eyesight or sub-normal sight on account of the occupational hazards. The court, therefore, evolved and directed a scheme to be framed, for providing alternative jobs, along with retirement benefits and for payment of an additional compensation, proportionate to the length of the service rendered by them, in case of a non-availability of alternative jobs. The scheme is summarised as follows:

(i) The corporation shall, in addition to giving each of the retired workmen, his retirement benefits, offer him any other alternative job which may be available and which he is eligible to perform.

(ii) In case no such alternative job is available, each of the workmen shall be paid, along with his retirement benefits, an additional compensatory amount as follows:

(a) where the employee has put in more than 5 years' or less than 5 years' service, the amount of compensation shall be equivalent to 7 days' salary per year of the balance of his service;

(b) where the employee has put in more than 5 years' but less than 10 years' service, the amount of compensation shall be equivalent to 15 days' salary per year of the balance of his service;

(c) where the employee has put in more than 10 years' but less than 15 years' service, the amount of compensation shall be equivalent to 21 days' salary per year of the balance of his service;

(d) where the employee has put in more than 15 years' service but less than 20 years' service, the amount of compensation shall be equivalent to one month's salary per year of the balance of his service;

(e) where the employee has put in more than 20 years' service, the amount of compensation shall be equivalent to two months' salary per year of the balance of his service. The salary will mean the total monthly emoluments that the workman was drawing on the date of his retirement.

(iii) If the alternative job is not available immediately, but becomes available at a later date, the corporation may offer it to the workman, provided he refunds the proportionate compensatory amount.

(iv) The option to accept either of the two reliefs, if an alternative job is offered by the corporation, shall be that of the workman.

While evolving the scheme, the court was influenced by three factors; namely (i) the workmen concerned were incapacitated to work only as drivers and were not rendered incapable to taking any other job, either in the corporation or outside; (ii) the workmen were at an advanced stage of their life and it would be difficult for them to get a suitable alternative employment outside; and (iii) the relief available under the scheme should not be such as would induce the workmen to feign disablement, which, in the case of a disability such as the development of a defective eye sight, may be easy to do. In *Rameshwar Dass*, a three-judge Bench of the court observed:

> If the judgment of this court in *Anand Bihari* ... (supra), is read in its proper context and spirit, then it has to be held that this court impressed on the State Road Transport Corporation, to first provide for alternative jobs to such drivers, who have become medically unfit for heavy vehicles. A direction for the payment of an additional compensation was given only when it is not possible at all, in the existing circumstances, to provide alternative jobs to such drivers. It need not be pointed out that the authorities of the corporation should not take recourse only to the payment of the additional compensation, without first examining whether such drivers could be put on alternative jobs.[30]

In this case, the Haryana State Road Transport Corporation gave alternative employment to the drivers who had developed defective or sub-normal eye sight due to occupational hazards and had became unfit to drive heavy vehicles. But subsequently, the corporation retired such drivers on the ground of medical unfitness and paid them an additional compensation. In view of the ratio of the *Anand Bihari* case, taking all the facts and circumstances into consideration, the court directed the corporation to apply its mind properly, to the question of whether the employees who had suffered injuries and had become medically unfit could be given some job by way of rehabilitation and the question of payment of additional compensation arose only if it was not possible to provide alternative jobs to them or to some of them. The court further directed that the question of providing alternative jobs to the employees should be examined within four months from the date of the production of the order of the court. The court also made it clear that the tenure of the alternative job only, will be till the date of superannuation of the employees. The employees to whom alternative jobs are provided, as directed by the court, will reimburse the corporation for the additional compensation received by them.

The contract of employment postulates a certain state of physical fitness in the workman. If he is discharged on the ground of ill-health, it is because he was unfit to discharge the service which he had undertaken under the contract, to render.[31] 'Continued ill-health' includes any physical detect or infirmity, incapacitating a workman for future work, for an indefinite period.[32] Occasionally, the health of an individual may break down and the doctor may fail to diagnose the cause of the physical debilitation. But while continued ill-health is only a state of the physical condition of a person, which need not necessarily be correlated to any organic disease in the system, a mere physical weakness at a particular moment of time would not constitute 'continued ill-health'. If that were to be the law, any passing ailment, which may temporarily render any employee unable to do work, would result in the far-reaching consequence of his discharge from service.[33]

Before discharging a workman from service, the employer, therefore, has to be satisfied that because of 'continued ill-health', the workman is unfit to perform his duties. In other words, the employer should be satisfied that the employee has remained in continued ill-health and because of that continued ill-health, he has become unfit to perform the duties for

which he was employed. The unfitness to perform the duties is, thus, related to continued ill-health. If a person has maintained ill-health and because of that, he has become unfit to perform his duties, he can be asked to leave the job. The ill-health must be of such a nature, that the person is not in a position to do the job for which he was employed.[34] But the service of an employee cannot be terminated on the basis of a presumption of continued ill-health. In *Lalit Mohan Puri*, the employer asked the driver of a heavy vehicle, to appear before an ESI doctor, to prove his ill-health, which the employee refused and the employer terminated his services on the ground of ill-health. The labour court upheld the termination of the service, on the basis of the presumption of ill-health, from the refusal of the employee to appear before the ESI doctor. The Delhi High Court set aside the award of the labour court, on the ground that the service of an employee could not be terminated on the basis of a mere presumption. Speaking for the court, Wadhwa J, observed that the long service of the employee would not be wiped out:

> ... merely on the basis of a presumption raised under section 114 of the Evidence Act 1872. In our view, the respondent should have some direct evidence with it, to show firstly, that the petitioner was suffering from ill-health and secondly, that he continued to be in ill-health till the time of the termination of his service.[35]

The court, therefore, held that an inquiry should have been held to prove that the employee had continued to be of ill-health and the matter should not have been left merely to presumption. Where, therefore, a workman is discharged on the ground of ill-health, it is because he was unfit to discharge the service which he had undertaken to render and therefore, it had really come to an end itself.[36] The reason for the discharge of a workman in such a case is, that he cannot render the services required of him and which, under the contract of service, he is bound to render. Hence, he would not fall in the category of surplusage, ie, one who is 'no longer required'. The industrial adjudicator, therefore, has to see whether the continued ill-health of the workman had made him unfit to perform his duties. However, it is one thing to say that a person is 'unfit' to perform his duties and it is quite a different thing to say that he is unable to perform his duties because of his ill-health. For instance, when an employee falls ill and because of ill-health, he is 'unable' to perform his duties during the period of illness, would not mean that because of the illness, he has also become 'unfit' to perform his duties. Continued ill-health mayor may not render him, in the course of time, unfit to perform the duties. It is quite possible that on his recovery from the illness, the workman may resume his job and may perform his duties as efficiently as he did prior to his illness. It is also possible in a particular case, that the nature of the prolonged illness was such as ultimately would render the workman unfit to perform his duties. So, in each case, where a workman is discharged from service on the ground of his having become unfit to perform his duties, because of his 'continued ill-health', the adjudicator has to record a finding as to whether the 'continued ill-health' had rendered him unfit to perform his duties.[37]

But the question, whether a workman suffered from 'continued ill-health' or not, is a pure question of fact. It may be open to the workman to demolish the truth of the contention that he was suffering from 'continued ill-health'. For instance, a termination of the service of a workman on account of incapacity to work, due to old age, was held not be 'retrenchment'.[38] Likewise, a termination of the service on account of the anaemic condition of the employee, was held not to be a case of 'continued ill-health'.[39] Similarly, cardiac trouble was held not to be a case of 'continued ill-health' and the termination of the service for such reason, was held to be 'retrenchment'.[40] A termination of service with the bald statement that the termination was on account of medical unfitness, without spelling out any particular ailment or the period for which the workman had been suffering from the same, would not be a termination on account of continued ill-health.[41] On the other hand, a person suffering from mental derangement was held to have been suffering from continued ill-health.[42] A person who lost three fingers of his left hand and as a result, lost 30 per cent of his earning capacity, was held to be suffering from continued ill-health.[43]

The order of the labour court, directing the reinstatement of a workman who was discharged on medical grounds, treating the said termination as retrenchment, was not sustainable, as such termination for reasons of continued ill-health is excluded from the definition of retrenchment in s 2(oo).[44] The labour court, having found that the termination of the service of a workman, for continued ill-health, was justified, cannot delve into the adequacy of such action or to award an *ex gratia* payment.[45] In *Barsi Light Rly* (supra), the Supreme Court held that sub-cll (a), (b) and (c) of cl 2(oo), defining retrenchment, whether inserted by way of abundant caution or on account of an excessive anxiety for clarity, merely exclude certain categories of termination of service, from the ambit of the definition. They do not necessarily show what is to be included within the definition. In *Sohan Lal*, the brief facts were: the workman met with a road accident while working as a driver in Haryana Roadways. In the course of the medical examination conducted by a civil surgeon, it was found that he was unfit to discharge the duties as a driver. Thereafter, a notice was issued to him in March 1997 proposing to retire him from service. The workman submitted his explanation on the consideration of which, the management retired him from service with effect from 27 March 1997. The management submitted to the labour court that it made every attempt to find an alternative job with a view to accommodate him, which, however, did not yield any positive result. It was also submitted that the workman was paid all the retiral benefits, in addition to compensation calculated at the rate of 21 days wages for every years of the residual service. The labour court took note of all the facts and declined to grant the

relief sought for by the workman, which was upheld by the High Court, with the result the workman approached the Supreme Court. While dismissing the petition, Ranjan Gogoi J (for self and Sathasivam J) took note of the formula evolved by the Court in *Anand Bihari* (supra), and held:

> Following the judgment of this Court in *Anand Bihari* ... as already noticed, a 'scheme' engrafting the essential parameters prescribed by this Court had been brought into force in the State of Haryana by Memorandum dated 20.08.1992. The said scheme, as applicable to the State of Haryana, creates an obligation on the employer (Haryana Roadways) to find suitable alternative employment for an employee proposed to be discharged on the ground of medical disability if such disability is attributable to the service rendered. ... The facts of the present case clearly go to show that the appellant was found to be medically unfit to continue to work as a driver. His case for alternative employment in terms of the Memorandum dated 20.08.1992 was duly considered. No such alternative employment was available. Consequently, additional compensation payable to the appellant in terms of the Memorandum dated 20.08.1992 was calculated and paid. The materials on record would also go to show that the superannuation of the appellant, if he had continued in service, was due on 30.09.2004.Taking into account the totality of the facts of the present case, we are of the view that the award of the learned Labour Court dated 27.02.2004 affirmed by the High Court by its order dated 22.08.2005 will not require any interference by us.[46] (Paras 10 & 12).

Tenures of Service *v* Retrenchment

Contract Labour

Contract labour, engaged by a contractor for a particular period and for a particular job, are not 'workmen' under the IDA. Such employment comes to an end automatically, as soon as the time is over and the job is over. The disengagement of contract labour does not amount to retrenchment and does not attract s 25F. Such contract workers are not entitled to absorption in the service of the company, in respect of whose work, they were engaged by the contractor.[47]

Casual Workers

The Calcutta High Court held that the termination of the service of a casual workman, will fall within the meaning of the definition of 'retrenchment'.[48] However, in *DR Aher*, where a daily-rated workman, employed on a purely temporary basis in an irrigation project, having been so engaged for a period of six years, did not report for duty on his own, but five years later, raised an industrial dispute alleging an illegal termination, the Bombay High Court quashed the award of reinstatement with full back wages, passed by the labour court, and held that there was no termination of service, that the award passed by the labour court was not only illegal, but had also resulted in the miscarriage of justice.[49] Muster-roll workers, engaged by the forest department, who had worked for more than 240 days in a calendar year and who had not been retrenched as contemplated under s 25F and who had been working continuously for a period ranging from 3 to 10 years, were held entitled to continue in service.[50] Where services were not terminated or retrenched by the management, but the workers remained absent after a particular date, the provisions of s 25F were not held applicable. Once a situation is held to be not a case of termination of service by the management, whether the workmen had worked for 240 days or more, becomes immaterial. In the case of certain daily-rated workers, who had worked on the muster roll for a very short period, the relief of reinstatement with back wages was refused.[51] Where the workmen employed as casual labourers in a cable-laying project of the telecom department were terminated, such termination did not come within the purview of the definition of retrenchment in s 2(oo) and there was no need to comply with s 25F.[52]

Where the casual workers, who had put in 240 of days of service and whose services were terminated, challenged the order of the labour court, directing payment of compensation in lieu of reinstatement, the High Court held that a reinstatement would merely put the workers in the same position as they were earlier, namely, as casual workers, and hence, the relief of compensation granted by the labour court was appropriate.[53] In a case where a daily-wager, who had put in more than 240 days of service, was terminated without complying with s. 25F, on the ground that his original appointment was not made against a sanctioned post and hence, he was not a workman within the meaning of the IDA, a single judge of the Karnataka High Court observed that the distinction between seeking regularisation and insisting on the procedure under s. 25F to be followed, was significant and the two should not be confused, and held that a retrenchment, without following the prescribed procedure under s 25F, was void *ab initio*.[54] Coolies employed by a municipality, to remove garbage, are daily-rated workers and are neither regular, nor permanent employees, and have no right to claim a regular employment, and hence, the order of the labour court, directing their reinstatement, is bad.[55] The termination of the service of a person, who was employed intermittently on a casual basis and on daily wages on work relating to audit and accounts, does not amount to retrenchment.[56] In *SM Nilajkar*, Lahoti J (for self and Brijesh Kumar J), had outlined the scheme and purpose of sub-cl (bb) of s 2(oo) in the following words:

> It is common knowledge that the Government as a welfare State floats several schemes and projects generating employment

> opportunities, though they are short lived. *The objective is to meet the need of the moment. The benefit of such schemes and projects is that for the duration they exist, they provide employment and livelihood to such persons as would not have been able to secure the same but for such schemes or projects.* If the workmen employed for fulfilling the need of such passing-phase-projects or schemes were to become a liability on the employer State by too liberally interpreting the labour laws in favour of the workmen, then the same may well act as a disincentive to the State for floating such schemes and *the State may opt to keep away from initiating such schemes and projects even in times of dire need, because it may feel that by opening the gates of welfare it would be letting in onerous obligations entailed upon it by extended application of the labour laws.* Sub-clause (bb) in the definition of retrenchment was introduced to take care of such like situations by Industrial Disputes (Amendment) Act, 1984 with effect from 18-8-1984.[57] ().

The above observation of Lahoti J is right. The said sub-clause was intended to serve the twin objects of: (i) providing the much needed exit route to the industry to plan and adjust its manpower according to the fluctuating requirements as dictated by the market forces; and (ii) tiding over the problem of unemployment, at least partially, by engaging workers in different peripheral/non-perennial/marginal activities for short spells in different sectors of economy. This view is in striking contrast to the judicial perversions of alarming magnitude that surfaced in S Govindaraju v KSRTC (supra). In Haryana Roadways, the facts briefly were: the workman was appointed in various capacities as a class IV employee between March 1988 and February 1989 with intermittent breaks, whereafter he was not given appointment, which gave rise to the dispute. The tribunal held that the workman worked for about 264 days during the said period and on this view of the matter ordered reinstatement with continuity of service and 50% back wages. Mathur J (for self, Lahoti CJI and Balasubramanian J), took the view that the respondent-workman was not doing any technical job, but was only employed as a class IV worker and that where the length of service was short the award of back wages was wholly inappropriate. On this view of the matter, the learned judge, while upholding the reinstatement part of the award, set aside that part which directed the employer to pay back wages.[58]

In *Haryana State EDC*, the facts briefly were: the respondent workman was appointed for a period of 89 days as Junior Technician (Electronics) on an *ad hoc* basis in 1990. In terms of an offer of appointment made to her, the post was purely temporary and her services were liable to be terminated without assigning any reason or notice. It was categorically stated that she would have no claim for regular appointment having worked with the corporation on ad hoc basis. Her services were extended from time to time. In each of the offer of appointment, similar terms and conditions were laid down, and in this manner she was appointed, terminated and reappointed for a period of 89 days, each time, with an intermittent break of 2-3 days between October 1990 and February 1992. Her service was finally terminated in February 1992. The labour court directed reinstatement of the workman with full back wages on the premise that she had completed 240 days service. The writ petition filed by the corporation was dismissed by the High Court. Sinha J (for self and Balasubramanian J), held:

> In this case the services of the respondent had been terminated on a regular basis and she had been re-appointed after a gap of one or two days. Such a course of action was adopted by the Appellant with a view to defeat the object of the Act. Section 2(oo)(bb) of the Industrial Disputes Act, 1947, therefore, is not attracted in the instant case. ... However, indisputably, the respondent was appointed on an ad hoc basis. She, although qualified to hold the post of Junior Technician, when the advertisement had been issued for filling up the said post, did not apply therefor. The services of the respondent was terminated as far back as in the year 1992. ... in the peculiar facts and circumstances of this case, interests of justice would be subserved if in the place of reinstatement with back wages, a lump sum amount is directed to be paid by way of compensation. This order is being passed keeping in view the fact that. ... the respondent has not worked since 1992. The post on which she may have been working must have also been filled up. ... It is wholly unlikely that respondent in the meantime had not been working anywhere else, since the respondent had not placed any material on record to show that she had not been working. ... we modify the impugned order by directing that the respondent shall be compensated by payment of a sum of Rs. 25,000/- instead of the order for reinstatement with back wages.[59] (Paras 11-14 & 20)

In *Haryana Tourism*, the facts disclosed that the corporation, which was running fast-food centres, had decided to discontinue the activity of running these outlets and to handover them to the transport department, which necessitated retrenchment of daily wagers engaged in the centres in 1991. The labour court directed reinstatement of the workers, but with 25 per cent back wages, which was confirmed by the High Court. Allowing the appeal in part, the Supreme Court held that payment of a compensation of Rs. 60000/- per workman in lieu of reinstatement having regard to the lapse of time.[60] In *Municipal Council, Samrala*, where it was found that the workman was employed and disengaged thrice in a span of 18 months, and the workman was aware that her service was liable to be terminated at the end of the period(s), the case fell within the purview of s 2(oo)(bb). Termination of her service cannot be challenged on the ground of violation of s 25F.[61]Where the service of a person, who was appointed on contractual basis for different periods, has been terminated, such termination falls within the exception stipulated under sub-cl (bb) of s 2(oo) and it ceases to be ‘retrenchment’. Once

it is covered by sub-cl (bb), Ch V-A cannot have any application and by the same token, s 25G cannot have any application. No legal right is derived to continue in service in terms of provisions of Act under which he was governed. Thus, the question of depriving him of any status or privilege as stipulated in Item 10 of Sch 5 of the Act, which provide for acts amounting to unfair labour practice, would not arise.[62] Where a person was engaged again and again as a Junior Typist for fixed periods on daily wages, his disengagement after the lapse of the last order is covered by the exception contained in sub-cl (bb) of s 2(oo), and hence it does not amount to retrenchment.[63] A daily wager engaged, not in accordance with the statutory rules, cannot claim reinstatement, much less regularization.[64]

In *District Programme Coordinator*, the facts were: the Mahila Samakhya was a registered society and was engaged in women empowerment activities in certain areas of Karnataka and funded by the Government of Netherlands. The respondent-driver were engaged on fixed tenure basis in two spells, the second spell being from 1 November 1997 to 31 October 1998. The contract of employment further stipulated that the services were liable to be terminated at any time before the expiry of the tenure by giving one month notice or wages in lieu thereof. During the second spell of his tenure, some omissions and commissions on his part came to the notice of the Samakhya and some oral enquiry was conducted in the said omissions commissions. His service was terminated on 3 July 1998 by invoking the termination clause mentioned above. The labour court held that the termination simpliciter was illegal and ordered reinstatement with full back wages, as no disciplinary enquiry was held by the management. The High Court, while upholding the order, reduced the back wages to 30 per cent. A Bench of Supreme Court comprising Sinha and Chatterjee JJ, held that it was not a fit case for ordering reinstatement and ordered payment of a compensation of Rs. 56,000/- in lieu of reinstatement.[65] In *Ghaziabad Development Authority*, a fundamental issue that fell for the decision of Supreme Court was "*whether the Proviso to s 6N of the Uttar Pradesh Industrial Disputes Act 1947* is in *pari materia with sub-cl (bb) of s 2(oo) of the Central Act, in order to bring fixed tenure contracts within the pale of the said exception in the latter Act.*" Section 6N of UPIDA runs thus:

> **S. 6N. Conditions precedent to retrenchment of workmen.—**No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-
>
> (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice wages for the period of the notice:
>
> *Provided that* no such notice shall be necessary if the retrenchment is under an agreement which specifies a date for the termination of service;
>
> (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of service or any part thereof in excess of six months; and,
>
> (c) notice in the prescribed manner is served on the State Government." (emphasis added).

Highlighting the distinction between the two provisions, Sinha J (for self and Bedi J), observed:

> Section 6N of the Act unlike section 25B of the Industrial Disputes Act, 1947 does not provide that working for a period of 240 days in the preceding year would subserve the purpose. What is necessary under the said provision is working for a period of 240 days in one year. Once, a workman, has been in continuous service for not less than one year before his retrenchment, one month's notice in writing. indicating the reason thereof or wages in lieu thereof, as also compensation equivalent to fifteen days' average pay for every completed year of service or in part thereof in excess of six months is imperative. Proviso appended to clause (a) of section 6N of the Act provides that no notice would be necessary to be served, if the retrenchment has been in terms of an agreement which specified a date for the termination of service. The said proviso is not in *pari materia* with section 2(oo)(bb) of the Industrial Disputes Act, 1947.[66] ().

In the light of the facts of the case, which disclosed that: (i) there was no agreement between the employer and the workman as contemplated in the Proviso to s 6N(a) ; (ii) the workman was engaged on daily wages; (iii) sanction of the State Government was necessary for the creation of posts; (iv) no post was sanctioned by the Government after 31 March 1990, which fact was neither denied nor disputed; and (v) any appointment in violation of the Constitutional provisions and statutory rules would be void. Sinha J held that the labour court should not have directed the reinstatement of the workman in service. On this view of the matter, Sinha J ordered payment of Rs. 50,000/- as compensation to the workman in lieu of reinstatement. In*UP Brassware Corporation*, which too came within the pale of s 6N of UPIDA, Sinha J (for self and Balasubramanian J), held that although in the normal course a direction to pay full back wages in the event of an invalid termination was being usually given, with the passage of time, a pragmatic view of the matter was being taken by

the court realizing that the industry was not compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched. The learned judge further held that payment of full back wages was not automatic, and that no precise formula could be laid down as to the circumstances under which the payment of entire back wages should be allowed.[67]

In a case where the services of casual workers, who were engaged continuously for several years, were terminated, it was held that the award of the labour court directing their reinstatement with half back wages would not call for interference, more so, when the facts disclosed that there was no evidence to the effect that they were engaged on contractual basis in order to bring it within the exception under sub-cl (bb) of s 2(oo).[68] However, in *MP Police Housing Corpn*, the MP High Court comprising (Menon and Kaushal JJ), upheld the award of the labour court directing reinstatement of a casual workman who completed 240 days service and whose service was terminated without complying with s 25F. The Bench held that the denial of back wages was justified in view of the fact that he was only a daily wager.[69] A person who was engaged as water boy on a casual basis but for an unbroken period of 11 years from 1983 to 1994 is a workman and his termination without complying with s 25F was illegal, and directed reinstatement, but without back wages.[70] In *Bhavnagar Municipal Corporation*, the facts disclosed that the service of a workman, who was engaged for fixed periods on a casual basis and on daily wages, was terminated. It was further established that he had worked only for 54 days. The labour court ordered reinstatement which was confirmed by the High Court. Quashing both the orders, Radhakrishnan J (for self and Ghose J), held that the contract of appointment consciously entered into by the employer and the employee would, over and above the specific terms of the written agreement, indicates that the employment was short-lived and the same was liable to termination, on the fixed period mentioned in the contract of appointment, and that in view of the fact that there was no retrenchment under s 2(oo) read with s 2(bb). It was therefore, held that ss 25G & 25H would not apply to the facts of the case.[71]

In *Dilip Kumar Mandal*, the facts briefly were: the workman worked as a peon but his service was orally terminated without paying retrenchment compensation. The tribunal refused to pass the award of reinstatement on ground of no employer-employee relationship and that the petitioner failed to establish to have worked as daily wager for 240 days or more. Hearing the writ petition, Srivastava J, of Patna High Court held that the petitioner could not succeed in proving his appointment to post of peon but proved to be working as daily wager. There was nothing to show that petitioner was appointed as daily worker for fixed period, and no document was brought by the Respondent/bank to show that petitioner was appointed on basis of contract for certain period and that, after its expiry, the contract was not renewed and hence the said termination did not come under s 2 (oo)(bb). The learned judge held that, in these circumstances, the tribunal ought to have drawn adverse inference against Respondent/bank and given a finding to the effect that the petitioner worked for more than 240 days, and that nearly 19 years rolled by since his termination. On this view of the matter, the learned judge ordered payment of Rs. 2,00,000/- as compensation payable by the Respondent/bank in lieu of compensation for back wages as well as reinstatement.[72] In *Microwave Project*, the issue related to the termination of service of a 'casual' worker engaged on a specific project. Quashing the orders of the lower courts and remanding the matter to the tribunal, Pasayat J (for self and Kapadia J) observed that the tribunal failed to consider the issues in proper perspective; that the effect of s 2(oo)(bb) was completely lost sight of; that the facts disclosed that there was no dispute that the employment was for a specific project; that there was no discussion of the various materials produced before the tribunal; that the orders of the High Court proceeded on the basis that because there was non-compliance with the requirements of s 25F, the Award was justified; and that the question of applicability of s 25F would be dependent upon the basic question relating to applicability of s 2(oo)(bb) of the Act, which aspect was lost sight of.[73]

Trainees

A termination of the service of a trainee, initially appointed for one year and continued in service for more than two years, amounts to retrenchment and such appointment is not saved by cl (bb) of s 2(oo). The employer has to comply with the provisions of s 25F.[74] In *Kalyani Sharp*, the labour court and the High Court held that a trainee technician, who was appointed to undergo training for a period of one year, with the stipulation that the facility of training might be withdrawn at any time before completion, without assigning any reason, was entitled to the protection of s 25F in view of the fact that he had completed 240 days. Quashing the orders of the labour court and the High Court, the Supreme Court held that from the order of employment, it was evident that the workman was on probation and his service was terminated during probation and as such, there was no question of issuing a notice to the respondent, before terminating his service.[75] In *Surat MNSB*, it was found that the management appointed a person as a trainee, for a period of two months and extended the training period up to one year by issuing five separate orders, each for a duration of two months, followed by her appointment as a temporary junior clerk-cum-cashier, for a period of one month. Her services were extended by issuing fresh appointment orders, each for one month, so much so that she was continued as a temporary clerk-cum-cashier for 10 months, making it a grand total of 1 year 10 months from the date of the initial appointment as a trainee, till the date on which she was terminated. The labour court directed reinstatement with full back wages, which was upheld by a single

judge of the Gujarat High Court. The learned single judge held that the said termination would not fall within the exception in sub-cl (bb) of s 2(oo). The facts of this case disclose *mala fides* on the part of the employer. The staggering number of 16 appointment orders (6 as a trainee and 10 as a temporary clerk-cum-typist) establish that it was not a case of a mere fixed-tenure appointment as contemplated by s 2(oo)(bb), and that the employer acted in a questionable manner. In a letters patent appeal, the Division Bench of the Gujarat High Court partially allowed the appeal by reducing the back wages to 50 per cent, without, however, disturbing the order directing the reinstatement, and observed that the exception in sub-cl (bb) to s 2(oo), had no application to cases, where, based on evidence, it was found that the action of the employer was by way of victimisation or, in any case, not bona fide.[76] Where the employee was appointed as a trainee for six months, on the condition that on a satisfactory completion of the training and on passing the test, he would be eligible for appointment as an officer, and his service was terminated as he did not clear the written test, the Supreme Court held that the case fell within the exception in s 2(oo)(bb).[77] A single judge of Madras High Court held that the termination of service of a trainee on ground of unsatisfactory performance does not amount to retrenchment nor does it amount to punishment, and the award of the labour court directing reinstatement with back wages was not sustainable.[78]

Temporary Workmen

In *Tata Consulting Engineeers*, the facts disclosed that a workman was engaged on a temporary basis, for a period of three months, which was extended by subsequent orders, so much so that she continued in employment for more than one year. A single judge of the Bombay High Court held that her termination would amount to retrenchment, and it would not be covered under sub-cl (bb) of s 2(oo).[79] An employee engaged for meeting the rush or overload of work or a contingency, is an employee to whom the provisions of s 25F of the Act would be attracted and the termination of his service without payment of retrenchment compensation, would be void *ab initio*.[80] An employee covered by the *Kalelkar Award*, under which he is entitled to be brought into the 'converted temporary establishment', by virtue of putting in five years of continuous service, if terminated in violation of s 25F, he is entitled to reinstatement with full back-wages.[81] The termination of the service of a 'tracer', appointed on a purely temporary basis, as a consequence of the closure of one division and three sub-divisions, does not attract the provisions of s 25F, unless it is shown that the power was misused or vitiated by its *mala fide* exercise.[82] In *Air India*, the Supreme Court, while setting aside the order of the High Court, directing the management to absorb a temporary employee who had worked in the organisation for 53 days only, observed:

> We fail to understand as to how the High Court could have passed an interim order, much less a final order, in matters of service which ultimately would upset the scheme of recruitment itself, restraining the appellant from the termination of the services when the term of employment comes to an end. [83]

In a case, where an employee appointed on a temporary basis, for a period of 89 days, against a permanent post of a lower division clerk, was reappointed for another period of 89 days, after the expiry of the initial appointment, and further re-appointed for another 89 days, before being terminated, it was held that her appointment was for a fixed period, notwithstanding the fact that she had worked for more than 240 days, and hence, the termination of her service did not amount to retrenchment.[84] The termination of work-charged employees, appointed for fixed periods and posted at various locations, does not amount to retrenchment, as such a termination is attracted by s 2(oo)(bb), irrespective of the length of the period that may have been stipulated in the contract.[85] In *Estate Officer*, the facts were: a workman was employed on a temporary basis, for a period of 89 days. After the expiry of the initial period, he was again appointed for another period of 89 days, after giving a break. Finally, his service was terminated as provided in the contract. The labour court recorded a finding that the action of the employer was *mala fide* and was aimed at depriving the workman of the benefit of s 25F, and ordered a reinstatement, even though the workman had not worked for 240 days. Sudhalkar J (for himself and Gill J), upheld the order of the labour court and that the termination was illegal. To say the least, the decision of both the labour court and the Division Bench is not in consonance with the plain provisions of law.[86] It is conceded that the court can interfere in a case where the employer terminates the services of a workman, who has completed one year of continuous service as defined in s 25B, without complying with the provisions of s 25F. Even here, if the appointment is found to be contractual, for a fixed term, there is no need to comply with s 25F, as it would be squarely covered by s 2(oo)(bb), as laid down by the Supreme Court in *Escorts Ltd*,[87] and *Birla VXL*.[88] Besides, no court can deny the employer, the right to engage employees on a temporary basis, for a fixed term. In this case, the facts disclosed that the workman had put in 232 days of temporary service. The employer had every right to terminate a temporary workman engaged for a fixed term, before he completes 240 days, and on that sole ground, no inference could be drawn that the employer had acted *mala fide*. It is not as if all the jobs in an organisation are of a permanent nature or of a perennial character, and the right of an employer to engage temporary and casual workmen, to take care of certain exigencies, as long as he is within the four corners of law, cannot be questioned. This decision reflects, not the proper and judicious exercise of judicial power, but its misinterpretation of statutes. The learned judge imagined and imported too many things into the case facts, which is clearly unwarranted. That apart, this decision runs counter to the ratio of *Escorts Ltd, Birla VXL, Allahabad Bank*,[89] and other decisions which touch upon the termination of the service of temporary workmen, employed for a fixed period.

Another decision which proceeds on the same lines is that of *Mukesh Kumar*, rendered by the same Bench that handed down the decision in *Haryana Urban Development.* In this case, despite the fact that the labour court had rejected the claim of the workman on the ground that he had not worked for 240 days, Sudhalkar J brought into the case, the doctrine of 'unfair labour practice', which, in the understanding of the learned judge, meant a 'termination of the services of a workman, before his completing 240 days of service'. He further held that what was in issue before the labour court, was not the mere completion of 240 days of service, but an unfair labour practice. [90] It is shocking that a High Court judge could deal with cases so recklessly and contrary to the plain provisions of law. It would be a real miracle, if the learned judge could cite the appropriate reference from Sch V to the IDA, where it is stipulated that a 'termination of the services of a workman, before his completing 240 days of services, amounted to an unfair labour practice', and, conversely, at least one provision in any labour statute of his choice, which compels the employer to engage workmen for not less than 240 days. To say the least, the manner in which Sudhalkar J proceeded to decide the above cases discloses the grave misconceptions of a fatal nature, entertained by him. Both the above decisions deserve to be rejected without a second look, as being repugnant to all notions of sound reasoning and common sense. In striking contrast, the Orissa High Court held that, in a case where the workman had not put in one year of continuous service, within the meaning of s 25(B), ie, he had not worked for 240 days in a year, he was not entitled to compensation under s 25F.[91] A single judge of the Rajasthan High Court, in *Giridhar Gopal*,[92] expressed a similar view. In *Rattan Singh*, where the services of an employee, who had served continuously for the requisite statutory minimum period in a year, were terminated without complying with s 25F, the Supreme Court held that the said termination was illegal. However, considering the fact that 20 years had elapsed since the termination of the service, instead of directing a reinstatement, a sum of Rs 25,000 was directed to be paid in lieu of reinstatement and back wages.[93]

Seasonal Employees

In *Morinda Coop Sugar*, the issue was "whether the termination of *seasonal workers*, engaged during the crushing season would amount to retrenchment." Rejecting the contention, Ramaswamy J (for self and Hansaria J), observed:

> It would thus be clear that the respondents were not working throughout the season. They worked during crushing seasons only. The respondents were taken into work for the season and consequent to closure of the season, they ceased to work. ... The question is whether such a cessation would amount to retrenchment. *Since it is only a seasonal work, the respondents cannot be said to have been retrenched in view of what is stated in clause (bb) of Section 2(oo) of the Act*. Under these circumstances, we are of the opinion that the view taken by the Labour Court and the High Court is illegal. However, the appellant is directed to maintain a register for all workmen engaged during the seasons enumerated hereinbefore and when the new season starts the appellant should make a publication in neighbouring places in which the respondents normally live and if they would report for duty, the appellant would engage them in accordance with seniority and exigency of work.[94]

The Madras High Court held that seasonal employees had no right to regularisation, till they were duly selected and the mere continuance for 480 days in service, would not qualify them for regularisation and, accordingly, a termination of their services on the completion of the procurement season would not be attracted by s 25F.[95] Termination of seasonal workers at the end of the season, does not amount to a 'retrenchment' under s 2(oo), and they do not acquire a right to regularisation.[96] In *Krishik Upaj*, it was held that workers appointed on seasonal basis and not against any clear vacancy, would not have any right to claim permanency, even if they had completed 240 days in a year.[97] In another case involving the same company, another single judge took a contrary view and upheld the award of the labour court, directing the company to retain a workman on the ground that he had worked for more than 240 days in service, that other workmen junior to him, were retained in service, and that the management could not adduce evidence to prove that the said workman was engaged in work of a seasonal nature.[98] A settlement providing for a regular absorption of seasonal employees, depending on a permanent vacancy, can be invoked by seasonal employees to their advantage, as and when permanent vacancies arise. No claim for regularisation need be considered if there are no permanent vacancies.[1] In *Bhogpur Coop Sugar Mills*, Sinha J (for self and Katju J), held that the termination of the service of a seasonal workman employed in a sugar factory and who had not completed 240 days of service would not amount to retrenchment.[2]

Probationers

The Gauhati High Court has held that the termination of the service of a probationer, on a bald statement that he was medically unfit, would fall within the definition of 'retrenchment'.[3] In *Raghavendra Kulkarni*, the Supreme Court held that the termination of a probationer, in terms of the appointment letter, does not amount to a retrenchment.[4] In *SN Jhavar*, the Supreme Court classified the cases falling within the ambit of a 'deemed confirmation' under three heads, and observed:

> The question of deemed confirmation in service jurisprudence, which is dependent upon the language of the relevant service rules,

> has been the subject-matter of consideration before this court, times without number, in various decisions and there are three lines of cases on this point. One line of cases is where the service rules or in the letter of appointment, a period of probation is specified and the power to extend the same is also conferred upon the authority, without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases, there is no bar against termination at any point of time after the expiry of the period of probation. The other line of cases is that where, while there is a provision in the rules for an initial probation and extension thereof a maximum period for such extension is also provided, beyond which it is not permissible to extend the probation. The inference in such cases is that the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation, in case, before its expiry, the order of termination has not been passed. The last line of cases is where, though under the rules, the maximum period of probation is prescribed, the same also require a specific act on the part of the employer, of issuing an order of confirmation and of the probationer's passing a test for the purpose of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed, nor the person concerned has passed the requisite test, he cannot be deemed to have been confirmed, merely because the said period has expired.[5]

The services of a probationer cannot be terminated for negligence in allowing vehicles to pass without collecting octroi, unless he has been given an opportunity of being heard and an inquiry is conducted.[6] In *SN Vasudevan*, the facts of the case were: a few machine operaters were appointed on probation for a period of six months, with a provision for an extension of the probation, if considered necessary. As against this, the Standing Order No 4(2) provided, *inter alia*, that a probationer shall be closely watched in regard to his conduct, ability and adaptability to the job and if he does not meet the requirements, his services will be terminated without notice, during or at the end of the probationary period. The management extended the probation of the workmen, and later terminated their services. The labour court upheld the said termination on the ground that it fell within the ambit of s 2(oo)(bb), in view of the fact that they were appointed for a fixed period, on probation, which was liable to be extended, and hence, the provisions s 25N were not attracted. Gopala Gowda J, held that the Standing Orders did not provide for an extension of the probation period and hence, the action of the management in extending the probation, admittedly under the contract of employment, was repugnant to the Standing Orders.[7]

This part of the decision deserves to be attacked. Extension of probation is an implied power conferred on the employer, unless there is a clause in the Standing Orders which positively prohibits such extension or which imposes a ceiling on the maximum period of probation, beyond which, the workman if continued, shall be deemed to have been automatically confirmed. Where no such ceiling is prescribed, the probationer shall continue to be a probationer and does not get automatically confirmed after the expiry of the said probation period. That is the settled legal position, as laid down by the apex court in *Dharam Singh*,[8] *BP Bhatnagar*,[9] and a host of other cases. In the present case, it was an admitted position that the Standing Orders did not stipulate any ceiling on the maximum period of probation. The expression in Standing Order No 4(2), that 'his services will be terminated without notice, during or at the end of the probationary period' could not obviously be interpreted to mean that the employer should necessarily terminate his services at the end of the probationary period. If the employer, in his discretion, feels that the probationer requires some more time to measure up to the job demands and extends the probationary period, it could be not be said that such an extension works out to the disadvantage of the workman. On the contrary, such an extension of the probationary period is beneficial to the workman, for the reason that it gives one more opportunity to him to prove his suitability. In the face of a crystal clear legal position relating to probation, and in the light of the above discussion, to hold that the employer had no right to the extend the probation, sounds capricious. On this point, the view taken by the labour court is right and that of Gopala Gowda J, is misconceived and wrong. In *Muir Mills*, Lakshmanan J (for self and Kabir J), held that in terms of the offer of appointment, the appellant mill reserved the right to terminate the service of a probationer without assigning any reason and without any notice. That being so, the termination of probationer under the said clause would not amount to retrenchment in view of the exception carved out under sub-cl (bb) thereof. By the same token, the award of the tribunal granting relief of reinstatement with back wages was not proper and deserved to be set aside.[10]

Part-time Workmen

A part-time workman, whose services were terminated without complying with the provisions of s 25F, is a workman and is entitled to a reinstatement.[11]

Workmen appointed illegally and in contravention of Rules

In *Eranallor SC Bank*, a single judge of the Kerala High Court held that the appointment of an employee, made without the authority of law, will be void *ab initio* and the termination of his services will not be retrenchment.[12] On the other hand, in *Mithilesh Kumar Singh*, a single judge of Patna High Court held that the termination of service of a workman, on the ground that his initial appointment was not legal and valid, would amount to a retrenchment. The court observed that the

idea of an illegal and invalid appointment is quite foreign to the Industrial Disputes Act.[13] A similar view was taken by the Madras High Court, in *Srirangam CU Bank*, in which the facts disclosed that the workman was appointed as a temporary clerk by the bank, in contravention of its rules and regulations. In view of the wide amplitude of the language of the definition of 'retrenchment', the termination of his service was held to be 'retrenchment'. Rejecting the contention of the employer bank that, since the appointment of the workman was void, he could not be continued in the service and, therefore, the termination of his service would not amount to 'retrenchment', the court observed that since the workman had put in over two years of service, he had been in continuous service for more than one year under the employer bank, as required by s 25F, and whether the appointment was made in accordance with the law or not, does not make any difference, and what is relevant is the fact of employment and not the legality or otherwise, of it.[14] The Madhya Pradesh High Court, in *Rajesh Kumar*, held that a termination of the employment of a probationer or of an invalidly appointed worker, will be retrenchment because an invalid appointment is not one of the exceptions to the provisions of the main definition of retrenchment.[15] The view of the single judge of the Kerala High Court is the correct law, because the holding judgments of the Patna, Madras and Madhya Pradesh High Courts will lead to absurd consequences. It would mean that illegally and invalidly employed employees will be automatically validated and they will be treated at par with the legally and validly employed employees. Thus, though the definition of 'retrenchment' comprehends a termination of service, it is not that every termination of service is retrenchment. In other words, every case of a discharge simpliciter may not be a case of retrenchment,[16] though there is a preponderance of judicial opinion, that every termination of service, not falling under any of the exception of s 2(oo), would amount to retrenchment. The words 'termination by the employer of the service of a workman, for any reason whatsoever' are the keywords.[17]

Adjudication of Retrenchment

All 'retrenchment' is termination of service, but all termination of service may not be 'retrenchment'. In order to be a 'retrenchment', the termination of service has to fall within the ambit of the definition of 'retrenchment', as given in s 2(oo) of the Act.[18] Furthemore, s. 25F prescribes the requirements of notice and compensation, as conditions precedent to a retrenchment of workmen. Section 25G introduces the rule 'last come first go', in effecting 'retrenchment' of workmen. A termination of service, without satisfying these statutory requirements, will be no 'retrenchment' in the eye of law. Hence, a non-compliance with these mandatory provisions, will render the purported retrenchment invalid. Industrial adjudication, therefore, has jurisdiction to see whether, in fact, these preconditions have been complied with or not. A termination of the service of a workman, as a measure of 'retrenchment', without complying with the mandatory requirements of law, will be illegal. But the word 'illegal' has a very wide significance. Considered in isolation, it is vague; for the termination of employment may be illegal for different and even conflicting reasons. Therefore, the meaning of the word 'illegal' has to be understood in the context of the allegations of facts constituting the particular kind of illegality pleaded. It would follow that the word 'illegal' so construed, according to the context, would not include some meaning of illegality which was not pleaded and which was contrary to the pleadings.[19]

In *JK Iron*, the Supreme Court observed that if in applying the principle 'first come, last go', the employer gives a preferential treatment to juniors, without any acceptable or sound reasons, the industrial adjudication will be well justified in holding that the action of the management is not *bona fide* and the adjudicator will be within his jurisdiction to go into the question of the *bona fides* of the retrenchment. However, the question of notice and compensation required by s 25F and the rule of 'last come, first go', as enshrined by s 25G, would arise only if the termination of the service of a workman is 'retrenchment' as contemplated by s 2(oo). These requirements are not attracted in cases of termination of service otherwise than as 'retrenchment'.[20] The desire of an employer to make profit is natural and, therefore, lawful.[21] It is not open to an industrial adjudicator to tell an employer as to how he should conduct his business.[22] So long as the retrenchment is carried out *bona fide* and is not vitiated by any considerations of victimisation or unfair labour practice, and the employer comes to the conclusion that he can carryon his undertaking with reasonable efficiency, with the number of employees retained by him after retrenchment, the tribunal ought not to ordinarily, interfere with such decision. It is for the management to decide the strength of its labour, required to carry out efficiently, the work of its undertaking. If, therefore, as a result of a re-organisation, the number of the existing employees exceeds the reasonable and legitimate needs of the undertaking, the employer, subject to his obligations under Chs VA and VB of the Act, can effect retrenchment.[23]

It is not the function of the tribunal to go into the question of whether such a scheme is profitable or not, or whether it should have been adopted by the employer. There is no provision in industrial law which confers any power on the tribunal to inquire into such a dispute, so long as it is not actuated by any consideration of victimisation or any unfair labour practice.[24] 'A person must be considered free to so arrange his business, that he avoids a regulatory law and its penal consequences, which he has, without the arrangement, no proper means of obeying. This, of course, he can do only so long as he does not break that or any other law'.[25] A person has a right to re-organise his business in any fashion he likes, for the purpose of economy or convenience. It is within the managerial discretion of an employer, to organise and arrange his business in the manner he considers best. So long as that is done *bona fide*, it is not competent for the tribunal to question

its propriety. Hence, the management has a right to determine the volume of its labour force, consistent with its business or anticipated business, and its organisation. If, for instance, a scheme for re-organisation of the business of the employer, results in surplusage of employees, no employer is expected to carry the burden of such economic dead weight and retrenchment has to be accepted as inevitable, however unfortunate it be.[26] The fact that the action of retrenchment, taken by the employer, is in exercise of his right of re-organisation of his business, is an important aspect which has to be specifically pleaded and proved before the tribunal and then, to be decided by the tribunal.[27]

Subject to the provisions of Chs VA and VB, the management has a right to take a decision to retrench the dead weight of uneconomic surplus. The justification for the retrenchment has, however, to be assessed by the reasonableness of the decision taken by the management in a particular situation of actual or threatened losses. It is not to be assessed as the vindication of that step by future events and by the substituted judgment of any other agency, judicial or otherwise, which has no responsibility or hazard in the industry.[28] For instance, a retrenchment cannot be said to be unjustified merely for the reason that the employer could have transferred the workmen to another unit in another part of the country, and the tribunal, a therefore, cannot infer that the failure of the employer to transfer the retrenched employees to other units, renders the retrenchment unjustified.[29] Likewise, the fact that the implementation of a reorganisation scheme, adopted by an employer, for reasons of economy and convenience, would lead to the discharge of some of the employees, will have no material bearing on the question as to whether the re-organisation has been adopted by the employer bona fide or not.[30] The law, however, requires that in effecting a retrenchment, for any reason whatsoever, the employer must be acting *bona fide* and not for the purpose of victimising his employees and in order to get rid of their services.[31] For instance, the retrenchment of a workman, who had put in one and a half decades of continuous service, on the ground that his age was a little more than the maximum eligible age for appointment, at the time of the employment, was held to be unjustified and invalid.[32] A mere invocation of the Standing Orders, for a termination of service, will not, *ipso facto*, take the termination beyond the jurisdiction of the industrial tribunal.

In appropriate cases, the tribunal will have jurisdiction to find out as to whether the invocation of the Standing Order was capricious, arbitrary, or *mala fide*, or was the result of victimisation or an unfair labour practice, and set aside the 'retrenchment' or award compensation if the facts of the case justify.[33] But the tribunal has to confine its adjudication to the terms of reference and the pleadings of the parties. It is 'not open to it to fly off at a tangent, disregarding the pleadings and reach any conclusion that it thinks as just and proper'.[34] For instance, where the only point of a dispute which was referred by the state government, to the tribunal, for adjudication, was, whether the 'retrenchment' of the workman by the general manager of the corporation was legal and valid, the tribunal had no jurisdiction to engage itself in the inquiry as to who had retrenched the workman concerned and whether he was competent to do so or not, because a workman cannot, in the same breath, say that he has not been retrenched and also say that his retrenchment is invalid and inoperative.[35] In *Subong Tea Estate*, the Supreme Court stated the following propositions for the guidance of industrial adjudicators:

(1) The management can retrench its employees only for proper reasons, which means, that it must not be actuated by any motive of victimisation or any unfair labour practice;

(2) It is for the management to decide the strength of its labour force, and the number of workmen required to carry out efficiently, the work in his industrial undertaking; the decision, therefore, must always be left to be determined by the management in its discretion;

(3) If the number of employees exceeds the reasonable and legitimate needs of the undertaking, it is open to the management to retrench them;

(4) Workmen may become surplus on the ground of rationalization or on the ground of economy, reasonably and *bona fide* adopted by the management, or on the ground of other industrial or trade reasons; and

(5) The right of an employer to effect retrenchment, cannot normally be challenged, but when there is a dispute in regard to the validity of the retrenchment, it would be necessary for the tribunal to consider whether the impugned retrenchment was justified and it would not be open to the employer, either capriciously or without any reason at all, to say that it proposes to reduce its labour force, for no rhyme or reason.[36]

Burden of Proof

The burden of proof to establish that the termination of service of a workman is retrenchment, is on the person putting forward the claim. In other words, where an employee claims that he has been retrenched, he must prove that he was retrenched from service and it is not for the employer to prove that the discharge or termination of the services of the employees was otherwise than by way of retrenchment.[37]

Clause (p): SETTLEMENT

The repealed Trade Disputes Act, 1929, did not contain the definition of 'settlement'. The definition as originally enacted in the Industrial Disputes Act, 1947, was as follows: "Settlement means a settlement arrived at in the course of a conciliation proceeding". This definition did not take notice of any private settlement or agreement, arrived at between the parties, in the course of their direct negotiations. A Division Bench of the Bombay High Court observed that, 'it is only that settlement upon which the law has its imprimatur and to which the law has given sanctity and which the law has made binding'.[38] The old definition was substituted by the present one, by the Amending Act of 1956.

Settlement and Agreement

The definition of settlement now envisages two categories of settlements (i) a settlement which is arrived at in the course of conciliation proceedings, ie, one which is arrived at with the assistance and concurrence of the conciliation officer, who is duty-bound to promote a right settlement and to do everything he can, to induce the parties to come to a fair and amicable settlement of the dispute, and (ii) a written agreement between the employer and workmen, arrived at otherwise than in the course of conciliation proceedings.[39] The legal effects of both the kinds of settlements are not identical, in that whereas the former binds all the present and future workmen as specified in s 18(3), even though such persons are not parties to the dispute and join the establishment subsequent to the settlement, the latter binds only the actual parties to the agreement, under the provisions of s 18(1) of the Act.[40] Rule 58(2) of the Industrial Disputes (Central) Rules, 1957, prescribes the manner of signing the settlement. Section 18(1) makes such a settlement binding on the parties to the agreement, while s 18(3) makes a settlement arrived at 'in the course of conciliation proceedings' binding on the parties enumerated therein. A settlement becomes binding on the parties and comes into operation on the date agreed upon by the parties to the dispute and, if no date is agreed upon, on the date on which the memorandum of the settlement is signed by the parties to the dispute and a copy of it is sent to the concerned officer. A party who wants to take advantage of a settlement, has to establish that the requisites of the 'settlement' had been complied with.[41]

The Preamble to the Act postulates the settlement of 'industrial disputes'. Therefore; in terms of the definition of a settlement, what is settled between the parties is an 'industrial dispute', which, *inter alia*, is a dispute between the employer and the workmen. If the employees concerned do not fall within the category of workmen, no agreement or arrangement between them, even if it is in compliance with the requirements of s 2(p) and the relevant rules, will be a 'settlement' as postulated by the Act.[42] A settlement between an employer and workmen, if not duly terminated, will operate as an inviolable condition of service of the workmen. Such a settlement is only a step up in labour's progressive ascent to the goal of their ultimate ideal, namely, a living wage with the realisation of other aspirations, including a partnership with the employer.[43] A voluntary settlement is, however, to be distinguished from an adjudication. There may be several factors that may influence the parties to come to a settlement, as a phased endeavour in the course of collective bargaining. It is a process of give and take. By a settlement, the labour may scale down its claims and score in some other aspects and save unnecessary expenses in uncertain litigation. Once cordiality is established between the employer and labour, in arriving at a settlement, which operates well for the period for which it is enforced, there is always a likelihood of further advances in the shape of improved emoluments by voluntary settlement, avoiding friction and unhealthy litigation. This is the quintessence of settlement, which courts and tribunals should endeavour to encourage. 'Any settlement arrived at should be a just and fair one,[44] It is in this spirit that the settlement has to be judged and not by the yardstick adopted for scrutinising an award in an adjudication. A settlement, therefore, cannot be judged on the touchstone of the principles which govern the adjudication of industrial disputes.[45] In the words of Koshal J:

> If the settlement had been arrived at by a vast majority of the concerned workers, with their eyes open, and was also accepted by them in its totality, it must be presumed to be just and fair and not liable to be ignored while deciding the reference, merely because a small number of workers...were not parties to it or refused to accept it, or because the tribunal was of the opinion that the workers deserved marginally higher emoluments than they themselves thought they did. A settlement cannot be weighed in any golden scales and the question whether it is just and fair, has to be answered on the basis of principles different from those which come into play when an industrial dispute is under adjudication.[46]

A settlement is the result of collective bargaining and when a recognised union negotiates with an employer, the workers as individuals, do not come into the picture and it is not necessary that such individual workers should know the implications of the settlement, since a recognised union, which is expected to protect the legitimate interests of the labour, enters into a settlement with the best interests of the labourers in view. There may be exceptional cases where there may be allegations of *mala fides*, fraud or even corruption or other factors, which cannot altogether be ruled out. The settlements in the course of collective bargaining, ought to be weighed in their proper perspective and to be considered by law courts while implementing the same, as representing the wishes and desires of the workmen of the concerned organisation. A settlement ought not to be interfered with so easily, even though it may operate with a little bit of harshness to a section of employees and there ought to be some amount of give and take for the proper industrial peace and harmony in the country.

Law courts, therefore, have a bounden obligation to maintain such a settlement and to give due consideration to a settlement arrived at between the recognised union and the management. It would, therefore, be improper for industrial adjudication, to ignore the settlement and insert something which is totally different.[47] The Karnataka High Court has gone to the extent to say that even if the settlement is technically not in accordance with the law, it should not be interfered with in judicial review, where it is between the management and the majority of the workmen, who have taken benefit under the settlement and thereafter, resumed normal production and industrial peace, unless it is shown that the terms of the settlement are onerous and against the interests of the majority of the workmen. It is well-settled that the extraordinary jurisdiction of the writ court or judicial review should not be exercised, even if the aggrieved party has made out a case on a question of law, unless a substantial injustice has been caused to it.[48]

The Andhra Pradesh High Court held that where the management is guilty of dishonouring its commitments under a settlement, whether it is called the 'understanding' or 'minutes of discussion', after taking full advantage of the terms thereof, and having trapped the union into an agreement and after taking advantage of that agreement, it could not be said that the settlement was not binding on the management. In this case, the court reprimanded the conduct of the management, in trying to resile from the settlement so entered into.[49] The question of the justness and fairness of a settlement should be examined with reference to the situation, as it stood on the date on which it was arrived at. For instance, if a settlement is arrived at between the parties during the pendency of adjudication proceedings, the possibility of an adverse decision operates as a positive force in favour of a deliberate and careful effort by both the parties, to settle their disputes through direct negotiations. There may also be the probability of the workmen having to refund some amounts to the employer, in the event of the award going in favour of the employer.[50] A settlement, therefore, is not to be seen in bits and pieces, by holding some parts good and acceptable and others bad. Unless it can be demonstrated that the objectionable portion is such that it completely out-weighs all the other advantages gained, the court will be slow to hold a settlement as unfair and unjust. The settlement has to be accepted or rejected as a whole.[51] In construing a settlement, if two views are possible, the view which is more favourable to the workers should be adopted.[52] But a settlement obtained by fraud or vitiated on account of its being involuntary, will be no settlement in the eye of law.[53]

However, unless an agreement arrived at between the parties, either before a conciliation officer, or otherwise, is a settlement in its grammatical or ordinary signification, it will not be a settlement within the meaning of the definition. The term 'settle' is used in more senses than one. For instance, one settles properties, one settles accounts, literally and metaphorically. In relation to disputes, the word in the dictionary sense would mean, to decide by arrangement between the contesting parties'. Obviously, what is decided by a settlement, is the 'industrial dispute'. Every settlement is an arrangement or agreement, though every arrangement or agreement is not a settlement. An agreement or arrangement will not be a settlement merely because the parties to the dispute choose to call it a 'settlement' and such agreement or arrangement is incorporated in a memorandum of settlement, signed by the parties for the purposes of settlement. The agreement or arrangement must decide some part of the dispute or some matter in the dispute or decide the procedure by which the dispute is to be resolved, or affect the dispute in some manner or the other, or provide for some act or forbearance in relation to the dispute, on the part of a party or parties to the dispute. In other words, a settlement only settles the matter or matters in the dispute which it settles. If some of the matters in dispute are not settled, it cannot be said that the settlement settles the entire dispute or settles those matters in dispute, which are not within the scope of the settlement. For instance, an interim settlement which not only leaves the dispute relating to the quantum of bonus at large, but also leaves at large, the time and manner of the payment of the bonus in its entirety and settles only the manner and time of an *ad hoc* payment to be made on account of the bonus and the procedure for the determination of the dispute to be adopted for the time being, would not fall within the definition of a settlement, as contemplated by the Act.[54]

An agreement to refer an industrial dispute to an arbitrator, under s 10A(l) of the Act, is not a settlement, because the dispute in question subsists after such agreement and does not come to an end.[55] In *Hindustan Lever*, speaking for the Supreme Court, Desai J observed that the courts, by interpretative process, must strive to reduce the field of conflict and expand the area of agreement and show its preference for upholding agreements sanctified by mutuality and consensus in the larger public interest, namely, to eschew industrial strife, confrontation and consequent wastage.[56] When any trade union enters into some settlement of an industrial dispute, with the employer, the presumption is that it has acted in the best interests of its members. Therefore, when a settlement of an industrial dispute is reached at, between the sponsoring union, particularly when it commands the support of the majority, it should be *prima facie*, considered to be in the best interests of the employees of the concerned establishment or industry, even of the public body. Such presumption is not assailable in the absence of any oblique motive behind it. But a mere allegation in this regard would not be sufficient, as it is easier to allege than to prove. The allegation of an oblique motive, even at the stage of pleadings, should be based on some concrete materials and not based on a vague allegation.[57] There are two modes of settling industrial disputes between parties, *viz*:

(1) by a settlement arrived at in the course of conciliation proceedings; and

(2) by a settlement otherwise than in the course of conciliation proceedings.

Settlement Arrived at in the Course of Conciliation Proceedings

Law attaches importance and sanctity to a settlement arrived at in the course of conciliation proceedings, since it carries a presumption that it is just and fair and makes it binding on all the parties, as well as other workmen in the establishment, or the part of it to which it relates. There is a distinction between a 'settlement arrived at in the course of conciliation proceedings' and a settlement arrived at 'by an agreement between the employer and workmen, otherwise than in conciliation proceedings', both as regards the procedure to be followed in the two cases and as regards the persons on whom they are binding.[58] The legislature, when it made a settlement binding not only on the parties, but also on the present and future employers and workmen, it intended that such settlement is arrived at in the course of conciliation proceedings.[59] The manner of arriving at a settlement in the course of conciliation proceedings has been prescribed by s 12(3), s 13(2) and r 58 of the Industrial Disputes (Central) Rules 1957. Section 12(3) and s 13(2) require the conciliation officer or the board, as the case may be, to send a report of the settlement arrived at, in the course of the conciliation proceedings, to the 'appropriate government', together with a memorandum of the settlement signed by the parties to the dispute. Rule 58 prescribes the requirement of the memorandum of settlement.

Sub-rule (1) prescribes that the memorandum of settlement shall be in form H, while sub-r (2) prescribes the mode and manner of signing the settlement and sub-r (3) repeats the requirement of s 12(3), that a conciliation officer should send a report of such a settlement to the Central Government. Section 18(3) makes such a settlement binding not only on all the parties to the dispute, but also upon the heirs, successors and assigns of the employer, in respect of the establishment and also, in certain cases, upon all the other parties summoned to appear in the proceedings as parties to the dispute, before the authority. It also makes such a settlement binding on all the present and future workmen employed in the establishment. Section 12(3) postulates that it should be a settlement between the parties to the dispute, which would include not merely one section, but all the workmen who are before the conciliation officer in connection with the conciliation proceedings, on an identical issue.[60] The report of the board of conciliation under s 13(2), in addition to the requirements of r 58, must also comply with the requirements of s 16. Such report shall have to be published in accordance with the provisions of s 17. The settlement arrived at in the course of the conciliation proceedings, stands on a higher footing than a settlement arrived at *de hors* the conciliation proceedings. Therefore, in order to have a binding effect under s 18(3), on the other parties, who are not parties to the settlement, it would be necessary, firstly, that there should be a conciliation proceeding pending and, secondly, that the settlement should have been arrived at in the course of the conciliation proceedings.[61]

A settlement which does not comply with the requirements of the statute, *viz*, the section and the relevant rules framed by the appropriate government, will not be a valid settlement.[62] A settlement, after it becomes enforceable under the law, cannot be modified subsequently, by a tribunal, arbitrator or any authority, under the Act.[63] The words 'in the course of conciliation proceedings', though refer to the duration when the conciliation proceedings are pending, do not mean any agreement arrived at between the parties privately, during this period. In *Bata Shoe Co*, the Supreme Court pointed out that a settlement, 'in the course of conciliation proceedings', does not mean a settlement which is reached at between the parties during the period when a conciliation proceeding is pending before a conciliation officer, but is the one which is assisted and aided by the conciliation officer, by his advice and concurrence, on his being satisfied that the settlement is fair and reasonable, for it is the duty of the conciliation officer to promote a right settlement and to do everything he can do to induce the parties to come to a fair and amicable settlement of the dispute. It is only such a settlement as is arrived at while the conciliation proceedings are pending, that can be binding under s 18(3). The legislature, when it made such a settlement binding, not only on the parties thereto, but also to the present and future employers and workmen, intended that such settlement is arrived at with the assistance of the conciliation officer and is considered by him to be reasonable and, therefore, has his concurrence.[64] The intention of the legislature in making the settlement arrived at during the conciliation proceedings so binding on the parties was that the conciliation officer will not be a mere silent spectator or a mediator alone, but it would be obligatory on him to ensure the presence of the parties and that the interests and obligations of all the concerned parties are taken into account.[65]

However, the conciliation officer is not an adjudicating authority. Therefore, a conciliation officer is not required to decide the dispute on merits. Patently, his task is one of discussion, or advice and persuasion, so that the matters in dispute are clarified to the parties themselves; and thrashing out the various points out of the dispute, in their presence, so that they are enabled to come to a settlement which is fair and amicable. The hearing by the conciliation officer, if any, is for the purpose of ascertaining the points of the dispute between the parties and for the purpose of finding out the matters which affect the rights and merits of the parties.[66] If the conciliation officer is satisfied, after negotiations with the parties, that the terms of the settlement taken as a whole, are beneficial to the workmen, being fair and reasonable, it is not open to the reviewing court to examine whether there was an application of mind by him, to each and every term of the settlement. But the conduct and the action of the conciliation officer, in impressing the settlement with the stamp of a settlement in the course of conciliation proceedings, is open to scrutiny by a reviewing court, though the relief granted by the reviewing court would be of a declaratory nature, which may, in appropriate cases, necessitate the granting of a consequential relief.[67]

Where the conciliation officer, after the receipt of a statement of claim, did not initiate any proceedings for conciliation, in that neither the investigation was made, nor any negotiations were held by her, nor did she make any attempt to induce the parties to reach a settlement and also did not apply her mind to the question, whether the settlement was fair or reasonable, it could justifiably be said that it was a settlement *de hors* the conciliation proceedings.[68]

The Madras High Court, in, *Ramakrishna Industries,* held that a settlement will not have the effect of the settlement in the course of conciliation proceedings, 'unless it is brought about with the assistance and concurrence of the conciliation officer and he has got a significant role to play in seeing to it that the terms arrived at are fair to both the parties'. Otherwise, it will not be a settlement in the course of conciliation proceedings. But even such a settlement may not survive, if it violates the provisions of Ch VA or VB of the Act, particularly when it is unreasonably bristling with unjustness and unfair labour practices.[69] A settlement brought about with the mediation of any person other than the conciliation officer, during the pendency of conciliation proceedings, cannot be treated as a settlement 'arrived at in the course of conciliation proceedings'. For instance, a settlement brought about with the intervention of a minister or a chief minister, will not be a settlement arrived at in the course of conciliation proceedings, for a minister is not a conciliation officer.[70] Nor would a mere statement in an agreement, to the effect that the minister had assured his good offices for the implementation of the demands and on his assurances, the union had called off the agitational programme, constitute a settlement of the dispute. However, the mere participation of a Minister, or Chief Minister in the conciliation proceedings, will not change the character of the conciliation proceedings, if the conciliation has been brought about with the aid and assistance of the conciliation officer. Merely because sometimes, a labour leader or a minister participated, to induce the parties to come to a fair and amicable settlement of the dispute, the proceedings would not cease to be conciliation proceedings. But if it can be shown that during the proceedings or in the meeting, the presence or participation of the minister made the presence of the conciliation officer of no consequence, or he abandoned his function of superintendence and control, then it can be said that there was no conciliation proceeding. Since the binding effect of such settlement under s 18(3), is far-reaching, it is incumbent on the conciliation officer to apply his mind to such a settlement, arrived at 'in the course of the conciliation' before him, to see whether the settlement is fair and reasonable and has not been procured by fraud, coercion or undue influence. On being satisfied as to this aspect of the settlement, he should record the settlement and send a report to the appropriate government. The question as to whether a settlement, in fact, was aided and assisted by the conciliation officer, having satisfied himself after applying his mind to it, is a question of fact and must be specifically pleaded and proved in challenging the settlement.[71]

An industrial dispute need not necessarily be a dispute between an employer and his workmen. It happens, though rarely, that the dispute may be between two sets of workmen in the same establishment. The parties to such a dispute must necessarily be the two factions of the workmen. In such a situation, no settlement can be arrived at between the employer and one faction of the workmen. A settlement arrived at between the employer and one faction of the workmen, even through the mediation of the conciliation officer, will be no settlement in the eye of the law.[72] A settlement arrived at, without the assistance and concurrence of the conciliation officer, will be quashable in judicial review. A writ petition praying for a declaration, that the settlement entered into between the employer and the union is not a settlement within the meaning of s 12(3) of the Act, and that it does not have the effect contemplated under s 18(3) of the Act, is maintainable.[73] The answer to the question, whether a settlement was arrived at in the course of conciliation proceedings or not would depend upon what happened during the conciliation proceedings and the part played by the conciliation officer during those proceedings, to bring into being, a fair and amicable settlement for the resolution of the controversy in regard to which the conciliation proceedings were commenced.[74] A settlement which is arrived at without the mediation of an officer, or with one who is not a 'conciliation officer', will not be a 'settlement'. An officer whose appointment has not been made by a notification in the Office Gazette of the appropriate government, as required by s 4(1), will not be a 'conciliation officer', in the eye of law. Likewise, 'an implied agreement by acquiescence or conduct, such as the acceptance of a benefit under an agreement to which the worker acquiescing or accepting the benefit was not a party' will be outside the purview of the 'settlement' and shall not be binding on such a worker either under sub-s (1) or under sub-s (3) of s 18 of the Act.[75]

But in *MICO,* the workmen had sought a declaration from the High Court to the effect that the settlement in question, be declared to be invalid, as it was not a settlement in the eye of law, having been entered into 'in the course of conciliation proceedings'. Though the court held that the settlement was not a settlement in the course of conciliation proceedings, it declined to grant the declaration sought for, as it found that the settlement was a settlement between the management and the majority of workmen and a good majority of the workmen had taken the benefit under the settlement and thereafter, resumed normal production and maintained industrial peace. The court observed that unless it was shown that the terms of the settlement were onerous and against the interests of the majority of the workmen, it would not be proper for the court to grant the declaration in exercise of its writ jurisdiction. The court also found that the capacity of the petitioners and members of the association of workmen itself, was in dispute before a civil court. It could, therefore, not be said that the interests of the workmen as a whole, were in jeopardy by the impugned settlement. The court was further influenced by the

fact that there was a possibility of industrial unrest and eruption of violence between the two groups of workmen, in case the settlement was disturbed.[76]

In *Hindustan Zinc*, the facts were: after the failure of the conciliation proceedings, at the request of the management to explore the possibility of a settlement, the conciliation officer went to the office of the company. His efforts resulted in a settlement, which was recorded in the form of the 'minutes of discussion', which was signed by four representatives of the management and five representatives of the workmen. In the settlement it was agreed that the workmen will file an appeal against the order of dismissal and the management agreed to award punishment other than a dismissal, discharge or removal of the concerned workman, from service. Though the workmen implemented the terms of the settlement, the management disposed of the appeal of the workmen by reducing the punishment to one of discharge, from that of a dismissal, thus resiling from the settlement. The workmen, therefore, filed a writ petition in the High Court of Andhra Pradesh. In the meanwhile, the government referred the dispute relating to the discharge of the workmen, for industrial adjudication under s 10(1) of the Act. Thereupon, the said writ petition was dismissed as being infructuous. Before the industrial tribunal, the management took the objection that the reference was invalid in view of the settlement. Though the tribunal upheld the objection raised by the management, it observed that the order of discharge issued to the workman was illegal, being inconsistent with the settlement. It also suggested that it was open to the chairman-cum-managing director to apply his mind and award punishment other than a removal from service, as per the understanding. When the workman approached the management for implementing the award, the management took the stand that there was no award to be implemented, since the reference itself had been rejected. The workmen again filed a writ petition, seeking a reinstatement in service, with back wages and continuity of service. The High Court strongly deprecated the conduct of the management in dishonouring its commitments under the settlement, whether called as an 'understanding' or as the 'minutes of discussion', after having trapped the union into an agreement and after having taken full advantage of that agreement. In the facts and circumstances of the case, the court held that the agreement reached at, between the parties, was a settlement and the same was binding on the management.[77] If the question that is agitated can be resolved only by reference to complicated questions of fact, then the reviewing court may direct the aggrieved party to resort to alternative remedies that might be available.[78]

In *State Bank Staff Union*, a settlement arrived at between the employees of the State Bank of India and the State Bank, relating to the conditions of service of the employees, was not implemented. Nor were the copies of the settlement forwarded to the authorities, as required by r 58(4) of the Central Rules framed under the Act on the ground that an approval of the Central Government was required before the implementation of the terms of the settlement. The union issued a notice of strike and forwarded copies of the settlement to various authorities. Consequently, the conciliation officer initiated conciliation proceedings, during the pendency of which, the employees went on a strike. The bank issued a circular that it will deduct the salaries of the workmen for the strike period, on the principle of 'no-work-no-pay'. The circular was challenged in a writ petition by the union of the Madras High Court quashed the circular, holding that there was no breach of the requirements of s 22, because the conciliation did not relate to an industrial dispute, as it was not connected with the employment or non-employment, terms of employment or conditions of labour of a person, and the non-implementation of the requirements of r 58(4) of the Industrial Disputes (Central) Rules 1957 would not be of any consequence, as the settlement in terms of s 20(2)(a) comes into existence when a memorandum of settlement is signed by the parties to the dispute.[79]

Settlement otherwise than in the Course of Conciliation Proceedings

The first part of the definition, *viz*, a settlement in the course of conciliation proceedings, is the denotation of the word 'settlement'. But 'a written agreement between an employer and workmen, arrived at otherwise than in the course of conciliation proceedings' has been brought within the ambit of the definition, in an inclusive manner; This extended meaning is the connotation of the definition. By this connotation of the definition, it is further required that such an agreement of settlement should be signed by the parties thereto, in the prescribed manner and a copy thereof should be sent to the 'appropriate government' and the conciliation officer. Settlement of labour disputes by direct negotiation or settlement through collective bargaining, is always to be preferred for, as is obvious, it is the best guarantee of industrial peace, which is the aim of all legislation for the settlement of labour disputes.[80] In order to bring about such a settlement more easily and to make it more workable and effective, it is no longer necessary under the law, that the settlement should be confined to that arrived at in the course of conciliation proceedings, but now, it includes 'a written agreement between the employer and the workmen, arrived at otherwise than in the course of conciliation proceedings, where such agreement has been signed by the parties thereto, in such manner as may be prescribed and a copy thereof, has been sent to the appropriate government and conciliation officer'.[81] Such a settlement, arrived at by agreement between the employer and the workmen, otherwise than in the course of conciliation proceedings, is binding only on the parties to the agreement, under s 18(1) of the Act and it is not binding on the other workmen, who are not parties to the settlement.[82] Therefore, an agreement by acquiescence and without being in writing, signed by the parties, will not be a settlement as contemplated by the definition and will not have the binding effect.[83] Nor would the record of an agreement in writing, without complying

with the requirements of the relevant rule, be called a 'settlement' as defined in the Act.[84] Rule 58 of the Industrial Disputes (Central) Rules 1957, prescribes the memorandum of settlement. Under sub-r (1), the memorandum of settlement in case of a settlement in the course of conciliation proceedings and a settlement otherwise than in the course of conciliation proceedings, is the same, *viz*, in form H.[85] Sub-rule (2) prescribes that the settlement shall be signed by:

> (a) in case of an employer, by the employer himself, or by his authorised agent, or when the employer is an incorporated company or other body corporate, by the agent, manager, or other principal officer of that corporation;
>
> (b) in case of the workmen, by any officer of a trade union of the workmen or by five representatives of the workmen, duly authorised in this behalf, at a meeting of the workmen held for the purpose;
>
> (c) in the case of the workman in an industrial dispute under section 2A, by the workman concerned.

The *Explanation* to the rule defines an 'officer' of a trade union to mean any of the following office-bearers:

> (i) The President;
>
> (ii) The Vice-President;
>
> (iii) The Secretary (including the General Secretary);
>
> (iv) A Joint Secretary;
>
> (v) Any other officer of the trade union, authorised in this behalf, by the President and the Secretary of the union.

Thus, where the workmen are represented by a recognised union, the settlement may be arrived at between the employer and the union. But if the Constitution of the union provides that any of its office-bearers can enter into a 'settlement' with the employer, on behalf of the union and its members, a 'settlement' may be arrived at between the employer and such office-bearers. The office-bearers, who wish to enter into a settlement with the employer, should have the necessary authorisation by the executive committee of the union or by the workmen.[86] An agreement between an employer and the workmen, arrived at otherwise than in the course of conciliation proceedings, would not constitute a 'settlement' unless the requirements prescribed by the relevant rules are complied with. In other words, such a settlement will be *non-est* in the eye of the law,[87] and parties can resile from such a settlement. By providing that such a 'settlement' should be in the proper form and signed by the parties and copies thereof, signed by both the employer and the workmen, should be forwarded to the concerned authorities for their information, the legislature has made in-built safeguards against its misuse. These requirements are not empty formalities and they are intended to protect the interests of the workmen. That purpose will be frustrated if these requirements are not strictly construed or duly complied with. In other words, the requirements contained in s 2(p) and r 58 are mandatory and non-compliance of them, shall vitiate the settlement.[88] In *Delhi Cloth Mills*, the Supreme Court said that the settlement has to be in compliance with the statutory provisions, as they are of a mandatory character.[89] In *Brooke Bond*, a controversy arose as to whether the office bearers of a trade union could sign an agreement, without their being specifically-authorised to do so, either in the Constitution of the union or in the resolution adopted by the union. The Apex Court held:

> ... unless the office bearers who signed the agreement, were authorised by the executive committee of the union, to enter into a settlement or the Constitution of the union contained a provision that one or more of its members would be competent to settle a dispute with the management, no agreement between any office bearers of the union and the management can be called a settlement, as defined in section 2(p). If the 'settlement' is to have a binding effect on all the workmen, the procedure prescribed by Rule 58 must be fully complied with. [90]

But in *Hindustan Lever*, a particular 'agreement' was not in the form and manner, as required by the relevant rule. And taking advantage of this agreement, the employer had successfully blocked the adjudication of several earlier references at the threshold, by setting up the ground that the said agreement was a 'settlement', which covered the dispute under reference. But in this case, the employer took the converse position, and claimed that the said agreement was not a 'concluded agreement', and therefore, not a settlement. In view of the fact that in the earlier references, the employer had taken an effective and wholesome advantage of the agreement, as a settlement, the court observed that no court of justice can ever permit such a thing to be done, and treated the agreement in question to be a settlement.[91] This holding was, thus, based on the peculiar facts and circumstances of the case. There is no reference in it to the language of s 2(p) and r 58. The case, therefore, as pointed out by Dr BP Saraf J, in *Adil Patel* (supra), cannot be treated as an authority for a general proposition, that the requirements of r 62 are not mandatory. In *Adil's* case, a letter written to the company by the union

and signed by its general secretary, vice president and a special representative of the employees, was set up by the management as a 'settlement' between the management and the recognised union, as binding on all employees, even if some of them were not its members. On an illuminating review of the relevant case law, and the statutory provisions the learned judge held that since this letter was not in compliance with the statutory requirements of s 2(p) and r 62 of the Bombay Rules, it was not a settlement in the eye of the law.

Likewise, in *IAAI*, the minutes of a meeting, recorded and duly signed by two representatives of the management and two of the union, were sought to be relied on as a 'settlement'. The Delhi High Court held that since the statutory requirements were not complied with, the record of the minutes was not a 'settlement' in the eye of the law and as such, were not binding on any of the parties.[92] But in *Johnson & Johnson*, the Bombay High Court held that in view of the fact that the settlement was fair and accepted by all the workmen, a procedural violation in arriving at it would not render it illegal.[93] A settlement arrived at between the parties, without the mediation of a conciliation officer or the conciliation board, will, under s 18(1), bind only the parties to such settlement and not any other person. A settlement arrived at between an association of employees and the representatives of the labour, through negotiations which comply with the requirements of the definition, is binding on all the members of the association.[94] Likewise, a settlement arrived at between an employer and the union of the workmen, is equally binding not only on such union, but also on the workmen whom it represents.

In *MICO*, the Supreme Court rejected the contention that the settlement arrived at between the employer and the union of the workmen, was not binding on the workmen, because the union was a distinct legal entity from the workmen. The court observed that apart from the tenor of the settlement and the principle of collective bargaining, recognised by industrial law, the contention was contrary to the provisions of the Act itself, under which a settlement arrived at between the employer and a union representing the employees, during the conciliation proceedings, is binding not only on such union but also on the workmen whom it represents.[95] When a recognised union negotiates with an employer, the workers, as individuals, do not come into the picture. It is not necessary that each individual worker should know about the implications of the settlement, since a recognised union, which is expected to protect the legitimate interests of the labour, enters into a settlement in the best interests of labour. This would be the normal rule, though there may be exceptional cases where there may be allegations of *mala fides*, fraud or even corruption or other inducements, or where on the face of it, the settlement is highly unconscionable and grossly unjust.[96] From the language used in the definition of a 'settlement', it is clear that a settlement can be arrived at between the employer and the employees, at any time, even during the pendency of the adjudicatory proceedings. A settlement is no less a settlement if it is arrived at after an industrial dispute is referred to the tribunal and it does not and cannot cease to be a settlement.[97]

In *Hindustan Lever Ltd*, Savant J, of the Bombay High Court, held that a settlement, as understood by s 2(p), must necessarily be with the union, since the dispute before the court, was not concerning either a discharge, dismissal, retrenchment or termination of the service of a workman.[98] This decision calls for some analysis as there is nothing, either in s 2(p) or in s 18(1), to suggest that an individual workman is prohibited from entering into a settlement with the management. That there should necessarily be a trade union in every industrial establishment, for negotiations and settlement of issues, is equally unknown to industrial law and no enactment provides for a compulsory unionisation of industrial establishments. On the contrary, the law permits a group of workmen and even an individual workman, to enter into a settlement with the management, whether or not there is a union and whether or not he or they are members of any union. Section 18(1) clearly stipulates, in terms: 'A settlement arrived at by an agreement between the employer and workman, otherwise than in the course of...' The singular word 'workman', occurring in the above sub-section, clearly points to the fact that an individual workman is not, in any way prevented from entering into a settlement with the management. Sawant J relied, *inter alia*, on the decisions of the apex court, rendered in *Ram Prasad Vishwakarma*,[1] and *Brooke Bond*,[2] in support of his decision. But, regrettably, neither of the said decisions touch upon the question that is directly and substantially at issue in the present case, much less, lend any support to his line of reasoning.

In *Ram Prasad Vishwakarma*, the issue raised and answered was, 'in an industrial dispute of a collective nature, the individual workman could at no stage, be a party to the proceedings, which question has nothing to do with a situation where the union has not espoused the cause and is nowhere in the picture, as here'. In *Brooke Bond*, the issue was: what would be the effect if the office bearers signing the settlement, had no authorisation from the executive committee of the union? The apex court held that in the absence of an authorisation from the executive committee, an agreement between any office-bearer and the management, could not be called a settlement, as defined in s 2(p). It is difficult to understand how these decisions could be considered relevant to the issues raised in *Hindustan Lever*, where the fact was that an individual workmen had signed the settlements. Where the individual workman himself, signs a settlement touching upon his own conditions of service, the law does not require him to furnish any authorisation, which is indispensable if he is represented by a union. In the face of the unambiguous language used in s 18(1), to hold that a 'settlement' means 'a settlement arrived at, with the union' is a gross misreading of the provisions of the Act, and amounts to rewriting the enactment. Both the finding recorded by the tribunal and the conclusion reached by Savant J, are perverse and contrary to the spirit of law. In striking contrast, another single judge of the same High Court, Kochar J, in another case involving the

very same company, ie, *Hindustan Lever*, ruled that, where all but one field-force employees arrived at individual settlements on identical lines, with the management, during the pendency of the dispute raised by the union on their behalf, it was unreasonable on the part of the tribunal to proceed further with the reference, and it should make an award in terms of the settlement between the parties.[3] The learned judge rightly followed the ratio of*DN Ganguly*.[4] Between the two decisions, the view taken by Kochar J is right and that of Savant J is repugnant to the provisions of the IDA, and is clearly wrong. Sub-rule (4) of r 58 of the Industrial Disputes (Central) Rules 1957 requires that the copies of the memorandum of settlement, arrived at otherwise than in the course of conciliation proceedings, should be sent 'jointly' by the parties, to the Central Government, the Chief Labour Commissioner (Central), and the Regional Labour Commissioner and the Asst Labour Commissioner concerned. Any settlement which does not comply with these requirements, will be no 'settlement' within the meaning of this provision.[5]A Division Bench of the Orissa High Court, on the construction of r 64(5), requiring that the copy of the settlement shall be 'jointly' sent, took the view that it is a requirement in excess of the provision of s 2(p) of the Act, and therefore, cannot be held to be mandatory.[6] This is the correct view of the law.

Note: *For the mode and manner of arriving at a settlement in conciliation proceedings, see notes and comments under s 12(3), infra and for the binding effect of such a settlement, see notes and comments under s 18(3). (Infra)*

Clause (q): STRIKE

The definition of a 'strike' in this clause, is the same as it was in s 2(1) of the repealed Trade Disputes Act 1929. It has since not undergone any amendment. Chapter V deals with strikes and lockouts. Sections 10(3), 10A(4A), 22 or 23 prohibit the continuance and commencement of strikes in certain circumstances and s 24 renders the strikes commenced or continued in contravention of these prohibitions, illegal; s 25 prohibits financial aid to illegal strikes and lockouts and s 26 provides for a penalty for illegal strikes and lockouts, s 27 prescribes the penalty for instigation of strikes and lockouts and s 28 prescribes the penalty for giving financial aid to illegal strikes and lockouts.

Judicial Definitions

In England, various judicial definitions have been attempted by courts,[7] the most accepted and precise of which is as expounded by Hannen J, in *Farrer v Close*. [8] He defined 'strikes' as a simultaneous cessation of work on the part of the workmen. In the United States of America, a fairly comprehensive definition has been given in *Uden v Schaeffer* ,[9] in the following words:

> A strike is the act of quitting work by a body of workmen, for the purpose of coercing their employer to accede to some demands they have made upon him, and which he has refused; but it is not a strike for workmen to quit work, either singly or in a body, when they quitted without intention to return to work, whatever may be the reason that moves them so to do.[10]

Ordinary meaning of Strike

A concerted refusal to work on the part of men, who are accustomed to work in a particular vocational area; more shortly, 'ceasing work or downing tools'[11] seems to be the ordinary meaning of the term 'strike'. The dictionary definitions are not wholly in accord with one another. For instance, the *Oxford dictionary* defines the noun 'strike' as a 'concerted cessation of work on the part of a body of workers, for the purpose of obtaining some concession from the employer or employers', though in defining the verb 'strike', it omits any reference to the purpose; *the Webster's dictionary* defines the noun 'strike' as 'the act of quitting work, done by a mutual understanding by a body of workmen, as a means of enforcing compliance with demands made on their employer; a stopping of work by workmen, in order to obtain or resist a change in conditions of employment'. *The Encyclopaedia of Social Sciences* defines a 'strike' as a 'concerted suspension of work by a body of employees; usually for the purpose of adjusting an existing dispute over the terms of the labour contract'.[12]*The Encyclopaedia Britannica* defines a strike in the labour sense, as 'a stoppage of work by a common agreement on the part of work-people, for the purpose of obtaining or resisting a change in the conditions of employment'.[13]In England, 'strike' was defined in the repealed Trade Disputes and Trade Union Act 1927, as a 'cessation of work by a body of persons employed in any trade'. According to Ludwig Teller, the word 'strike', in its broad significance, has reference to a dispute between an employer and his workers, in the course of which, there is a concerted suspension of employment. He describes four characteristics of a 'strike', as the term is employed in modern times, which are:

(i) an established relationship between the strikers and the person or persons against whom the strike is called;

(ii) the constituting of that relationship as one of employer and employee;

(iii) the existence of a dispute between the parties and the utilisation by the labour, of the weapon of concerted refusal to continue to work, as the method of persuading or coercing compliance with the workmen's demand; and

(iv) the contention advanced by workers that, although work ceases, the employment relation is deemed to continue, albeit in a state of a belligerent suspension.[14]

In Austrialia, some of the state Parliaments have passed legislations which define the word 'strike'. All such statutory definitions are of the extensive type and save in Queensland, do not exclude the ordinary meaning of the word 'strike'. All these definitions have in common, the notion of quitting, cessation or discontinuance of work in combination, and further, the idea that such a cessation must be for the purpose of wresting concessions from an employer, while in some quarters, there is the insistence that the demands must relate to the conditions of employment, a requirement which would probably exclude many strikes for organisational purposes. But it is clearly agreed on all sides, that the cessation of work must be used as a weapon for the furtherance of some demand.[15]

Ingredients of Strike

The definition of a strike in s 2(q), is exhaustive. The essential ingredients of the definition may be treated under the following heads:

(a) Industry

'Any Industry'—The words 'employed in any industry' postulate that there should be an 'industry' within the meaning of s 2(j), in which the concerned workmen are employed. In other words, unless the establishment in which the striking persons are employed is an 'industry', even if the other ingredients of the definition are satisfied, it would not be an industrial strike within the meaning of s 2(q).

(b) Cessation of Work or Refusal to Work

(i) 'Cessation of Work Acting in Combination'

The expressions 'acting in combination', 'concerted refusal' or 'refusal under a common understanding', though appear to be distinct, the line of demarcation between them is not quite clear and occasionally, they overlap and may be compendiously described as 'concerted activities'. Likewise, the expressions 'cessation of work', 'refusal to continue to work' or 'to accept employment', though not synonyms, too overlap. The notion of quitting, cessation or discontinuance of work in combination, is an essential requirement of the definition of a strike. Thus, a mere cessation of work will not come within the purview of the definition of a 'strike', unless it can further be shown that such cessation of work was a concerted action, for the purpose of enforcing an industrial demand.[16] A combination means an agreement or a concert. In order to establish such concert, there need be no formal meetings, discussions, or even an interchange or a mutual consent or assent, to a common purpose or a course of conduct. It may be deduced from similar acts and course of conduct. But once it is proved that the cessation of work or refusal to work was the result of a concerted action, on the part of the workers or of the workers acting in combination, under a common understanding, such a stoppage, even for a short period, say for two to four hours, must fall within the definition of a 'strike'. In other words, the fact that the duration of a strike was for a few minutes or even for a few hours, is irrelevant.[17] There is nothing in the scheme of the Act or the provisions thereof, to show that in order to constitute a 'strike', the cessation or stoppage of work must be by virtue of an industrial dispute.[18] Likewise, the purpose behind the cessation of work too, would be irrelevant in determining whether the cessation or stoppage of work would constitute a strike or not.[19] It is implicit in the definition of a strike that the 'cessation of work' or 'concerted refusal to work' must be in defiance of the employer's authority.[20] A cessation of work, even while working on paid overtime, would amount to a 'strike'.[21] But a mere presence of certain workmen in the striking crowd, in the absence of any satisfactory proof of their having 'ceased' to work or 'refused' to work, would not amount to a 'strike'.[22] Similarly, if a workman joins certain demonstrations organised in connection with the 'strike', or if he takes part in the preparation of a strike, his conduct cannot amount to taking part in the 'strike', as such.[23] In cases where workmen go on a 'hunger strike', by refraining from taking food in the off-duty period, it would not be a 'strike' within the meaning of s 2(q). But if the 'hunger strike' is not simply refraining from taking food, but is also accompanied by a cessation of work by a body of persons employed in any industry, it would clearly come within the definition of a strike.[24]

(ii) 'Concerted Refusal or Refusal Under Common Understanding...to Continue to Work or Accept Employment

A concerted refusal under a common understanding of any number of employees, to continue to work or accept employment, would constitute a strike. In *Mahanga Ram,* the Allahabad High Court held that where the workmen did not, in fact, commence the work for some time after lifting their tokens and punching their cards, they were not guilty of taking part in a strike. The court took the view that the concerned workmen had combined not with an intent to cease work, but with a view to staging a demonstration and thus, delayed the start of work by about 15 or 30 minutes and it could not be considered that their action amounted to a 'strike', as they had technically commenced their duties by lifting their tokens

and punching their cards; hence, there was really no cessation of work.[25] But admittedly there was a concerted action on the part of the workmen, in refusing to commence work after lifting their tokens and punching their cards, with a common understanding of staging a demonstration. The words 'refusal to continue to work', in the definition, clearly indicate that work can be struck even after its commencement. An interruption of work, a concerted refusal or refusal under a common understanding to work, or to accept employment, even for a short time, say half an hour or less, would constitute a strike, within the meaning of s. 2(q) of the Act.[26] The decision of the labour appellate tribunal, in *Standard Vacuum* (supra), that the *en bloc* absence of the workmen, in the special circumstances of the case, was not a strike, is also not consistent with the wording of the definition. But when the workmen refuse to do additional work, which the employer has no right, in law, to ask them to do, it would not amount to a strike, even if such refusal is concerted or under a common understanding.[27]

Illustrations of actions which amount to Strike

The cessation of work by workmen acting in combination and a refusal to work on the calendar machine of the mills.[28] Staying away from work under a common understanding, as a protest to the introduction of a card system for marking attendance for the workmen.[29] A concerted refusal by coal loaders and trammers, continuously, for four days, on account of quarrels between rival labour unions.[30] A pen-down strike by the workmen of a bank.[31] Stoppage of work by workmen for two to four hours and their refusal to resume work, as a result of the refusal of the employer, to declare the forenoon of a particular day as a holiday due to a solar eclipse.[32] Stoppage of work by the workmen with a view to enforcing their demand of the removal of the weaving master and his favourite workmen in a textile mill.[33] Refusal to work by workmen on a listed holiday, for which the management had offered a compensatory holiday in accordance with a prior agreement between the management and the union.[34] Refusal of workers to resume work on account of the sudden death of a worker, acting in concert.[35] But where two workmen were absent from duty on a particular day and there was no evidence to show that the absence was due to concert between the two workmen and other persons, or that there was a common understanding between them and other persons, or that they would not continue to work or there would be a refusal to work; it was held that the absence did not constitute a strike.[36]

(c) Relationship of Employment

'Persons employed'—The definition of a 'strike' in s 2(q), uses the expression 'persons employed', which means that there should be a relationship or contract of employment between the striking employees and the industry. This also has reference to the contract of employment mentioned in s 22 and s 23. In the contract of employment of every workman, there is an implied term that he will work according to the rules of the concern in question.[37]Unless there is a contract of employment between the striking persons and the industry, there can be no strike within the meaning of s 2(q) of the Act.

Types of Strikes

Strikes may be broadly considered under the following heads:

(i) Primary Strike

A strike in its primary use, is a weapon which is used directly against the employer with whom an industrial dispute exists. This type of strike takes various forms, such as 'sit-down' or 'stay-in', 'strike', 'tool-down' or 'pen-down' strike, 'go-slow', 'boycott', 'picketing' or 'black-ban', *etc*. 'Stay-in', 'sit-down', 'tool-down' or 'pen-down' strikes are some of the names given to strikes in various circumstances. In such strikes, workmen peacefully enter the premises of the establishment or the office, without indicating their intention to go on strike. But having thus entered the premises, they generally stay at their places of work or sit down there. When clerical workers refuse to do their work, such refusal is generally known as a 'pen-down' strike.[38] Likewise, when factory workers refuse to work with their tools, such action is known as a 'tool-down' strike.[39] On account of the workmen staying inside the premises of the establishment, such strikes are also known as 'sit-down' or 'stay-in' strikes. A 'sit-down' strike is defined as occurring whenever a group of employees or others, interested in obtaining a certain objective in a particular business, forcibly take over the possession of the property of such business, establish themselves within the plant, stop its production and refuse access to the owners or to others desiring to work. The 'sit-down' or 'stay-in' strike can be more accurately defined as a strike in the 'traditional sense', to which is added the element of trespass of the strikers upon the property of the employer.[40] In other words, every 'sit-down' or 'stay-in' strike involves a tort of trespass. Such a strike, therefore, constitutes a civil conspiracy, for the employees have a right to enter and remain on the employer's premises only for the purpose of their work (as invitees at common law), or for other purposes, as the employer may allow, for example, recreation. In such cases, they are usually licensees at common law.

(ii) Secondary Strike

A 'secondary strike' has been defined by Ludwig Teller as a 'coercive measure adopted by workers, against an employer, connected by product or employment, with alleged unfair labour conditions or practices.[41]. In such a strike, the pressure is applied not against the primary employer, with whom the industrial dispute exists, but against a person who has some sort of trade relations with him. The employees of the secondary employer threaten to strike, until the secondary employer refuses to deal with the primary employer. Frequently, the threat of a strike is enough, as the secondary employer himself has no direct dispute with the union and will naturally wish to preserve the industrial peace of his concern.

(iii) Sympathetic Strike

A 'sympathetic strike' is one called for the purpose of indirectly aiding others, the striking employees having no demand or grievances of their own and the strike having no direct relation to the advancement of the interest of the strikers.[42] Such a strike is an unjustifiable invasion of the rights of the employers and is, therefore, unlawful. In USA, a union calling a sympathetic strike is liable in damages, for the injuries thereby inflicted and the strike may be enjoined. It would appear that the extreme view of some authorities on the right to strike, is not dependent upon the motive; a sympathetic strike is not to be condemned as unlawful.[43]

(iv) Go-Slow

'Go-slow' is not like an ordinary strike, which has been recognised as a lawful weapon under certain circumstances and is controlled by the provisions of law. 'Go-slow' has, on the other hand, been made a misconduct under the Model Standing Orders appended to the Industrial Employment (Standing Orders) Act 1946. Workers are under an obligation to their employers, to procure average production, and if they deliberately refuse to give that average, they must be held to be guilty of the misconduct of 'go-slow'.[44]The fact that the workmen are piece-raters does not make a 'go-slow' policy any the less unlawful. A behest by some workmen, to others, to adopt a 'go-slow' policy, would be an act of serious misconduct.[45] The law relating to various aspects of 'go-slow', has been elaborately stated by the Supreme Court in the following two cases. In *Bharat Sugar Mills*, certain workmen indulged in a 'go-slow'. The employer company, on the basis of a domestic inquiry, decided to dismiss 21 workmen. But the tribunal held that the domestic inquiry was not proper and the employer was guilty of a *mala fide* conduct and victimisation, and except in the case of one workman, the others were not guilty of a deliberate 'go-slow'. In appeal against the order of the tribunal, the Supreme Court held that the evidence produced before the tribunal clearly established that 13 out of 20 workmen were 'guilty of a deliberate 'go-slow', whose dismissal was justified. Speaking for the Supreme Court, Das Gupta J, stated the law in the following words:

> 'Go-slow', which is a picturesque description of a deliberate delaying of production, by workmen pretending to be engaged in the factory, is one of the most pernicious practices that discontented or disgruntled workmen sometimes resort to. It would not be far wrong to call this dishonest. For, while thus delaying production and thereby reducing the output, the workmen claim to have remained employed and thus to be entitled to full wages. Apart from this also, 'go-slow' is likely to be much more harmful than a total cessation of work by strike. For, while during a strike, much of the machinery can be fully turned off, during the 'go-slow', the machinery is kept going on a reduced speed, which is often extremely damaging to the machinery parts. For all these reasons, 'go-slow' has always been considered a serious type of misconduct. [46]

Then, in *SU Motors*, the company did not pay the workers, the wages for the entire month of July 1984, because the workers had indulged in a 'go-slow', and consequently, the production for the month had been negligible. As a consequence, the company was compelled declare a lockout with effect from 14 August 1984. On a complaint lodged by the union under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 (MRTU & PULP Act 1971), the industrial court held that the company had committed an 'unfair labour practice' by not paying the full monthly wages to the workmen for the month of July and directed the company to pay the same. In appeal against the said order, the Supreme Court, on the admitted facts, accepted the finding recorded by the industrial court that there had been a 'go-slow' resorted to by the workmen and the production had suffered during the period in question. It also accepted the right of the employer to deduct the wages, as admittedly, the workmen had resorted to a 'go-slow'. However, while allowing the appeal, the court directed that the company shall not deduct more than 5 per cent of the wages of the workmen, for the month of July 1984. In this case, the court recognised the right of the employer to treat a 'go-slow' as an act of misconduct, liable to a penal disciplinary action, as also the liablility of the delinquent persons, to face the consequences, including a deduction of wages and dismissal from service. Sawant J held:

> There cannot be two opinions that go-slow is a serious misconduct, being a covert and a more damaging breach of the contract of employment. It is an insidious method of undermining discipline and at the same time, a crude device to defy the norms of work. It has been roundly condemned as an industrial action and has not been recognised as a legitimate weapon of the workmen to redress their grievances. In fact, the Model Standing Orders, as well as the certified Standing Orders of most of the industrial

establishments, define it as a misconduct and provide for a disciplinary action for it. Hence, once it is proved, those guilty of it have to face the consequences, which may include a deduction of wages and even a dismissal from service.[47] (Paras 36 & 37).

But, by its very nature, the proof of go-slow, particularly when it is disputed, involves an investigation into its various aspects, such as the nature of the process of production, the stages of production and their relative importance, the role of the workers engaged at each stage of production, the pre-production activities and the facilities for production and the activities of the workmen connected therewith and their effect on production, the factors bearing on the average production, etc. The go-slow further may be indulged in by an individual workman or only some workmen, either in one section or different sections, or in one shift or both shifts, affecting the output in varying degrees and to different extents, depending upon the nature of the product and the productive process. Even where it is admitted, a go-slow may, in some case, present difficulties in determining the actual or approximate loss, for it may have repercussions on the production after the go-slow ceases, which may be difficult to estimate. The deduction of wages for a go-slow may, therefore, present difficulties which may not be easily resoluble. When, therefore, wages are sought to be deducted for a breach of contract, on account of a go-slow, the quantum of deduction may become a bone of contention in most of the cases, inevitably leading to an industrial dispute to be adjudicated by an independent machinery, statutory or otherwise, as the parties may resort to. It is necessary to emphasise this because unlike in the case of a strike, where a simple measure of a pro-rata deduction from the wages may provide a just and fair remedy, the extent of the deduction of wages on account of a go-slow action may, in some case, raise a complex question. The simplistic method of deducting a uniform percentage of wages from the wages of all workmen, calculated on the basis of the percentage fall in production compared to the normal or average production, may not always be equitable. It is, therefore, necessary that in all cases where the factum of a go-slow and/or the extent of the loss of production on account of it, is disputed, there should be a proper inquiry on the charges which furnish particulars of the go-slow and the loss of production on that account. The rules of natural justice require it, and whether they have been followed or not, will depend on the facts of each case.

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96 *Santosh Gupta v State Bank of Patiala* (1980) 2 LLJ 72 [LNIND 1980 SC 214] (SC) : AIR 1980 SC 1219 [LNIND 1980 SC 214]: 1980 Lab IC 687 per Chinnappa Reddy J.

1 *Surendra Kumar Verma v CGIT* (1981) 1 LLJ 386 [LNIND 1980 SC 403], 388 (SC) : AIR 1981 SC 422 [LNIND 1980 SC 403]: 1980 Lab IC 1292 per Chinnappa Reddy J.

2 *Mohan Lal v Mgmt of Bharat Electronics Ltd* 1981 Lab IC 806 [LNIND 1981 SC 244] (SC), per Desai J.

3 *L Robert D' Souza v Executive Engineer, Southern Rly* (1982) 1 LLJ 330 [LNIND 1982 SC 47], 333-34 (SC) : AIR 1982 SC 854 [LNIND 1982 SC 47]: 1982 KLJ 164 per Desai J.

4 *Gammon India Ltd v Niranjan Dass* 1983 Lab IC 1865 [LNIND 1983 SC 361], 1867 (SC), per Desai J.

5 *Mgmt of KSRTC v M Boraiah* (1984) 1 LLJ 110 [LNIND 1983 SC 326], 115 (SC) : AIR 1983 SC 1320 [LNIND 1983 SC 438]: 1984 (48) FLR 89 per Ranganath Misra J.

6 *Mattulal v Radhe Lal* AIR 1974 SC 1596 [LNIND 1974 SC 161], 1602 : (1975) 1 SCR 127 [LNIND 1974 SC 161] per Bhagawati J.

7 *Punjab LDRC v PO, LC* (1990) 2 LLJ 70 [LNIND 1990 SC 310], 90 (SC) : 1991 (61) FLR 73 : (1990) 3 SCC 682 [LNIND 1990 SC 310] per Saikia J.

8 [1944] KB 718.

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10 1978 Lab IC 467 [LNIND 1963 SC 89] (SC), per Krishna Iyer J.

11 *Kamleshkumar R Mehta v PO, CGIT* (1980) 1 LLJ 336 (Bom) (DB) 1979 Mh LJ 874 per Lentin J.

12 *Surendra Kumar Verma v CGIT-cum-LC* (1981) 1 LLJ 386 [LNIND 1980 SC 403], 388 (SC) : AIR 1981 SC 422 [LNIND 1980 SC 403]: (1980) 4 SCC per Pathak J.

13 Cyrile Grunfeld, *The Law of Redundancy*, 1980, 2nd ed, p 172.

14 Ins by Amending Act 49 of 1984, brought into force wef 18 August 1984.

15 *English Electric Co of India Ltd v IT* (1987) 1 LLJ 141, 155, 158 (Mad) (DB) : AIR 1958 SC 130 [LNIND 1957 SC 105] per Chandurkar CJ.

16 *Indian Iron & Steel Co Ltd v Workmen* (1958) 1 LLJ 260 [LNIND 1957 SC 105], 268 (SC), per SK Das J.

17 1977 Lab IC 1695 [LNIND 1977 SC 280] (SC), per Goswami J.

18 (1982) 1 LLJ 330 [LNIND 1982 SC 47], 333-34 (SC), per Desai J.

19 *Madhabananda Jena v Orissa SEB* (1990) 1 LLJ 463 [LNIND 1989 ORI 27] (Ori) (DB), per DP Mohapatra J.

20 *HD Singh v Reserve Bank of India* 1985 Lab IC 1733, 1735 (SC), per Khalid J.

21 *Syed Bin Ali v Supdtg Engineer, APSEB* 1986 Lab IC 848 (AP), per Jeevan Reedy J.

22 *Naresh Chandra Das v Seventh IT* 1982 Lab IC 579 (Cal), per GN Ray J.

23 *Dabur Pvt Ltd v State of West Bengal* 1978 Lab IC 1581 (Cal) (DB), per Anil K Sen J.

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27 *Bada Sahab Devgonda Patil v MD, SPSS Kharkhana Ltd* (1988) 2 LLJ 413 [LNIND 1987 BOM 491] (Bom) (DB) : 1988 (90) Bom LR 131 : 1988 Mh LJ 370.

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29 *Ramachandra Vithuji Kothare v IC* (1986) 1 LLJ 363, 367 (Bom) : 1985 Mh LJ 709 per Dhabe J.

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31 *Maharashtra STTC Ltd v Vasudev V Joshi* 1990 Lab IC 1004, 1009 (Bom), per Sujata Manohar J.

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44 *L Robert D'Souza v Exec Enggr, Southern Railway* (1982) 1 LLJ 30 (SC), per Desai J.

45 CA No 1898 of 1982, p 73, para 5.

46 Ibid, p 95, para 83.

47 CA No 8456 of 1983.

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49 *State of Haryana v Om Prakash* (1998) 8 SCC 733.

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27 *Northbrook Jute Co Ltd v Workmen* (1960) 1 LLJ 580 [LNIND 1960 SC 87], 584 (SC), per Das Gupta J.

28 *Model Mills Ltd v Dharamdas* (1958) 1 LLJ 539 [LNIND 1957 SC 110], 543 (SC), per Imam J.

29 *Indian Hume Pipe Co Ltd v Rashtriya Indian Hume Pipe Mazdoor Sangh* (1957) 2 LLJ 67 (LAT).

30 *Sirka Colliery Ltd v South Karanpura Coal Mines Workers' Union* (1951) 2 LLJ 52 (LAT).

31 *Punjab National Bank Ltd v Workmen* (1959) 2 LLJ 666 [LNIND 1959 SC 166], 684 (SC), per Gajendragadkar J.

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36 *Ram Sarup v Rex* AIR 1949 All 218 [LNIND 1948 ALL 32], per Chandiramani J.

37 *Ram Naresh Kumar v State of West Bengal* (1958) 1 LLJ 567 [LNIND 1957 CAL 138], 570 (Cal) (DE), per Guha Ray J.

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39 *Lakshmi Devi Sugar Mills Ltd v Ram Sarup* (1957) 1 LLJ 17 [LNIND 1956 SC 85], 22 (SC), per Bhagwati J.

40 *Ludwig Teller, Labor Disputes and Collective Bargaining*, 1940, Vol I, p 311.

41 Ibid at p 298.

42 *Dorchy v Kansas* 71 L Ed, 248, 261.

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44 *Janab Muhammad Israil v Saxby and Farmer (India) Ltd* (1956) 1 LLJ 72, 75 (LAT).

45 *Ziakh v Firestone Tyre & Rubber Co Ltd* (1954) 1 LLJ 281 [LNIND 1953 BOM 121] (Bom) (DB), per Chagla CJ.

46 *Bharat Sugar Mills Ltd v Jai Singh* (1961) 2 LLJ 644 [LNIND 1961 SC 306], 647 (SC) : [1962] 3 SCR 684 [LNIND 1961 SC 306], per Das Gupta J.

47 *SU Motors (P) Ltd v Workmen* (1990) 2 LLJ 39 [LNIND 1990 SC 308], 51-54 (SC) : (1990) 4 SCC 744 [LNIND 1990 SC 308] : [1990] 3 SCR 214 [LNIND 1990 SC 308], per Sawant J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER I Preliminary

S. 2. Definitions.—

Strike as a Weapon in the process of Collective Bargaining

On the question of right to strike work, Lord Denning MR observed:

> The nature of the right of strike is such as in my view cannot be abridged or taken away, save in strict conformity with the provisions of the statute providing for such abridgment or taking away.[48]

The right to strike is labour's ultimate weapon and in the course of the century, it has emerged as the inherent right of every worker. It is an element which is of the very essence of the principle of collective bargaining.[49] In the landmark case, the *Federated Municipal and Shire Council Employees Union of Australia v Melbourne Corpn* , speaking for the High Court of Australia, Isaacs and Rich JJ stated:

> Industrial warfare is no mere figure of speech. It is not the mere phrase of theorists. It is recognised by the law as the correct description of internal conflicts in industrial matters.[50]

The expression 'industrial warfare' was adopted by Lord Loreburn LC, who described strikes and lockouts as weapons allowed by the law.[51] In the words of Gajendragadkar J:

> In the struggle between the capital and labour, the weapon of strike is available to labour and is often used by it, as is the weapon of lockout available to the employer and can be used by him.[52]

Thus a strike is the antithesis of a lockout. It is regarded as a powerful weapon of collective bargaining and is generally fraught with the possibility of industrial dislocation, with all its attendant hardships and evils, the occurrence of which is regarded as one of the powerful levers to bring about agreements. 'Of course, a collective strike is economic pressure by cessation of work and not exchange of pleasantries. It means embarrassing business'.[53] Trade unions with a sufficient membership strength, are able to bargain more effectively with the management than individual workmen. This bargaining strength would be considerably reduced if it is not permitted to demonstrate by adopting agitational methods, such as 'work to rule', 'go-slow', 'absenteeism', 'sit-down strike' and 'strike'. This right has been recognised by almost all democratic countries.[54] The idea has been succinctly expressed by Prof Mathews thus:

> The strike is itself a part of the bargaining process. It tests the economic bargaining power of each side and forces each to face squarely, the need it has for the other's contribution. As the strike progresses, the workers' savings disappear, the union treasury dwindles, and management faces mounting losses. Demands are tempered, offers are extended, and compromises previously unthinkable, become acceptable. The very economic pressure of the strike is a catalyst, which makes agreement possible. Even when no strike occurs, it plays its part in the bargaining process, for the very prospects of the hardship which the strike will bring,

> provides a prod to compromise. Collective bargaining is a process of reaching an agreement, and 'strikes' are an integral and frequently necessary part of that process.[55]

Collective bargaining, for securing improvement on matters like wages, basic pay, dearness allowance, bonus, provident fund and gratuity, leave and holidays and other terms of service or conditions of labour, is the primary object of trade unions and when demands like these are put forward, a strike thereafter, may justifiably be resorted to, in an attempt to induce the employer to agree to the demands or at least to open negotiations.[56] Sometimes, the threat of a strike is enough to make the employer concede to the demands of the union. In *Umesh Nayak*, speaking for the Supreme Court, Sawant J stated the law in the following words:

> The strike, as a weapon, was evolved by the workers as a form of direct action, during their long struggle with the employers. It is essentially a weapon of last resort, being an abnormal aspect of employer-employee relationship and involves a withdrawal of labour, disrupting production, services and the running of the enterprise. It is a use by the labour of their economic power, to bring the employer to see and meet their viewpoint, over the dispute between them...The cessation or stoppage of work, whether by the employees or by the employer, is detrimental to the production and economy and to the well being of the society as a whole. It is for this reason that industrial legislation, while not denying the right of workmen to strike, has tried to regulate it, along with the right of the employer to lockout and has also provided a machinery for peaceful investigation, settlement, arbitration and adjudication of the disputes between them...The strike or lockout is not be resorted to, because the concerned party has a superior bargaining power or the requisite economic muscle to compel the other party to accept its demand. Such indiscriminate use of power is nothing but an assertion of the rule of 'Might is right'. Its consequences are lawlessness, anarchy and chaos in the economic activities which are most vital and fundamental to the survival of the society. Such action, when the legal machinery is available to resolve the dispute, may be hard to justify. This will be particularly so when it is resorted to by the section of the society which can well await the resolution of the dispute by the machinery provided for the same. The strike or lockout, as a weapon, has to be used sparingly, for the redressal of urgent and pressing grievances, when no means are available or when available, means have failed to resolve it. It has to be resorted to, to compel the other party to the dispute, to see the justness of the demand. It is for this reason that industrial legislation, such as the Act, places additional restrictions on strikes and lockouts in public utility services.[57]

No doubt, a strike is a recognised mode of agitation, to press home the demand of the workers, in the process of collective bargaining, but a strike cannot be resorted to, to pressurise the management to accede to the demands which they cannot get lawfully. For instance, the weapon of strike cannot be used to pressurise the management to pay an additional amount of bonus, apart from the bonus permissible under the Payment of Bonus Act.[58]

Illegal Strikes

Though the right to strike is not raised to the high pedestal of a 'fundamental right' under the Constitution, it is recognised as a mode of redress for resolving a grievance of the workers. The workers in a democratic state, have the right to resort to a strike, in order to express their grievances or to make certain demands. Thus, a strike is a necessary safety valve in industrial relations.[59] Brandies J, speaking for the US Supreme Court, observed: *A strike may be illegal because of its purpose, however orderly the manner in which it is carried*.[60]In America and England, there are certain objects which render the strike illegal. But in India, in the field of industrial law, it is not the objects which makes the strike illegal, but it is the breach of statutory provisions, which renders certain industrial strikes illegal. Sections 10(3) and 10 A(4A) of the ID Act empower the appropriate government to prohibit the continuance of a strike, which may be in existence on the date of the reference of a dispute in connection with such dispute. Section 22(1) prohibits the commencement of a strike in public utility service industries, without complying with the requirements thereof. Section 23 prohibits the commencement of a strike during the pendency of conciliation, adjudication and arbitration proceedings and for some time even after the conclusion of such proceedings. It also proscribes a strike during the period of operation of the a settlement or an award, in respect of matters covered by such settlement or award. Section 24(1) makes the strikes in contravention of these provisions, illegal.[61] Likewise, there are provisions in state statutes also, which make strikes in contravention of the prohibitory provisions thereof, illegal.[62] A strike can be illegal only when it contravenes some provision of law. It would follow that a strike continued or commenced, without a contravention of any statutory provision, would be legal even if it is of a violent type. For instance, in *BR Singh*, the strike resorted to by the workmen, in frustration and to press their demands, without contravening any of the statutory requirements, was held to be legal. Conversely, a strike, however orderly and peaceful, would be illegal, if it contravenes the statutory provisions.[63] In *Churakulam*, the Supreme Court observed that a strike contravening the provisions of s 23(a) would be illegal. But since admittedly, there were no conciliation proceedings before the board on the day on which the factory workers went on the strike, the strike could not come within the prohibition of s 23(a).[64] An illegal strike will invite disciplinary proceedings, because it is an act of

misconduct.[65]

Justified and Unjustified Strikes

In *Chandramalai Estate*, Das Gupta J, stated:

> While on the one hand, it has to be remembered that a strike is a legitimate and sometimes, unavoidable weapon in the hands of labour, it is equally important to remember that an indiscriminate and hasty use of this weapon should not be encouraged. It will not be right for labour to think that for any kind of demand, a 'strike' can be commenced with impunity, without exhausting the reasonable avenues available for a peaceful achievement of their objects. There may be cases where the demand is of such an urgent and serious nature, that it would not be reasonable to expect the labour to wait after asking the government to make a reference. In such cases, the strike, even before such a request has been made, may well be justified.[66]

But the justifiability of a strike has to be viewed from the standpoint of the fairness and reasonableness of the demands made by the workmen, and not merely from the standpoint of their exhausting all the other legitimate means open to them, for getting the demands fulfilled.[67] The question of the justifiability or otherwise, of a strike, would also depend upon whether the demands are made *bona fide*, for the betterment of the conditions of service of the workmen or whether they are made frivolously or for any ulterior purpose.[68] Thus, where, after the failure of conciliation efforts, the workmen could have waited to ask the government to make a reference before starting the strike, the strike was held to be unjustified.[69] Likewise, where the circumstances clearly showed that the demand of the workmen, regarding *ex-gratia* bonus, could not be considered to be of an urgent and serious nature, the launching of a strike was held to be unjustified.[70] On the other hand, where the strike was not directly connected with the demand for bonus and uncontroverted evidence established that the strike was a protest against the unreasonable attitude of the management, in boycotting the conferences held by the Labour Minister, the strike was held to be not unjustified.[71] Similarly, where the employer failed to pay bonus to the workmen, as ordered by the Supreme Court as well as the High Court, the strike could not be held to be unjustified, particularly so, as the strike was peaceful and the workmen did not resort to acts of violence or intimidation, nor did they violate the civilised norms during the period of strike or earlier and the strike was immediately recalled when the issue of the payment of bonus was finally settled.[72] A strike may be justified if it is *bona fide*, resorted to for the betterment of the conditions of service of the workmen. At the commencement, a strike may be both legal and justified. It may become illegal if continued after an order under s 10(3) or s 10(4A) has been made by the 'appropriate government'. The strike may also become unjustified as it progresses, if the strikers resort to acts of violence and sabotage. Or else, a strike may become unjustified on account of its being motivated by extraneous considerations, not connected with the genuine grievances of the workmen; it also may become unjustified on account of being unduly and inordinately protracted. Though such strikes may not be illegal, they might certainly be unjustified. The justifiability or non-justifiability of a strike is irrelevant for determining the question of wages for the period of such strikes.

The question, whether a particular strike was justified or not, is a question of fact, which has to be judged in the light of the facts and circumstances of each case. Furthermore, the 'use of force or violence or acts of sabotage, resorted to by the workmen' during a strike, is apt to render a strike unjustified. A strike, however, cannot be said to be unjustified unless the reasons for it are entirely perverse or irrational.[73]Therefore, the question, whether a 'strike' is justified or unjustified, has to be examined by taking into consideration various factors, such as the service conditions of the workmen, the nature of their demands, the cause which led to the strike, the urgency of the cause or demand, the reasons for not resorting to the dispute-resolving machinery provided by the Act or the contract of employment or the service rules and regulations, etc. An inquiry into these issues is essentially an inquiry into the factors which, in some cases, may require taking of oral and documentary evidence. The appropriate forum to conduct such inquiry is industrial adjudicator. But such an inquiry cannot be conducted by' the High Court in its writ jurisdiction, under Art. 226 of the Constitution. In *Umesh Nayak*, the Supreme Court held that the High Court had erred in recording its finding on the question of the legality and justifiability of a 'strike', by assuming the jurisdiction which was properly vested in the industrial adjudicator.[74] However, if the findings of the industrial adjudicator suffer from an 'error of law apparent on the face of the record' or is based on no evidence or is perverse, it is liable to be interfered with, in Judicial review by the High Court in its jurisdiction under Art. 226 of the Constitution,[75] In *Amalendu Gupta*, the Calcutta High Court held writ court would be competent to decide the question of justifiability of the strike.[76]

Illegal Strike - If can be considered as Justified

In *IGN Rly*, speaking for the Supreme Court, Sinha CJI stated the law thus:

> The tribunal, having held that the strike was illegal, proceeded to discuss the question, whether it was justified, and came to the conclusion that it was 'perfectly justified'. In the first place, it is a little difficult to understand how a strike in respect of a public

> utility service, which is clearly illegal, could at the same time be characterised as 'perfectly justified.' These two conclusions cannot in law, co-exist. The law has made a distinction between a strike which is illegal and one which is not, but it has not made any distinction between an illegal strike which may be said to be justifiable and one which is not justifiable. This distinction is not warranted by the Act, and is wholly misconceived, specially in the case of employees in a public utility service. Every one participating in an illegal strike, is liable to be dealt with departmentally, of course, subject to the action of the department being questioned before an industrial tribunal, but it is not permissible to characterise an illegal strike as justifiable.[77]

Referring to this statement of law, in *Gujarat Steel Tubes*, Krishna Iyer J, observed:

> This court did observe that if a strike is illegal, it cannot be called 'perfectly justified' and glossed that 'between the perfectly justified and unjustified strike, the neighborhood is distant', and then, he inferred that, 'mere illegality of the strike does not, *per se*, spell unjustifiability.[78]

From a cursory glance of the passage cited above, it is obvious that the words 'perfectly justified', being put in quotes, refer to the holding of the tribunal. Then there is the comment of the court that it was difficult to understand as to how a strike which was illegal, could at the same time, be characterised as 'perfectly justified' by the tribunal, as these two conclusions are irreconcilable in law. This is followed by the opinion of the court that the law 'has not made any distinction between an illegal strike which may be said to be justifiable and one which is not justifiable. This distinction is not warranted by the Act and is wholly misconceived...It is not permissible to characterise an illegal strike as justifiable'. It is clear that while expressing its opinion, the court has not used the word 'perfectly' to qualify the word 'justifiable', as observed by Iyer J, in *Gujarat Steel Tubes*. He has, therefore, misread the holding of the court in *IGN Rly.*, and his conclusion is, therefore, unwarranted. For fortifying his conclusion, he further relied on *Crompton Greaves*, and observed that in that case, 'this court held that even if a strike is illegal, it cannot be castigated as unjustified, unless the reasons for it are entirely perverse and unreasonable - an aspect which has to be decided on the facts and circumstances of each case'. But in *Crompton Greaves*, there is nothing to support this observation or conclusion. The relevant passage reads:

> It is well-settled that in order to entitle the workmen to wages for the period of strike, the strike should be legal as well as justified. A strike is legal if it does not violate any provision of the statute. Again, a strike cannot be said to be unjustified, unless the reasons for it are entirely perverse or unreasonable. Whether a particular strike was justified or not, is a question of fact, which has to be judged in the light of the facts and circumstances of each case.[79]

That case dealt with the question of payment of wages to the workmen for the period of strike and lays down that for being entitled to wages for the period of the strike, the strike should have been 'legal as well as justified'. Then, it further points out that a strike is legal 'if it does not violate any provision of the statute' and it cannot be said 'to be unjustified, unless the reasons for it are entirely perverse or unreasonable'. The clear legal position, as established by the *IGN Rly* and *Crompton Greaves* cases, is that if a strike is illegal, it is not permissible to characterise it as justifiable. In other words, a strike which is illegal (being violative of the statutory provisions), cannot be justified. But even if a strike is legal, it has further to be seen whether it is justified or unjustified. The question of justifiability or unjustifiability would depend upon the facts and circumstances of each case. Therefore, there is no warrant for the inference from these two decisions, that a 'mere illegality of a strike does not, *per se*, spell unjustifiability. Even if the strike is legal, it cannot be castigated as unjustified. The question of the legality or illegality of a strike is relevant in the context of disciplinary action, because going on an illegal strike is generally made an act of misconduct under the Standing Orders. As observed in *IGN Rly*, in this connection, the only question of any practical importance, that may arise in the case of an illegal strike, would be the kind or quantum of punishment which has to be modulated in accordance with the facts and circumstances of each case. The justifiability or unjustifiability of a legal strike is relevant in the context of the wages payable to the workmen for the period of the strike. In *Umesh Nayak*,[80] a Constitution Bench of the court referred to and relied on the holding in the *IGN Rly* and did not refer to the obiter observations of the court in the *Gujarat Steel Tubes* case.

Effect of Strike on Contract of Employment

The *sui-generis* nature of striking employees or the employees whose work has ceased in consequence of a lockout, is now well recognised in law, ie, 'although the work ceases, the employment relation is deemed to continue, *albeit* in a state of a belligerent suspension'.[81] In *Iron Moulders*, the *sui-generis* nature was cited with approval:

> Neither strike, nor lockout completely terminates, when this is its purpose, the relationship between the parties. The employees who remain to take part in the strike or whether the lockout do so that they may be ready to go to work again on terms to which

> they shall agree - the employer remaining ready to take them back on terms to which he shall agree. Manifestly then, pending a strike or a lockout, and so to those who have not finally and in good faith, abandoned it, a relationship exists between employer and employee, that is neither that of the general nature of employer and employee, nor again that of employer looking among strangers for employees or employees seeking from strangers, employment.[82]

A recognition of the notion of a striking employee is also contained in *Keith Theatre,* where the court said:

> While out on strike, it is not considered that the strikers have abandoned their employment, but rather have only ceased from their labour.[83]

The position of the law is the same in India also, as stated by the Supreme Court in *Michael Mark,* holding that if employees absent themselves from work because of a strike, for the enforcement of their demands, there can be no question of an abandonment of their employment, by them. And, if the strike was in fact, illegal, the employer may take a disciplinary, action against the workmen under the Standing Orders or otherwise, and dismiss them.[84] In this connection, in *Oriental Textile,* the court further said:

> While it is an accepted principle of industrial adjudication, that workmen can resort to strike in order to a press for their demands, without snapping the relationship of employer and employee, it is equally a well-accepted principle, that the work of the factory cannot be paralysed and brought to a stand-still by an illegal strike, in spite of legal steps being taken by the management to resolve the conflict. The management has the right in those circumstances, to carry on the work of the factory, in furtherance of which, it would employ other workmen and justify its action on merits, in any adjudication of the dispute arising therefrom.[85]

Punishment for Participating in Illegal Strikes

Taking part in an illegal strike amounts to a misconduct on the part of an employee, which will expose him to disciplinary action. In other words, the employees who take part in an illegal strike, make themselves liable to be dealt with departmentally, by their employers.[86] But if the strike is not illegal, the disciplinary action of a discharge or dismissal will be uncalled for. In *BR Singh* (supra), the dismissal of certain workmen for going on a strike, which was not illegal, but was resorted to out of frustration and not for any animosity towards any officer and without indulging in any destructive method, was held to be improper. However, until an employee is formally dismissed from service for such misconduct, the relation of employment subsists and the continuity of service is not affected.[87] In other words, the dismissal of workmen for going on an illegal strike, without holding a domestic inquiry against them, for the charges, in accordance with the rules of natural justice, will not be sustainable in industrial adjudication.[88] Furthermore, before inflicting the punishment on the delinquent workmen, not only do they have to be found guilty of the charges levelled against them, but their role in the strike has also to be determined by the adjudicator, to see whether the punishment is warranted or not. In *Model Mills,* the employer company dismissed certain workmen under its Standing Orders, for participating in an illegal strike and the dismissal was held to be proper and justified by the Supreme Court.[89] In *Bata Shoe Co,* the court held that where the Standing Orders authorise dismissal as a punishment for going on an illegal strike, the order of dismissal would be justified, even though there was no violence and the strikers remained peaceful.[90]

In *Michael Mark* (supra), the court, however, discountenanced the action of the employer in filling the places of the striking workmen, by employing new hands, as the striking workmen had not joined duty despite the notices given to them. The court observed that if the employees absent themselves from work on account of a strike, in furtherance of their demands, there could be no question of abandonment of employment by them and held that if the strike was, in fact, illegal, the employer could take disciplinary action against the employees, in compliance with the Standing Orders, and dismiss them. In *IGN Rly* (supra), the court laid down the general rule that merely taking part in an illegal strike, without anything further, would not necessarily justify the dismissal of all the workmen taking part in the strike and that it was necessary to hold a regular inquiry, after furnishing the charge-sheet to each of the workmen sought to be dealt with for his participation in the strike. In *Oriental Textile,* there were no Standing Orders applicable to the establishment, and the court held that the domestic inquiry should have been held in order to entitle the employer to dispense with the services of its workmen on the ground of misconduct. Dealing with the question as to whether, before the services of the workmen who are on strike, are terminated, is an inquiry into their misconduct obligatory and would an omission to comply with this requirement, make the order of termination illegal, the court held:

> It appears to us that merely because workmen go on strike, it does not justify the management's order terminating their services. In any case, if allegations of misconduct have been made against them, those allegations have to be inquired into by charging them with specific acts of misconduct and giving them an opportunity to defend themselves at the inquiry. Even where a strike is illegal,

> it does not justify the management in terminating their services merely on that ground, though if it can be shown on an inquiry, that the conduct of the workmen amounted to a misconduct, it can do so...If, however, the management does not hold such an inquiry or the inquiry is due to some omission or deficiency, not valid, it can nonetheless support its order of discharge, termination or dismissal when the matter is referred for industrial adjudication, by producing satisfactory evidence and proving misconduct. Even in such cases, the evidence which is produced to substantiate and justify the action taken against the workman, is not as stringent as that which is required in a court of law. At any rate, the evidence should be such as would satisfy the tribunal that the order of termination is proper.[91]

The position of law, therefore, seems to be that if there are Standing Orders providing for a dismissal, in the establishment, the striking workmen may be punished or dismissed in compliance with the requirements thereof but in cases where there are no such Standing Orders, it would be necessary to serve the individual workmen, who have participated in the strike, with charge-sheets and then to hold a regular domestic inquiry to determine the quality of the misconduct and the quantum of punishment, by finding out whether they were peaceful strikers or violent strikers, so as to deserve the extreme penalty of a dismissal. It is only after complying with these requirements, that a workman, if found guilty of the charges, may be dismissed.[92] It is not as if, simply because the workman participated in an illegal strike, necessarily and in every case, a dismissal must be visited upon the workman. Majmudar J pointed out:

> In case of a mass movement, crusade and mass hysteria, actions taken and statements made by the concerned striking workmen, cannot be judged on the touchstone of cold logic, resorted to in an air-conditioned court room, detached from the atmosphere under which such statements are made and such acts are undertaken. They have to be judged in their own settings, which were aflame and explosive in character.[93]

There may be an actual participation and a passive participation on the part of the workman, in an illegal strike. It may be that those workmen who actually participated, may deserve a more serious punishment than the passive participants. Passive participants cannot be punished to the same extent as the active participants or the militant workmen.[94] The quantum of punishment would vary depending upon the facts and circumstances in each case.[95] The kind or quantum of punishment has to be modulated in accordance with the facts and circumstances of each case. However, in case of an illegal strike, the striking workmen are liable to be suspended forthwith, pending an inquiry into their conduct.[96] But a mere participation in an illegal strike, which is peaceful and non-violent, would not justify the suspension or dismissal of the participants. Nor would a mere participation in an illegal strike, bar the strikers' claim for reinstatement if they are dismissed,[97] for 'there may be reasons for distinguishing the case of those who have acted as dumb-driven cattle, from those who have taken an active part in fomenting the trouble and instigating workmen to join such a strike or have taken recourse to violence'. Though the employer may be justified in imposing the extreme punishment of dismissal, on the striking workmen who had indulged in violent activities or defied prohibitory orders issued by the authorities, such punishment will be too severe for those workmen who were peaceful strikers or acted like dumb-driven cattle.[1] On the other hand, even if the strike is legal and justified, if the workmen resort to violence, an order of dismissal may be proper.[2]

In *Changunabai*, the Bombay High Court pointed out that no doubt, those workmen who take part in an illegal strike, make themselves liable to be dealt with by their employers, whether such participation is passive or active. However, a distinction has to be maintained in dealing with both the types of workmen who may have been guilty of a participation in the illegal strike, because both are not liable to the same kind of punishment. A passive participation in a strike, which is illegal, and may also be unjustified, does not, *ipso facto*, invite a dismissal or a punitive discharge. To justify the ultimate penalty, there must be an active individual excess, ie, masterminding the unjustified aspects of the strike, such as violence, sabotage or some other reprehensible role. In the absence of such gravamen in the accusation and proof thereof, through cogent individualised proof, the extreme economical penalty of a penal termination is wrong, especially in an economic structure where large scale unemployment stares in the face.[3] The requirements of law before a just punishment, for going on an illegal or an unjustified strike, can be inflicted upon a delinquent workman, have been succinctly stated by Krishna Iyer J, in *Gujarat Steel Tubes*, in the following words:

> The short position is this. Is there a punishment of any workman? If yes, has it been preceded by an inquiry? If not, does the management desire to prove the charge before the tribunal? If yes, what is the evidence, against whom, of what misconduct? If individuated proof be forthcoming and relates to an illegal strike, the further probe is this: was the strike unjustified? If yes, was the accused worker an active participant therein? If yes, what role did he play and of what acts was he the author? Then alone the stage is set for a just punishment. These exercises, as an assembly-line process, are fundamental. Generalisation of a violent strike, of a vicious union leadership, of strikers fanatically or foolishly or out of fear, failing ro report for work, are good background material, beyond that, they must not be identified by a rational process, the workman, their individual delinquency and the sentence

according to their sin. Sans that, the dismissal is bad. [4]

It may be pointed out that in view of the decision in *IGN Rly*, to the effect that an illegal strike cannot be justified, the query in the above passage, *viz*, 'the further probe is this: was the strike unjustified?', would be unwarranted and uncalled for. It is not in the interest of the industry that there should be a wholesale dismissal of all the workmen who merely participated in a strike. Nor is it in the interest of the workmen themselves. The question of punishment, therefore, has to be considered by industrial adjudication, keeping in view the over-riding consideration of the full and efficient working of the industry as a whole. To determine the question of punishment, therefore, a clear distinction has to be made between those workmen who not only joined in such strike, but also took part in obstructing the loyal workmen from carrying on their work, or took part in violent demonstrations, or acted in defiance of law and order, on the one hand, and those workmen who were more or less silent participants in such a strike. In order to find out which of the workmen, who had participated in an illegal strike, belonged to one or the other of the two categories, the strikers may, for the sake of convenience, be classified as: (i) peaceful strikers, and (ii) violent strikers. Industrial adjudication has to inquire into the part played by each. The punishment of dismissal or termination of service, may be imposed on such workmen as have not only participated in an illegal strike, but have also fomented it and have been guilty of violence or of doing acts detrimental to the maintenance of the law and order in the locality of the establishment.[5] A physical obstruction of loyal workers, by the strikers, during a strike, so as to prevent them from attending the place of work, is a serious misconduct, for which a punishment of dismissal would be justified.[6]

If the order of the punishment lacks *bona fides* or is a measure of victimisation or an unfair labour practice, even though purporting to be under the Standing Orders, it would be vitiated. For instance, if the employer picks up only a few employees for imposing the penalty of dismissal, without any rational explanation, where a large number of workmen had gone on strike, the action can be held to be *mala fide*, inasmuch as it is based on an irrational or unreasonable discrimination. Likewise, if the employer makes an unreasonable discrimination in the matter of taking back employees, particularly when no clear distinction can be made between the persons who are taken back into service, although they had participated in the strike, and the persons who are dismissed, there may, in certain circumstances, be ground for industrial adjudication to interfere.[7] But the circumstances of each case have to examined by the adjudicator, before he can interfere with the order of the employer in a properly held managerial inquiry, on the ground of discrimination.[8] In the undernoted case,[9] the action of the employer in selecting six workmen out of a large number of strikers for punishment, was held to be *mala fide*, inasmuch as it was based on an irrational and unreasonable discrimination, and their dismissal was unjustified. A participation in an illegal strike may not necessarily and in every case, be punished with a dismissal; but where an inquiry has been properly held and the employer has imposed the punishment of dismissal on the employee who has been guilty of the misconduct of joining an illegal strike, the tribunal should not interfere, unless it finds an unfair labour practice or victimisation against the employee.[10]

Wages for the Period of Strike

The question as to whether the workmen who proceed on an strike, whether legal or illegal, are entitled to wages for the period of the strike, has generated a good bit of decisional grist. As early as 1953, in *Buckingham & Carnatic*, the claim of workmen for wages for the strike period was rejected by the Supreme Court, because the strike was found to be illegal, as the textile mill was a public-utility-service and a notice, as required by the Act, had not been given to the management.[11] In *Chandramalai Estate* (supra) the Supreme Court deprecated the indiscriminate use of the weapon of strike. In the facts and circumstances of the case, it found that the strike was unjustified. It was, therefore, held that the workmen were not entitled to even 50 per cent of the wages, for the period of the strike.

Similarly, in *Fertiliser Corpn*, the workmen were denied wages for the period of the strike, because the strike, though not illegal, was unjustified in the facts and circumstances of the case.[12] In *IGN Rly* (supra), the court observed that an 'illegal' strike cannot be characterised as 'justified', because the law makes a distinction only between a strike which is 'illegal' and one which is not. But it does not make any distinction between an 'illegal' strike which may be said to be justifiable and one which is not justifiable. Such a distinction is wholly misconceived and especially so in the case of employees in a 'public-utility-service'. Therefore, in order to entitle the workmen for wages for the period of the strike, the strike must be both legal and justified. If the strike is legal as well as justified, it would be difficult for the employer to resist the claim of the workmen for wages for the period of the strike; on the other hand, if the strike is unjustified, the workmen may not be entitled to wages for the period of the strike. This principle was conversely applied by another three-judge Bench of the court, to the fact-situation in *Churakulam*, in which the court held that since the strike was neither 'illegal', nor 'unjustified', the workmen were entitled to wages for the days on which they went on strike. Likewise, in *Crompton Greaves*, the workmen were held to be entitled to the wages for the period of strike, as the strike was held to be neither illegal, nor unjustified. However, in connection with the 'unjustifiability' of a strike, the court pointed out:

> A strike cannot be said to be unjustified, unless the reasons for it are entirely perverse or unreasonable. Whether a particular strike was 'justified' or not, is a question of fact, which has to be judged in the light of the facts and circumstances of each case. It is also well-settled that the use of force or violence or acts of sabotage resorted to by the workmen, during a strike, disentitle them to wages for the strike period. [13]

It is apparent from the decisions in *Churakulam* and *Crompton Greaves* that the view taken in them was that, for an entitlement to wages for the period of strike, the strike has to be both legal and justified. The employees cannot be entitled to wages for such period merely because the strike was legal. In other words, if the strike was illegal but justified, or if the strike was legal but unjustified, the employees would not be entitled to the wages for the strike period.[14] But the question, whether the workmen who had proceeded on the strike, whether legal or illegal, were at all entitled to wages for the period of the strike, was for the first time considered by a two-judge Bench of the court in *TS Kelawala,* in which the facts were: the All India Bank Employees Assn gave a call for a countrywide strike in support of the demand of the bank employees for a wage revision. Consequently, on 29 December 1977, the bank employees went on a four hours strike, from the beginning of the working hours, despite warnings of wage deductions for the period of the strike, issued by the bank. After the strike period, the employees resumed work on that day and the bank did not prevent them from doing so. But the hours of the strike covered the banking hours for the public. Therefore, the bank issued a circular directing its managers and agents to deduct a full day's salary of those employees, who had participated in the strike. The employees' union challenged that circular of the bank by a writ petition, which was allowed by the High Court of Bombay. In appeal by a special leave, a two-fold question was raised before the Supreme Court, as to whether the bank was entitled to deduct the wages of the workmen, for the period of the strike, and further, whether the bank was entitled to deduct wages for the whole day or pro-rata only for the hours for which the employees had struck work. However, the question as whether the strike was legal or illegal and whether it was justified or unjustified, was not raised in this case. In short, the only question debated before the Supreme Court was whether, even assuming that the strike was legal, the bank was entitled to deduct wages, as it purported to do under the circular in question. Answering this question, the court held that the legality or illegality of the strike had nothing to do with the liability for a deduction of the wages and even if the strike was legal, it did not save the workers from losing the salary for the period of the strike. Therefore, both legal as well as illegal strikes invite a deduction of the wages, on the principle that 'whoever voluntarily refrains from doing work when it is offered to him, is not entitled for a payment for work he has not done'. In other words, the court upheld the doctrine of 'no work, no pay'.[15]

In the *Umesh Naik* (supra), certain settlements were entered into between the union of the workmen and the management of the bank, under s 2(p), read with s 18(1) of the Act, under which the employees of the bank were entitled to certain advantages with retrospective effect. The bank, however, did not forward the copies of the memorandum of settlements to the authorities, as required by r 58(4) of the Industrial Disputes (Central) Rules 1957. The settlements, therefore, were not implemented by the bank, on the plea that the implementation of the settlements, giving the extra benefits to the workmen, required the government's approval, which was in process. The union on the other hand, contended that the settlements were signed without any pre-condition that they were to be cleared by the government. Since the matter was becoming a stalemate, the union issued a strike notice to the bank, demanding an immediate implementation of the settlements and the payment of the arrears of pay and allowances, pursuant to them. Though there was no formal strike notice in terms of s 22 of the Act, on the basis of a copy of the notice given by the union to the bank, the Deputy Chief Labour Commissioner & Conciliation Officer (Central), wrote to both the parties, informing them that he would be holding conciliation proceedings under s 12 of the Act and required them to attend the conciliation proceedings, along with a statement of the case, in terms of r 41 (a) of the Rules. After a few meetings, the conciliation officer found that there was no meeting ground and no settlement could be arrived at. However, he kept the proceedings alive by stating that, in order to explore the possibility of bringing about an understanding in the matter, he would hold further discussions. As the employees felt that the possibility of the implementation of the settlements was not in sight, their union gave a letter to the conciliation officer, requesting him to treat the conciliation proceedings as closed. But the conciliation officer still decided to keep the proceedings open, with a view to explore the possibility of resolving the matter amicably. Subsequently, on 18 October 1989, the bank issued a circular notice, stating, *inter alia*, that it would deduct salary for the days the employees go on a strike, on the principle of 'no work, no pay'. In spite of the circular, the employees went on a strike, on a 16 October 1989 and filed a writ petition in the High Court for quashing the circular threatening to deduct the salary for the days of the strike. The High Court, quashed the circular dated 18 October 1989, relying on the holding in *Churakulam* and held that the workmen were entitled to wages for the strike period, as the strike was legal and justified. In appeal by special leave, the Supreme Court set aside the decision of the High Court, holding that the decision of the High Court, with respect to the legality, as well as the justifiability of the strike, was erroneous, being beyond the writ jurisdiction of the High Court, since the jurisdiction to decide the questions of fact involved in these issues, was properly vested in the industrial adjudicator. The court, therefore, directed the government to refer the dispute with regard to a deductions of wages, for adjudication, to the appropriate authority under the Act.[16] In *The Statesman,* the workmen had resorted to an illegal strike, following which, the

management had declared a lockout and thus, the declaration of the lockout was 'legal'. However, in view of the unreasonable attitude adopted by the management in continuing the lockout, the tribunal held that the blame for the 'strike' and the 'lockout', had to be apportioned between both the sides and accordingly, ordered the payment of half wages for the period of the lockout. Affirming the award of the tribunal, Krishna Iyer J, stated the law in the following words:

> If the strike is illegal, wages during the period will ordinarily be negatived, unless considerate circumstances constrain a different course. Likewise, if the lockout is illegal, full wages for the closure period shall have to be 'forked out', if one may use that expression. But in between, lies a grey area of twilight law. Strictly speaking, the whole field is left to the judicious discretion of the tribunal. Where the strike is illegal and the sequel of a lockout, legal, we have to view the whole course of the developments and not stop with examining the initial legitimacy. If one side or the other behaves unreasonably or the overall interests of good industrial relations warrant the tribunal making such directions regarding strike period wages, as will meet with justice, fair play and pragmatic wisdom, there is no error in doing so. His power is flexible. [17]

The purport of these observations is that the mere fact that a strike or a lockout, at the commencement, was legal, but the subsequent events or conduct of the parties renders the strike or the lockout, illegal or unjustified, will expose the situation to judicial scrutiny and the discretion of the adjudicator. In none of these cases, except in *TS Kelawala*, the court has adverted to the statutory language of the definitions of 'strike' and 'wages'. Even in this case, though the court did refer to the language of these definitions and observed that:

> ...reading the two definitions together, it is clear that wages are payable only if the contract of employment is fulfilled and not otherwise, and when the workers do not put in the allotted hours of work, or refuse to do it, they would not be entitled to the wages proportionately.

It still went into the irrelevant question of the justifiability or unjustifiability of the strike. 'Strike' has been defined in s 2(q) of the Act, which reads:

> Strike' means a cessation of work by a body of persons employed in any industry, acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons, who are or have been so employed, to continue to work or to accept employment.

And the term 'wages' has been defined in s 2(rr) which, omitting the surplus words, reads:

> 'Wages' means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment or of work done in such employment...

In other words, if, for a certain period of time, a workman does not fulfil the expressed or implied terms of his contract of employment, or does no work, no remuneration will be payable to him for that period, in respect of his employment, in terms of the definition of 'wages'. Thus, in this definition, the legislature has unequivocally incorporated the doctrine of 'no work, no pay'. When the workmen go on strike, they cease to work, refuse to continue to work or to accept employment. Therefore, they wantonly fail to fulfil the terms of the contract of employment. From a juxtaposition of these definitions of 'wages' and 'strike', the conclusion that the workmen, who go on a strike, are not entitled to wages for the period of the strike, is inescapable. On the clear and unambiguous language of the statute, the questions of legality or illegality, or justifiability or unjustifiability of the 'strike' are irrelevant. Likewise, in the case of a 'lockout', the question of its legality or illegality or justifiability or unjustifiability are also irrelevant. In view of the plain language of the definition of a 'lockout' in s 2(1), an employer who declares a 'lockout', is liable to pay wages to the workmen for the period of the 'lockout', because he disables them to fulfil the terms of the contract of employment, by closing the place of employment.[18] Therefore, while going into these questions, the court side-stepped the statute and strayed into the prohibited area of judicial legislation. In this connection, the holding of a single judge of the Calcutta High Court, in *Algemene Bank*, is relevant, where, on the construction and application of the expression 'wages', in the Payment of Wages Act, Sabyasachi Mukherji J, stated that the definition '...in express terms, mentions as remuneration, that which would have been payable, if the terms of the employment were fulfilled and one of the main terms of employment, undoubtedly, in the instant case, is that the employee would work for a specified period of work during the working hours'. Therefore, 'if the employee does not work for a specified period of work, then the remuneration would not be payable'. Even under the general law of contract, an employee who does not perform the work required of him, under the contract, will not be entitled to wages foot such period, because of a failure of the consideration. Referring to the dictum of Lord

Denning to the effect:*wages are to be paid for services rendered, not for producing deliberate chaos*,[19] Sabyasachi Mukherjee J observed:

> The right of the employees to get remuneration depends upon the performance of his work during the period of employment. If there is any failure of that consideration, then taking a strict view of the matter, the employer is entitled to refuse any payment at all.[20]

In the cases discussed hereinabove, the attention of the Supreme Court does not appear to have been drawn to this holding of the Calcutta High Court. In *Swastik Textiles*,[21] the facts were: the workmen went on a strike for some days, after which they called off the strike. But when they returned to work, they were not allowed to resume duty by the management, unless they gave a statement in writing, as required by the management. The statement contained an admission of having participated in the illegal strike and also required the workmen to seek pardon of the management and give an undertaking that they would not question the validity of any penalty that the management may decide to impose upon them for participating in the illegal strike. It further contained an assurance that the workmen would not indulge in a similar misconduct in the future. On the refusal of the workmen to give the statement, the management did not permit them to resume their duty for a period of about two months from the date of their having called off the strike. In the adjudication proceedings arising out of the dispute relating to the wages for this period, the tribunal held that the action of the management, refusing to permit the workmen to resume their duty, was not justified. Hence, the workmen were entitled to the wages for the period in question. The Division Bench, in a writ petition filed against the award of the tribunal, upheld the validity of the direction given by the tribunal. Following the decision of the Apex Court in *Umesh Naik* (supra), a single judge of the Madras High Court held that a strike by workmen during the pendency of conciliation proceedings, is illegal, warranting a deduction of the wages for the days of such illegal strike. In *Neyveli Lignite Corpn*, a single judge of the Madras High Court held that the mere issuing of a strike notice would not confer the right to wages, and that, in order to claim wages, the workmen should show that, the strike was not only legal, but also justified.[22] Apparently, these decisions are based on the ratio evolved by Sawant J, in *Umesh Naik* and *TS Kelawala.* These two decisions merit some detailed analysis in the context of a pioneering decision given by a Constitution Bench in *IGN Rly.* In *Umesh Naik*, Sawant J observed:

> We may now refer to...*Kelawala's* case,[23]...Since it was not the case of the employees, that the strike was justified, neither arguments were advanced on that basis, nor were the aforesaid earlier decisions cited before the court. There is, therefore, nothing in the decisions of this court in *Churakulam Tea Estate*,[24] and *Crompton Greaves* cases,[25]...or the other earlier decisions cited above, which is contrary to the view taken in *TS Kelawala.* What is held in the said decisions is that to entitle the workmen to the wages for the strike period, the strike has both to be legal and justified. We, therefore, hold, endorsing the view taken in *TS Kelawala*, that the workers are not entitled to wages for the strike-period, even if the strike is legal. To be entitled to the wages for the strike period, the strike has to be both legal and justified...[26] (,).

As was rightly pointed out by Sinha CJI, in *India General Navigation (IGN) and Rly Co Ltd*, the justifiability or unjustifiability of the strike, has no relevance to a strike under the Act, and the concept of 'justifiability of a strike' is wholly foreign and unknown to industrial law. How does it matter whether or not any argument was advanced in *Kelawala* in support of the justifiability of an illegal strike, which, going by the binding ratio of *IGN Railway*, cannot, at any rate, be held to be justified, because of a *prima facie* violation of ss 22 and 23 of the IDA? Sawant J, then went on to observe that there was nothing in *Churakulam* and *Crompton Greaves*, that was contrary to the view taken by him in *Kelawala.* This observation is wrong on facts. Indeed, Sawant J, by his decision in *Kelawala*, tacitly reversed not only *Churakulam* and *Crompton Greaves*, but also *Gujarat Steel Tubes*,[27] at one stroke, and rightly so. In *Kelawala*, he clearly held that no wages were payable in the case of a strike, whether it was legal or illegal, which is not the same thing as the ratio of *Cromptom Greaves* and *Gujarat Steel Tubes*, which propounded in terms: *in order to be entitled to wages, the strike should be both legal and justified.'* In the face of a line of reasoning that proceeded so spectacularly in the opposite direction, the further observation of Sawant J, that 'there was nothing contrary in Kelawala' is intriguing. Reverting to his later decision in *Umesh Naik*, it is significant to note the relevant portion of his observation:

> We, therefore, hold, endorsing the view taken in *TS Kelawala* that the workers are not entitled to wages for the strike period, even if the strike is legal. To be entitled to the wages for the strike-period, the strike has to be both legal and justified...

The second part of the above statement is inconsistent with the first. In *Kelawala*, it was clearly held: 'There should not be any confusion between the strike as a legitimate weapon and the liability of deduction of wages incurred on account of it, whether the strike is legal or illegal'. If, as per this ratio, the workmen are not entitled to wages for a strike-legal or illegal-

then, by no means can that position be reconciled with the later observation in *Umesh Naik:* 'to be entitled to the wages for the strike period, the strike has to be both legal and justified'. In other words, having virtually struck down *Crompton Greaves* and *Gujarat Steel Tubes* by his peremptory observation in *Kelawala,* Sawant J, endorsed the perverse ratio of *Crompton Greaves* and *Gujarat Steel Tubes,* thereby denouncing his own decision in *Kelawala,* to the contrary. The decision of a single judge in *Neyveli Lignite Corporation,* is a standing example of the fallout of uncertain and half-hearted rulings of the kind given in *Umesh Naik.* It is an undeniable fact that *Crompton Greaves* and *Gujarat Steel Tubes* were wrongly decided glaringly violating the binding precedent set in *IGN Railway,* and, therefore, have to be necessarily treated as *per incuriam.* In the final analysis, out of all these new-generation decisions, handed down by activist judges, *Kelawala* alone can rightfully claim to be consistent with *IGN Rly* and with the scheme of the Act, while other decisions, commencing from *Churakulam* and ending with *Umesh Naik,* suffer *from the vice of judicial caprice, either in whole or in part.*

Civil Liability of the Unions

Workmen and their unions are immune under s. 18(1) of the Trade Unions Act 1926, from any civil liability. The fact that a strike is illegal, is immaterial in this connection. The law with respect to the tort of conspiracy, is well-established. The position of law has as declared by Ramaswamy CJ of Patna High Court, as he then was, affirmed by the Supreme Court in *Rohtas Industries*:

> Conspiracy, as a tort, must arise from a combination of two or more persons doing an act. It would be actionable if the real purpose of the combination is the inflicting of damage on A, as distinguished from serving the *bona fide* and legitimate interests of those who so combine and there is a resulting damage to A...In the case of a 'mixed motive' or a 'mixed purpose' for the conspiracy, the test is: what is the dominant motive or the dominant purpose of the conspiracy...It is well-established that if there is more than one purpose actuating the combination, the liability must depend on ascertaining, what the pre-dominant purpose is.[28]

On the general issue of strikes, NCL-II observed:

> We also discussed the question, whether any distinction should be made between 'strike' and 'work stoppage' and came to the conclusion that the existing definition of 'strike', in the Industrial Disputes Act 1947, may stand, 'Go slow' and 'work to rule' are forms of action which must be regarded as misconduct. Standing Orders and provisions relating to unfair labour practices already include them and provide for action both in the case of 'go slow' and 'work to rule'...There are some industries or services where the effects of industrial action, create situations which threaten the lives and the normal and the essential needs and activities of the vast majority. One's liberty has to be seen in the light of the equal right that everyone else has, to demand and enjoy liberty. Social intervention thus, becomes justified and necessary to protect the interests of all concerned...We, therefore, recommend that in the case of socially essential services, like water supply, medical services, sanitation, electricity and transport, when there is a dispute between employers and employees in an enterprise, and when the dispute is not settled through mutual negotiations, there may be a strike ballot as in other enterprises, and if the strike ballot shows that 51% of workers are in favour of a strike, it should be taken that the strike has taken place, and the dispute must forthwith be referred to compulsory arbitration (by arbitrators from the panel of the Labour Relations Commission (LRC), or arbitrators, agreed to by both sides)...We are recommending the withdrawal of the Essential Services Maintenance Act.[29]

Clause (qq): Trade Union

The expression 'trade union' was not defined in the Act so far. But now, in view of the amendments introduced by the Amending Act 46 of 1982, the term 'trade union' has been defined to mean a 'trade union, registered under the Trade Unions Act 1926'. Section 2(h) of the Trade Unions Act 1926 (16 of 1926), defines a 'trade union' as:

> 'trade union' means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more trade unions:
>
> Provided that this Act shall not affect:
>
> (i) any agreement between partners as to their own business;
>
> (ii) any agreement between an employer and those employed by him, as to such employment; or

(iii) any agreement in consideration of the sale of the goodwill of a business, or for instruction in any profession, trade or handicraft.

Clause (r): TRIBUNAL

The repealed Trade Disputes Act of 1929, did not provide for adjudication of industrial disputes. Hence, there was no provision for the creation or constitution of tribunals. The industrial tribunals, *inter alia*, were created for the first time, under the original Industrial Disputes Act 1947, in which a 'tribunal' was defined by the original cl (r) of s 2. The definition was amended by the Amending Act of 1957.

Clause (ra): UNFAIR LABOUR PRACTICE

Prior to the amending Act of 1982, though the expression 'unfair labour practice' was generally used in connection with a wrongful termination of the service of a workman, it was not defined in the Act. Nor, judicially, had any meaning been ascribed to it, even while dealing with cases of a wrongful termination of the service as a measure of victimisation or unfair an labour practice. For instance, in *HD Singh*,[30] the action of the Reserve Bank of India, in striking the name of the workman off its rolls, without giving him any order in writing, either refusing work or informing him that his name would be struck off the rolls, was held to be an act of 'unfair labour practice'. The term 'unfair labour practice' was defined under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 (Act 1 of 1972), to mean practices listed in Schs II, III and IV thereof. The termination of the service of an employee, without issuing a show cause notice or holding a domestic inquiry, has been held to be an act of indulging in an 'unfair trade practice', within the meaning of sub-items (a), (b) and F of item 1 of Sch IV of that Act.[31] Now, this clause has been inserted by the Amending Act 46 of 1982, which defines an 'unfair labour practice' to mean any of the practices specified in the Fifth Schedule. The Fifth Schedule enumerates the unfair labour practices: (i) on the part of the employers and trade unions of employers and (ii) on the part of workmen and trade unions of workmen. Chapter VC has also been inserted by the same Amending Act. Section 25T of this chapter, prohibits an 'unfair labour practice', while s 25U prescribes the penalty for committing an unfair labour practice. After these amendments, to employ workmen as casuals and continue them as such for years, with the object of depriving them of the status and privilege of permanent workmen, has been held to be an unfair labour practice, falling within the purview of item 10 of para (1) of the Fifth Schedule of the Act.[32]

In *P Rajeev*, the Karnataka High Court pointed out that the object behind a particular order of appointment, has to be examined to find out whether it is an unfair labour practice. Since *mala fide* is an essential ingredient of item 10 of the Fifth Schedule, *mala fides* have to be alleged and proved. In the absence of such an allegation or proof, it is not possible to stigmatise a particular mode of appointment as an unfair labour practice. Such oblique motive on the part of the employer, cannot be inferred, merely because appointments were made for temporary periods and the employees were continued in service temporarily, from time to time.[33] In *Assn of SRT Undertakings*, the union held violent demonstrations and staged *dharnas* at the residences of senior officers and also abused and assaulted some senior executives of the employer and threatened them with dire consequences. In this situation, the employer instituted a suit for certain perpetual injunctions. A single judge of the Delhi High Court held that, in view of the provisions of item 2(b) of Pt II of the Fifth Schedule, the workmen had indulged in an 'unfair labour practice', and therefore, the employer was entitled to the grant of the perpetual injunctions.[34] On the issue of terming an action as an unfair labour practice, the Supreme Court in *Raja Ram*, held:

> ...before an action can be termed as an unfair labour practice it would be necessary for the Labour Court to come to a conclusion that the badlis, casuals and temporary workmen had been continued for years as badlis, casuals or temporary workmen, with the object of depriving them of the status and privileges of permanent workmen. To this has been added the judicial gloss that artificial breaks in the service of such workmen would not allow the employer to avoid a charge of unfair labour practice. However, it is the continuity of service of workmen over a period of years which is frowned upon. *Besides, it needs to be emphasized that for the practice to amount to unfair labour practice it must be found that the workmen had been retained on a casual or temporary basis with the object of depriving the workman of the status and privileges of a permanent workman. There is no such finding in this case*. Therefore, Item 10 in List I of the Fifth Schedule to the Act cannot be said to apply at all to the respondent's case and the Labour Court erred in coming to the conclusion that the respondent was in the circumstances, likely to acquire the status of a permanent employee.[35] (Italics supplied).

Applying the above principle to a case with a similar set of facts involving the same employer, Ms Ruma Pal J, while setting aside the award of the tribunal as well as the order of the High Court, held that in the light of the fact that no finding to the effect that the practice amounted to unfair labour practice was recorded by the tribunal, the conclusion reached by it that the Bank had committed an unfair labour practice was not tenable.[36] In *Hindustan Lever*, the facts briefly were: the service of a workman who was engaged as a casual clerk was terminated giving rise to a complaint by the workman

alleging unfair labour practice against the management by engaging him on casual basis for four years with an intention to deprive him of the status and privileges of a permanent workman. The tribunal held that the employer had committed an unfair labour practice under s 2(ra) read with Item 10 of Sch V. Quashing the award, Rajesh Kumar J of Allahabad High Court held that the workman did not worked for 240 days in the preceding year, nor could he discharge the burden of proving that the management was guilty of any unfair labour practice.[37]

Clause (rb): VILLAGE INDUSTRIES

Since the Amending Act 46 of 1982, refers to village industries at several places, therefore, it became necessary to define 'village industries'. Accordingly, by this clause, the expression 'village industries' has been given the same meaning as assigned to it in cl (b) of s 2 of the Khadi and Village Industries Commission Act 1956, which reads:

> 'Village Industries' means all or any of the industries specified in the schedule and includes any other industry deemed to be specified in the schedule, by reason of a notification under section 3.

Clause (rr): WAGES

Etymologically, the term 'wages' means an 'amount paid periodically, especially by the date or week or the month or time during which the workman or servant is at the employer's disposal'. *Webster's Third New International Dictionary* defines 'wages' as a 'pledge of payment of monetary remuneration by an employer, for labour or services, according to the contract or on an hourly, daily or piece-work basis and often including bonuses, commission and amounts paid by the employer for insurance, pensions, hospitalisation and other benefits especially; such remuneration is paid to skilled or unskilled labour'. In the language of law, 'wage' is the consideration for the work done by an employee for his employer, paid periodically. Section 2(s) of the Act postulates that industrial employment, to do any skilled or unskilled, manual, supervisory, technical or clerical work, is for 'hire or reward'. It is this 'hire or reward,' which forms the subject-matter of 'wages' of an industrial employee.

Components of Wages

The definition of 'wages' is in three parts. The *first part* defines 'wages' as 'all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to workman in respect of his employment or work done in such employment'. This is the denotation of the term 'wages', or what it denotes. The *second part* is designed to include something more than what the term primarily denotes. This part gives an extended connotation, by including certain payments, allowances and amenities, in the ambit of the definition. The *third part* of the definition excludes three types of payments made by the employer, *viz*, (i) bonuses; (ii) contribution towards pension or provident funds or for any other benefit of a workman, under the law for the time being in force; and (iii) gratuity payable on the termination of the service of a workman. The NCL-II recommended the bifurcation of the terms 'wages' and 'remuneration' and redefining them separately: the term 'wages' to include only basic wages and dearness allowance and no other allowance; and 'remuneration' to include all other payments, including other allowances as well as overtime payment, together with wages.[38]

(i) Remuneration

Remuneration is a more formal version of 'payment'. It means to recompense by paying an equivalent for a service. In other words, remuneration is a return for the services rendered. The definition, however, postulates that the remuneration must be 'capable of being expressed in terms of money', payable to a workman, in respect of his employment or for the work done in such employment.[39] Any amount paid to a workman by way of remuneration, must be in respect of his employment or work done by him. In *Bennett Coleman*, the car allowance and the benefit of a free telephone and newspaper, given to the workman, were held not to be covered by the word 'remuneration' as used in the first part of the definition, because they were not restricted to the employment or the work of the workman as a special correspondent and were not fixed after taking into consideration, the expenses which he would have ordinarily to incur in connection with his employment, or the work done in such employment.[40] The definition expressly states that the remuneration in respect of the employment or for the work done, would be payable to a workman only when he has fulfilled the express or implied terms of the contract of his employment. Hence, if the express or implied terms of the contract of employment are not fulfilled by the workman, he would not be entitled to remuneration. The contract of employment has many express and implied terms. Non-fulfilment of such terms would disentitle the workmen to claim remuneration. The pivotal term of employment of a workman in an industry, is to do 'any skilled or unskilled, manual, supervisory, technical or clerical work'. If a workman absents from work or having come to work, does not perform the duties assigned to him and thus, fails to do the work for which he was employed, he may be disentitled from claiming 'remuneration'. On the same principle, workmen who go on a strike, pursuant to their demands, would not be entitled to the remuneration for the strike

period. Though, going on a legal strike, may be a legitimate right of the workmen, in the process of collective bargaining, yet, they cannot be, simultaneously, on strike and fulfilling the terms of their employment.[41] Such a claim, therefore, will not be comprehended in the definition of 'wages'. Any such claim, therefore, would be *de hors* the Act itself.

(ii) Basic wage and Allowance

The expression 'basic wage' has not been defined in the Act, though the concept of 'basic wage' is relevant for fixing the wage-structure. The adjectival 'basic' means, what is normally allowable to all-irrespective of special claims. The phrase 'basic wage' is also ordinarily understood to mean that part of the price of labour, which the employer must pay to all workmen, belonging to all categories. The phrase is used ordinarily, in contradistinction to allowance-the quantum of which may very in different contingencies. The 'basic wage', therefore, does not include additional emoluments, which some workmen may earn on the basis of a system of bonuses, related to the production. The quantum of the earnings from such bonuses, varies from individual, to individual according to their efficiency and diligence; it will vary sometimes from season to season, with the variation in the working conditions in the establishment; it will also vary with variations in the rate of supply of raw materials or with the assistance obtainable from machinery. This element of variation excludes the additional emoluments from the connotation of the 'basic wage'.[42]

Allowances Included in the Definition

All allowances, including dearness allowance, to which a workman, at the relevant time, is entitled, have been brought within the definition of wages, by the including part. Such allowances may be discussed under different heads, as appearing in the definition itself.

Sub-clause (i) -General Allowances

As fringe benefits of industrial employment, employers pay various sorts of allowances to their workmen, depending upon the nature of their duties and other incidents of the employment. Such allowances have been taken in the definition of wages, by the inclusive part. Quite a few of these allowances are discussed below illustratively.

(i) Tiffin Allowance:

Commercial or industrial concerns, with a view to ensure efficiency and to economise time, sometimes provide free tiffin facilities to their employees. In certain industries and regions, it has become customary and an implied condition of service. In *Mc Leod*, the company was supplying free tiffins, ie, two cups of tea and two biscuits to each of the members of their clerical staff and one cup of tea and one biscuit each, to the members of the subordinate staff. On the ground that the tiffin arrangement was not satisfactory, the workmen demanded a cash allowance in lieu of the tiffin arrangements. Most of the comparable concerns in the same region, were also supplying free tiffins to their employees. The Supreme Court affirmed the award of the tribunal, directing the employer to pay the clerical staff and the subordinate staff, at the rate of eight *annas* and six *annas* respectively, on all working days, in lieu of the tiffin, holding that the tiffin arrangement was an implied condition of service, in addition to the wages and dearness allowance and it was an amenity to which the employees were entitled, as a matter of right.[43] But in a somewhat different situation, in *River Navigation*, the court affirmed the award of the tribunal, rejecting the demand of the employees of the company, working at the *ghats*, that the tiffin as provided to similar workmen in their head office, should be paid to them. The tribunal rejected the demand because:

(i) the expenditure of the workmen on account of tiffin, was theoretically, included in the wage structure;

(ii) the companies which were the constituent members of the Bengal Chambers of Commerce, provided a tiffin allowance to the employees posted only at the head office;

(iii) providing for tiffin was only an act of generosity;

(iv) the company had set up canteens at the branch offices, on a 'no-profit no-loss' basis, where the workmen could obtain food at a rate cheaper than the market rate; and

(v) the supply of free tiffin to all workmen in the *ghat* area would cost the company a sum of Rs 3,35,000. The court observed that the fact that the company had set up a canteen, wherein workmen obtained food at cheap rates, was in itself, a reasonable amenity in the matter of providing food for the employees. It was observed that the mere fact that the company was providing, in addition, tiffin to the workmen in the head office, could not itself be a ground to hold that the company should do likewise for the employees at the branch offices as well. [44]

In *Remington Rand*, the industrial tribunal awarded an enhanced rate of lunch allowance, with the direction that such allowance should be paid to all the workmen employed in the Bangalore branch. In making these directions, the tribunal was influenced by the financial capacity of the employer company to pay, the existence of such allowance in some other companies, and the discrimination between the workmen employed in Calcutta and Delhi on the one hand and in the Bangalore office, on the other. But in appeal, the Supreme Court noticed that the finding of the tribunal, that there was a lunch allowance in existence in other similar concerns in Bangalore, was not based on any evidence. Regarding the financial capacity, the court observed that the mere fact that the establishment has the capacity to bear an additional burden of a lunch allowance, would, by itself, be no ground for conceding to the demand, if it is not justified, especially when the wage-structure prevailing in the employer company was undisputably fair and the dearness allowance paid to the workmen, had been linked with the index of cost of living, which took care of the rise in the of cost living from time to time. It was, therefore, held that if the company were to be compelled to pay a lunch allowance to all the workmen, including those who worked at the Bangalore office, it would, in fact, mean a double provision for the constituent of the cost of food, which was already provided for in the wage-scales and the rates of dearness allowance. The holding of the tribunal regarding discrimination, was buttressed by the plea on behalf of the workmen, that the principle of industry-cum region should not be applied to the lunch allowance with the same rigidity as it is applied in the adjudication of wage-scales and dearness allowance; which was also discountenanced by the court, with the observation that it would mean 'cutting holes in a principle which industrial adjudication has, for a number of years, accepted and which has lent a certain amount of uniformity in a field where problems have to be resolved on a pragmatic approach'. Following the rule in *River Navigation* (supra), the award directing the payment of lunch allowance, was set aside.[45]

In a connected appeal,[46] the tribunal, on a consideration of the minimum expenses incurred by a workman while being on duty, away from his place of residence, did away with the graded scale of *batha* prevailing in the company and introduced a uniform scale at the rate of Rs 10 per day, to all those drawing up to Rs 500 per month and also drew an elaborate scheme to make a provision against a workman falling ill while on an out-station duty. The Supreme Court set aside this award, holding that the tribunal had gone beyond the usual concept of *batha*, as the award of Rs 10 per day did not take into account the normal expenses that the workman would incur, if he were at the headquarters. The court itself adopted the rates prevailing at the Madras office of the company. In *Statesman*, there were two canteens—one for officers and the other for the subordinate staff. The staff of the officers' canteen was getting a dietary allowance of 50 paise, while the staff of the subordinate staff canteen was not getting a similar allowance. The Supreme Court affirmed the award of the tribunal, granting the same allowance to the staff of the subordinate staff canteen as well, with the condition that if they take free food from the canteen, they would become ineligible for the allowance, since they could not have both.[47]

(ii) Running Allowance:

In *Calcutta Port Commrs*, the workmen of the Calcutta Port Trust Railways, claimed a running allowance, payable to the 'running staff of the state railway, performing comparable duties' and also demanded free passes and PTOS on the lines admissible to the employees of the state railways. The tribunal rejected both the claims. In appeal by special leave, the Supreme Court observed that these allowances and facilities were not available to the employees of the port trust railways, as their service in all material respects, could not be compared with that of the employees of the state railway, because the work performed by them was not substantially the same or of similar nature, as the work of the state railway employees. After comparing various incidents of both the services, the court held that the tribunal was justified in not acceding to the demand for the running allowance. Likewise, on comparing the incidents of the facilities of PTOS given to the employees of the state railways, the court held that the employees of the port trust railways were not entitled to them.[48]

(iii) Clothing and Uniform Allowance:

In *Chandramalai Estate*, the tea plantation estate had been paying a clothing allowance to their workmen for a number of years, which had become an implied condition of service. On the employer's stopping the payment of this allowance, the workmen raised an industrial dispute and the tribunal awarded the payment of the clothing allowance. The award was affirmed by the Supreme Court, with the observation that such allowance having become a condition of service, could not be refused on the ground that the workmen did not raise any dispute when the allowance was stopped.[49] In *DCM Chemical Works* on the consideration of certain facts, the tribunal awarded the supply of uniforms by the employer, to a certain category of workmen and that, in addition to the uniforms, the persons entitled to the uniforms, should also be given protective equipment. In appeal, the Supreme Court upheld the award of the tribunal with respect to the supply of uniforms, but it set aside the award with respect to the protective equipment, because the tribunal had overlooked the difference between the uniforms and protective equipment which was provided under the Delhi Factory Rules, for a certain category of workmen, and not to all to whom uniforms were to be supplied. The protective equipment was to be given for certain purposes specified in the rules and had no connection with the uniforms, which the employer company was ordered to supply to its workmen, for reasons entirely different.[50] In *Remington Rand*, the union demanded that the employer should provide, for all its subordinate staff and mechanics, four sets of uniforms per year or pay them the cost thereof, on

the ground that the nature of the work done by them was such that their dresses got dirty. But the management had, in the course of negotiations, offered aprons to the mechanics, which was not accepted by them on the ground that they would not give them complete protection. The company had been giving two sets of uniforms to the peons and drivers. In the circumstances, the tribunal directed that if the dresses worn by the mechanics got dirty during the course of employment, the management should provide such number of sets of uniforms 'as it deems fit under the circumstances'. This direction was affirmed by the Supreme Court in appeal.[51] In *Kirloskar Electric Co*, the company had been giving uniforms to its watchmen, drivers, sweepers and canteen workers and such other workmen who were to be provided with protective clothing under the Factories Act and the rules framed thereunder. The workmen demanded that all workers should be provided with a pair of uniforms and a pair of shoes every year. The award of the tribunal, that uniforms should be supplied to certain other categories of workers as well, was affirmed by the Supreme Court in view of the relevant evidence and the additional financial burden involved in supplying the uniforms.[52] In *Statesman*, the employer used to supply warm coats to gate darwans and inspectors, but did not extend this facility to other darwans and delivery peons. The Supreme Court upheld the award of the industrial tribunal, directing that 'all the members of the subordinate staff should be supplied with warm coats', while rejecting the claim for warm jerseys over and above the warm coats.[53]

(iv) Retaining Allowance for Off-season:

The question as to whether retaining allowance should be paid to seasonal workers during the off-season, has been discussed by many committees, constituted by the Uttar Pradesh Government, for this purpose. The divergent views expressed by these committees made the problem quite complex, by further confounding the confusion. The question was considered by the Supreme Court in *Rohtas Sugar Ltd v Mazdoor Seva Sangh.* [54] After considering the various aspects of the matter, Das Gupta J, observed that in deciding, whether on principles of social justice, which it is the aim of industrial adjudication to apply, in order to justify the payment of a retaining allowance to unskilled workmen in these sugar industries, it is necessary to take into account:

(a) the opportunity of alternative employment in the off-season, that will be available to such workmen;

(b) the degree in which such workmen can be said to have become attached to the particular factory where they work;

(c) the likely benefit to the industry; if such workmen are induced to return to the factory, by the incentive of retaining allowance to be paid while the season commences; and

(d) the capacity of the industry to bear the burden of a retaining allowance.

Certain benefits paid to the workmen, if withdrawn by the employer, on the provisions of the Employees' State Insurance Act 1948 being made applicable to the establishment, to the admissible extent, would give rise to an industrial dispute, as it would be a dispute connected with the 'terms of employment or with the conditions of labour' of the workmen. Such a dispute would be validly referable under s 10 of the Industrial Disputes Act.[55] For instance, in *Nawabganj Sugar*, there was an order by the UP government to pay a retaining allowance to the workmen employed in the sugar factories in Uttar Pradesh, which expired in 1950. Even after the expiry of the said order, the sugar factories continued to pay the retaining allowance at a certain rate, to their clerks, for the off-season. The employer company had also been paying the retaining allowance to its clerks for about five years after the expiry of the order of the government. But for the off-seasons 1954-59, the company paid the retaining allowance only to some of its clerks, while denying the same to the others. The tribunal directed the company to pay to the concerned workmen, the same retaining allowance as was paid to the others. In appeal, the company could not explain to the Supreme Court as to how and why it paid the retaining allowance to half of the seasonal clerks and not to the others. It was therefore, held that, in view of the facts of the case, and the practice followed by the other factories in the neighbourhood, the company could not make any distinction in the payment of the retaining allowance, by paying it to some of its clerks and denying it to others.[56]

(v) Over-time Allowance:

Section 59 of the Factories Act 1948, prescribes that a worker who works over-time in a factory, shall be entitled to twice his ordinary rate of wages in respect of the over-time work. And for the purposes of calculating such over-time, the expression 'ordinary rate of wages' has been defined to mean the basic wage, plus such allowances, including the cash equivalent of the advantage accruing on account of the concessional sale to workers of food grain and other articles, as the worker is, for the time being, entitled to, but does not include a bonus. Section 33 of the Mines Act 1952 is in similar terms. This provision specifically includes the dearness allowances in the definition of 'ordinary rate of wages'. For workers working in factories and mines, the rates of over-time have been fixed by relevant statutes. In *Delhi Cloth Mills*, the power-plant operators of the mill claimed extra remuneration for having to forego half an hour's rest interval, which, in substance, was a claim for an over-time payment. The industrial tribunal made a rather startling observation, that these operators were working continuously for eight-and-a-half hours in a day. But this could not be possible, as there were three

shifts working in the mill. The employer's case was that the wages were fixed in accordance to the fact that in view of the nature of their work, they would be working for eight hours at a stretch, without the half hour's interval admissible to the other workmen. On the basis of the evidence on record, the Supreme Court held that the power plant operators were not entitled to any extra remuneration for having to forego the half-hour rest interval.[57]

In their respective Shops and Establishments Acts, 'some states have prescribed the rates of overtime work and the overtime allowance is paid in accordance with the provisions of these statutes. Some such statutes even extend the provisions of the Factories Act to certain establishments. For instance, s 70 of the Bombay Shops and Establishments Act extends the provisions of the Factories Act beyond its usual scope and further provides that where the Act, as extended, applies, the Shops and Establishment Act would not apply, except to a shop or establishment situated within the premises of a factory; and it further enables the state government to extend the provisions of the Factories Act to any such shop or commercial establishment, situated within the precincts of the factory. The effect of this provision is to supplement the provisions of the Factories Act, by extending them to those persons who are employed in a factory, though they are not 'workers' within the meaning of s 2(1) of the Factories Act 1948.[58] But the Shops & Establishments Acts of certain states do not prescribe the rates of overtime work which the workmen may have to do. The question, therefore, of the fixation of overtime rates in such cases, is left to industrial adjudication. In *Karam Chand Thapar*, the Supreme Court stated the following principles for fixing the overtime allowance:

(i) Overtime allowance should have relation to the total wage packet, *viz*, basic wage plus dearness allowance.

(ii) It should be fixed on a consideration of the financial capacity of the company.

(iii) It should also be fixed in consonance with the practice prevalent in other concerns in the neighbourhood. [59]

Accordingly, the court affirmed the award of the tribunal, fixing the overtime allowance at one-fourth times the wages, *viz*, the basic wage plus the dearness allowance, in respect of the workmen working at the head office of the company, at Calcutta. In another decision pronounced on the same day, ie, *Jessop & Co*, the court fixed the over-time allowance in case of another company, having its head office at Calcutta, at one-half times the ordinary rate of wages, ie, the basic wage plus the dearness allowance.[60] In *Indian Oxygen*, the tribunal, after taking into consideration the overtime paid by other industrial concerns in the region, awarded one-fourth times the ordinary wages, for overtime work exceeding 39 hours a week, but not exceeding 48 hours and in cases where the work exceeded 48 hours, (48 hours of work being the maximum, provided by the Bihar Shops and Establishments Act) at the rate of double the ordinary rates of wages, as provided in the Act. The employer company challenged the award of the tribunal before the Supreme Court, on the ground that:

(i) the company's factory at Jamshedpur, having been declared an establishment under the Bihar Shops and Establishments Act, could be made liable to pay for overtime work at the rate provided in that Act, *viz*, at double the ordinary rate when a workman was asked to work beyond 48 hours per week, as provided therein, but it could not be asked to pay more than its ordinary rate of wages, payable to workmen, if they were asked to work beyond 39 hours, but less than 48 hours; and

(ii) the comparative statement of the overtime rates paid by other concerns in Jamshedpur, before the tribunal, showed that if the company were made to pay one-fourth times its ordinary rate of wages, it would, in the light of the higher scales of wages, be paying more than the other concerns.

The court observed that in view of the fact that the total hours of work per week were 39 hours, under the conditions of service of the company, the workmen asked to work beyond those hours, would obviously be working overtime and the company would be expected to pay them compensation for such overtime work. The Bihar Shops and Establishments Act, therefore, had no relevance to this question, as that Act fixed the maximum number of hours of work allowable thereunder, ie, 48 hours a week, and provided for double the rate of the ordinary wages, for work being done after the 48 hours. It was not, therefore, as if the provisions of the Act governed the overtime payments, payable by the employer, where the maximum hours of work were governed by the conditions of service prevailing in his establishment. If the company were asked to pay at the rate equivalent to the ordinary rate of wages, for the work done beyond 39 hours, but not exceeding 48 hours work a week, it would be paying no extra compensation at all, for the work done beyond the agreed hours of work, and it would mean that the working hours would indirectly be increased, consequently altering the conditions of service. On this view of the matter, the court affirmed the award of the tribunal, as it was made after taking into consideration, the comparatively higher scales of wages prevalent in the company.[61]

In *Calcutta Electric Supply Corpn*, the tribunal directed that the overtime rate for non-factory personnel should, in no case, be less than the time-rate. And no employee should get an overtime at more than the time-rate, until he had completed 48 hours a week, but as soon as he exceeded 48 hours, the overtime should be one-half times the time-rate. This rate of

overtime wage, in favour of non-factory personnel, was directed to be given effect from the date of the reference. The workman challenged this award in appeal before the Supreme Court, in so far as the tribunal had limited the overtime wages to the time-rate, for any period short of 48 hours a week. The court held that it was inclined to admit the appeal and set aside the award of the tribunal and to direct that overtime should be paid at one-half times the hourly rate, for all hours of work beyond the scheduled hours and not merely for hours of work beyond 48 hours in a week and this had to apply from the date of the order of the court. However, in view of the heavy financial burden of the retrospective effect of the proposed increase of overtime wages and in view of the further delay involved in the remand of the case, for ascertaining the financial capacity of the company, the parties agreed to a suggestion of the court, that in respect of the overtime period for hours worked in excess of the scheduled hours, up to 48 hours, should be one-half times the hourly rate, instead of the hourly rate, which the company had already paid in terms of the award.[62]

(vi) Compensatory Allowance:

The adjectival expression—'compensatory'—used in the phrase 'compensatory allowance', is indicative of the fact that such an allowance is a compensation for something. For instance, the allowance paid to the workmen, for the work done on holidays, has been treated as a compensatory allowance. Likewise, an allowance paid in lieu of any benefit, to which the workmen, for the time being, are entitled, would fall within the ambit of such an allowance. Compensatory allowance and other allowances have been included as item two in the Third Schedule to the Industrial Disputes Act. In *Shaparia Dock & Steel*, the labour appellate tribunal awarded a compensatory allowance to the daily-rated workmen. Timely-rated workmen were given twice their normal rates of wages, for work on weekly rest days and holidays, provided that where a worker was given an alternative day of rest in place of the weekly day of rest, the extra payment for him was fixed only at half the normal wage. As regards the watchmen, on the facts of the case, the tribunal directed that they should also get emoluments, equal to that of the daily-rated workers.[63]

(vii) Acting Allowance:

Acting allowance is the allowance paid to an employee when he is acting in a higher post, on the employee holding the higher post proceeding on leave or otherwise, being away from his duties. The recognised principle with respect to acting allowance is that the acting incumbent will get an acting allowance equivalent to the difference between his salary and the minimum salary of the higher post in which he is acting, subject to a maximum of 25 percent of the incumbent's basic salary. In *Burn & Co*, the employer was following this rule. But adjudicating on an industrial dispute, regarding a revision of the acting allowance, the tribunal awarded the difference between the actual pay of the incumbent and the actual pay of the person in whose place the incumbent employee acted, subject to a maximum of 25 per cent of his basic salary. The tribunal did not alter the existing rules, but in modifying the rules regarding the acting allowance, it took the view that the acting man does practically the same work as was done by the person for whom he was acting and the company derives benefit from his work. In appeal, the Supreme Court set aside the order of the tribunal in this respect, as it was inconsistent with the recognised principle in respect of the fixing of the acting allowance.[64]

(viii) Special Allowance:

A special allowance may be granted to the workmen, in view of certain special circumstances peculiar to a situation or where they have to run some special risk. For instance, a special allowance in banks is paid in terms of the Shastri and Desai awards, when an employee discharges duties of a supervisory nature or is accorded the status of a person competent to discharge functions of a supervisory character. In *VABhide*, dealing with the claims of the employees, for the payment of a special allowance, granted to the supervisors under the Shastri and Desai awards, the Supreme Court held that before a person can claim the supervisory or special allowance, he must establish that he is discharging duties and functions which are similar to or the same as the duties or functions assigned to supervisors, under those awards.[65] In *Reserve Bank of India*, the bank gave a special allowance to its officers, to accept a transfer to Gauhati in the North Eastern region. This allowance was available only to such officers as were posted in Gauhati on transfer from areas outside the north eastern region, to mitigate the hardships faced by them on such transfer. In the peculiar facts and circumstances of the case, the Supreme Court did not countenance the challenge to the payment of such allowance, to the officers transferred from outside the north eastern region, on the ground of discrimination.[66]

Likewise, in *Haroon Rashid*, also, the Supreme Court upheld the award of the tribunal. In this case, a special pay of Rs 35 was granted to 10 per cent of the junior accountants. This special pay was not granted to them in lieu of promotion, for having been stagnated in the lower post or grade, but it was granted for handling more complex and important work. Such junior accountants were entitled to this special pay till they were appointed to the next promotional post of senior accountant. It was a kind of an intermediate level of post or grade. Therefore, this special pay had to be taken into account, while fixing their pay on promotion.[67] In *Gramphone Co*, the sepoys who were entrusted with the work of carrying money from the bank and who were doing duplicating and filing work as well, claimed a special allowance. The award of the tribunal, rejecting the demand, in view of the fact that the office of the company was situated in the heart of the city and

not at a long distance from the bank and the sepoys carrying money, did not carry any risk and the duty of bringing money from the bank was not strenuous as compared to any other duty usually allotted to the sepoys, and that the duplicating and filing work was not of such a nature as to call for any special allowance, was affirmed by the Supreme Court.[68] In *SSDhaliwal*, certain bank employees claimed a special allowance under the Shastri and Desai Awards and the bipartite settlements. However, these awards specified only the posts which would carry the special allowance and not the duties which carried the special allowance. The Division Bench of the Delhi High Court held that the claims of the employees would require the determination of the question of whether the special allowance went with posts only, or was also payable for discharging certain duties, which could be done on a reference under s 10(1), and not under s 33C(2) of the Act.[69]

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48 *Morgan v Fry* [1968] 3 WOR 506, 516, per Lord Denning MR.

49 *Andhra Pradesh SRTCE Union v APSRTC* 1970 Lab IC 1225, 1226 CAP), per Chinnappa Reddy J.

50 *Federated MSCEU of Australia v Melbourne Corpn* [1918-19] 26 CLR 508, 552-53 (HCA).

51 *Conway v Wade* [1909] AC 506, 511 (HL), per Lord Lorwburn LC.

52 *Kairbetta Estate v Rajmanickam* (1960) 2 LLJ 275 [LNIND 1960 SC 92], 278 (SC), per Gajendragadkar J.

53 *Gujrat Steel Tubes Ltd v GST Mazdoor Sabha* (1980) 1 LLJ 137 [LNIND 1979 SC 464] (SC), per Krishna Iyer J.

54 *BR Singh v Union of India* 1990 Lab IC 389, 396 (SC), per Ahmadi J.

55 *RE Mathew, Labour Relations and the Law*, 1953, p 563.

56 *Swadeshi Industries Ltd v Workmen* (1960) 2 LLJ 78 [LNIND 1960 SC 7], 81 (SC), per Das Gupta J.

57 *Syndicate Bank v K Umesh Nayak* (1994) 2 LLJ 836, 849 : AIR 195 SC 319 (SC), per Sawant J.

58 *Coimbatore PMDPTM Sangam v State of TN* (1986) 1 LLJ 303, 305-06 : (1984) 2 MLJ 102 [LNIND 1983 MAD 337] (Mad) (DB), per Gokulakrishnan J.

59 *Gwalior Rayons Silk Mfg (Wvg) Co Ltd v Distt Collector* 1982 Lab IC 367, 370 (Ker), per TC Menon J.

60 *Dorchy v Kanasas* 71 L Ed 248.

61 *Andhra Pradesh SRTCE Union v APSRTC* 1970 Lab IC 1225, 1226 (AP), per Chinnappa Reddy J.

62 *Raja Bahadur Motilal Poona Mills v Tukaram P Musale* (1957) 1 LLJ 258 [LNIND 1956 SC 88] (SC), per Govinda Menon J.

63 *BR Singh v Union of India* 1990 Lab IC 389, 396 (SC), per Ahmadi J.

64 *Mgmt of Churakulam Tea Estate v Workmen* (1969) 2 LLJ 407 [LNIND 1968 SC 256] (SC), per Vaidialingam J.

65 *Bank of India v TS Kelawala* (1990) 2 LLJ 39 [LNIND 1990 SC 308], 50 (SC) per Sawant J.

66 *Mgmt of Chandramalai Estate v Workmen* (1960) 2 LLJ 243 [LNIND 1960 SC 107], 246 (SC), per Das Gupta J.

67 *National Transport General Co Ltd v Workmen* 10 FJR 409, 411 (LAT).

68 *Western India Match Co Ltd v Wimco Mazdoor Union* (1957) LAC 322(LAT.

69 *Chandramalai Estate, Emakulam v Workmen* (1960) 2 LLJ 243 [LNIND 1960 SC 107] (SC), per Das Gupta J.

70 *Mgmt of Fertilizer Corpn of India v The Workmen* (1970) 2 LLJ 25 (SC), per Vaidialingam J.

71 *Churakulam Tea Estate v Workmen* (1969) 2 LLJ 407 [LNIND 1968 SC 256] (SC), per Vaidialingam J.

72 *LIC of India v Amalendu Gupta* (1988) 2 LLJ 495, 505 (Cal) (DB), per Baboo Lall Jain J.

73 *Crompton Greaves Ltd v Workmen* (1978) 2 LLJ 80, 82 (SC), per Jaswant Singh J.

74 *Syndicate Bank v K Umesh Nayak* (1994) 2 LLJ 836, 849 : AIR 1995 SC 319 : (1994) 5 SCC 572 (SC), per Sawant J.

75 *Sadul Textile Mills Ltd v Workmen* (1958) 2 LLJ 632, 638 (Raj) (DB), per Wanchoo CJ.

76 *Life Insurance Corpn of India v Amalendu Gupta* (1988) 2 LLJ 495, 505 (Cal) (DB), per Baboo Lall Jain J.

77 *India Gen. Navigation & Rly Co Ltd v Workmen* (1960) 1 LLJ 13 [LNIND 1959 SC 182], 22 : AIR 1960 SC 219 [LNIND 1959 SC 182] (SC), per Sinha CJI.

78 *Gujarat Steel Tubes v GST Mazdoor Sabha* (1980) 1 LLJ 137 [LNIND 1979 SC 464] : AIR 1980 SC 1896 [LNIND 1979 SC 464] (SC), per Krishna Iyer J.

79 *Crompton Greaves Ltd v The Workmen* (1978) 2 LLJ 80, 82 : AIR 1978 SC 1489 (SC), per Jaswant Singh J.

80 *Syndicate Bank v K Umesh Nayak* (1994) 2 LLJ 836 (SC), per Sawant J.

81 Ludwig Teller, *Labor Disputes & Collective Bargaining*, 1940, Vol 1, p 237, s 78.

82 *Iron Moulders Union v Allis Chalmers* 20 LRA (NS) 315.

83 *Keith Theatre v Vachon* 134 ME 392.

84 *Express Newspapers (P) Ltd v Michael Mark* (1962) 2 LLJ 220 [LNIND 1962 SC 242], 223 : AIR 1963 SC 1141 [LNIND 1962 SC 242] (SC), per Mudholkar J.

85 *Oriental Textile Finishing Mills v LCT* (1971) 2 LLJ 505 [LNIND 1971 SC 426], 510 : AIR 1972 SC 277 [LNIND 1971 SC 426] (SC), per Jaganmohan Reddy J.

86 *India General Navigation & Rly Co Ltd v Workmen* (1960) 1 LLJ 13 [LNIND 1959 SC 182], 22 (SC), per Sinha CJI.

87 *Jairam Sonu Shogale v New India Rayon Mills Co Ltd* (1958) 1 LLJ 28, 30 (Bom) (DB), per Dixit J.

88 *BR Singh v Union of India* 1990 Lab IC 389, 397 (SC), per Ahmadi J.

89 *Model Mills Ltd v Dharamdas* (1958) 1 LLJ 539 [LNIND 1957 SC 110] : AIR 1958 SC 311 [LNIND 1957 SC 110] (SC), per Imam J.

90 *Bata Shoe Co Pvt Ltd v DN Ganguly* (1961) 1 LLJ 303 [LNIND 1960 SC 345] : AIR 1961 SC 1158 [LNIND 1960 SC 345], per Wanchoo J.

91 *Oriental Textile Finishing Mills v LC* (1971) 2 LLJ 505 [LNIND 1971 SC 426], 510-11 : AIR 1963 SC 1141 [LNIND 1962 SC 242] (SC), per Jaganmohan Reddy J.

92 *IMH Press v Additional Industrial Tribunal* (1961) 1 LLJ 499 [LNIND 1960 SC 110], 501 (SC), per Wanchoo J.

93 *Vasanti M Shah v All India HFMC Society Ltd* (1986) 1 LLJ 69, 76 : (1985) 1 GLR 281 (Guj) (DB), per Majmudar J.

94 *Gujarat Steel Tubes Ltd v Gujarat Steel Tubes Mazdoor Sabha* (1980) 1 LLJ 137 [LNIND 1979 SC 464], 165 (SC), per Krishna Iyer J.

95 *Bharat Barrel & Drum Mfg Co Pvt Ltd v FH Lala* 1978 Lab IC 31 (Bom) (DB), per Tuljapurkar CJ.

96 *Lakshmi Devi Sugar Mills Ltd v Ram Sarup* (1957) 1 LLJ 17 [LNIND 1956 SC 85] (SC), per Bhagwati J.

97 *Punjab National Bank Ltd v Workmen* (1959) 2 LLJ 666 [LNIND 1959 SC 166] (SC), per Gajendragadkar J.

1 *India General Navigation & Rly Co Ltd v Workmen* (1960) 1 LLJ 13 [LNIND 1959 SC 182], 22 : AIR 1960 Sc 219 [LNIND 1959 SC 182] (SC), per Sinha CJI.

2 *Swadeshi Industries Ltd v Workmen* (1960) 2 LLJ 78 [LNIND 1960 SC 7] (SC), per Das Gupta J.

3 *Changunabai C Palkar v KM Mills Ltd* (1992) 2 LLJ 640, 643 (Bom) (DB), per PD Desai CJ.

4 *Gujarat Steel Tubes Ltd v GST Mazdoor Sabha* (1980) 1 LLJ 137 [LNIND 1979 SC 464] : AIR 1980 SC 1896 [LNIND 1979 SC 464] (SC), per Krishna Iyer J.

5 *India Gen Navigation & Rly Co Ltd v Workmen* (1960) 1 LLJ 13 [LNIND 1959 SC 182], 22 : AIR 1960 SC 219 [LNIND 1959 SC 182] (SC), per Sinha CJI.

6 *Bengal Bhatdee Coal Co v Ram Prabesh Singh* (1963) 1 LLJ 291 [LNIND 1963 SC 13], 294 (SC), per Wanchoo J.

7 *Burn & Co Ltd v Workmen* (1959) 1 LLJ 450 [LNIND 1958 SC 174], 454 (SC) : AIR 1959 Sc 529 [LNIND 1958 SC 174], per Imam J.

8 *Bata Shoe Co v DN Ganguly* (1961) 1 LLJ 303 [LNIND 1960 SC 345], 310 (SC), per Wanchoo J.

9 *Northern Dooars Tea Co Ltd v Workmen of DDTE* (1964) 1 LLJ 436 [LNIND 1963 SC 184], 441 (SC), per Gajendragadkar J.

10 *Bata Shoe Co v DN Ganguly* (1961) 1 LLJ 303 [LNIND 1960 SC 345], 310 (SC), per Wanchoo J.

11 *Buckingham & Carnatic Co Ltd v Workers* (1953) 1 LLJ 181 [LNIND 1952 SC 77] : AIR 1953 SC 647 (SC), per Mahajan J.

12 *Mgmt of Fertiliser Corpn of India v Workmen* (1970) 2 LLJ 25, 39 : AIR 1970 SC 867 [LNIND 1968 SC 340] (SC), per Vaidialingam J.

13 *Crompton Greaves Ltd v Workmen* (1978) 2 LLJ 80, 82 : AIR 1978 SC 1489 (SC), per Jaswant Singh J.

14 *Syndicate Bank v K Umesh Nayak* (1994) 2 LLJ 836, 840, per Sawant J.

15 *Bank of India v TS Kelawala* (1990) 2 LLJ 39 [LNIND 1990 SC 308] : (1990) 4 SCC 744 [LNIND 1990 SC 308] : [1990] 3 SCR 214 [LNIND 1990 SC 308] (SC), per Sawant J.

16 *Syndicate Bank v K Umesh Naik* (1994) 2 LLJ 836 : AIR 1995 SC 319 (SC), per Sawant J.

17 *The Statesman Ltd v Workmen* (1976) 1 LLJ 484 [LNIND 1976 SC 5], 489 : AIR 1976 SC 758 [LNIND 1976 SC 5] (SC), per Krishna Iyer J.

18 Cf, *Kairbetta Estate v Rajamanickam* (1960) 2 LLJ 275 [LNIND 1960 SC 92], 278 (SC), per Gajendragadkar J.

19 *Secy of State v Associated Society of LEF* [1972] 2 All ER 949, 967 (CA), per Lord Denning MR.

20 *Algemene Bank v CGLC* 1978 Lab IC 47, 55 (Cal), per Sabyasachi Mukherji J.

21 *Swastik Textiles Engineers Pvt Ltd v RS Santsingh* (1984) 2 LLJ 97 : (1984) 1 GLR 470 (Guj) (DB), per Mankad J.

22 *NLCWPU v Neyveli Lignite Corpn Ltd* (2001) 1 LLN 948,952 (Mad), per Karpagavinayagam J.

23 *Bank of India v TS Kelawala* (1990) 2 LLJ 39 [LNIND 1990 SC 308] (SC), per Sawant J.

24 *Mgmt of Churakulam Tea Estate (P) Ltd v Workmen* (1969) 2 LLJ 407 [LNIND 1968 SC 256] (SC), per Vaidialingam J.

25 *Crompton Greaves Ltd v Workmen* (1978) 2 LLJ 80, 82 (SC), per Jaswant Singh J.

26 *India General Navigation & Railway Co Ltd v Workmen* (1960) 1 LLJ 13 [LNIND 1959 SC 182] : AIR 1960 SC 219 [LNIND 1959 SC 182]) (SC), per Sinha CJI.

27 *Gujarat Steel Tubes Ltd v GST Mazdoor Sabha* (1980) 1 LLJ 137 [LNIND 1979 SC 464], 168 (SC), per Iyer J.

28 *Rohtas Industries Ltd v Rohtas Industries Staff Union* (1976) 1 LLJ 274 [LNIND 1975 SC 523] : AIR 1976 SC 425 [LNIND 1975 SC 523] (SC), per Krishna Iyer J.

29 Government of India (2002), *Report of NCL-II*, Chap 13, pp 39-40.

30 *HD Singh v Reserve Bank of India* 1985 Lab IC 1733, 1738 : AIR 1986 SC 132 [LNIND 1985 SC 278] (SC), per Khalid J.

31 *Promer Sales Pvt Ltd v Manohar Sondhur* 1993 Lab IC 1762, 1766 (Bom), per Kantharia J.

32 *Govt of Tamil Nadu v TNRCGE Union* (1993) 1 LLJ 977 (Mad) (DB), per Abdul Hadi J.

33 *P Rajeev v Karnataka SCC Ltd* (1992) 1 LLJ 217, 222 : 1990 (3) ar LJ 1 (Kant), per Shivashankar Bhat J.

34 *Assn. of SRT Undertakings v Employees Union* 1986 Lab IC 1543 (Del), per Luthra J.

35 *Regional Manager, SBI v Raja Ram* (2004) 8 SCC 164.

36 *Regional Manager, SBI v Rakesh Kumar Tewari* AIR 2006 SC 839 [LNIND 2006 SC 6]: (2006) 1 SCC 530 [LNIND 2006 SC 6], per Ms Ruma Pal J.

37 *Hindustan Lever Ltd v IT* (2008) 1 LLJ 222 [LNIND 2007 ALL 39] : (2007) 7 AWC 7014 (All .), per Rajesh Kumar J.

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39 *Bhagaband Colliery v Workmen* (1962) 2 LLJ 356 [LNIND 1962 SC 244] (SC), per Mudholkar J.

40 *Bennett Coleman & Co Pvt Ltd v Punya Priya Das Gupta* (1969) 2 LLJ 554 [LNIND 1969 SC 150], 565-66 : AIR 1970 SC 426 [LNIND 1969 SC 150] (SC), per Shelat J.

41 *Algemene Bank v CGLC* 1978 Lab IC 47 (Cal), per Sabyasachi Mukharji J.

42 *Muir Mills Co Ltd v Workmen* (1960) 2 LLJ 586 [LNIND 1960 SC 112], 590-91 (SC), per Das Gupta J.

43 *Mc Leod & Co Ltd v Workmen* (1964) 1 LLJ 386 [LNIND 1963 SC 272], 387-88 : AIR 1964 SC 1449 [LNIND 1963 SC 272] (SC), per Gajendragadkar J.

44 *River Navigation Co Ltd v Employees* CA Nos 916 and 692 of 1965 (1967), per Subba Rao CJI.

45 *Remington Rand of India Ltd v The Workmen* CA No 856 of 1968 (1968) (SC), per Shelat J.

46 Ibid, connected with CA No 2119 of 1969.

47 *Statesman Ltd v Workmen* (1976) 1 LLJ 484 [LNIND 1976 SC 5], 488 : AIR 1976 SC 758 [LNIND 1976 SC 5] (SC), per Krishna Iyer J.

48 *Workmen of Calcutta Port Commrs v CP Commrs* CA No 973 of 1966 (1969) (SC), per Vaidialingam J.

49 *Chandramalai Estate v Workmen* (1960) 2 LLJ 243 [LNIND 1960 SC 107] : AIR 1960 SC 902 [LNIND 1960 SC 107] (SC), per Das Gupta J.

50 *DCM Chemical Works v Workmen* (1962) 1 LLJ 388 [LNIND 1962 SC 97], 399 : [1962] Supp 3 SCR 516 (SC), per Wanchoo J.

51 *Remington Rand of India Ltd v Workmen* (1968) 1 LLJ 542 [LNIND 1967 SC 225] : AIR 1968 SC 224 [LNIND 1967 SC 425] (SC), per Mitter J.

52 *Mgmt. of Kirloskar Electric Co Ltd v Workmen* (1973) 2 LLJ 305 [LNIND 1973 SC 201] : AIR 1973 SC 2119 [LNIND 1973 SC 201] (SC), per Grover J.

53 *Statesman Ltd v Workmen* (1976) 1 LLJ 484 [LNIND 1976 SC 5], 488 : AIR 1976 SC 758 [LNIND 1976 SC 5] (SC), per Krishna Iyer J.

54 *Rohtas Sugar Ltd v Mazdoor Seva Sangh* (1960) 1 LLJ 567 [LNIND 1960 SC 39], 569-71 : AIR 1960 SC 671 [LNIND 1960 SC 39] (SC), per Das Gupta J.

55 *Basant Kumar Sarkar v Eagle Rolling Mills Ltd* (1964) 2 LLJ 105 [LNIND 1964 SC 52] (SC), per Gajendragadkar CJI.

56 *Nawabganj Sugar Mills Co Ltd v Workmen* (1964) 1 LLJ 750 [LNIND 1963 SC 309] (SC), per Wanchoo J.

57 *Delhi Cloth & General Mills Co Ltd v Workmen* (1964) 1 LLJ 55, 59 (SC), per Das Gupta J.

58 *BP Hira (WM, Central Rly) v CM Pradhan* (1959) 2 LLJ 397 [LNIND 1959 SC 107] (SC), per Gajendragadkar J.

59 *Karam Chand Thapar & Bros Ltd v Workmen* (1964) 1 LLJ 429 [LNIND 1963 SC 178], 434-35 (SC), per Das Gupta J.

60 *Workmen of Jessop & Co Ltd v Jessop & Co Ltd* (1964) 1 LLJ 451 [LNIND 1963 SC 179], 454-55 (SC), per Wanchoo J.

61 *Indian Oxygen Ltd v Workmen* 1969 Lab IC 467, 472-73 (SC), per Shelat J.

62 *Workmen of Calcutta Electric Supply Corpn Ltd v CESC Ltd* (1973) 2 LLJ 258 [LNIND 1973 SC 179] : AIR 1973 SC 2143 [LNIND 1973 SC 179] (SC), per Mukherjea J.

63 *Engineering Mazdoor Sabha v Shaparia Dock & Steel Co Ltd* (1957) 1 LLJ 324 (LAT).

64 *Burn & Co Ltd v Workmen* (1959) 1 LLJ 450 [LNIND 1958 SC 174], 459 (SC), per Imam J.

65 *State Bank of Hyderabad v VA Bhide* (1969) 2 LLJ 713 [LNIND 1969 SC 181] : AIR 1970 SC 196 [LNIND 1969 SC 181]: (1969) 2 SCC 491 [LNIND 1969 SC 181] (SC), per Vaidialingam J.

66 *Reserve Bank of India v RBI Staff Officers Assn,* AIR 1992 SC SC 485 : (1991) 4 SCC 132 [LNIND 1991 SC 361] (SC), per Kania J.

67 *Union of India v Mohd Haroon Rashid 1995 Lab IC* 1634 (SC).

68 *Gramphone Co Ltd v Workmen* (1964) 2 LLJ 131 [LNIND 1964 SC 114], 138 (SC), per Wanchoo J.

69 *Union Bank of India v SS Dhaliwal* 1980 Lab IC 26 (Del) (DB), per Prakash Narain J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER I Preliminary

S. 2. Definitions.—

(ix) Moving Staff Allowance:

In *Remington Rand*, the workmen employed in the Eranakulam branch of the company, demanded that those workmen who were deputed on tout, on the company's work, should be given a day off if they had to travel two nights consecutively. A further demand was made that the travelling staff should be paid overtime for the work done on holidays while on tour, at double the normal wages for the day. The tribunal, on examining a mechanic who used to go on tours, found that the jurisdiction of the Ernakulam branch was limited to the districts of Trivandrum, Quilon, Alleppey and Kottayam and that even if he was forced to work on holidays, he was given over-time wages. But in spite of these findings, it held that it was only just and reasonable that the touring mechanics should be given a day off, if they travelled on two consecutive days, for reaching a place of work and also an overtime at double the rate, for the work done on holidays. In appeal against the award of the tribunal, by the employer, the Supreme Court observed that, in view of the limitation as to the jurisdiction of the branch noted above, the occasion for a mechanic spending two consecutive nights for reaching a place of work, will arise very seldom and if such an occasion does arise, there was no reason why a workman should not get the overtime wages as awarded by the tribunal.[70] Project allowance paid to the employees falls within the definition of 'wages' in s 2(rr), and any reduction of the said allowance amounts to change in the conditions of service in terms of s 9A of the Act.[71]

(x) Key Allowance:

In *Indian Overseas Bank*, a key allowance was paid to its cashiers from 15 September 1958, but it was discontinued after the Desai Award, with effect from 1 December 1962. On a dispute being raised with respect to the stoppage of the allowance to the head cashier of the Chandni Chowk, Delhi branch of the bank, the tribunal found that the key allowance was not a part of the benefits under the Shastri Award and it was introduced as a result of a separate agreement between the bank and the head cashier. In view of the fact that the key allowance was a term and condition of employment of the head cashier, it was held that the bank could not discontinue the allowance, except after following the procedure laid down by s 9A of the Industrial Disputes Act and r 34 of the Industrial Disputes (Central) Rules 1957. Since that procedure had not been followed, the key allowance was payable from 1 December 1962, till such time when it could be said to be legally discontinued. Affirming the award of the tribunal, the Supreme Court observed that the key allowance was payable even after the Desai Award, as the correct procedure was not followed by the bank while discontinuing the allowance.[72]

(xi) Vacation Allowance:

In *Polychem*, the industrial tribunal allowed the demand of the workmen of the company, claiming a vacation allowance for the workmen, at the same rate as was granted to the higher staff of the company, both at the head office and at its Chembur plant. This award was challenged by the company before the Supreme Court, on the ground that there was no evidence in support of the conclusions arrived at by the tribunal and that it proceeded on grounds which were irrelevant and contrary to the settled principles relating to the adjudication of industrial disputes. Furthermore, nowhere in the region, was the vacation allowance granted in similar industries and thus, there was no comparable instance. It was further pointed out that the workmen in the establishment, were getting various other amenities, like dearness allowance, according to the

revised textile rates, overtime wages, lunch allowance (not allowed to officers), gratuity, uniforms and medical facilities. It was, therefore, urged that the real criterion should have been the overall pay structure of the workmen, in the light of the standard prevailing in similar industries in the same region and the mere capacity of the employer to pay, should not be the sole criterion. In the circumstances of the case, the court took the view that the tribunal committed a serious error in not considering the other allowances and other amenities allowed to the respondent workmen and comparing their total wage-packet, with the total wage-packet, of those employees to whom the allowance in question had been allowed, when determining this question, and the question in issue was virtually decided exclusively, on the basis that the employer had the financial capacity to stand the burden of such allowance being granted to the workmen, at the same higher rate slab, with the same conditions. The court observed:

> The difference between the amenities allowed to the workmen and to the staff to whom the vacation allowance is granted, must, in law and justice, be looked into and the question then decided, whether or not the present workmen's demand is justified. The principle of region-cum-industry has no doubt to be kept in view, but then the comparable industries in the region have to be considered from all the relevant aspects which have been laid down by this court in various decisions...But to what extent that should weigh with the tribunal is for the tribunal to decide in the light of all the relevant circumstances. The total wage packet of the various categories of employees in the appellant's industry itself, including the question of their nature of duties and functions, however, deserves to be given primary importance so that there is no reasonable chance of heart-burning and discontentment amongst the different categories of workmen, on account of the differential treatment which, though seemingly justifiable, may, in real effect, be discriminatory. The importance of appropriate standardisation of wages in the appellant-industry, on a proper consideration of the duties and functions of the different categories of employees, must be kept in view in deciding the present dispute.[73]

In *Shaw Wallace*, the award of the tribunal, with respect to an yearly travelling allowance, maintaining the rate of train fare as agreed between the parties, but with the modification that a workman who is visiting his home town or village, shall be entitled to an actual class 2 train fare for the outward and return journey for himself, his wife and dependent children, once a year, was upheld by the Calcutta High Court. The court observed that the additional benefit conferred on the workman was, as a matter of fact, a bare necessity, considering the rising prices, the cost of living index and considering the fact that an annual holiday is required for the purpose of a proper and efficient discharge of his duty by a workman.[74]

(xii) Education Allowance for Employees' Children:

In *Hindustan Aeronautics,* the workmen of the company, employed in their Barrackpore branch, engaged in repairs of aircrafts, claimed an allowance for the education of their children, on the basis that education facilities were available to the workmen at Bangalore. On the other hand, the employer company pleaded that certain educational facilities were given to the employees living in the township of the company at Bangalore, but not to those living in the city of Bangalore and the workmen working at Barrackpore had also been provided with certain educational facilities. The tribunal directed the employer company to pay Rs 12 per month, to each employee, to meet the educational expenses of their children, irrespective of the number of children a particular workman may have, despite the fact that, strictly speaking, the claim for the education allowance, could not form the subject-matter of the industrial dispute in question. The award of the tribunal was set aside by the Supreme Court, holding that in substance and in effect, the direction given by the tribunal in this connection, was by way of a revision of the wage-structure of the employees and it was beyond the scope of the issue referred for adjudication, as no such reference was either asked for, or made.[75]

Sub-clause (i) - Dearness Allowance:

Dearness allowance has been comprehended in the definition of, wages', by the inclusive cl (i). It is the additional payment made by an employer to his employees, to compensate them to a certain extent, for the rise in the cost of living.[76] The process of the rise in prices continues with the passage of time and the improvement in economic conditions. Even a fair wage, fixed for the time being, tends to sag downwards and adjustments in wage levels becomes necessary. To a certain extent, the disparity is made up by the payment of the dearness allowance. In *Hindustan Antibiotics*, the award of the tribunal merging a portion of DA with the basic wage and linking the balance to the cost of living was challenged on the ground that it amounted to granting Dearness Allowance on Dearness Allowance. Repelling the contention, Subba Rao, CJI rightly observed:

> "The doctrine of dearness allowance was only evolved in India. Instead of increasing wages as it is done in other countries, dearness allowance is paid to neutralise the rise in prices. This process was adopted in expectation that one day or other we would go back to the original price levels. But, when it was found that it was only a vain hope or, at any rate, it could not be expected to fall below a particular mark, a part of the dearness allowance was added to the basic wages, that is to say, the wages to that extent were increased. While the Tribunal increased the wages, in fixing the dearness allowance, it looked into the overall picture,

> namely, whether the total wage packet would approximate to the total packet of wages in comparable industries. There is no question, therefore, of paying dearness allowance on dearness allowance, but it was only a payment of dearness allowance in addition to the increased wages. Even on the basis of the increased wages, dearness allowance was necessary to neutralise the rise in prices. That is exactly what the Tribunal has done."[77]

In the words of Desai J:

> Dearness allowance is directly related to the erosion of real wages by the constant upward spiralling of the prices of basic necessities and as a sequel to the inflationary input, the fall in purchasing power of the rupees...Dearness allowance is inextricably intertwined with price rise, it being an attempt to compensate loss in real wages on account of price rise, considered as a passing phenomenon, by compensation. That is why it is called variable dearness allowance...Dearness allowance, by its very form and name, has an intimate relation to the prevailing price structure of basic necessities at the centre in which the workman is employed.[78]

The system of dearness allowance as a separate component of wages, in contradistinction to the 'basic wage', is a special feature, peculiar to India. To a certain extent, it is also prevalent in some Asian countries. But in the industrialised countries, wages themselves are adjusted to neutralise the increase in the prices and the rise in the cost of living. In the United States of America, Belgium, Denmark and Italy, the 'escalator clauses', which are somewhat similar to linking the total wage to the index, are common. In some agreements in the United States, another device, known as the 'wage reopening clause', has been used. In this system, all other clauses remain undisturbed, except the one which relates to wages, which can be reopened even during the pendency of the contract. This system is prevalent in Norway and Sweden as well. In some Asian countries, systems somewhat similar to the 'dearness allowance' in India, are in vogue. For instance, in Ceylon, there are several allowances, such as, 'cost of living allowance', 'rent allowance' and 'special living allowance', which have the same effect as the 'dearness allowance' in India. A somewhat similar system is prevalent in Pakistan also. In Japan, wages include a cost of living allowance and rent allowance. The NCL-I observed:

> ...while some form of relationship between wage levels and cost of living increase is preferred, the form of the relationship varies. While the predominant pattern appears to be the adjustment of the wages as a whole, the practice of keeping the compensation for price increase as a separate element, also exists; both arrangements have their own advantages and disadvantages. The main advantage claimed for the latter is its flexibility...while wage rates cannot be brought down because of a fall in prices, the dearness allowance, if kept as a separate element, can. The system can also be designed to reduce the time-lag between the price increases and the payment of compensation therefor. The opposite view is that the way the system has operated all these years, has resulted in a complete distortion of the wage-structure, with the dearness allowance portion, in certain areas, being several times the size of the basic wage. This may have an adverse repercussion on incentives and productivity. The system of DA, as it has evolved in this country, may, under certain circumstances, add to the inflationary tendencies.[79]

In India, with the rise of prices during the first world war, there started a clamour in different industries and different centres, to secure compensation for the rising prices of commodities. In Ahmedabad, the demand led to the epic fast of Mahatma Gandhi and it succeeded in securing for workers, the principle of protecting their real wage in the event of a substantial rise in the prices. This compensation, presently termed as 'dearness allowance' (DA), was, at some centres, called 'dear-food allowance' (to emphasise its food component) in the early stage of its being recognised as a separate component of the remuneration for work. In the inter-war period, and particularly during recession, these allowances were adjusted, taking into account the lower price level. The practice of paying a 'dearness allowance', as distinct from the 'basic-wage', had these early beginnings.[80] The outbreak of the second world war ruptured the relationship between the wages and the price-line, which, in its train, brought a spate of industrial disputes in perhaps, all the industrial centres in the country. Consequently, a compensation for the increase in the prices was sought to be secured during this period, through the machinery of industrial adjudication, set up for the settlement of such disputes. Dearness allowance was primarily intended to be a temporary expedient and was sought to be made as a protection to those who had no cushion at all, in their wage-packet, in the face of an appreciable rise in prices. Some relief was given to others as well. The price indices have now assumed menacing figures. This is the stark reality of the situation and any problem regarding wages or dearness allowance has to be considered in that background; at the same time, not losing sight of the national economy.[81] In other words, dearness allowance was intended as the protection of persons whose salaries were at the subsistence level, against the adverse effects of a rise in prices.[82] In the language of Ahmadi J:

> The concept of dearness allowance, the second most important element in a worker's wage-plan, next to the basic wage, was introduced during the second world war, to meet the increase in the cost of living caused by inflation. It was either linked to the

> cost of living index or was given by way of a flat increases. When linked to the former, it was granted to all the income groups at a flat rate or was graded on a scale admissible to different income groups, diminishing with the rise in the income. Basically, the concept of dearness allowance was designed to combat inflation and protect real wages and therefore, it would appear that there should be cent per cent neutralisation. This is a concept peculiar to India, Ceylon, Pakistan and Bangladesh.[83]

The Commission on Dearness Allowance, in May 1967, stated that historically, dearness allowance was regarded as applicable to those employees whose salaries were at the subsistence level or a little above, in order to enable them to face the increase in the dearness of essential commodities. Industrial adjudication introduced a system of 'dearness allowance', to supplement the wages of workmen, for neutralising the rise in the prices, in the expectation that one day or the other, prices will go back to the original level, based on the assumption that the increase in the living costs was a phenomenon of a temporary character and 'the expectation was that such allowance would be adjusted downwards and would eventually disappear'. But the hope that the prices will decline, never came true and 'dearness allowance' has, therefore, come to stay. On realizing that the price level could not be expected to rail beyond a particular mark, a part of the 'dearness allowance' was added to the 'basic wages', that is to say, the wages, to that extent, were increased.[84] According to one estimate, nearly two thirds of the industrial working force is now being compensated on this basis. Thus, the prevalent system of 'dearness allowance', originating as a protection against a fall in the real wages and temporary in character, has come to stay as a part of the total wage structure.[85] Even on the basis of the increased wages, dearness allowance still became necessary to neturalise the rise in prices with the passage of time. Dearness allowance has thus, continued, for fuller neutralisation of the rise in the cost of living, as a result of the ever rising price-line of commodities. In the last thirty years, besides industrial tribunals and the Supreme Court, it has been discussed and accepted by various bodies. [86] Historically and by the industrial texts as well as by the observations of various commissions and committees, dearness allowance was regarded as applying to those employees whose salaries were at the subsistence level or a little above it...in order to enable them to face the increasing dearness of essential commodities. The Government of India also set up a number of wage boards for determining the terms of employment in several industries and such wage boards have generally sought to keep the 'dearness allowance' as a separate component of the wages, though some of them have recommended the merger of a substantial part of it, with the basic wage. A tripartite meeting over the last 20 years, also felt the same way. On account of the ephemeral nature of the price line, the system of dearness allowance cannot be constant and it varies from time to time, centre to centre, and from industry to industry, within the same centre. In the language of Goswami J:

> Like all changes in life and in a continuous march towards progress of society, the concept of dearness allowance also may change to take in a wider range of commodities and services, to make life worth living as far as practicable, subject to the compelling limitations of general interest... the old definition of dearness allowance may not even serve the climate of the new aspirations of various classes of employees of this vast country. Luxuries of yesterday may be the comforts of today and necessities of tomorrow. The economic solution must reckon the turn-abouts in social urges. Because even the worm turns. Industrial adjudication, which has not the limitations of the ordinary courts, has to respond to the needs of the changing society and it may be possible to widen the scope of dearness allowance, if that serves the cause of general welfare. There may be no inexorable rule, tying down economic existence to a definition of bygone days, if unsuitable or irrelevant in the context of the times.[87]

In some cases, a flat rate of dearness allowance has been made applicable to all the employees, irrespective of their wages, while in other cases, it has varied according to the wage or salary slabs. A graded percentage, linked to the wages or the salaries, has also been linked to the working class consumer price index. This resulted in a variety of systems, with dearness allowance linked to the index emerging dominant. The system of dearness allowance, as it has been evolved in this country, may, under certain circumstances, add to the inflationary tendency. The NCL-I has considered these issues and felt that the changes in money wages should be associated with the corresponding changes in the cost of living and that, without such adjustment, the real wages would be eroded. In view of the fact that the system of dearness allowance has come to stay in this country and, as in most of the cases, it is linked to the index, the commission has discussed the issues arising out of such linkage in some detail, in its report.[88] Since the object of dearness allowance is to neutralise the rise in the cost of living, it would not be proper to adopt an academic or doctrinaire approach to the problem. In considering the problem, industrial adjudication has necessarily, to adopt a pragmatic approach in fixing the dearness allowance and has to take care and see that the legitimate demand of the employees is met without doing any injustice to the employer and without acting unfairly to him.[89] Desai J notes:

> It is, by now, well-settled that dearness allowance to workmen at a particular place should depend upon the place, where the workmen are working, irrespective of the fact that the industrial undertaking in which they are employed, is a unit of an industrial enterprise, having an all India or inter-state operation.[90]

Dearness allowance, therefore, has to be fixed after taking into account, the total emoluments or the total wage-packet of the workers, *viz*, wages, production or incentive bonus, the existing dearness allowance, if any, and the value of other amenities, like concessional food, quarters, water and light etc.[91] In *Wenger & Co* (supra), though the Supreme Court did not treat the tips received by the bearers in a restaurant, as a substitute, wholly or partially, for dearness allowance, nor treated them as a payment made by or on behalf of the employers, it took into account a certain minimum of such tips in determining the quantum of the dearness allowance, at a flat rate. In *Rambagh Palace Hotel*, the court observed that the proper approach for the tribunal is to bear in mind the fact that tips are received, and make some suitable adjustment in that behalf. The court reiterated that the receipt of tips by the staff is not anything like a payment made by the management to its employees, warranting consideration by the tribunal, to depress the award of dearness allowance, though it is a factor which may, perhaps, be borne in mind by the tribunal while finalising the actual figures of dearness allowance.[92] In *Bengal Chemicals*, the following guidelines were laid down:

1. Full neutralisation is not normally given, except to the very lowest class of employees.
2. The purpose of dearness allowance being to neutralise a portion of the increase in the cost of living, it should ordinarily, be on a sliding scale and provide for an increase on the rise in the cost living and a decrease on a fall in the cost of living.
3. The basis for the fixation of wages and dearness allowance should be industry-cum-region.
4. Employees getting the same wages, should get the same dearness allowance, irrespective of whether they are working as clerks, members of subordinate staff for factory workmen.
5. The additional financial burden which a revision of the wage structure or dearness allowance would impose upon an employer, and his ability to bear such burden, are very material and relevant factors to be taken into account.[93]

(i) Financial Capacity of the Employer:

By and large, the same principles govern the adjudication of wages and of dearness allowance. Hence, where dearness allowance is to be awarded to supplement the basic-wage, which is below the minimum wage or subsistence wage, the capacity of the industry or the employer to pay, is irrelevant.[1] But, in other cases, the financial capacity of the industry, the employer or the establishment, as the case may be, to pay, is a material factor to be taken into consideration in awarding dearness allowance.[2] In *Millowners Assn*, the Supreme Court emphasised that in trying to recognise and give effect to the demand for a fair wage, including the payment of dearness allowance, to provide for an adequate neutralisation, industrial adjudication must always take into account the problem of the additional burden which such wage structure would impose upon the employer and ask itself, whether the employer can reasonably be called upon to bear such burden.[3] In *Filmistan*, the court reiterated that the tribunal...must examine the facts and figures relating to the financial position of the establishment concerned, compare the said position with the financial position of comparable concerns, and inquire what would be the total impact of the additional burden of the revised wage structure'. In other words, while considering the claim for dearness allowance, industrial adjudication has to consider, whether an employer is capable of bearing the additional financial burden, which may have to be imposed upon it on account of the increase in the dearness allowance.[4] The financial capacity of the employer is a relevant consideration in this connection.[5] The failure of the tribunal to adopt such a course, would constitute a serious infirmity in its approach. Likewise, it is obligatory on the part of the tribunal, to determine the true financial position of the establishment and also the impact which the increase in the 'dearness allowance' would have on its financial resources. This principle consists of two parts, *viz*, (1) the capacity of the industry to pay, and (2) the financial burden that would result by any increase in the dearness allowance, which may be granted by the tribunal.[6] The burden of proof, however, is on the employer, to show by pleading and by adducing relevant evidence, that he has no capacity to bear the financial burden that the increase in the dearness allowance would cast on him.[7] If the employer fails to plead and establish by adequate and relevant evidence, that he has no financial capacity to bear the additional burden of the increase in the dearness allowance, before the tribunal, he cannot successfully assail the award on the ground of a want of the requisite financial capacity.[8] The Allahabad High Court held that the payment of dearness allowance, has a priority over income-tax and other reserves. Therefore, in considering the financial soundness of an undertaking, for the purpose of paying dearness allowance, the gross profits should be arrived at, without deducting the provisions for depreciation, taxation and reserves. Considerations for determining the net profits under the Income-Tax Act, for taxation purposes, are different from considerations of social justice, on which the payment of dearness allowance is based. A reserve may be liable to be deducted from the profit and loss account for the purpose of taxation, but it cannot have priority over the requirement of the payment of dearness allowance.[9]

No doubt, the financial capacity of the employer is an important factor in determining the ceiling on dearness allowance, but it cannot be made the sole criteria for the purpose.[10] The mere fact that a particular company is a member of the chamber of commerce, would not justify a claim by the workmen, as of right, or as a matter of course, for the scales of

'dearness allowance' to be at the level recommended by the chamber. In *Gujarat Electricity Board*, dealing with the demand for 'dearness allowance', the industrial tribunal held that the workmen, having failed to prove that the total wage packet, including the dearness allowance, fell below the minimum wage, the capacity of the electricity board to bear the burden of paying its employees, the enhanced dearness allowance, would be a relevant factor. In this view of law, the tribunal rejected the claim of the workmen for dearness allowance, because the board was already running at a heavy loss and would not have been able to meet the extra burden which would be imposed upon it if the dearness allowance, as claimed by the workmen, was allowed. The award of the tribunal was affirmed by the Supreme Court in appeal.[11]

In *Press Employees' Assn*, the dearness allowance paid by the company was held to be otherwise fair, the claim for an increase in the dearness. allowance, therefore, was negatived by the labour appellate tribunal.[12] In *Kapoor Silk Mills*, though the tribunal found that the financial position of the employer was not very re-assuring, it still awarded an increase in the dearness allowance. The award of the tribunal was quashed by the High Court, as there was nothing to show as to how the tribunal had come to the conclusion that the dearness allowance should be increased and in view of the fact that the tribunal had ignored the principles laid down by the Supreme Court in this behalf.[13] In *Ghaziabad Engineering*, the tribunal, in coming to the conclusion that the financial position of the company was sound, relied upon a news item published by a newspaper, that the company was importing new Russian tractors, even though the agency for selling the tractors of the company was in danger of being terminated on account of the State Trading Corporation taking over such agency. In appeal, the Supreme Court held that the news item was one of the circumstances which the tribunal took into consideration, along with the balance-sheet of the company, which showed that the agency was one of the many lines of business of the company and the closure of the agency would not affect the financial structure of the company seriously.[14]

In *Silk & Art Silk Mills*, the claim of the union for a hundred per cent neutralisation of the consumer price index in Bombay, was resisted by the employers' association, *inter alia*, on the ground that the demand was beyond the financial capacity of most of its member units, and furthermore, that the position of the industry was steadily deteriorating due to various reasons. But on the basis of the materials produced before it by the parties, the industrial court took the view, that the position of the industry in general, and the financial capacity of the employer units, in particular, was satisfactory, and granted a 99 per cent neutralisation of the rise in the Bombay consumer price index 106(o1d series), on the basis of a minimum basic wage of Rs 30 per month of 26 working days. In appeal by special leave, the Supreme Court affirmed the award, holding that the industrial court was fully aware of the nature of the demand and the extent of the burden which the employer units will have to bear and taking a broad and overall view of the financial position of the employer units into account, it had tried to reconcile the natural and just claims of the employees for a higher rate of dearness allowance, with the capacity of the employers to pay it and in that process, it had made allowance for the legitimate desire of the employer to make reasonable profits. It was observed, that what was really material in assessing the financial capacity of the employer units, in this context, was the extent of the gross profits made by them.[15] In *British India Corpn*, the award of the tribunal, enhancing the dearness allowance from 37 paise per point to 75 paise per point, was challenged on the ground that the employer company had been taken over by the Central Government as a sick unit and had suffered losses. It was further contended that even if there was no case to interfere with the award of the tribunal, looking into the financial situation of the employer, the court must grant some indulgence, by evolving some formula by which the employer is absolved of the liability to pay the balance of the arrears of the enhanced dearness allowance. The court declined to grant the indulgence, With the observation:

> It must be remembered that the dearness allowance hardly, if ever, keeps pace with the rise in the index. There is always a gap between the rise in the index and the related dearness allowance formula and also the fact that neutralisation never reaches cent per cent rise in prices and therefore, any tinkering with the dearness allowance formula would cause a dent in the otherwise uneconomic pay packets of these industrial workmen.[16]

(ii) Industry-cum-region Basis:

In the words of Desai J:

> In the matter of dearness allowance especially, the court should lean in favour of an adjudication of the dispute on the principle of industry-cum-region, because dearness allowance is linked to the cost of living index of a particular centre, which has a local flavour...A man is exposed to the vagaries of the market where he resides and works, even though he may be an employee of a national, multinational or trans-national industrial empire. The workman is concerned with the vagaries of price fluctuations in the area in which he resides and works for gain and to which he is exposed. Therefore, the region-cum-industry principle must inform industrial adjudication in the matter of dearness allowance...Realising this situation, courts have leaned in favour of the determination of dearness allowance as linked to cost of living index, if available, for the centre where the workman is employed, and in the matter of neutralisation, on the industry-cum-region principle.[17]

Note: *For a detailed discussion of this topic, see notes and comments under the head 'Adjudication of wage fixation'.*

In revising the scales of the dearness allowance payable to the workers, the tribunal has to take into account, the total pay packet of similarly placed categories of workmen in another similar company and the same should be made, more or less, similar to each other. In this connection, what is relevant is not the years of service. The dearness allowance has to be fixed at any given point of time, on the basis of the basic wages and the slab and not on the basis of the years of service. If the same has to be fixed in comparison to another concern, for affecting the basic wage structure, the two extreme points in the two concerns have to be fixed. If the span of one is shorter than the other, there has to be some acceleration in between, so as to make the two wage structures, including all the allowances, more or less equal.[18]

(iii) Neutralisation of Increase in Prices:

The labour appellate tribunal took the view, that while awarding 'dearness allowance', cent per cent neutralisation of the price of cost of living should not be allowed, as it will lead to a vicious circle and will add fillip to the inflationary spiral.[19] This view was approved by the Supreme Court in *Calcutta Tramways,* where it observed that a distinction cannot be made in this respect, among the lowest paid employees, in the very lowest of manual labourers, whose income is just sufficient to keep body and soul together. It is impolitic and unwise to neutralise the entire rise in the cost of living, by a dearness allowance. More so, in the case of middle classes. The main consideration, so far as dearness allowance is concerned, is neutralisation of the cost of living and it matters not if the dearness allowance paid in all the industries in the area, is taken into consideration, for ascertaining what the correct dearness allowance ought to be for a particular concern.[20] The dearness allowance which is paid in all concerns, is after all, a reflection of:

(a) the capacity of the concern to pay; and

(b) the necessity for such payment, having regard to the rise in the cost of living.[21]

Wherever the facts justify, a higher dearness allowance should be granted, for a satisfactory neutralisation of the cost of living, in the interest of long-lasting industrial peace in the industry.[22] Besides, with the possibility of inflation in the future, another reason for not giving a cent per cent neutralisation is that the industrial workers are also expected to make some sacrifice, like other citizens.[23] The whole purpose of dearness allowance being to neutralise the portion of the increase in the cost of living, it should ordinarily be on a sliding scale and provide for an increase, on a rise in the cost of living and for a decrease, on the fall in the cost of living.[24] In considering the claim for a dearness allowance or for a revision of the dearness allowance, amongst other factors, it should be borne in mind that, (i) full neutralisation is not normally given, except to the very lowest class of employees and (ii) the purpose of dearness allowance being to neutralise a portion of the increase in the cost of living, it should ordinarily be on a sliding scale and provide for an increase, on the rise in the cost of living and for a decrease, on fall in the cost of living.[25] However, in so far as the lowest paid employees at or just above the subsistence level are concerned, they are entitled to a 100 per cent, or at any rate, not less than a 95 per cent neutralisation in the cost of living. Thus the ratio of neutralisation cannot be more than 100 per cent, even in the case of the lowest paid employees.[26] According to Sawant J:

> The neutralisation of the rise in the consumers price index, mayor may not mean the same thing as the neutralisation of the rise in the cost of living, depending upon the basket of goods and services which are taken into consideration for compiling the consumer price index and the income group whose cost of living is sought to be protected. The consumer price index which is used in industrial adjudication, for considering the rise or fall in the prices, for fixing the dearness allowance, is the consumer price index of the basket of goods and services consumed by the average worker. This consumer price index is known as the All India Working Class Consumer Price Index. The dearness allowance is paid to workmen of all establishments, on the basis of the rise and fall in this consumer price index. Further, as held by all the expert committees and commissions, the object of granting dearness allowance is to neutralise as nearly as possible, the rise in the consumer price index for the lowest paid workman or the minimum wage earner in any establishment and the percentage of neutralisation should go on declining on a sliding scale, with the higher wage groups. Although, therefore, theoretically, it is possible to contend...that the consumer price index does not necessarily indicate a rise and fall in the cost of living of all the sections of the workmen, for the purposes of industrial disputes, the wage authorities, committees and commissions have not so far favourably considered the idea of compiling different consumers price indices for different wage groups, and have, in fact, treated the concept of cost of living, synonymously with that of the consumer price index of the working class. In fact, they have, in terms, discouraged the idea of neutralising fully, the cost of living of workmen, save those at the minimum wage level.[27]

The NCL-I pointed out:

> ...the only purpose of dearness allowance is to enable the worker, in the event of a rise in the cost of living, to purchase the same amount of goods of basic necessity, as before. This purpose would be served by an equal amount of dearness allowance to all employees, irrespective of the differences in their emoluments.[28]

Hence, the commission recommended that a 95 per cent neutralisation should be granted against the rise in the cost of living, to those drawing minimum wage in non-scheduled industries. Neutralisation, at the best, may be such as to neutralise fully, the increase in the cost of living or, it may be restricted to neutralising only a portion of the increase. Full or cent per cent neutralisation can be achieved if the increase in the cost of living is fully compensated, so that the pay of the worker is not adversely affected. But an award of more than a 100 per cent of the increase in the cost of living, would be more than a neutralisation and would, in fact, give the worker an increased wage. The result would be that the worker would be getting an increased wage-packet, whenever there is a price rise, a result which would not have been envisaged while making the provision for the grant of dearness allowance.[29] The commission, therefore, was reluctant to recommend the same rate for workers in higher wage groups, for fear that it may spark off inflationary trends. In *Hindustan Lever*, Ahmadi J, who delivered the opinion of the court, observed:

> Normally, such a dearness formula suffers from two drawbacks, (i) it has the pernicious effect of distorting the wage-structure and (ii) it results in a sharp erosion of the real income, particularly of those in the higher wage groups. Generally speaking, the distortion of the wage-structure takes place because employees in different pay scales, are granted dearness allowance, not at a uniform rate, but at a tapering rate, ie, the workers in the lower scales getting a higher neutralisation as compared to those in the higher pay brackets, in whose case the neutralisation percentage diminishes with the rise in the basic wage. That is because it is believed that those in the higher pay brackets have a cushion to absorb the brunt of inflation.[30]

In *Silk and Art Silk Mills*,(supra), the Industrial Court granted dearness allowance at the rate of 99 per cent neutralisation of the rise in the Bombay CPI on the basis of the minimum basic wage of Rs 30 per month of 26 working days. In appeal, the Supreme Court held that the award was correct and the industrial court was justified in relying on these documents for finding the trend or the norms in the region, as regards the extent of neutralisation payable for the lowest paid employees. The court observed:

> The question of the extent of neutralisation to the workmen in the units, does not depend solely upon the fact whether neutralisation to that extent, has been allowed to the employees in comparable concerns in the same industry, in the same region. Much distinction cannot be made in this respect, among the lowest paid employees in the region, merely because some of them are employed in other industries.

In *Killick Nixon* (supra), the Supreme Court candidly pointed out that the lowest paid employees and those above the subsistence level, were entitled to a 100 per cent, or at any rate, not less than a 90 per cent neutralisation of the rise in the cost of living and declined to put any ceiling on dearness allowance payable to employees within the slab of the first Rs 100, unless it could be shown by the management, that the rate of neutralisation in their case, was more than 100 per cent. With respect to the other employees, it was left to the tribunal to consider the question, having regard to the principles laid down by the court in this connection, as to whether a ceiling should be imposed or not. In *SCVKUSM Ltd* (supra), a neutralisation of the variable dearness allowance, at 125 per cent was awarded. In *Mazgaon Docks* (supra), Sawant J held:

> One thing, therefore, is certain, that the trend, beginning from the Third Pay Commission, is in favour of the view that the object of the dearness allowance is to prevent the erosion of real income, and not merely to protect the consumption basket of essential goods and services, against the price rise. The Fourth Pay Commission and the High Power Pay Committee have, as pointed out earlier, felt the need to protect the monthly basic pay up to Rs 3,500 of the government employees, fully. Whatever the view, therefore, with regard to the object of dearness allowance, that one may accept, it can safely be concluded, on the authority of these expert government panels, that the rise in the cost of living up to the basic pay of at least Rs 3,500 per month, needs to be neutralized to the extent of 100 per cent. As observed by the High Power Pay Committee, the consumption basket, which is the basis of the All India Consumer Price Index, is not relevant up to the said basic pay range. It is also to be noted that these expert panels have afforded a substantial protection even to the monthly incomes above Rs 3,500, by recommending 75 per cent and 65 per cent of neutralisation to incomes between Rs 3,500 to Rs 6,000 and above Rs 6,000 respectively.

(iv) Ceiling on Dearness Allowance:

In *Killick Nixon*, the Supreme Court held that the removal of the ceiling on dearness allowance would not be justified, as the company had made out a case for an imposition of a ceiling. The court indicated the following important factors, which the adjudicator should bear in mind while deciding the question of ceiling on dearness allowance:

(1) Condition of the wage-scales prevalent in the company.

(2) Condition of the wage level prevalent in the industry and the region.

(3) The wage packet as a whole, of each earner in the company, with all amenities and benefits, and its ability and potency to cope with the economic requirements of daily existence, consistent with his status in society, his responsibilities, efficiency at work and with industrial peace.

(4) The position of the company viewed in relation to other comparable concerns in the industry and the region.

(5) Peremptive necessity for a full neutralisation of the cost of living, at the rock-bottom of the wage-scale, if at or just above the subsistence level.

(6) The rate of neutralisation which is being given to the employees in each salary slab.

(7) Huge distortion of wage differentials, taking into reckoning, all persons employed in the concern, should be avoided.

(8) Degree of sacrifice necessary, even on the part of the workers, in general interest.

(9) The compulsive necessity of securing social and distributive justice to the workmen.

(10) Capacity of the company to bear the additional burden.

(11) Interest of national economy.

(12) Repercussions in other industries and the society as a whole.

(13) The state of the consumer price index at the time of the decision.

(14) Forebodings and possibilities in the foreseeable future, as far as can be envisaged.

The court further observed:

> It will always be a delicate task for the tribunal to strike a balance, keeping in view the above principles, weightage to each one of which being variable, according to the conditions obtaining. Whether or not there should be a ceiling on dearness allowance in a given case, must depend on the facts and circumstances of that case. There can be no inexorable rule in that respect.

In *Indian Hume Pipe*, speaking for the court, Khalid J, pointed out:

> A close study of the *Killick Nixon* case will bear out, that this court did not lay down that in all cases, the slab system of dearness allowance should be abolished or done away with, to the detriment of the workers. All that this court held in that case was that the employer having made out a case for putting a ceiling on dearness allowance, it was for the tribunal to decide at what particular amount there should be a ceiling on dearness allowance...Thus, the ratio of that case cannot be extended to every case, to interfere with the DA scheme, which is beneficial to the workmen.[31]

In this case, the court set aside the award of the industrial tribunal, that the employer was justified in substituting the slab system of dearness allowance with the revised textile scale of dearness allowance for workmen, affording a 115 per cent neutralisation, with the observation that the theory of a ceiling on the quantum of dearness allowance cannot be accepted, since, under the prevailing conditions, there is no control over the prices of essential commodities and as such, a ceiling would not give a sufficient cushion when prices of essential commodities continuously rise. It is thus evident that the observations in this case too, are not intended to lay down any proposition of law, but are restricted to the facts of the case. It was pertinently pointed out by the court, that if there is material to show that the dearness allowance system adopted by a company, had become 'improper' or unscientific, because the workmen were getting a fantastic amount of dearness allowance, a departure from the existing slab system could be envisaged; the court, therefore, not only approved the ratio of *Killick Nixon*, but further held that if the employer had made out a case for putting a ceiling on the dearness allowance, it was for the tribunal to decide as to at what particular amount, there should be a ceiling on the dearness allowance.

The Bombay High Court, in negatived the demand of the employer, to change the existing basis for neutralisation of living index, by adopting the neutralisation rate giving lesser benefits to all workmen, uniformly, including the clerical and subordinate staff, without linking it to their basic pay. Speaking for the court, Sawant J observed that in dealing with the question of replacement of the existing system, the first thing the adjudicator is required to consider is, whether the system which is sought to be introduced is more or less beneficial to the workmen, compared to the existing one. If it finds that the new system is less beneficial than or deprives the workmen of the benefits available in the existing system, it has to keep its hands off the new system, unless of course, there are compelling reasons to do so. Any considerations, such as a uniformity with other concerns, is not relevant for downgrading the existing benefits, which would have been in existence for about 40 years. Though the court set aside the award of the tribunal, replacing the existing system of dearness allowance with the new one, it remitted the matter to the tribunal for fresh consideration, in the light of the distortions and disparities in the wage packets of the workmen and their superior officers and the financial capacity of the company to bear the burden of the dearness allowance, because these facts have to be established by applying the relevant tests in this connection.[32] In *Hindustan Lever*, the facts disclosed that the claim of management for a ceiling on DA was accepted by the tribunal, which passed an order fixing a ceiling on a basic pay exceeding Rs 500 per month. The award of the tribunal was challenged by the union as well as the management in the High Court of Bombay. A single judge upheld the award, which was reversed by the Division Bench. The Division Bench was of the view that the prevailing dearness allowance system did not result in an over-neutralisation of the cost of living index at any level of income group and had maintained a tapering scale, though not a steeply declining one. And the system also did not result in the distortion of the total incomes, either of the workmen *inter se*, or between the workmen and their superiors, namely, the executive staff. Upholding the decision of Division Bench in a Special Leave Petition, Ahmadi J, observed:

> As is so well-known, wages are among the major factors in the economic and social life of the working classes. Workers and their families depend almost entirely on wages, to provide themselves with the three basic requirements of food, clothing and shelter. The other necessities of life, like children's education, medical expenses, etc, must also come out of the emoluments earned by the bread-winner. Workers are therefore, concerned with the purchasing power of the pay-packet they receive for their toil. If the rise in the pay-packet does not keep pace with the rise in the prices of essentials, the purchasing power of the pay-packet falls, reducing the real wages, leaving the workers and their families worse off. Therefore, if on account of inflation, prices rise while the pay-packet remains frozen, real wages will fall sharply. This is what happens in periods of inflation. In order to prevent such a fall in real wages, different methods are adopted to provide for the rise in the prices. In the cost-of-living sliding scale systems, the basic wages are automatically adjusted to price changes shown by the cost of living index. In this way, the purchasing power of the workers' wages is maintained to the extent possible and necessary. However, leap-frogging must be avoided.[33]

(v) Cost of Living Index and Consumer Price Index:

In India, a standarised type of family-living study was first initiated in Bombay in 1921. Such inquiries were also conducted in some centers in Bihar in 1923, in Sholapur in 1925 and in Ahmedabad in 1926. While reviewing the position of social surveys in India, the Royal Commission on Labour pointed out the great paucity of statistical material in this country, for judging the standard of living of the workers and recommended the conduct of socio-economic inquiries of the type of family living surveys. This report naturally gave an impetus to the conduct of family budget inquiries. In all the surveys that followed, sampling and interviewing techniques were adopted, though, of course, not of a such an advanced nature. A statistical analysis of the data collected was also attempted.[34]During the second world war, the Government of India appointed the Rau Court of Inquiry, constituted under the Trade Disputes Act 1929. The commission, *inter alia*, recommended that the Central Government should take up the responsibility for maintaining an up-to-date cost of living index number, for important areas and centres. The government accepted this recommendation and set up a special organisation called 'The Directorate of Cost of Living Index Numbers', and family budget inquiries among industrial workers were conducted at 28 centers during 1944-45, in the course of which, 2700 budgets were collected. A significant feature of these inquiries was that for the first time in this country, an attempt was made to conduct such inquiries simultaneously, at a large number of centres, under more or less uniform techniques. During the same period, the Labour Bureau of the Government of India and some of the organisations of the state governments, continued to conduct family budget inquiries from time to time, at specific areas or centres, either for deriving weighing diagrams for consumer price index numbers, or for collection of data required for fixation of minimum wages. In the background of these events, the Second Five Year Plan made the following noteworthy recommendations:

> The existing wage structure in the country comprises, in the main, of a basic wage and a dearness allowance. The latter component in a majority of cases, has relation to cost of living indices at different industrial centres. These indices have not been built up on a uniform basis; some of them are worked out on primary data, collected about 20 to 25 years ago and are, therefore, not a true reflection on the present spending habits of workers. Since one of the questions which the wage commission will have to take into

> account is the demand made by the workers' organisations, for merging a part of the dearness allowance with the basic wage, evolving recommendations for such a merger, will not be sufficiently scientific, if the cost of living indices at different centres, do not have a uniform basis. Steps will therefore, have to be taken simultaneously, with the undertaking of a wage census, to institute inquiries for the revision of the present series of cost of living indices at different centres.[35]

Pursuant to the above recommendation in the Second Five Year Plan, the Labour Bureau, Ministry of Labour and Employment, Government of India, conducted a family living survey in 1958-59. The survey was based on the co-operation of several institutions and its technical details were worked out under the guidance of a technical advisory committee on the cost of living index numbers, consisting of the representatives from the Ministry of Labour Employment, Food & Agriculture, Finance, Planning Commission, The National Sample Survey Directorate, The Department of Statistics (CSO), the Indian Statistical Institute and the Reserve Bank of India. The field work was entrusted to the Directorate of National Sample Survey, and the processing and tabulation of the data collected in Sch A (family budget), to the Indian Statistical Institute, Calcutta. The tabulation of the data collected under Sch B, which dealt with the level of living, was done in the labour bureau. It was a multi-purpose survey, and so, the investigation conducted under it, covered both the family budget and the level of living. The ultimate analysis of the data, publication of reports on the results of the surveys and construction and maintenance of new series of consumer price index numbers, were the responsibilities of the labour bureau.

The first thing the organisation did was to define a 'working class family', which was the basic unit of the survey. It was defined in terms of sociological and economic considerations, as consisting of persons: (i) generally related by blood and marriage or adoption; (ii) usually living together and/or served from the same kitchen; and (iii) pooling a major part of their income and/or depending on a common pool of income, for a major part of their expenditure. The geographical area to be covered during the survey, was decided in consultation with the local organisations, both official and non-official. At the Ahmedabad centre, 46 localities were selected for the purpose of the survey; they consisted of 16 chawls, 21 labour colonies (housing societies) and 9 villages. Before setting the ultimate units of the family living survey, *viz*, the families, two types of sampling methods were adopted: tenement sampling and pay-roll sampling. The sample size for a centre was determined on the basis of the number of industrial workers, the type of sampling followed, the work-load manageable by an investigator and the required precision of weight to be derived from Sch A for consumer price index numbers. The sample size for Ahmedabad was 720 families, to be canvassed for Sch A. The number of samples finally collected & tabulated, was 722, for Sch A. The two samples drawn for Schedules A and B were, however, mutually exclusive, because canvassing for both the schedules from the same sampled families, would have caused fatigue, both to the investigators and to the informants. The whole sample was staggered over a period of twelve months, evenly, so as to eliminate seasonal effects on the consumption pattern. The selection of the sample was done in two stages. In the first stage, the chawls within each of the wards, were grouped to form blocks of about 150 households each and these blocks, along with the labour colonies (housing societies), were grouped to form clusters of about 450 households each, so that each cluster had blocks from different wards. From the list of these clusters and villages, four independent simple systematic samples of 12 clusters or villages each, were selected for the survey. Each of the 12 clusters sampled for an investigation, was assigned to a particular month for inquiry by a random process. That is how the first stage was arranged.

The second stage unit for selection was a working class family. Each month, the investigator listed all the families in the cluster allotted to that month, by a house-to-house visit and classified them as working class families and others. While listing, information was also collected on the family size, the expenditure class to which it belonged and the state of origin of the head of the family. This information was utilised to arrange the working class families in the cluster, first by family size, and within these classes, by expenditure class and within these, by the state of origin. A simple systematic sample of 20 working class families was drawn from this arranged list. Every fourth family in this sample was contacted for filling Sch B (on the level of living) and the remaining three were contacted for Sch A (on family budget). That is the nature of the procedure adopted while selecting the families for the sample survey and for determining the size of the sample. The sample survey was designed to cover a period of twelve months, at each centre. At the Ahmedabad centre, the work was carried on between August 1958 and July 1959. The method of survey was the interview method. The questionnaire which each investigator adopted, covered a wide range of subjects, accurate replies to some of which could not be had without explaining the significance of the question to the persons concerned.

The population of Ahmedabad is about 11.5 lakhs. The working class population in Ahmedabad was reported to be concentrated in thirteen localities. The markets predominantly patronised by the working class population in Ahmedabad, were six and it were these markets that were selected for the collection of retail prices, for the new service series of consumer price index number of the Ahmedabad centre. From the summary of the report, a broad idea as to the manner in which and the method by which the investigation was made, which ultimately led to the construction of the consumer price index number, is available. From the two respective inquiries, *viz*, the one held in 1926-27 and the other in 1958-59, the comparative contents of the basket, as devised by them, is available. The former inquiry reflects the consumption pattern

of the working class as it existed in the year 1926 and the index number then devised was composed of five groups, *viz*, (i) food, (ii) fuel and lighting, (iii) clothing, (iv) house rent, and (v) miscellaneous. The food group in its turn, consisted of 16 items; the fuel and lighting group of four items; the clothing group of seven items; the house rent group of one item, *viz*, the house rent, and the miscellaneous, of two groups, *viz*, bidis and soap. Thus, in all, 30 items were included. These items represented 82.82 per cent of the average monthly expenditure and they were respectively, assigned 58, 710, 12 and 4 weights, which together aggregated 91. At the time of this inquiry, the items included in the investigation totalled 49; out of them, 30 were priced and 19 were unpriced, and in respect of the latter, the method of imputation was adopted. This series was prepared after collecting the budget of 985 families, when the estimated population of the city of Ahmedabad was nearly 3 lakhs. The new series is based on an inquiry into 722 working class families, conducted in 1958-59, when the total population of the city was about 11 lakhs. The total working class families at this time, were estimated to be 51.5 thousand; and so, the percentage of the sample size in relation to the universe of the working class families, would come to about 1.4 not less than 0.5. The weighing diagram for the new series is based on 110 articles, divided into the same main five groups, *viz*:

(1) food;

(2) fuel and lighting;

(3) clothing;

(4) housing; and,

(5) miscellaneous.

The important groups in this inquiry carried, respectively, the weights of 64.41, 6.22, 5.05, 9.08 and 15.24, which aggregated 100. The total number of items included in the basket was 239. Of these, 89 were priced items and 150 unpriced, and in respect of the latter, the method of imputation was adopted. In the new series, the unpriced items were considerably more than in the earlier one. The total expenditure of all the items in the 1926-27 inquiry, was Rs 36.01, of which Rs 32.35 was the expenditure on priced items and Rs 3.66 was the expenditure on non-priced items. In terms of percentage, the expenditure on priced items, to the total expenditure, was 89.8 per cent and the expenditure on unpriced items, to the total, was 10.2 per cent. In the latter inquiry of 1958-59, the total expenditure on all items was Rs 139.06. Of this, Rs 124.91 was the expenditure on priced items and Rs 14.15 was the expenditure on non-priced items. In terms of percentage, the first expenditure was 89.8 per cent and the second was 9.2 per cent. Thus, the expenditure on unpriced items in the latter inquiry is not larger than that in the former inquiry. The components of the basket at the time of the latter inquiry, had considerably increased, with the growth of the country's economy and the change in the standard of living of all citizens; so have the requirements of the working class increased and the components of the basket, which was devised in 1926-27, have now become completely obsolete. The following observation of the survey is significant:

> ...the consumer price index number measures nothing but changes in prices, as they affect a particular population group; and so, it is really a price index number, as distinct from a cost of living index number. In fact, these indices used to be termed as cost of living index numbers in the past, but in order to make their meaning clear, it was decided by the government to change the name to consumer price index numbers, in accordance with international recommendations and growing practice in other countries. Most of the state governments compiling such index numbers, have also adopted this usage.[36]

In *Millowners' Assn*, this survey was challenged by the Ahmedabad Millowners' Association, on various grounds. The industrial court did not accept the contention on behalf of the Millowners' Association, that the sample size was inadequate or had vitiated the quality of the survey and held that the method of inquiry adopted by the investigators, who conducted the survey, was by no means, unsatisfactory or unscientific and in its opinion, having regard to the local conditions, it was indeed the most feasible and satisfactory way to adopt. The industrial court, therefore, was of the opinion that the adoption of the interview method did not introduce any infirmity in the survey and held that the compilation of the consumer price index by the Labour Bureau, Simla, in the city of Ahmedabad, was proper and was not unscientific, nor did it suffer from any major infirmity. In appeal, the Supreme Court itself, considered the report and other evidence and the opinions of experts in detail and upheld the view taken by the industrial court. Speaking for the court, Gajendragadkar J, who delivered the opinion of the court, said:

> This index number is intended to show over a period of time, the average percentage change in the prices paid by the consumers, belonging to the population group, proposed to be covered by the index, for a fixed list of goods and services consumed by them. The average percentage change, measured by the index, is calculated month after month, with reference to a fixed period. This fixed period is known as the 'base-period' of the index, and since the object of the index is to measure the effect of price-changes only, the price-changes have to be determined with reference to a fixed list of goods and services of consumption, which is known

as a fixed 'basket' of goods and services.[37]

The index does not purport to measure the absolute level of prices, but only the average percentage change in the prices of a fixed basket of goods and services, at different periods of time. There are certain preliminary considerations which are relevant in the construction of consumer price index numbers. The first consideration is the purpose which the index is intended to serve, and that necessarily, involves the definition of the group of consumers to which the index is intended to relate. Then, it is necessary to determine the consumption level and pattern of the population group, at a period of time which generally, becomes the base-period of the index numbers. For that purpose, a list of commodities and services has to be made. Usually, this list would contain items of food, fuel and light, clothing and others; items of services, such as barber charges, bus fare, doctor's fee, etc, have also to be selected. It is the combined total of the items of commodities and services, that constitutes the basket. Then follows a description of the quality of each commodity and service, through which price-changes have to be measured. Generally, one quality, which is popularly consumed by the population group, is selected for each commodity and service. The importance of the weight which has to be attached to each commodity or service, is also a material factor. For instance, if rice is considered to be twice as important as wheat in the consumption pattern, the weight of rice will be two in relation to one of wheat. Having determined the consumption level and the pattern of the population group, the next task to attempt is to arrange for the regular collection of price data for the various qualities of commodities and services which enter the basket. With this material, the consumer price index has to be compiled from month to month, subsequent to the base-period. That, shortly stated, is the nature of the preliminary considerations which have to be borne in mind, while constructing the consumer price index numbers.

In *Ahmedabad Millowners' Assn*, the industrial court accepted the linking factor at 3.17, adopted by the Government of Gujarat, to link the existing series with the new series of 'Consumer Price Index Numbers', for the city of Ahmedabad. The Supreme Court held that the employers had not placed any material before the industrial court, to justify their contention, that for determining a linking factor, the behaviour of prices for two or three years during the relevant period, should be and could be studied and then a factor should be decided on the average rise in the prices during the period in question. However, the court made it clear that its decision on this point should not be taken to be of any general significance and should be confined to the facts of the case under consideration. If the employers and employees thought it necessary or desirable, that this question should be scientifically examined and determined in a general way, it would be appropriate for them to move the government to appoint a special body of experts to deal with it. But in the under noted case,[38] an increase of three rupees per month in the dearness allowance, on the ground that the cost of living had gone up and also on the ground that there were other sources of income for the employer, was held unjustified, as there was no evidence on record, to support such findings of the tribunal. The award of the increase in the dearness allowance, therefore, was quashed in a writ petition.

In *Indian Oxygen*, dealing with the demands of the workers of the Kanpur unit of the company, that the dearness allowance payable to the workmen at Kanpur, should be linked with the consumer price index for the industrial workers at Kanpur, the court observed that the consumer price number for industrial workers (base 1960-100) were being compiled and published by the Labour Bureau, Simla, every month in respect of 50 industrial centres, scattered all over the country.[39] The material collected is through the family surveys of working class families. There are six main groups for which indices for each centre are being compiled besides the general index. They are:

(i) Food;

(ii) Pan, supari, tobacco and intoxicants;

(iii) Fuel and light;

(iv) Housing;

(v) Clothing, bedding and footwear;

(vi) Miscellaneous.

Consumer price index numbers are intended to measure the relative temporal (overtime) changes in the price of a fixed basket of goods and services, consumed by the index population, in a current period, in relation to the base period. The index numbers are compiled by using the Laspeyres' formula. Broadly stated, this formula takes note of the base and current prices for a particular item and the quantity consumed of those items during the period, in relation to the base period. It would appear that for the compilation of an index, there are three essential requirements, namely: (1) a weighing diagram, which is the relative percentage share of the total consumption expenditure, as revealed by the basic family budget inquiry in respect of different items, (2) the base prices of the different items which go into the index basket, and (3) the current prices in respect of each one of the items featuring in the index basket. The weighing diagram for a centre is derived on the basis of the data collected through family budget inquiries, which were conducted in 1958-59, at each one

of the 50 centres. The survey was conducted by taking all the samples of working class families, in each of the 50 centres and the data was collected by interviewing these families. Based on the results of the family budget inquiries, the average expenditure of a family per month, on different items of consumption, was arrived at. An all India average consumer price index number is a weighted average of the 50 centres' indices. This is compiled and published alongwith the index number for each centre.[40]

(vi) Rates and Scales of Dearness Allowance: Uniform rates and Flat rates

In *Jardine Henderson,* according to the practice prevalent in West Bengal, the employer company was paying dearness allowance at different rates, to its clerical and subordinate staff. In view of the deteriorating financial condition of the company, the Supreme Court affirmed the award of the tribunal, rejecting the demand of the workmen of the subordinate staff, for raising their dearness allowance to the level of the dearness allowance being paid to the clerical staff, *viz,* at a rate linked with the middle class cost of living index, though it did not allow the reduction in the rates of dearness allowance, as claimed by the employer, on the basis of the deteriorating financial position of the company.[41] In *Greaves Cotton,* the court upheld the validity of an award of the industrial tribunal, fixing the scales of dearness allowance for the subordinate staff and the factory workmen at the same rates as were applicable to the clerical staff. Speaking for the court Wanchoo J said:

> Time has now come when employees getting same wages should get the same dearness allowance irrespective of whether they are working as clerks, or members of subordinate staff or factory workmen. The pressure of high prices is the same on these various kinds of employees. Further, subordinate staff and factory-workmen these days, are keen to educate their children as clerical staff and in the circumstances there should be no difference in the amount of dearness allowance between employees of different kinds getting same wages. Further an employee whether he is of one kind or another getting the wage hopes for the same amenities of life and there is no reason why he should not get them, simply because he is, for example, a factory-workman though he may be coming from the same class of people as a member of clerical staff.[42]

The principle of *Greaves Cotton,* however, applies to the workmen of the same establishment. It cannot be stretched to different establishments. In *WIMCO,* Mudholkar J observed that there was no valid reason for compelling employers to offer uniform terms of employment to their employees working in different establishments because various considerations must enter into the question such as the value of their work to the employer, the employer's ability to pay, the cost of living, the availability of the persons for doing the particular kind of work and so on. Hence, in the circumstances of this case and in view of the history of industrial adjudication in Bengal, and also the precise reasons for adopting different rates of dearness allowance by the company for its employees at the sales office and the factory, the award of the industrial tribunal could not be characterised as contrary to principles of industrial law.[43] In *Associated Power,* the court held that there should be no disparity between the dearness allowance paid by the company to its employees at its two factories. In this case an electric company had two factories. Under the terms of agreement, the workmen working at one of the factories were given higher rates of dearness allowance and certain other benefits which were not given to the workmen at the other factory though the workmen were found to be transferable from one factory to the other and the same work was carried on by both the factories.[44]

In a case where a company is paying dearness allowance at different rates, the dearness allowance depends upon the place of posting of an employee. There may be some difficulty, however, to apply this principle to the case of an employee having no definite place of posting. In such a case, the principle that dearness allowance should be governed by the place of posting can only mean that the employees should get dearness allowance where their families (ie wife and children) are residing, for that would be the place of posting of such employees for all practical purposes.[45] In the language of Desai J, dearness allowance '*generally, has a local flavour*'. Payment of dearness allowance, therefore, would depend upon the place where the workmen are working irrespective of the fact that industrial undertaking in which the workman is employed has a unit of industrial enterprise having all-India or inter-state operation. If the concept of uniformity on an all-India basis is introduced in the matter of dearness allowance, it would work havoc, because the price structure in a market economy at places like Bombay, Madras, Calcutta, Delhi, Ahmedabad has little or no relation to smaller centres like Kanpur. Uniformity and equality have to be amongst the equals measured by common denominator. In the matter of dearness allowance, any attempt at uniformity between the workmen working in metropolitan areas and smaller centres like Kanpur, would be destructive of the concept of dearness allowance. In other words, uniformity amongst the similar persons would be productive.

In respect of Sliding scale of rates though dearness allowance at a flat rate is permissible,[46] the whole purpose of dearness allowance, being to neutralise a portion of the increase in the cost of living, it should ordinarily be on a sliding scale and provide for an increase on rise in the cost of living and decrease on a fall in the cost of living[47] but where incremental scales of wages are fixed and dearness allowance is expressed as percentage of basic wages, then the dearness allowance will vary with the basic wages of the workmen in the same scale in accordance with the length of their service, which

would not be fair. Hence, dearness allowance must be fixed on the basis of extra cost of feeding three consumption units on which basic wages are also based and that should apply whether the workman is in the highest or in the lowest rung of the ladder of his grade.[48] In *Hindustan Motors,* the Supreme Court directed that a sliding scale be attached to the dearness allowance awarded by the industrial tribunal on the lines that it will be liable to be increased or decreased on the basis of one rupee for every five points in case of rise and fall in the cost of living index from point 364 on the same lines as provided for in the third major engineering award.[49] Likewise, on consideration of all the circumstances in *Hindustan Times,* the Supreme Court directed that a sliding scale be attached to the dearness allowance of twenty-five rupees per month as awarded by the tribunal so as it will be liable to be increased or decreased on the basis of one rupee for every ten points in case of rise and fall in the cost of living from the base of 400, the 1939 index being taken to be 100.[50]

(vii) Revision of Dearness Allowance:

Increase and decrease in dearness allowance: Regarding increase in dearness allowance, the problem of constructing a wage-structure as well as a dearness allowance is to be tackled on the basis that wage structure and dearness allowance should not be changed from time to time; as they are long range plans,[51] but the passage of time brings in its train various improvements in the conditions of living of people due to scientific and technological advancements. This affects the living standards of the working classes as well. Besides, the gulf between the wages and the cost of living goes on widening with the increase in prices of commodities and other amenities. In the course of time, therefore, the dearness allowance which is given to compensate for the rise in the cost of living starts to sag down and then ceases to sufficiently make up the gap between wage and cost of living, and a revision of wages or dearness allowance then becomes necessary.[52] The principle is now settled that if the paying capacity of the employer increases or the cost of living shows an upward trend, the industrial employees would be justified in making a claim for the re-examination of the rates of the dearness allowance. The tribunal will not be normally justified in rejecting it solely on the ground that enough time has not passed after the making of the award. The question regarding revision will have to be examined on the merits of each industrial case by the tribunal concerned.[53] But like fixation of wages or dearness allowance, in the first instance, the revision of wage-structure or dearness allowance is equally a delicate operation. The wage-structure or dearness allowance, therefore, when fixed by the industrial adjudicator as reasonable after a fair consideration of the available material should not be disturbed except on clear proof of error or unfairness.[54] Further, as in the case of basic wage, no change in existing scales of dearness allowance should also be made unless there is a material change in the circumstances or any other strong reasons to revise the scale.[55] The industrial adjudication has evolved certain principles for revising the wage structure or dearness allowance.[56] For instance in *Remington Rand,* the Supreme Court indicated the circumstances which would justify upward revision of the dearness allowance fixed under a settlement or award, *viz,*

(i) improvement in the financial position of the employer subsequent to the settlement or award; or

(ii) rise in the cost of living subsequent to such settlement or award.

Speaking for the court, Gajendragadkar J observed:

> It is quite conceivable that if the cost of living shows a tendency to rise very high, the workmen would be entitled to claim that there should be a change in rates of dearness allowance basically fixed in order to allow them more neutralisation, and such a demand cannot be rejected without examining its merits solely on the ground that because a provision is made for adjustment from time to time, the scheme ought to remain in force for all time and cannot be reopened or re-examined.[57]

In this case, the rates of dearness allowance were linked with the cost of living index fixed under the terms of settlement between the parties in 1953. The settlement also provided for increase in the rates of dearness allowance on a percentage basis linked to the increase in the then cost of living index. The demand raised by the workmen for revision of the dearness allowance in 1958 was referred to the tribunal in 1959. Taking into consideration the relevant factors ie, the financial capacity of the employer to bear the additional burden, the rise in the cost of living and the rates of dearness allowance paid to workmen in comparable concerns, the tribunal increased the dearness allowance. The award was affirmed by the Supreme Court. But when the circumstances disclosed improvement in the financial position of the employer and high rise in the cost of living subsequent to a settlement or award have been established, a claim for revision of dearness allowance cannot be rejected without examining it on merits.[58] In other words, the industrial adjudication has to bear in mind the other two principles, namely, the financial capacity of the employer to bear the burden of enhanced clearness allowance and the industry-cum-region rule. As in fixing wage scales or dearness allowance so also in revising the same, two principal factors must weigh with the adjudicator, i.e., how the wages prevailing in the establishment in question compare with those given to workmen of similar grades or scales by similar establishments in the same industry or in their absence in similar establishments in other industries in the region and what wage scales the establishment in question can pay without any undue strain on its financial resources.[59] In *Bengal Chemicals,* the tribunal took the view that since the

employer company by a settlement had agreed to pay increased dearness allowance if there was a substantial change in the cost of living index, the question of the financial capacity of the company did not come in for consideration. But in appeal, the Supreme Court said that the financial burden that will be thrown on the company by reason of dearness allowance is a very material and relevant factor to be taken into account in such circumstances.[60] In *Cinema Theatres*, the increase in the cost of living index over a course of nine years was held to be a 'change of circumstances', justifying an upward revision of the wages-scales and dearness allowance for the concerned employees fixed in the year 1951.[61]

In another case involving *Remington Rand*, the workmen employed at the Bangalore office of the company raised an industrial dispute for the revision of dearness allowance. The tribunal found that the cost of living index in Bangalore for 1965 was 641.74 while the corresponding figure for Madras in that month was 617. It further noted that the company had revised the scales of dearness allowance in July 1961, but in spite of this, there was a disparity in the payment of dearness allowance to workmen working at Madras and to those working at Bangalore and, therefore, held that there was no reasonable justification for the disparity. In view of the enormous profits the company was making, the tribunal directed that the dearness allowance should be paid to the employees of the Bangalore branch at the rate at which and in the manner in which it was paying dearness allowance to its employees at Madras regional office. In appeal by a special leave, the court, after noticing that the cost of living index at Bangalore was higher than that of Madras, affirmed the award of the tribunal.[62] In *Karam Chand Thapar*, the workmen claimed upward revision of dearness allowance in accordance with the Bengal Chamber of Commerce scheme in view of two facts, *viz*, that there was a steep rise in the price of living index and also that the company was in financial position to afford the claimed dearness allowance. But the employer company resisted the claim on the ground that the demand of the workmen for dearness allowance according to the Bengal Chamber of Commerce scheme had been consistently rejected by the tribunals and also by the Supreme Court. The court held that the steep rise in the cost of living index between the period of the earlier award and the award under appeal, was considered to be sufficient justification for the revision of the rates of dearness allowance.[63]

Note: *For a detailed discussion on decrease in dearness allowance, see notes and comments under 'Reduction in wage-structure'.*

(viii) Retrospective Award of Dearness Allowance:

In *Phaltan Sugar*, dearness allowance was revised by an award of the industrial tribunal directing retrospective operation of the award. Such revision was directed to come into effect not from the date of reference but from some date subsequent thereto but earlier than the date of making of the award. It was also found that the financial capacity of the employer at the relevant time was satisfactory. The Supreme Court in appeal, held that the tribunal could have directed retrospective operation of the revised rates of dearness allowance even from the date of reference.[64] However, once dearness allowance is fixed by the award of an industrial tribunal, it becomes a condition of service and any vital change in the financial position of the management can be brought about only after asking for yet another adjudication on the basis of such altered circumstances vitally effecting the capacity of the employer to pay.[65] The question of retrospective operation of awards 'relating to wages' has been discussed in detail under the head 'Wages' caption—'Retrospective award of wages'.

Sub-clause (ii) - Housing Accommodation

The NCL-I cited the following observations made by the Rege Committee (1944-46) on housing:

> Very little, by way of providing more and better housing for industrial labour, has been done either by government or municipalities. Employers have no doubt made some contribution to better housing by erecting lines, tenements or small cottages in certain industrial centres. The houses created by them differ greatly from one another and only a small percentage of workers are, on the whole, accommodated in them. It may, however, be said that employers' tenements are, all things considered together, far superior to the slums that have been allowed to develop in cities...a perusal of our ad hoc survey reports in respect of different industries would show that the housing conditions in general are far from satisfactory.[66]

The problem of housing industrial labour is a very big problem and involves a huge amount. Efforts are being made by the Central Government to invite the co-operation of industrial employers to tackle this problem with progressively increasing financial and other assistance offered by the state governments. The problem has also been engaging the attention of all the three organs of the state, ie, the legislature, the executive and the judiciary. There have been several enactments on the subject. It is obvious that the problem cannot be tackled in isolation by industrial tribunals, in meeting the housing demands made by employees in individual cases. In *Patna Electric Supply Co*, Gajendragadkar J observed:

> It is necessary to emphasise that, in considering the claims of workmen sympathetically on the ground of social and economic justice, industrial adjudication has to bear in mind the interests of national economy and progress which are relevant and

> material...In the present economic condition of our industries, it would be inexpedient to impose this additional burden on the employers. Such an imposition may retard the progress of our industrial development and production and thereby prejudicially affect the national economy. Besides, such an imposition on the employers would ultimately be passed by them to the consumers and that may result in an increase in prices which is not desirable from the national point of view. It is true that the concept of social justice is not static and may expand with the growth and prosperity of our industries and a rise in our production and national income; but so far as the present state of our national economy and general financial condition of our industry are concerned, it would be undesirable to think of introducing such an obligation on the employers today. That is why we think the industrial tribunals have very wisely refused to entertain pleas for housing accommodation made by workmen from time to time against their employers.[67]

In the circumstances of this case, the tribunal had not discussed the question about the financial liability of the employer to meet the additional burden imposed by the award. However, in view of the erroneous view with respect to the effect of the housing scheme sanctioned by the Bihar Government, taken by the tribunal, the award was set aside. Later, in *Tocklai Experimental Station*, the court held that under the present economic conditions prevailing in the country, the responsibility for providing housing accommodation could not reasonably be placed solely on the shoulders of the employer and expressed the hope that, in due course, the problem may have to be tackled by the industry in co-operation with the state and the state would have to bear a part of that responsibility. In the circumstances of this case, the enhancement of the house rent allowance at a flat rate of Rs 20 instead of Rs 10 was held to be justified. But allowing this enhancement, the court stated a further test that a demand for the provision of housing accommodation could be entertained, if the financial position of the employer could bear the burden.[68] In *United Salt Works*, Gajendragadkar J explained that the observations in *Patna Electric were* 'not intended to lay down an invariable or inflexible rule. Exceptions can and should be made where circumstances justify the departure from the said observations'. In the circumstances of this case, it was held that the undertaking given by the employer to make reasonable provision for housing to all its permanent employees, would meet the ends of justice.[69] In *Mohammed & Sons*, Wanchoo CJI observed:

> We do not think that conditions have changed since that decision was given and we still think that the responsibility for providing housing facilities should not be thrown on the industries in this country under the present conditions. [70]

In *Shevaroy Bauxite*, in view of the very low terms of remuneration of the workmen and the financial capacity of the employers, the Supreme Court upheld the direction of the tribunal awarding a house-rent allowance to the workers as well as staff members of the company equal to 10 per cent per month of the basic wage or pay of the workmen or staff, subject to a minimum of Rs 5 and maximum of Rs 25.[71] In *Corpn of Madras*, the workmen of the corporation were entitled to house-rent allowance in terms of the recommendations of the pay commission. The workmen concerned were given quarters by the corporation in view of the nature of their duties. But after occupying the quarters for about a month, the workmen vacated the quarters and claimed house-rent allowance in terms of their entitlement. The corporation declined to pay the house-rent on the plea that when quarters were provided for them, the workmen could not refuse the same and claim house rent. The workmen, therefore, filed applications under s 33C(2) for computation of the benefit of house-rent and the labour court directed the payment of house rent allowance to the workmen. In a writ petition against the order of the labour court, the Madras High Court upheld the direction of the labour court as there was no condition in the rules relating to the service of the workmen that they should occupy the quarters and that in lieu of their occupation of the quarters the house-rent allowance shall not be payable.[72]

On the other hand, in *Indian Oxygen*, the employer company had built four quarters within the premises of its factory, intended to lodge the workmen employed in its watch and ward department. The relevant Standing Order provided that after the employer provided any quarters to a watch and ward employee, it shall be for his personal use only and he shall not permit outsiders to use them. Though the quarters in question were built with the intention of lodging therein its watch and ward employees, the fact that it had done, so did not mean that it was under an obligation to give them to the workmen. The workmen employed in the watch and ward department, raised a dispute claiming that they were entitled to be provided with the said quarters, that the company had imposed an unreasonable condition that the quarters would only be for their personal use and that even their families would not be permitted to reside with them therein, that therefore, none of them except one could live in those quarters and; consequently, the company was bound to pay, in lieu of those quarters, quarter allowance to each one of them at the rate of Rs 15 per month. The tribunal allowed the claim and directed the company to pay to each of the said workmen, Rs 10 per month as quarter allowance. But in appeal, the Supreme Court observed that the tribunal misconstrued the relevant provision in the Standing Orders in assuming that the company was under an obligation to provide quarters, which assumption was not borne out by the provisions of the Standing Orders in question, and if there was no obligation on the employer to provide the workmen with quarters, their claim for quarter allowance in lieu of quarters was not sustainable and, therefore, held that the tribunal was manifestly in error in holding that in a case where the company did not provide quarters to anyone of these workmen with permission to live with his

family, the company should pay quarter allowance. The award, therefore, was set aside.[73]

Sub-clause (ii) - Supply of Light and water:

The value of the supply of light and water also has been brought within the ambit of the definition of wages where these are supplied to the workmen.

Sub-clause (ii) - Medical Attendance:

The medical and surgical benefit plans providing hospitalisation of workers or the group health insurance, sickness and accident compensation schemes were pioneered by enlightened employers as an important part of their developing personnel policies and programmes.[74] Two factors, however, have contributed to direct financing of such plans by employers, *viz*,

(1) because such payments can be made 'before income tax', and

(2) because direct financing can provide greater benefit to the workmen also, as, if the same amount were paid to the workmen as wages, each employee will be forced to pay taxes on that.

In recent years, the trade unions have sought the expansion of the coverage of these schemes. Consequently, more liberal plans not only by increasing benefit amounts but also by adding to the kinds of medical services provided have been introduced. For the above reasons, the employers have not disagreed about the desirability of the medical benefit plans. On this issue, the employers, therefore, cannot be cast in the role of employees' antagonist. The issue in negotiation has essentially been the degree and cost of particular liberalisation of those benefit plans.[75] The Government of India enacted the Employees' State Insurance Act 1948, designed to provide cash benefits in case of sickness, maternity and employment injury, payment in the form of pension to dependents of workers who died of employment injuries and medical benefit to workers. Workers' families were also brought into the scheme later. It introduced contributory principle to cover these contingencies, provided protection against sickness, replaced lump sum payments by pension in the case of dependent's benefit and placed the liability for claims on a statutory Organisation. The Act applies to all non-seasonal factories run with power and employing twenty or more persons, excluding mines or railway running sheds. It covers all employees, manual, clerical and supervisory, and employees engaged by or through contractors, whose remuneration does not exceed Rs 500 per month. Moreover, the definition of 'employee' has been enlarged to include administrative staff and the persons engaged in connection with purchase of raw materials or sale or distribution of products and related functions by an amendment of the Act in 1966. It can be extended to cover other establishments or classes of establishments, industrial, commercial, agricultural, or otherwise. The scheme has been gradually extended but because of the vastness of the country and the considerable preparatory work involved, such as provision of building, equipment and personnel, the scheme could not be implemented throughout the country simultaneously. A plan for its phased extension to different places was drawn up. Transitory provisions which require payment of special contributions by all employers had to be introduced to meet the objection of the employers in covered areas that Employees State Insurance scheme levy would affect their competitive position adversely. The contribution of employers in implemented areas was fixed on a rate higher than that for employers in non-implemented areas.[76] In this work, a detailed discussion of the Employees State Insurance Act and the scheme is out of place. In *Remington Rand*, the three awards of industrial tribunals were challenged by the employer company before the Supreme Court, on the grounds that:

(i) the provision for medical facilities is the responsibility not of the employer, but, in a welfare state, of the government;

(ii) assuming that it is an employer's obligation, medical expenses, which a workman would ordinarily have to incur, were looked after and taken into account when fair wages were settled; and

(iii) in any event, medical facilities, including those to the workmen's family and without any ceiling, could not be sustained.

Regarding medical facilities to workmen and their families, the Supreme Court observed:

> The tribunals in these cases, not only did not fix any ceiling, but also did not define who would be the members of the family of a workman. Obviously, in such a scheme, the possibility of its being abused, cannot be altogether ruled out. It was, therefore, necessary that if the tribunal desired to impose such an additional obligation on the company, it should have made a proper scheme, defining the limits of the company's obligation, both as to the ceiling on the benefit and the beneficiaries thereunder. Vague and indefinite directions, instead of fostering harmony, are likely to open up a vista for future bickerings and disputes in

their implementation.[77]

However, on the facts and in the circumstances of the case, the court gave certain directions modifying the awards. In a later case of the same company, the Supreme Court introduced the same scheme for the workmen in the Madras office of the company also.[78] In *National Insurance*, affirming the award of the tribunal, directing the employer company to appoint a medical practitioner, and to pay to the employees, medical expenses, if certified by the medical practitioner, not exceeding Rs 100 a year, the Supreme Court held that the award was fair and reasonable and the demand for Rs 300 a year was too excessive and the suggestion for the allowance to be carried forward could not be accepted, as it was neither proper nor legitimate.[79] In*National and Grindlays Bank*, the tribunal directed that the employees of the Kanpur Branch of the National and Grindlays Bank, would be entitled to medical aid and expenses, up to a monetary limit of Rs 250 per annum, which would be available to the employees as well as to the members of their families. The tribunal further allowed hospitalisation charges, not only for the employees, but also for members of their families. In appeal by special leave, the Supreme Court noticed that under the bipartite agreement, the workmen were having the benefit of medical aid extended to the members of their families, which was not applicable to the workmen before. It was observed that even though the employees of the Kanpur Branch had no upper limit, their families were given the benefit of medical aid and there was no justification for the tribunal to extend the hospitalisation facilities to the members of their families, if that was not enjoyed by the workmen in the other branches of the appellant bank and in other banks which were similarly situated. Hence, there was no justification for giving the employees of the Kanpur branch, a favoured treatment, which other employees of the banks and even of the appellant bank, in other branches, could not avail, under the bipartite agreement. In view of the fact that the bank was agreeable to give a higher limit, as indicated in its offer before the conciliation officer, which offer was also reiterated before the court, the Supreme Court allowed the appeal partly and directed a higher limit of Rs 250 to be fixed towards medical aid and expenses of the employees of the Kanpur branch and their families, as defined in the bipartite agreement, and also entitled each of the workmen to hospitalisation, in terms of the said agreement.[80]

Sub-clause (ii) - Other Amenities:

The value of any other amenity, any service or any concessional supply of food grains or other requisites, has also been included within the meaning of wages, by this clause. Such amenities, services or concessions, therefore, will have to be taken into account as a component of the wages.

Sub-Clause (iii) - Travelling Concession:

The expression ‘any travelling concession’, used in the definition of wage under s 2(rr)(iii), connotes a concession specifically provided by the employer, in the form of free travelling or travelling at a reduced rate.[81] In the group of appeals reported as *Atul Products*, the Industrial Tribunal of Gujarat rejected the claim of the workmen, for a free transport facility, but directed the company to pay an allowance of 15 paise per day to every employee who stayed at a distance of five miles or more, from the village Atul, but such allowance need not be paid on days on which the employee was on earned leave or any other type of leave, authorised or otherwise. These directions were challenged by the company as well as the workmen, before the Supreme Court, in cross-appeals. While the company wanted the allowance awarded by the tribunal to be set aside, the workmen, on the other hand, required the allowance to be enhanced. In this group of appeals, both the companies took the plea that it was not the function or duty of an employer to provide transport facilities or pay an allowance for the same. The common question for consideration of the court, therefore, related to the claim of the workmen for the payment of a transport allowance, to enable them to go from their place of residence to the place of work. Both the companies were public limited companies, engaged in the business of manufacturing dyes and chemicals and other intermediates and were having their factories in the village Atul. The basis of the claim made by the workmen of both these companies was, that the majority of the workmen employed in these companies came from a distance of 5 to 10 miles. Since the factories were not situated in a place where labour force was available easily, majority of the workmen had to come from distant villages or the town of Bulsar, and the workmen, therefore, had to incur a bus fare of 40 paise per trip from Bulsar to Atul and another 40 paise for the return journey. Therefore, each day, a workman had to incur and expense of 80 paise as bus fare, in going to the village Atul from Bulsar and back and this was too much of an expense, which could not be borne by an employee from and out of his wages. In the case of Atul Products, the demand was for a uniform allowance of Rs 15 per month, while in the case of Atic Industries, the demand was slightly different. In the circumstances of the case, the directions of the tribunal were held justified. The court also rejected the appeal of the workmen in Atic Industries, for enhancement of the allowance merely because the financial capacity of the employer was sound and could bear the additional burden.[82] In *Delhi Electric Supply Undertaking*, one of the demands in dispute related to the claim of the workmen for an increase in the conveyance allowance of the inspectors and superintendents of the Delhi Electric Supply Undertaking. The tribunal rejected the claim, on the ground that the conveyance allowance had already been fixed for motorcycles and motorcars on a rational basis and that any disturbance in the rates, will have repercussions on every category of workmen. But having due regard to the increase in the cost of maintenance, fuel, etc, which the

employer had itself taken note of and the extra mileage that had to be covered, the Supreme Court, in appeal, gave an increase of Rs 25 and Rs 12.5 per month, to the superintendents and inspectors, respectively, over the existing rates of allowance given to them.[83]

Sub-Clause (iv) - Commission

This sub-clause has been inserted by the Amending Act 46 of 1982. It includes any commission payable on the promotion of sale or promotion of business, or both. Previously, commission was not considered to be a part of the wages, as its quantum varied with the promotion of sales or business, brought about by the workman. But now, commission payable to a workman on promotion of sale or business or both, has specifically been made a component of 'wages'.

Excluded Items

(a) Bonus

The use of the word 'any' before bonus, indicates that it is not only the bonus payable under the Payment of Bonus Act 1965, but a bonus of any type would not form a part of the 'wages', under the Act. Insofar as a bonus under the Payment of Bonus Act is concerned, there is no difficulty in its exclusion from the wages. In *Orissa SRTC*, the Orissa High Court held that the minimum statutory bonus payable under the Payment of Bonus Act 1965, is excluded from the definition of wages. Therefore, it would not form a part of the back-wages awarded to the workman. But, since the workman had been reinstated with full back wages, he would have been entitled to the statutory minimum bonus payable to him for the period during which he was out of the job, apart from the wages. Therefore, he was entitled to the bonus, though separately. Even a bonus which, in nature, is akin to such bonus, though not covered by the Act, would be excluded from the meaning of wages. But in the case of any other type of 'bonus', the question that arises is whether such 'bonus' is a 'remuneration' within the meaning of the principal clause, or an allowance, within the meaning of cl (i) of the including clause, or is it a bonus within the meaning of the excluding cl (a)? For instance, in view of its incidents, production bonus, which is sometimes called the incentive wage or incentive bonus, would appositely fall within the meaning of the word 'remuneration', rather than under bonus. It is, therefore, a question of fact, depending upon the facts and circumstances of each case, as to whether a particular 'bonus' would fall within the meaning of the words, 'remuneration', 'allowance' or 'bonus', as used in the definition.[84]

In *State Bank of India*, a novel contention was raised before the writ court, that the parties to the settlement-award had understood and intended that, for computing the wages payable to the workmen, bonus, the contribution of the employer towards the provident fund and the gratuity, were also to be included. However, in view of the absence of any pleading or evidence before the tribunal or the High Court, the contention was rejected.[85] In *Bala Subrahmanya Rajaram*, dealing with the definition of wages under s 2(vi) under the Payment of Wages Act 1936, the relevant portion of which is in *pari materia* with the definition of 'wages' under this Act, the Supreme Court held that the bonus which is not payable under the contract of employment, but is payable because of the award of the industrial tribunal, is not 'wages' within the meaning of the Payment of Wages Act.[86]

In *Vayitri Plantations*, the Kerala High Court held that the monthly *ex gratia* payment made to workmen, which was not a part of the original contract of employment, but was offered by the employer, long after the employee's promotion, on terms that it was in appreciation of his good services and the payment had to be shown separately in the books and records of the employer and was liable to be increased or decreased or totally withdrawn, at the discretion of the employer, was not includible for the purposes of computing the wages.[87]

(b) Contribution to Pension or Provident Fund etc

The contribution made by the employer, to any pension fund or provident fund or for any other benefit of the workmen, under any law, for the time being in force, has also specifically been excluded from the definition of 'wages', by the excluding cl (b). Such contributions made by industrial employers, for retiral or other benefits of their workmen, therefore, cannot be taken into account in computing 'wages' for the purposes of the Act. Hence, any dispute relating to any such items would not be covered under item one of the Third Schedule, though it may fall under item five of that Schedule.

(c) Gratuity

Gratuity has also been excluded from the definition of wages. Any type of gratuity, whether under the Payment of Gratuity Act or otherwise, will, therefore, not be taken into account in computing wages for the purposes of this Act.

Wage Concepts

The Committee on Fair Wages had identified three distinct levels of wages, i.e., (i) the minimum wage; (ii) the fair wage; and (iii) the living wage. Justice Gajendragadkar observed that "in an expanding economy, the contents of these expressions also expand and vary."[88] These levels naturally, do not represent a static, inflexible concept; they would vary and expand according to the economic development and compulsions of social justice'.[89] It is, therefore, very difficult, if not quite impossible, to define, or even describe accurately, the contents of the terms 'living wage', 'fair wage' or 'minimum wage'. These terms, or their variants—the 'comfort or decency level', the 'subsistence level', and the 'poverty or the floor level'—cannot and do not mean the same thing in all countries, nor even in different industries in the same country. What may be a fair wage in a particular industry in one country, may be a living wage in the same industry in another country. Similarly, what may be a fair wage in a given industry today, may cease to be fair and border on the minimum wage, in the future.[90] In other words, the concepts of 'minimum wage', 'fair wage' and 'living wage' are not static and would keep on changing with the circumstances, with the growth, both of industries and of the economy, the living standards and circumstances of the industries and the people.[91] The following passage of Philip Snowden on the wage concepts was cited by Das Gupta J, in *Hindustan Times*:[92]

> At the bottom of the ladder, there is the minimum basic wage, which the employer of any industrial labour must pay, in order to be allowed to continue an industry. Above this is the fair-wage, which may roughly be said to approximate to the need-based minimum, in the sense of a wage which is 'adequate to cover the normal needs of the average employee, regarded as a human being in a civilised society'. Above the fair wage, is the 'living wage'—a wage which will maintain the workman in the highest state of industrial efficiency, which will enable him to provide his family with all the material things which are needed for their health and physical well being, enough to enable him to qualify to discharge his duties as a citizen.[93]

This statement has been reiterated by the court in *Workmen v Management of Raptakos Brett & Co Ltd* , where Kuldip Singh J said:

> Broadly, the wage-structure can be divided into three categories-the basic 'minimum wage', which provides bare subsistence and is at poverty-line level, a little above is the 'fair-wage' and finally, the 'living wage', which comes at a comfort level.[94]

However, the court further observed that though it is not possible to demarcate these levels of the pay structure with any precision, these are well-accepted norms, which broadly distinguish one category of pay-structure from another.

Minimum Wage

As a matter of fact, the concept of 'minimum wage' has recently undergone a progressive change. It is no longer based upon the subsistence theory, according to which minimum wage equals the cost of commodities necessary to feed and clothe a worker and his family. In *Hindustan Times* (supra), Das Gupta J said, 'at the bottom of the ladder, there is the minimum basic wage, which the employer of any industrial labour must pay in order to be allowed to continue an industry'. In other words, the minimum wage is the lowest wage in the scale, below which the efficiency of a worker is likely to be impaired. However, the content of the expression 'minimum wage' too, is not fixed and static. It varies and is bound to vary from time to time and from place to place. With the growth and development of national economy, living standards would improve and so would the notions about the respective categories of wages expand and be more progressive.[95] According to the Committee on Fair Wages:

> The minimum wage must provide not merely for the sustenance of life, but for the preservation of the efficiency of the worker. For this purpose, the minimum wage must also accommodate some measure of education, medical requirements and amenities.[96]

The Committee categorically stated that an industry which was incapable of paying this minimum wage, had no right to exist and in cases where the continued existence of such an industry was imperative, in the larger interest of the country, it was the responsibility of the state to take steps to enable that industry to pay at least the minimum wage. The Committee was of the definite view that for fixing the minimum wage, no regard should be paid to the capacity of the industry to pay and it should be based solely on the requirements of the worker and his family. In other words, the Committee recognised that the minimum wage, as described, formed a part of the fair wage, though at its lower level. For claiming such a wage, the employee, in its view, should not be called upon to prove an employer's capacity to pay.[1] These predilections of the Committee on Fair Wages, in favour of the minimum wage, have been reverberated by industrial adjudicators in their awards and particulars by the Supreme Court, in its judicial dicta. In *Phaltan Sugar,* the labour appellate tribunal said that the minimum wage now includes not only the bare physical necessities, but also a modicum of comforts, otherwise known as conventional necessities.[2] The Tripartite Committee of the Indian Labour Conference, held in New Delhi in 1957,

declared the wage policy which was to be followed during the second five-year plan. The Committee accepted the following five norms for the fixation of 'minimum wages':

(i) In calculating the minimum wage, the standard working class family should be taken to consist of 3 consumption units for one earner; the earnings of women, children and adolescents should be disregarded.

(ii) The minimum food requirement should be calculated on the basis of a net intake of calories, as recommended by Dr Aykroyd, for an average Indian adult of moderate activity.

(iii) Clothing requirements should be estimated at a per capita consumption of 18 yards per annum, which would give the average worker's family of four, a total of 72 yards.

(iv) In respect of housing, the rent corresponding to the minimum area provided for under the government's industrial housing scheme, should be taken into consideration in fixing the minimum wage.

(v) Fuel, lighting and other 'miscellaneous' items of expenditure should constitute 20 of the total minimum wage.[3]

(vi) Children's education, medical requirement, minimum recreation, including festivals/ceremonies and provision for old age, marriage, etc, should further constitute 25 percent of the total minimum wage.[4]

The standards of minimum wage, as laid down by the committees, were adopted by the Supreme Court also, in holding that the minimum wage must provide not merely for the bare subsistence of life, but also for the preservation of the efficiency of the worker and for this purpose, the minimum wage must also provide for some measure of education, medical requirements and amenities and that the minimum wage rates must ensure not only the mere physical needs of the worker, which would keep him just above starvation, but must father ensure for him, not only his subsistence and that of his family, but also to preserve his efficiency as a workman.[5] This judicially pronounced concept of the components of the minimum wage has been generally accepted by industrial adjudication. Sometimes, the 'minimum wage' is described as a 'bare-minimum wage', in order to distinguish it from the wage structure, which is 'subsistence plus' or fair wage. But too much emphasis on the adjective 'bare' in relation to the minimum wage, is apt to lead to an erroneous assumption, that 'minimum wage' is a wage which enables the worker to cover his bare physical needs and keep himself just above starvation. That clearly is not intended by the concept of 'minimum wage'. On the other hand, since the capacity of the employer to pay is treated as irrelevant, it is but right that no addition should be made to the components of the minimum wage, which would take minimum wage near the lower level of fair wage, but the components of this concept must ensure for the employee, not only his subsistence and that of his family, but must also preserve his efficiency as a worker.[6] In the words of Hegde J:

> Minimum wage does not mean wage just sufficient for bare sustenance. At present, the concept of a minimum wage is a wage which is somewhat intermediate to a wage which is just sufficient for bare sustenance and a fair wage. That concept includes not only a wage sufficient to meet the bare sustenance of an employee and his family, but it also includes expenses necessary for his other primary needs, such as medical expenses, expenses to meet some education for his children and in some cases, transport charges etc.[7]

This concept of minimum wage is in harmony with the theory that in all civilised countries, minimum wage approximates to the statutory minimum wage which the state should strive to achieve, particularly in this country, having regard to the Directive Principles of the State Policy, enshrined in the Constitution. The recommendations of the Committee on Fair Wages, that in awarding the minimum wage, the capacity of the employer to pay is irrelevant and where an industry cannot afford to pay the minimum wage, it has no right to exist, has also been emphasised by judicial pronouncements. In *Bijay Cotton Mills*, dealing with a challenge to the constitutional validity of the provisions of the Minimum Wages Act, relating to fixation of minimum wages, on the grounds of repugnancy to Art. 19(1)(g), speaking for the Supreme Court, Mukherjea Jobserved:

> Individual employers might find it difficult to carryon their business on the basis of the minimum wages fixed under the Act, but this must be due entirely to the economic conditions of these particular employers. That cannot be a reason for striking down the law itself, as unreasonable.[8]

In *Crown Aluminium Works*, Gajendragadkar J vehemently held that the principle, that no industry has the right to exist unless it is able to pay its workmen at least a bare minimum wage, admits no exceptions, and the employment of labour on starvation wages cannot be encouraged or favoured in a modern democratic welfare state. If, therefore, an employer cannot maintain his enterprise without cutting down the wages of his employees below even a bare subsistence or minimum wage,

he would have no right to conduct his enterprise on such terms.[9] These dicta have since become classic.[10] In *Express Newspapers*, speaking for the court, Bhagwati J, observed:

> ...whereas the bare minimum or subsistence wage would have to be fixed irrespective of the capacity of the industry to pay, the minimum wage thus contemplated, postulates the capacity of the industry to pay and no fixation of wages which ignores this essential factor of the capacity of the industry to pay, could ever be supported. [11]

But in *U Unichoyi* (supra) explaining these observations, Gajendragadkar J said that in the *Express Newspapers'* case, the court was dealing with the statutory wage structure, where s 9 of the Working Journalists (Conditions of Service and Miscellaneous Provisions) Act 1955, authorised the imposition of a wage structure very much above the level of the minimum wage and the observations of Bhagwati J in that case, were made in that context, which could not be and should not be divorced from the text of the provisions, with respect to which they were made. In *Kamani Metals*, speaking for the court, Hidayatullah J, with eloquent candour remarked:

> ...minimum wage which, in any event, must be paid, irrespective of the extent of profits, the financial condition of the establishment or the availability of workmen on lower wages. This minimum wage is independent of the kind of industry and applies to all alike big or small. It sets the lowest limit below which wages cannot be allowed to sink, in all humanity.[12]

The same sentiment has been reverberated by Kuldip Singh J, in *Raptakos Brett*, in observing that the wage-structure which approximately answers the six components enumerated therein, is nothing more than a 'minimum wage' at subsistence level and added that the employees are entitled to the 'minimum wage' at all times and under all circumstances. An employer who cannot pay the minimum wage has no right to engage labour and no justification to run the industry.[13] In *S Krishna Murty*, in a writ petition under Art. 32 of the Constitution, filed on behalf of the workmen of the irrigation department of the Andhra Pradesh State Government, the Supreme Court noted that no minimum wage had been fixed for the category of the workmen like the workmen employed in the irrigation department. In the facts and circumstances of the case, the court directed the state government to fix the minimum wage for such workmen within four months from the date of the order.[14] The concept of minimum wage too, is dynamic. It is a wage-structure above the mere subsistence wage. It takes into account, primary amenities, such as medical care and education. As the standard of living increases, there must be a gradual change in the concept of the minimum wage, in any developing economy.[15] In fixing this wage, the industrial adjudicator or any other authority, will have to consider the position from the point of view of the worker. This wage will, therefore, have to be fixed irrespective of the capacity of the industry to pay.[16] In other words, it is the first charge on the 'industry'.[17] It is universally recognised that a minimum wage must be prescribed to prevent the evil of 'sweating' and for the benefit of workmen, who are not in a position to bargain with their employers.[18]The minimum wage policy, as it has emerged in this country, distinguishes between the organised industries and the sweated ones. The Minimum Wages Act 1948 is an instrument which seeks to protect the interests of the workers in the latter. In the organised sector, the wage fixing authorities have generally been guided by the report of the Committee on Fair Wages. The minimum wage defined by it, indicated only the components which should be taken into account in fixing the minimum wage. It was the Indian Labour Conference (15th session) which, for the first time, moved in the direction of formally quantifying its main components.[19] A Minimum Wage Fixing Machinery Convention was held in Geneva, in the year 1928 and the resolutions passed in that Convention were embodied in the International Labour Code. These resolutions required that for the purpose of determining the minimum rates of wages to be fixed:

> ... the wage-fixing body should, in any case, take account of the necessity of enabling the workers concerned, to maintain a suitable standard of living. For this purpose, regard should primarily be had to the rates of wages being paid for similar work in trades where the workers are adequately organised and have concluded effective collective agreements, or, if no such standard of reference is available in the circumstances, to the general level of wages prevailing in the country or in the particular locality.[20]

In the light of these resolutions, the Whitely Commission examined the question of 'minimum wage' and gave a general conclusion that it was likely that there were many trades in which a minimum wage might be desirable, but not immediately practicable and recommended that 'as in other instances cited, the policy of gradualness should not be lost sight of, if the desired end is to be achieved'.[21] The Central Legislative Assembly, in the year 1938, adopted a resolution,[22] urging the payment of 'sufficient wages' and fair treatment to workers employed in industries receiving protection or subsidy from the government. 'Sufficient wage' was defined as 'a wage which would ensure to every worker, the necessities for existence, food, clothing, housing and education, taking into account, at the same time, the practical side of the question and the needs of the industry'. However, the implementation of the resolution was deferred.

The 'minimum wage' was discussed in the fifth session of the Indian Labour Conference, held in September 1943, but in

the context of 'social security'. The question of statutory wage control was again discussed by the fourth session of the Standing Labour Committee, held in January 1944. The Committee came to the conclusion that there was a fair body of opinion in favour of some form of minimum wage for regions, but the enforcement of the minimum wage was a matter of very great importance. *After* a full debate in another session of the Indian Labour Conference, and scrutiny in the special sub-committee appointed by it, the Minimum Wages Bill was introduced in the Central Legislative Assembly in April 1946 and the Minimum Wages Act 1948, was enacted, which came into force on 15 March 1948. The main object of the Act is to prevent 'sweated' labour, as well as to prevent the exploitation of unorganised labour. It proceeds on the basis that it is the duty of the state that, at least minimum wages are paid to the employees, irrespective of the capacity of the industry or the unit, to pay the same. The mandate of Art. 43 of the Constitution is that the state should endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work on living wage, under conditions of work which ensure a decent standard of life and full enjoyment of leisure and social and cultural opportunities. This fixing of a minimum wage is just a first step in that direction. In the course of time, the state has to take many more steps to implement that mandate.[23]

The policy of the Act, therefore, is to prevent the employment of such sweated labour, in the interest of general public, and so, in prescribing the minimum wage rates, the capacity of the employer need not be considered, because what is being prescribed is the minimum wage rates, which a welfare state assumes, every employer must pay before he employs the labour.[24] If the labourers are to be secured in the enjoyment of minimum wages and they are to be protected against exploitation by their employers, it is absolutely necessary that restraints should be imposed on their freedom of contract and such restriction cannot, in any sense, be said to be unreasonable. On the other hand, the employers cannot be heard to complain if they are compelled to pay the minimum wages to their labourers, even though, the labourers, on account of their poverty and helplessness, are willing to work on lesser wages.[25] The Act does not define 'minimum wages', presumably because it would not be possible to lay down a uniform wage for all industries throughout the country, on account of different and varying conditions prevailing from industry to industry and from one part of the country to another. In this connection, the following observations of the Supreme Court are noteworthy:

> The concept of minimum wage is likely to undergo a change with the growth of our economy and with the change in the standard of living. It is not a static concept. Its concomitants must necessarily increase with the progress of the society. It is likely to differ from place to place and from industry to industry. That is clear from the provisions of the Act itself and is inherent in the very concept. That being the case, it is absolutely impossible for the legislature to undertake the task of fixing the minimum wages in respect of any industry, much less in respect of an employment. That process must necessarily be left to the government.[26]

Although the Minimum Wages Act was intended mainly as a measure of preventing sweating or exploitation of labour, through the payment of unduly low wages, it took into account, such employments in which labour was unorganised or weakly organised and over the years, a number of new employments have been added by the state governments, to the original schedule, depending on local requirements. But such extension of the coverage of the Act, brought in its wake, difficulties of implementation.[27] The following recommendations of the NCL-I, in connection with the fixing of the minimum wage, are apposite:

> The minimum wage may thus vary from region to region and even within the same region, from time to time, depending on particular situations. Prescribing some rigid criteria in regard to minimum wage fixation is, therefore, neither feasible nor desirable. It will necessarily have to be left flexible. We are further of the opinion that laying down a rigid cash equivalent of the content of a statutory minimum wage, whose coverage is essentially transitional, under conditions of development, would not serve any useful purpose.[28]

In *Transport Corpn of India*, a single judge of the Bombay High Court pointed out that when the minimum rates of wages are fixed by the 'appropriate government', under the provisions of the Minimum Wage Act, then industrial adjudicators are not supposed to fix the minimum rates of wages, because in such a case, 'fixation' is done only by the government. The adjudicators, therefore, do not 'fix' the minimum rates of wages. They merely ascertain what the minimum rates of wages for the purposes of deciding 'fair-wage' are.[29] In *Millowners Assn* (supra), the Supreme Court held that a basic minimum wage can be fixed by an industrial tribunal when the statute has not fixed the minimum wage.[30]Section 3(2A) of the Minimum Wage Act 1948, does contemplate fixation of minimum wage by industrial adjudication. In fixing such a minimum wage, the tribunal may take into account all the facts and fix the minimum wage, which may even be higher than the minimum wage contemplated under the Minimum Wages Act.[31]

The basic concept on which the provisions of the Minimum Wages Act are founded, is to prevent the sweating and exploitation of labour, through payment of unduly low wages. It would, therefore, conceptually follow, that just as in the case of scheduled industries, statutorily determined minimum wages have to be paid by the employer to his employees, in

order to prevent sweating and exploitation of labour, so must the employer in any establishment not covered by the schedule, also pay to his employees, a minimum wage, because what applies to the establishments included in the schedule to the Minimum Wages Act, must, on principles of social justice, apply with equal force, to industrial establishments not covered in the schedule as well. In such cases, considerations of social justice ought to play a major role in shaping the social, economic and industrial policies of a welfare state. This aspect has to be borne in mind by industrial adjudicators in fixing the level of wages. From the judicial dicta,[32] it is clear that in fixing the bare minimum wages and subsistence wages, industrial adjudicators will have to consider the position from the point of view of the worker, the capacity of the employer to pay such a wage would be irrelevant. The concept of minimum wage is no longer the same as in 1936, and even 1957 is way behind. In the language of Kuldip Singh J:

> A worker's wage is no longer a contract between an employer and an employee. It has the force of collective bargaining under the labour laws. Each category of the wage structure has to be tested at the anvil of social justice, which is the live-fibre of our society today.

The learned judge further observed:

> Purchasing power of today's wage cannot be judged by making calculations which are solely based on 30 or 40 years old wage-structure. The only reasonable way to determine the category of wage structure, is to evaluate each component of the category concerned, in the light of the prevailing prices. There has been a sky-rocketing rise in the prices and the inflation chart is going up so fast, that the only way to do justice to the labour, is to determine the money value of the various components of the minimum wage in the context of today.[33]

In non-scheduled industries, wages are fixed in a variety of ways, of which two are accentuated, *viz*, collective bargaining and failing that, industrial adjudication. Generally, a wage-settlement proceeds by first fixing the wage for the lowest category of workers in the industry or unit, and then differentials for scales are built up on the basis of this minimum. If wage determination is industry-wise, within an area, the wage fixed, whether it is through collective bargaining or with the help of industrial adjudication, is on the basis of the overall capacity of the industry to pay. However, industrial adjudication has consistently taken the view that the capacity to pay, of an individual unit, is irrelevant for fixing the minimum wage for the industry in a local area, so long as the industry as a whole, can pay. If a unit has no capacity, either it goes out of existence or improves its working to acquire the necessary capacity. Where, however, the wages for individual units in a local area are fixed through collective bargaining or industrial adjudication, arguments are entertained, in the process of such determination, about the capacity of the units to pay.[34]

Though, in fixing a non-statutory minimum wage, the capacity of the industry to pay is irrelevant, industrial adjudication cannot proceed to fix the fair wage, while purporting to fix the minimum wage without taking the financial capacity of the industry to pay, into consideration.[35] The adjudicator has also to bear in mind, the minimum wage paid by other similarly situated industries in the region. For instance, in *Orient Paper Mills*, the tribunal took into consideration, other industries in the region, in which minimum wages were higher than the minimum wages paid by the company in question, because there were no other comparable concerns in the same line of business in the region. The tribunal took the view that the industry-cum-region rule in *French Motor Car*,[36] could not apply to the facts of the case and observed that if the minimum wages in the company were to be fixed more on the basis of the minimum wages prevailing in the other industries in the region, then the revision was really necessary. Accordingly, it thought that it would be appropriate to fix the minimum wage in the company, as the minimum wage prevailing in those industries. In appeal, the Supreme Court observed that, having come to the conclusion which the tribunal did, it should have given full effect to the principle laid down in *French Motor Car*, and therefore, should have proceeded to fix the minimum wage in the company on the basis of the average minimum wage prevailing in the other industries, instead of proceeding on the alternative calculation on some other basis, so as to arrive at a lower figure. In this connection, the court pertinently pointed out that the total wage-packet of the three components, *viz*, the basic wage, the dearness allowance and the production bonus, had to be taken into consideration in fixing the minimum wage.[37]

In *Jaydip Industries*, during the pendency of an industrial dispute relating to wages, before the industrial tribunal, the Government of Maharashtra fixed the minimum rates of wages for certain employees including paper and paper board manufacturing industry. Subsequently, the tribunal adjudicated the reference made to it and revised the rates of wages for the workmen. The award of the tribunal was challenged in appeal before the Supreme Court, by the employer, contending that once the appropriate government had fixed the minimum rate of wages in the employment under s 3 of the Act, it was not open to the tribunal to fix higher rates of wages as minimum wages. Repelling the contention, the Supreme Court observed that the fixation of minimum rates of wages by the appropriate government does not operate as a bar to the tribunal to fix the minimum wages at higher or lower rates, if the dispute was pending at the time of the fixation of the

minimum wages.[38] In other words, the tribunal was not bound by the rates of wages fixed by the government under the provisions of s 3 and could fix rates of minimum wages in its award. Since the rates fixed by the tribunal were minimum rates of wages.

Fair Wage

Das Gupta J defined 'fair wage' as something above the minimum wage 'which may roughly be said to approximate to the need-based minimum, in the sense of a wage which is adequate to cover the normal needs of the average employee regarded as a human being in a civilised society.'[39] In the words of Hidayatullah J, 'a fair wage, lies between the minimum-wage which must be paid in any event and the living wage, which is the goal'.[40] Bhagwati J described a 'fair wage' as a mean between the living-wage and the minimum-wage.[41] Marshall would consider the rate of wages prevailing in an occupation as 'fair' if it is 'about one level with the average payment for tasks in other trades, which are of equal difficulty and disagreeableness, which require equally rare natural abilities and an equally expensive training'. Prof Pigou would apply two degrees of fairness, in judging a wage-rate, *viz*, 'fair in the narrower sense', and 'fair in the wider sense'. A wage-rate, in his opinion, is 'fair in the narrower sense', when it is equal to the rate current for similar workmen in the same trade and the neighbourhood, and fair 'in the wider sense', when it is equal to the predominant rate for similar work throughout the country and in the generality of trades'.[42] It may roughly be said to approximate to the need-based minimum, in the sense of wage which is adequate to cover the normal needs of the average employee regarded as a human being in a civilised society.[43] The fair wage must also take note of the economic reality of the situation and the minimum needs of the worker, having a fair sized family, with an eye to the preservation of his efficiency as a worker.[44] A fair wage is thus, related to fair workload and the earning capacity. It is a step lower than the living wage. The concept of fair wage, therefore, involves a rate sufficiently high, to enable the worker to provide a standard family, with food, shelter, clothing, medical care and education of children, appropriate to his status in life, but not at a rate exceeding the wage earning capacity of the class of establishment concerned.[45] But only such of the items which go directly to reduce the expenditure that would otherwise go into the family budget, are relevant in fixing the fair wage.[46] As time passes and prices rise, even a fair wage fixed for the time-being, tends to sag downwards and then a revision becomes necessary.[47] In the language of Hidayatullah J:

> A fair wage is thus related to the earning capacity and workload. It must, however, be realised that a fair wage is not a living wage, by which is meant a wage which is sufficient to provide not only the essentials above-mentioned, but a fair measure of frugal comfort, with an ability to provide for old age and evil days. Fair wage lies between the minimum wage, which must be paid in any event, and the living wage, which is the goal.[48]

Thus, while the lower limit of the fair wage must obviously be the minimum wage, the upper limit is equally set by what may broadly be called the capacity of the industry to pay. This will depend not only on the economic position of the industry, but also on its future prospects. Between these two limits, the actual wage will depend on a consideration of certain factors, *viz*:

(i) the productivity of labour,

(ii) the prevailing rates of wages,

(iii) the level of national income and its distribution, and

(iv) the place of the industry in the economy of the country. [49]

In the actual calculation of the fair wage, the Committee on Fair Wages observed that it was not possible to assign any definite weights to these factors. The wage fixing machinery should relate a fair load of work and the needs of a standard family, consisting of three consumption units, inclusive of the earner. The capacity of a particular industry in a specified region, should be taken into account to determine 'the capacity to pay', and this in turn, could be ascertained by taking a fair cross-section of the industry in the region concerned. The committee recognised the fact that 'the present level of our national income does not permit of the payment of a 'living wage' on the standards prevalent in more advanced countries'. But according to the committee, this should not preclude the fixation of fair wages on different and lower standards, and 'at almost any level of the national income, there should be a certain level of minimum wages, which the society can afford; what it cannot afford are minimum wages fixed at a level which would reduce employment itself and thereby, diminish the national income.' The Committee on Fair Wages also recognised that the concepts laid down by it could not be viewed in any static sense; they would very from time to time, depending on the economic and social developments in the country. The principle that the luxuries of today, become necessities of tomorrow, was implicit in this recognition. These recommendations have exerted a considerable influence on the wage fixing authorities while formulating the wage

structures in various industries and industrial units.

Living Wage

The concept of living wage, which has influenced the fixation of wages, statutorily or otherwise, in all economically advanced countries, is an old and well-established one. There are several current definitions of 'living wage', attempted in the recent past.[50] The quintessence of all these definitions is that a living wage should enable the male earner to provide for himself and his family, not merely the bare essentials of rood, clothing and shelter, but also a measure of frugal comfort, including education for the children, protection against ill-health, requirement of essential social needs, and a measure of insurance against the more important misfortunes, including old-age.[51] In other words, a living wage should not only provide the essentials contemplated by a fair wage, but should also be sufficient to provide for a fair measure of frugal comfort, with an ability to provide for old-age and evil days.[52] The living wage, according to the Committee on Fair Wages, represents the higher level of wage, and naturally, it would include all amenities which a citizen living in a modern civilised society is entitled to, when the economy of the country is sufficiently advanced and the employer is able to meet the expanding aspirations of his workers. As the traditional doctrine interprets it, the living wage is a will-o'-the-wisp, which floats a little further ahead, an arm's length out of reach. Its pursuit belongs to the same category as 'squaring the circle'.[53] In *Hindustan Times*, Das Gupta J, wistfully observed:

> While industrial adjudication will be happy to fix a wage-structure which would give the workmen, generally, a living wage, economic considerations make that only a dream for the future. That is why, the industrial tribunals in this country generally confine their horizon to the target of fixing a fair wage. [54]

In a later case, *viz*, *RBI Employees Assn*, in the same strain, Hidayatullah J remarked:

> ...our political aim is 'living wage', though in actual practice, living wage has been an ideal which has eluded our efforts like an ever-receding horizon and will so remain for some time to come. Our general wage structure has at best, reached the lower levels of fair wage, though some employers are paying much higher wages than the general average.[55]

In *Hindustan Antibiotics*, Subba Rao CJI, struck an optimistic note, that the prosperity in the country would help to improve the conditions of labour and the standard of life of the labour can be progressively raised from the stage of minimum wage, passing through need-bound fair-wage, to a living wage.[56] More than two decades later, Khalid J, in *Indian Hume Pipe Co*, still echoing the sentiments of Hidayatullah J, observed:

> ...This court has, often times, emphasised the need for a 'living wage' to workmen, instead of a subsisting wage. It is indeed a matter of concern and mortification that even today, the aspirations of a living wage for workmen remain a mirage and a distant dream.[57]

As nothing short of a living wage can be a fair wage, he exhorted that, 'it should be the combined effort of all concerned, including the courts, to extend the workmen a helping hand, so that they get a living wage, which would keep them to some extent at least, free from want'. In *Raptakos Brett*, Kuldip Singh J, has observed:

> A living wage has been promised to the workers under the Constitution. A 'socialist' framework, to enable the working people a decent standard of life, has further been promised by the 42nd amendment. The workers are hopefully looking forward to achieve the ideal. The promises are piling-up, but the day of fulfilment is nowhere in sight. Industrial wage, looking as a whole, has not yet risen higher than the level of minimum wage.[58]

The Directive Principles enshrined in the Constitution, make it the duty of the state to strive and secure living wages for the working class. This, however, cannot be achieved at one stroke, for the interests of the industry and its survival are as important as the betterment of the standard of living of the working class. All the same, unless there is a continuous and progressive trend towards securing better living conditions for labour, which would necessarily, in its turn, call for a determination of a progressive, higher minimum wage, it is only likely that the goal may never be reached.[59]

Machinery for Wage Fixation

In United Kingdom

In the United Kingdom, where trade boards, and not general boards, have been set up, the Minister of Labour appoints a board if he is satisfied that no adequate machinery exists in a particular trade or industry, for effectively regulating the wages and that it is necessary to provide such machinery. The trade board is a fairly large body, consisting of an equal number of representatives of employers and workers with a few independent members, including the chairman. Although, appointments are made by the minister, the representatives of employers and workers are appointed on the recommendation of the associations of the concerns. The trade board publishes a notice announcing its tentative proposals for the fixation or revision of a wage-rate and invites objections or comments. After a two months' notice, the board takes a final decision and submits a report to the minister, who must confirm the rate unless, for any special reason, he returns the recommendations of the board for further consideration.[60]

The Wage Council Act 1945 (8 and 9 Geo VI c 17), provides for the establishment of wage councils. The Minister of Labour and National Services, has the power to make a wage council order, after considering objections made with respect to the draft order, on behalf of any person appearing to him to be affected. The wage council makes such investigation as it thinks fit and publishes a notice of the wage regulation proposals and the parties affected are entitled to make written representations with respect to these proposals, whose representations the wage council considers. The wage council can make such further inquiries as it considers necessary and thereafter, submits the proposals to the minister, either without any amendment or with such amendments as it thinks fit, in regard to the same. The minister considers these wage-regulation proposals and makes an order giving effect to the proposals from such date as may be specified in the order. Remuneration fixed by the wage regulation orders is called the 'statutory minimum remuneration'. There are similar provisions under the Agricultural Wage Regulation Act 1924 (14 and 15 Geov c 37), in regard to the regulation of wages by agricultural wage committees and the agricultural wage board.

In The United States of America

In the United States of America, some state laws prescribe that the representatives of employers and workers should be elected, but in the majority of states, the administrative authorities are authorised to make direct appointments. The boards so set up, are empowered to make inquiries, to call for records, to summon witnesses and to make recommendations regarding the minimum wages. Some American laws lay down a time-limit for the submission of the proposals. The administrative authority may accept or reject a report and refer it back for reconsideration or form a new board for considering the matter afresh. Some of the laws provide that if the report is not accepted, the matter must be submitted again to the same wage board.[61] The whole procedure for the determination of wages, in the United States of America, is described in two decisions of the Supreme Court: (a) *Inter-State Commerce Co v MR Luis Ville* [62] and (b) *Opp Cotton Mills v Administrator*. [63]The Fair Labour Standards Act 1938, in the United States of America, provides for a convening by the administrator, of industry committees, for each such industry, which, from time to time, recommends the minimum rates of wages to be paid by the employers. The committee recommends to the administrator, the highest minimum wage-rates for the industry, which it determines, having due regard to the economic and competitive conditions, will not substantially curtail employment in the industry. Wage orders can thereupon be issued by the administrator, after due notice to all interested persons and after giving them an opportunity to be heard.

In Australia

In Australia also, there are provisions in various states for the appointment of wage boards, the details of which are not necessary for the present purpose. Reference, as an instance, may be made to the wage board system in Victoria, which was established in 1896, as a means of directly regulating wages and working conditions in industries subject to 'sweating', and was not intended to control industrial relations as such. Under the Factories and Shops Act 1924, wage boards are to be set up for various industries, with a court of industrial appeals, to decide upon appeals from the determinations of a wage board. Industries for which there is no special wage board are regulated by the general wages board, which consists of two employers' representatives, nominated by the Victorian Chamber of Manufactures, two employees' representatives, nominated by the Melbourne Trade Hall Council, and a chairman, agreed upon by these four members or nominated by the Minister of Labour.[64] It may be noted that in the majority of cases, these wage boards are constituted of an equal number of representatives of the employers and the employees and one or more independent persons, one of whom is appointed as the chairman.

In India

The history of wage-fixation in India is of recent vintage. There was practically no effective machinery until the second world war, for the settlement of industrial disputes or the fixation of wages. The first important enactment for the settlement of disputes was the Bombay Industrial Disputes Act 1938, which created an industrial court. The Act had limited application and the court was not charged with the responsibilities of fixing and regulating wages. During the war, state intervention in the settlement of industrial disputes, became necessary and numerous adjudicators were appointed to

adjudicate on trade disputes under the Defence of Indian Rules. The Industrial Disputes Act 1947, is the first effective measure with an all-India applicability, for the settlement of industrial disputes. Under this Act, various tribunals have passed awards regulating wages in a number of important industries.

The first enactment, specifically to regulate wages in this country, is the Minimum Wages Act 1948. This Act is limited in its operation to the so-called sweated industries, in which labour is practically unorganised and working conditions are far worse than in organised industries. Under that Act, the appropriate government has either to appoint a committee to hold inquiries and to advise it in regards to the fixation of the minimum rates of wages, or, if it thinks that it has enough material on hand it has to publish its proposals for the fixation of wages, in the Official Gazette and to invite objections. The appropriate government finally fixes the minimum rates of wages, on the receipt of the recommendations of the committee or of the objections from the public. There is no provision for appeal. There is an advisory board in each state, to co-ordinate the work of the various committees. There is also a central advisory board, to co-ordinate the work of the state boards. Complaints of non-payment of the minimum rates of wages fixed by government, may be taken to claim authorities. Breaches of the Act are punishable by criminal courts.[65]

It is worthy of note that these committees, sub-committees, state advisory boards and central advisory boards, are to consist of persons to be nominated by the Central Government, representing employers and employees in the scheduled employments, who shall be equal in number, and independent persons not exceeding one-third of its total number of members; one of such independent persons shall be appointed the chairman, by the appropriate government. Under an amendment to the Bombay Industrial Relations Act 1946, wage boards can be set up in the state of Bombay, either separately for each industry or for a group of industries. The wage board is to consist of an equal number of representatives of employers and employees and some independent persons, including the chairman, all of whom would be nominated by the government. The board decides disputes relating to reduction in the number of persons employed, rationalisation or other efficiency systems of work, wages and the period and mode of payment, hours of work, and leave with or without pay. When a matter has been referred to a wage board, no proceedings may be commenced or continued before a conciliator, conciliation board, labour court or industrial court. The wage boards are authorised to form committees for local areas, for the purpose of making inquiries. It is obligatory on the government to declare the decisions of the wage boards, binding, but where the government feels that it will be inexpedient, on public grounds, to give effect to the whole or any part of the decision, the matter has to be placed before the state legislature, the decision of which will be binding. There is a provision for filing of appeals from the decisions of the wage boards, to the industrial court. Those wage boards, moreover, are under the superintendence of the industrial court. Recommendation 30, being the recommendation concerning the application of the minimum wage-fixing machinery, made by the International Labour Office in 1949 (extracts from Conventions and Recommendations 1919-49, published by International Labour Office 1949), is noteworthy, which is in the following words:

> (1) The minimum wage-fixing machinery, whatever form it may take (for instance, trade board for individual trades, tribunals), should operate by way of investigation, into the relevant conditions in the trade or part of trade concerned, and consultation with the interests primarily and principally affected, that is to say, the employers and workers in the trade or part of trade, whose views on all matters relating to the fixing of the minimum rate of wages should, in any case, be solicited and be given full and equal consideration.
>
> (2)
>
> (a) To secure greater authority for the rates that may be fixed, it should be the general policy, that the employers and workers concerned, through representatives equal in number or having equal voting strength, should jointly take a direct part in the deliberations and decisions of the wage-fixing body; in any case, where representation is accorded to one side, the other side should be represented on the same footing. The wage-fixing body should also include one or more independent persons, whose votes can ensure effective decisions being reached in the event of the votes of the employers' and workers' representatives being equally divided. Such independent persons should, as far as possible, be selected in agreement with or after consultation with the employers' and workers' representatives, on the wage-fixing body.
>
> (b) In order to ensure that the employers' and workers' representatives shall be persons having the confidence of those whose interests they respectively represent, the employers and workers concerned should be given a voice as far as is practicable in the circumstances, in the selection of their representatives, and if any organisations of the employers and workers exist, these should, in any case, be invited to submit names of persons recommended by them, for appointment on the wage-fixing body.
>
> (c) The independent person or persons mentioned in paragraph (a), should be selected from among men or women recognised as possessing the necessary qualifications for their duties and as being dissociated from any interest in the trade or part of trade concerned, which might be calculated to put their impartiality in question.[66]

The following appraisement of the system of establishing trade boards, by the Committee on Fair Wages, may be noted in this context:

> A trade board has the advantage of expert knowledge in the special problems of the trade for which it has been set up and is, therefore, in a position to evolve a scheme of wages suited to the conditions obtaining in the trade. The system, however, suffers from the limitation that there is no one authority to co-ordinate the activities of the various boards, with the result that wide disparities may arise between the scales sanctioned for similar industries. A general board ensures due co-ordination', but is far less competent than a trade board, to appreciate the special problems of each trade. The Bombay Textile Labour Inquiry Committee have stared in their report, that the trade board system is best suited to Indian conditions, particularly because the very manner of functioning of trade boards is such, that wages are arrived at largely by discussion and conciliation and that it is only in exceptional cases, that the deciding votes of the chairman and of the independent members have to be given.[67]

It is clear therefore, that a wage board, relating to a particular trade or industry, constituted of a equal number of representatives of employers and employees, with an independent member or members, one of whom is appointed the chairman, is best calculated to arrive at the proper fixation of wages in that industry. The NCL-I made the following recommendations:

> There is little scope for making any radical departure from the existing procedures and practices being adopted for wage fixation in organised industry. Building up on the procedures evolved so far and making improvements in the process, would indeed be necessary. There is no doubt that wage boards have done some useful work and they should continue...Some of these and other recommendations of which we would like to make a special mention are:
>
> (i) There need be no independent persons on the wage board. If considered necessary, an economist could be associated with it, but only as an assessor;
>
> (ii) As far as possible, the chairman should be appointed by the common consent of the parties. An agreed panel of names should also be maintained by the proposed National/State Industrial Relations Commissions, for appointment as chairman. They should preferably be drawn from the members of the proposed National or State Industrial Relations Commissions. In case a chairman is appointed by the consent of both the parties, he should arbitrate if no agreement is reached in the wage board. A person should not be appointed as chairman of more than two wage boards at a time. In case the commission is unable to prepare a panel of agreed names, the government shall appoint the chairman;
>
> (iii) The wage boards should normally be required to submit their recommendations within one year of their appointment. The date from which the recommendations would take effect, should be mentioned by the wage board, in the recommendation itself;
>
> (iv) The recommendations of a wage board should remain in force for a period of five years;
>
> (v) Unanimous recommendations of wage boards should be made statutorily binding. In cases where no agreement is reached within the wage board, the chairman should arbitrate, if the chairman, before appointment, was acceptable to both sides;
>
> (vi) A Central Wage Board Division should be set up in the Union Ministry of Labour and Employment on a permanent basis, to service all wage boards. This division should lend the necessary staff support to the wage boards and also supply statistical and other information needed by them, for the expeditious disposal of the work; and
>
> (vii) A manual of procedure for wage boards should be prepared.[68]

Wage Fixation by Industrial Adjudication

Subject Matter of Reference

The Third Schedule to the Act, enumerates the matters which are within the jurisdiction of an industrial tribunal, constituted under s 7 A. Item I of this schedule refers to 'wages, including periods and modes of payment'. From a cursory reading of this item and the definition of 'wages' in s 2(rr), it would appear that on a reference relating to wage fixation, a tribunal, apart from all remuneration payable to workmen as consideration for the work done by them, can also go into all such allowances including, dearness allowance, as the workmen are entitled to at the time of the dispute. Hence, if the workmen are not entitled to any allowance, including dearness allowance, at the time of raising the dispute, the tribunal cannot deal with such items if the reference is made merely with respect to wages. That is why, the second item of the

schedule refers to 'compensatory and other allowances'. In other words, if, at the time of raising the dispute for wages, the workmen were not entitled to a compensatory allowance or any other allowances, including dearness allowance, the tribunal will have no jurisdiction to award these allowances on a reference for the adjudication of wages, unless a dispute has been separately raised and referred for adjudication, in connection with such allowances. Any bonus, contributions to any pension or provident fund and gratuity have specifically been excluded from the definition of wages. Hence, in adjudicating a reference in connection with wages, the tribunal cannot award these benefits to the workman. Item 5 deals with 'bonus, profit sharing, provident fund and gratuity'. The disputes relating to these matters, therefore, have to be specifically raised and referred for adjudication.

General Principles

Wage fixation is an important subject in any social welfare programme.[69] With the advent of the doctrine of a welfare state, which is based on notions of a progressive social philosophy, the theory of 'hire and fire', as well as the theory of 'supply and demand', which were allowed free scope under the doctrine of *laissez faire*, have become obsolete and no longer hold the field in constructing a wage-structure. In a given case, industrial adjudication has to take into account, to some extent, considerations of right and wrong, propriety and impropriety, fairness and unfairness. 'It is in this sense, and no doubt, to a limited extent' as pointed out by Gajendragadkar J, 'that the social philosophy of the age supplies the background for the decision of industrial disputes as to wage structure'. Under the growing strength of the trade union movement, collective bargaining enters the field and wage structure ceases to be a purely arithmetical problem. Considerations of the financial position of the employer and the state of the national economy, have their say, and the requirements of a workman living in a civilised and progressive society, have also come to be recognised.[70] The social and ethical implications of arithmetic and economics of wages cannot be ignored in the present age.[71] Subba Rao CJI, observed that the social and economic uplift of labour is important for securing industrial peace, which is essential to increase the national productivity.[72] Vaidialingam J held:

> The object of industrial law is to improve the service conditions of industrial labour, so as to provide for them, the ordinary amenities of life, with a view to bring about industrial peace, which would, in turn, accelerate the productivity of the country, resulting in its prosperity, the prosperity of the country in its turn, will help to improve the conditions of labour. The worker is interested in his pay packet and given reasonable wages, he can be expected to be a satisfied worker.[73]

In all countries, wage policy is a complex and sensitive area of public policy. This is because the employer, in his pursuit to surpass competition, through expansion facilities, increased production, greater efficiency and higher profits, may ignore the aspirations of the workmen for higher wages, lower hours, fringe benefits and security, which may threaten their present status and becloud future prospects. The relative status of the workers in the society, their commitment to industry and their attitude towards the management, their morale and motivation towards productivity, their living standards and their way of life, are all conditioned by the wages and their conditions of service, including security. In the language of the NCL-I:

> A policy dealing with this crucial problem cannot be simply economic, as it has to reckon with the relative multi-dimensional social phenomena, in which, besides the workers and the management, the consumer and the society at large and in consequence, the State are all vitally interested ... Equally important in this context, are the concrete social facts that must be taken into account in the formulation of a wage structure at any given time.[74]

Hence, the problem of wage structure, with which industrial adjudication is concerned in a modern democratic state, in the ultimate analysis, depends, to some extent, on the ethical and social considerations. Besides, there are numerous complex factors, some of which are economic and some springing from social philosophy, giving rise to conflicting considerations, that have to be borne in mind. In formulating a wage structure in a given case, industrial adjudication does take into account, to some extent, considerations of right and wrong, propriety and impropriety, fairness and unfairness.[75] Wage structure is 'a determinant of the shares of rival claimants of the product of industry and national dividend, but there may often be conflict between its short run and long run objectives, as well as between profit and social interests'.[76] In *Hindustan Times*, Das Gupta J, observed:

> The fixation of wage-structure is among the most difficult tasks that industrial adjudication has to tackle. On the one hand, not only the demands of social justice, but also the claims of the national economy, require that attempts should be made to secure to workmen, a fair share of the national income which they help to produce. On the other hand, care has to be taken that the attempt at a fair distribution does not tend to dry up the source of the national income itself On the one hand, better living conditions for workmen, that can only be possible by giving them a 'living wage', will tend to increase the nation's wealth and income. On the other hand, unreasonable inroads on the profits of the capitalists might have a tendency to drive capital away from fruitful

> employment and even to affect prejudicially, capital formation itself The rise in prices that often results from the rise of the workmen's wages may, in its turn, affect other members of the community and may even affect prejudicially, the living conditions of the workmen themselves. The effect of such a rise in price on the country's international trade, cannot also be always ignored. Thus, numerous complex factors, some of which are economic and some spring from social philosophy, give rise to conflicting considerations that have to be borne in mind. Nor does the process of valuation of the numerous factors remain static. While international movements in the cause of labour have, for many years, influenced thinking and sometimes even judicial thinking in such matters, in this country, the emergence of an independent democratic India has influenced the matter even more profoundly.[77]

In formulating the wage structure, the adjudicator has to reconcile the following conflicting interests, *viz*:

(a) the natural and just claims of the employees, for a fair and higher wage;

(b) the financial capacity of the employer;

(c) the legitimate desire of the employer to make a reasonable profit;

(d) the rise in price-structure which may result from the fixation of a wage-structure; and

(e) the reasonableness of the additional burden which may be imposed upon the consumer, by the wage-structure[78].

Hence, the fixation of a wage-structure is always a delicate task, because a balance has to be struck between the demands of social justice, which require that the workmen should receive their proper share of the national income which they help to produce, with a view to improving their standard of living, and the depletion, which every increase in wage makes in the profits, as this tends to divert capital from industry into other channels thought to be more profitable.[79] In balancing the conflicting interests of the employer, the employees and the public, the adjudicator has a delicate job of weighing; and it is a three-and not a two-pan scale. His is a tedious task of reconciliating a head-on clash of various very basic policies and interests, namely: freedom of contract, freedom of trade, sanctity of contract, individual liberty, protection of business, right of work, making of training available to the employees, earning of livelihood for oneself and family, utilisation of one's skill and talent, continued productivity, betterment of one's status, avoidance of one's becoming a public charge, encouragement of competition and discouragement of monopoly and international trade, etc. To quote the NCL-I:

> The right of the workers for a fair standard, the claim of the industry for expansion through its own surplus, the charges on the industry for public revenues, the need of the economy for resources and the need of the consumer to get supplies at stable and fair prices, all become relevant factors, which an industrial adjudicator has to bear in mind.[80]

The claim of the employee, for fair and higher wages, is undoubtedly based on the concept of social justice, and it plays inevitably, a major part in the construction of the wage-structure. There can be little doubt that if the employees are paid a better wage, which would enable them to live in fair comfort and discharge their obligation to the members of their families in a reasonable way, they would be encouraged to work wholeheartedly and their work shall appreciably increase in efficiency.[81] Not only social justice, but also claims of national economy, require that attempts should be made to secure to workmen, a fair share of the national income, which they help to produce.[82] Besides, the requirements of a workman living in a civilised and progressive society, have also to be recognised.[83] In the language of Goswami J 'The central figure in the adjudication, however, is the wage-earner, who should have a fair deal in the bargain in a real sense, as far as can be, without at the same time ignoring the vital interests of the industry whose, viability and prosperity are also the mainstay of labour.'[84]

In trying to recognise and give effect to the demand for a fair wage, including the payment of a dearness allowance, to provide for an adequate neutralisation against the increasing rise in the cost of living, industrial adjudication must always take into account the problem of the additional burden, which such wage-structure would impose upon the employer and ask itself, whether the employer can reasonably be called upon to bear such burden.[85] Not only the consideration of the financial capacity of the employer, but the state of the national economy has also to be taken into consideration.[86] Care, therefore, has to be taken, that the attempt at a fair distribution does not tend to dry up the source of the national income itself.[87] But it has to be borne in mind that the first claim is of the workers, for a basic minimum wage, irrespective of any other consideration. Beyond this, however, in the determination of the wage differential, the capacity of the industry to pay and other considerations become relevant.[88] How the various competing claims have to be balanced, in a given case, should mainly be the function of an impartial adjudicator, in an industrial proceeding, unless the legislature chooses to adopt other appropriate means and methods. However, the principles of wage-structure cannot operate in vacuum, divorced of the realities of the situation. It is necessary to take note of so many factors from the real life a worker lives, or is reasonably expected to live or to look forward to, with hope and fervency, in the entire social context. Principles, therefore,

have to be evolved from the conditions and circumstances of actual life.[89] The social and economic conditions prevailing in the country at the relevant time too, have to be borne in mind. Considering the question of wages in the background of the directive principles enshrined in our Constitution, a wage structure should serve to promote a fair remuneration to labour, ensuring due social dignity, and strengthen incentives to efficiency, without being unmindful of the legitimate interests and expectations of the consumer, in the matter of prices. Guided by this principle, if the financial capacity of the industry permits, the workers should, broadly speaking, be allowed their due share in the prosperity of the industry, to which they have contributed by their labour, so as to enable them, within reasonable limits, to improve their standard of living.[90] Industrial adjudication, in this connection, has to be pragmatic, though it does not follow that it has to be unscientific and remain simply as a matter of expediency. There are, of course, theoretical generalisations or principles that may provide guidelines for framing a wage policy.[91]

Industrial adjudication has evolved certain broad principles for formulating, the wage structure in industrial undertakings. It is now well settled, that industrial adjudication can alter or modify the contractual terms of employment, between an employer and his employees. In an industrial dispute as to wage-structure, therefore, the immediate objective is to settle the dispute by constructing such a wage-structure as would do justice to the interests of both labour and capital, establish harmony between them and lead to their genuine and whole-hearted co-operation in the task of production.[92] To lay down a hard and fast rule in a case, such as the fixation of wages, would hinder the achievement of maximum justice, as such, a rule might leave no room for compromise, or might compel a compromise where none is necessary. Hence, almost always, neither does the tribunal fix, nor, it can in fact, fix the wage-structure so as to reach the perfection point.[93]

Relevant Factors for Wage Fixation

Broadly speaking an industrial adjudicator, in fixing a wage-structure, has to balance the following factors:

(a) Better living conditions for workmen can only be possible by giving them a living wage, which in turn, will tend to increase the national wealth and income.

(b) Higher wages, nearing a 'living wage', would appreciably increase the efficiency of workmen, by enabling them to live in fair comfort and discharge their obligations to the members of their families.

(c) A wage-structure nearing a 'living wage', would be conducive to harmony and peace in the industry.

(d) Claims of social justice and the national economy, to secure to workmen, a fair share of the national income, which they help to produce.

(e) The requirements of a workman's living wage in a civilised and progressive society.

For counter-balancing the above considerations, the following points have to be borne in mind, in favour of keeping the wage-structure at a reasonable level:

(a) Unreasonable inroads into the profits of the employer may have the tendency to drive capital away from fruitful employment and may prejudicially affect capital formation.

(b) A wage structure which is beyond the financial capacity of the employer, may lead to the closure of the industry itself.

(c) The wage-structure being a long-range plan, a long range view of the financial capacity of the industry should be taken into consideration.

(d) In considering an increase in the wage, the increase should be correlated to minimum wage, in relation to the financial capacity of the industry to bear the burden.

(e) The effect of an increase on other similar industries in the region, should be taken into consideration, ie, a wage-structure should take into consideration the industry-cum-region basis, after giving careful consideration as to the ability of the industry to pay.

(f) The total pay-packet of the workmen, including the dearness allowance, other allowances and other benefits enjoyed by them.

(g) The effect of the rise in prices, resulting from the rise of wages, which may affect other members of the community and even prejudicially affect the living conditions of the workmen themselves.

(h) The effect of the rise in prices on the international trade of the country.

The problem of wage-structure fixation has also to be tackled on the basis that such wage-structure should not be changed from time to time. It is a long range plan; and so, in dealing with this problem, the financial capacity of the employer must be carefully examined.[1] In determining the question as to whether workmen are entitled to an increase in the rate of wages, the dearness allowance and other benefits enjoyed by them, have also to be taken into consideration.[2] Further, the tribunal has to consider the minimum wage and the capacity of the management to bear the burden of the increased wages, and then to correlate the increment in the minimum wage, in relation to the capacity of the industry.[3] Hence, in achieving the immediate objective, industrial adjudication has to take into account several principles of wage structure and decide every dispute so as to do justice to both the sides.[4] For these reasons, the Supreme Court has repeatedly stressed the need for considering the problem on an industry-cum-region basis, giving careful consideration to the ability of the industry to pay.[5] In this connection, the following observations of NCL-I are apposite:

> The determination of wages implies evolving and sustaining a wage structure which (i) permits a fair remuneration to labour, (ii) permits a fair return to capital, and (iii) strengthens incentives to efficiency. Apart from these intra-industry wage-differentials, the inter-industry and inter-regional wage differentials have a relevance. The latter may be due to the limitations of the market or on account of inter-regional disparities in productivity, due to differences in technology, capital per worker or organisation. It is expected that with the industries competing for skill in the country as a whole, these will be soon eliminated. Inter-industry differentials likewise, are also unjustified except on grounds of local differences in technology and capital per worker.[6]

No distinction can be made in fixing the wage-structure, dearness allowance or gratuity, etc, between the workmen employed by public sector undertakings and those employed in private sector undertakings. In *Hindustan Antibiotics*, after a careful consideration of the constitutional, legislative, judicial and executive trends of opinion with regard to the question, the Supreme Court held that the principles evolved by industrial adjudication in regard to private sector undertakings, will also govern public sector undertakings, having a distinct corporate existence.[7] The International Encyclopaedia states thus:

> Wage structure is a generic term for the set of inter-relations among a collection of wage-rates. It is frequently used in contrast to the concept of wage-level, which refers to an average of collection. Correlative with the concept of wage-structure, is that of wage-differential-some measure of difference between elements of a wage-structure. In short, a wage, structure is the relation among two or more wages related to one another in some systematic way.[8]

Industrial adjudication has laid down two principal factors, which weigh while fixing or revising a wage structure, *viz*, (i) what wage scales the establishment in question can pay, without any undue strain on its financial resources, and (ii) how the wages prevailing in the establishment in question, compare with those given to workmen of a similar grade and scale, by similar establishments in the same industry, or, in their absence, in other similar establishments in other industries in the region.[9] Thus, the former factor is the financial capacity of the employer and the latter has come to be known as the principle of region-cum-industry. In the absence of the requisite material for the construction of a wage structure, before the Tribunal, its award in that respect would not be sustainable.[10]

Financial Capacity

Though, in fixing the minimum wage, the question of the financial capacity of the employer is irrelevant, the case of fair wage stands on a different footing. In a case where the employer is already paying the minimum wage and the claim is for a fair wage, the question of the financial capacity of the employer is not only relevant, but is pertinent, because fixing the upper limit of the fair wage would depend upon the capacity of the employer to pay. The burden, therefore, above the minimum wage, can only be justifiably imposed if the industry is capable of meeting that extra burden.[11] Hence, the capacity of the employer to bear the financial burden must receive due consideration. The past performance of the company and the future prospects, with a totality of the picture, must be present in the mind of the adjudicator, while deciding the dispute.[12] In the fixation of rate of wages, which includes within its compass, the fixation of the scales of wages also, the capacity of the industry to pay, is one of the essential circumstances to be taken into consideration.[13] The question of the fixation of a wage-structure, like every major consideration, is to be considered on the basis that the conflicting claims of capital and labour must be harmonised on a reasonable basis, and if it appears that the employer cannot really bear the burden of the increase in the wage-bill, industrial adjudication should not hesitate to give him relief, if it is satisfied that if such relief is not given, then he may have to close down his business.[14] The capacity of the industry to pay means one of the following things, *viz*:

(a) the financial capacity of all the industries in the country, to pay;

(b) the financial capacity of a particular industry as a whole, to pay;

(c) the financial capacity of an employer to pay; or

(d) financial capacity of a particular unit of establishment (marginal, representative or average) to pay.

(a) Financial Capacity of all the Industries in the Country to Pay:

Here, the word 'industry' is used in the most comprehensive sense, which may perhaps be an industry as defined in s 2 (j) of the Act. This concept of industry becomes relevant in the national context, when it is to be decided that below a particular level, any employer in the whole country, in any industry, will not employ any workman. But, in this country, so far, the stage when any such wage has been fixed on this basis, has been not reached.

(b) Financial Capacity of Particular Industry as a Whole, to Pay:

This, refers to particular types of industries in the whole country, such as, the jute industry, cotton and textile industry, coal industry, paper industry, sugar industry and engineering industry, etc. It would obviously not be possible for industrial adjudication to measure the capacity of each of the units of an industry, and the only practicable method is to take a fair cross-section of that industry.[15] In *Express Newspapers*, Bhagwati J held:

> ... the capacity of an industry to pay should be gauged on an industry-cum-region basis, after taking a fair cross-section of that industry. In a given case, it may be even permissible to divide the industry into appropriate classes and then deal with the capacity of the industry to pay classwise...no doubt, against the ultimate background that the burden of an increased rate should not be such as to drive the employer out of business.

The learned judge further observed:

> Industrial adjudication is familiar with the method which is usually adopted to determine the capacity of the employer to pay the burden sought to be imposed on him. If the industry is divided into different classes, it may not be necessary to consider the capacity of each individual unit, to pay, but it would certainly be necessary to consider the capacity of the respective classes to bear the burden imposed on them. A cross-section of these respective classes may have to be taken for a careful examination and all relevant factors may have to be borne in mind in deciding what burden the class, considered as a whole, can bear. If possible, an attempt can also be made, and is often made, to project the burden of the wage-structure into two or three succeeding years and determine how it affects the financial position of the employer. [16]

In *Bajrang Jute Mills*, Vaidialingam J held that the uniform wage scales fixed by a wage board, for all the jute mills in the various regions in the country (20 in West Bengal and 9 in other parts of the country) without taking note of the financial position of the individual units and in disregard of the region-cum-industry formula, were improper. The learned judge held:

> ...the requirement of considering the capacity of each individual unit to pay, may not become necessary if the industry is divided into different classes. Even if the industry is divided into different classes, it will still be necessary to consider the capacity of the respective classes, to bear the burden imposed on them. For this purpose, a cross-section of these respective classes may have to be taken, for a careful consideration, for deciding what burden the class considered as a whole, can bear.[17]

In *Kirlampudi Sugars*, Jaganmohan Reddy J observed:

> The classification into classes, it will be seen, is not an obligatory one, but is required only in cases where otherwise, a fair wage cannot be determined. Any injunction that the industry in a region should in all cases be divided into classes, while determining a fair wage for that industry, would, on the other hand, be likely to introduce a greater disparity. ... There is nothing in the *Bajrang Jute Mills'* case, which makes it obligatory on a wage board, to divide an industry into regions as well as classes, or to examine the financial capacity of every unit in that industry in the region, irrespective of the conditions prevailing in the different regions of that industry. As long as all relevant factors appertaining to that industry, industry wise and region wise, have been considered and the capacity of a fair cross-section of that industry to pay, in that region, has been ascertained, the recommendations of the wage board cannot be held to be invalid. It is not in every case, that a division into classes in the same region, on a unit wise capacity, should be made before recommendations of the wage structure, dearness allowance or other conditions of service in that industry could be held to be fair and within the financial capacity of the industry in that region.[18]

(c) Financial Capacity of an Employer to Pay:

The particular employer may be having a number of establishments, being managed and controlled by him. If in the circumstances and facts of a particular case, the entire business of an employer is a composite whole, then the financial capacity of the employer with respect to all his establishments, is to be taken into consideration. Large-scale industries are managed very rarely by individual employers. Generally, joint stock companies are floated for running and managing such industries. Such companies, occasionally, set up a number of establishments, in one or more states in the country. If the various establishments have a functional integrity, ie, they are functionally interdependent on one another, the financial capacity of the whole company has to be taken into consideration.

(d) Financial Capacity of a Particular Unit or Establishment to Pay:

An employer may have a number of units or establishments or only one unit or establishment. In the latter case, occasionally, the words 'employer' and 'establishment' have been used interchangeably, in industrial adjudication. If each unit or establishment of an employer is separate from the others with no functional integrity with the others, the financial capacity of that particular unit or establishment alone is relevant for the purposes of wage fixation. The financial capacity of the employer with respect to other units, is irrelevant. In *Gujarat Electricity Board*, the Supreme Court held that the financial capacity of the board should be judged not only on the basis of its commercial undertakings, but also on the basis of its other activities, which were in the nature of national duties. The running of power house was only one branch of those activities. Hence, the demand for additional wages could not be granted when the board did not have the capacity to pay and was incurring heavy losses.[19] While fixing a wage-structure on the basis of a fair wage, a long range view of the financial position of the employer's undertaking is to be taken.[20] In *Ahmedabad Millowners Assn*, Gajendragadkar CJI observed:

> ...industrial adjudication must always take into account, the problem of the additional burden which such wage structure would impose upon the employer and ask itself whether the employer can reasonably be called upon to bear such burden...It is a long range plan; and so, in dealing with this problem, the financial position of the employer must be carefully examined.[21]

A close scrutiny of the concern's working has to be made. The profit and loss account, the prospects of the concern improving itself in future and all other relevant matters will have to be taken into account. The expenses properly incurred for working of the industry, such as buying of the raw material, expenses incurred in running the factory office, transport expenses, expenses incurred in marketing, and other such allowable expenses, have to be deducted. The determination of gross profits varies according to the basis of accounting adopted. But the deduction of income-tax, reserves and depreciation are not permissible for the purposes of determining the financial capacity of the concern. However, the amount of bonus paid or is payable, will have to be deducted for the purpose of calculating the financial capacity.[22] Having ascertained the financial position of the undertaking, the adjudicator has to assess the additional burden imposed on the employer, by the wage-structure, for seeing whether he would be able to meet it for a reasonably long period in the future.[23] Not only the present financial ability, but also the financial stability in the future, of the employer, must be proved, to justify the burden of the wage-structure or fixation of an increased fair wage, on an incremental scale. It would not be right to compel an employer to bear the burden of an increased fair wage on an incremental scale, out of the capital, for such a situation is likely to lead to a closure of his business, which would be even more detrimental to the workmen themselves.[24]

A broad and overall view of the financial position of the employer, has to be taken into account. It would not be permissible to lay undue emphasis on a temporary prosperity or temporary adversity of the employer.[25] In other words, an even view of unusual profits made by an undertaking for a particular year, as a result of some adventitious circumstances, or unusual losses incurred by it for similar reasons, has to be taken by the adjudicator. Such considerations should play a major role.[26] Similarly hypothetical considerations, that in the near future, the financial position of the employer would be affected by certain contingencies, should not be taken into account.[27] Likewise, in determining the financial stability of the concern or its ability to bear the burden of the wage-structure, the pious hopes expressed in the directors' reports, as regards the future prospects, cannot be accepted as conclusive.[28] Sometimes, statements of this nature, in the annual reports of the directors, are made to strike a note of hope, to dispel doubts and misgivings in the minds of the shareholders and these cannot be a substitute for the actual audited figures of accounts. The adjudicator, therefore, is to ascertain the financial position of the concern from its audited accounts, in accordance with the principles of accountancy.[29] Broadly, the adjudicator has to bear in mind, the profit earning capacity of the concern, the profits earned in the past, its reserves and the possibility of replenishing the reserves, the claim of capital, risks involved-in short, the financial stability of the concern.[30]

In judging the financial capacity of the employer, industrial adjudication has to look at the burden as well. It is not proper that the employer should pay increased wages to one class of workers and utilise whatever balance remains, for payment to the other class of workers, irrespective of whether they can be paid increased wages or not. This is not what is envisaged by the term 'capacity to pay'. No doubt, the wage increase will have to be met from the revenue, and only thereafter, the profits can be computed. Once, it is found that the burden of the proposed increase of wages is heavy, it cannot be assumed that the burden can be borne by the establishment. As Kailasam J put it:

> It is of utmost importance that the industry must be kept going as long as it can pay the minimum wages. It may, sometimes, be necessary for the workers to make some sacrifice to keep the industry going. It is not wise to kill the goose that lays the golden egg. The capacity of the industry to bear the burden will have to be taken into account, in determining whether a provision can be made for fixing a wage structure...In determining the capacity of the industry to bear the burden, all relevant facts will have to be taken into account and the actual state of affairs determined... [31]

In such cases, assumptions are not enough. The adjudicator is required to ascertain the financial capacity and fix a wage structure according to that capacity.[32] The proper measure for gauging the capacity of an industry to pay, is to take into account the elasticity of the demand for the product, the possibility of tightening up the organisation, so that the industry could pay higher wages without difficulty, and the possibility of an increase in the efficiency of the lowest paid workers, resulting in an increase in the production, considered in conjunction with the elasticity of the demand for the product, no doubt against the ultimate background that the burden of the increased rate, should not be such as to drive the employer out of business.[33] The following are some of the important considerations which are to be carefully weighed in determining the financial capacity of an industry:

(i) the progress of the industry in question;

(ii) the prospect of the industry in future;

(iii) the existence and extent of the profits of the industry;

(iv) the nature of demand which the industry is expected to secure;

(v) the extent of the burden and its gradual increase, which the industry may have to face.

These considerations are merely illustrative, and not exhaustive. In *Unichem Laboratories*, the tribunal proceeded, on the basis of the gross profits, without any deductions for taxation, depreciation and development rebate, as against the claim of the company to have the calculations made on the basis of net profits. In appeal before the Supreme Court, this method was challenged on behalf of the employer company. The court held that if the Drugs Price (Control) Order materially affects the prosperity of the business of the company, it would be open to it to raise a dispute for the reduction in the wage structure by showing that the financial position had been weakened to such an extent, that it cannot bear the burden of the wage structure fixed by the award and the matter may have to be examined on its merits.[34] In *Shri Chalthan VKUSM* (supra), the court observed that the decisions in *Unichem*, etc, were given on their own particular facts and are not to be understood as laying down that under no circumstances, the deduction for depreciation, reserves etc, could be made. Kailasam J observed:

> It may be that for the prudent management of an industry, it would be desirable to take into account, to some extent, the depreciation of the machinery, for otherwise, after a lapse of years, the machinery may get worn out and without a provision for its replacement, the industry itself would come to a stop. Whether provision for such depreciation should be made and if so, to what extent, will depend upon the facts of the case. Depreciation allowance to the extent of making out a loss, need not be accepted, but a reasonable provision should be made...It cannot be taken as a hard and fast rule, that a provision for depreciation, provision for development rebate and tax liabilities, should never be allowed. While the preservation of the industry is paramount, the attempts of the management to show that the company is running at a loss, by boosting the depreciation allowances, etc, should not be permitted. In short, the real capacity of the industry to bear the extra burden will have to be determined. An employer claiming a depreciation allowance, is only entitled to the actual or probable depreciation of the machinery, tools, etc, for the period, due to wear and tear. The depreciation cannot be computed on any natural basis or on the profit and loss account furnished by the company.[35]

In *Shivraj Fine Arts*, speaking for the court, the same judge suggested further factors which would determine the capacity of the industry to pay, *viz*, the productivity of the labour, the prevailing rates of wages in the same and similar industries, in

the same neighbouring localities, the present economic position of the industry, its prospects in the near future, etc. Fair wage will grow with the growth and development of the national economy and the progress made by the industry, must approximate to the capacity of the industry to pay.[36] As stated by the NCL-I, a policy dealing with the chronic problem, cannot be simply economic, as it is to reckon with relative multidimensional social phenomena, in which the workers and the management, the consumer and the society at large and in consequence, the state, are of vital interest. The claims of the employees for a fair and higher wage, depends not only on the financial capacity of the employer, but also on the interests of the consumer and the state, the employer's desire for a reasonable profit, the rise in the prices which may affect the consumer and the national economy, which, in turn, may have an adverse effect on the labour itself.

Industry-Cum-Region Formula

The Committee on Fair Wages, in its report, recommended that in determining the capacity of an industry to pay, it would be wrong to take the capacity of a particular unit or the capacity of all industries in the country. The relevant criterion should be the capacity of a particular industry in a specified region and, as far as possible, the same wages should be prescribed for all units of that industry in that region. It will 'obviously' not be possible for the wage-fixing board to measure the capacity of each of the units of an industry in a region and the only practicable method is to take a fair cross-section of that industry.[37] This classic recommendation has been adopted by industrial adjudication as a guiding principle, which has come to be known as the 'industry-cum-region basis' for fixing wage structures in industrial establishments. The legal position now, is well-settled, that the wage structure has to be fixed on an industry-cum-region basis, having due regard to the financial capacity of the unit under consideration.[38] The aim of this principle is that the scales of wages or dearness allowance fixed for a particular unit or industry, should not be out of tune with the wages etc, prevalent in the industry or the region, so that unfair competition may not result between one establishment and another and the diversity in the wages in the region may not lead to industrial' unrest.[39] The main object, obviously, is that in similarly circumstances units and in similar activities, as far as possible, the wages should not differ widely. If that were to be so, then there would be migration of labour from one industry to the other and there would also be a possibility of industrial unrest amongst the employees engaged in the same kind of business or industry.[40] In *Remington Rand,* Shelat J observed:

> The foundation of the principle of industry-cum-region is that, as far as possible, there should be uniformity of conditions of service in comparable concerns in the industry in a region, so that there is no imbalance in the conditions of service between workmen in one establishment and those in the rest. The danger otherwise, would be migration of labour to the one where there are more favourable conditions, from those where conditions are less favourable. Therefore, the mere fact that a particular concern can bear an additional liability would, by itself, be no ground to impose upon it, such extra obligation [41]

Rejecting the contention of the workmen, that the principle of industry-cum-region should not be applied in adjudicating a dispute regarding tiffin allowance, as it is applied in the adjudication of wage-scales and dearness allowance, the court observed that such a proposition would mean 'cutting holes in a principle which industrial adjudication has, for a number of years, accepted and which has lent a certain amount of uniformity in a field where the problems have to be resolved in a pragmatic approach'. This rule, on the one hand, tends to the maintenance of industrial peace in the entire region, and on the other, it puts the different concerns of the industry on a more or less equal footing, in their productive struggle.[42] Wanchoo J observed:

> It is now well-settled that the principle of industry-cum-region has to be applied by an industrial court, when it proceeds to consider questions like wage-structure, dearness allowance, and similar conditions of service. In applying that principle, industrial courts have to compare wage-scales prevailing in similar concerns in the region with which it is dealing, and generally speaking, similar concerns would be those in the same line of business as the concern with respect to which the dispute is under consideration.[43]

The capacity of an industry to pay should be gauged on an industry-cum-region basis, after taking a fair and representative cross-section of that industry and dividing them into appropriate classes and then dealing with the capacity of the industry to pay, classwise.[44] In *Jessop & Co,* Wanchoo J pointed out that one of the reasons behind the principle of region-cum-industry is that concerns of more or less the same standing, in the same industry, should have as nearly as possible, the same wages, so that they might stand on par with one another in the matter of competition. Otherwise, if disparate rates of wages are fixed in a particular concern, which are much higher than the prevailing rates of wages in concerns of similar standing in the same industry, it will be put to a disadvantage when it comes to compete in the market for the sale of its product. It is for this reason that when scales of pay are being fixed, the tribunals look at what are called comparable concerns, in framing the wage-structure.[45] In *Greaves Cotton,* the court emphasised that in fixing wages and dearness allowance, the tribunal should take into account, the wage scales and dearness allowance prevailing in comparable concerns carrying on in the same industry, in the same region.[46] In *Kamani Metals,* Hidayatullah J observed:

> In attempting to compare one unit with another, care must be taken that units differently placed or circumstanced, are not considered as guides, without making an adequate allowance for the differences. The same is true when the regional levels of wages are considered, and compared. In general words, comparable units may be compared but not units which are dissimilar. While disparity in wages in industrial concerns similarly placed, leads to discontent, attempting to level up wages, without making sufficient allowances for differences, leads to hardships.[47]

In *French Motor Car*, the Supreme Court held that the principle of industry-cum-region has to be applied by an industrial tribunal, when it proceeds to consider questions like wage-structure, dearness allowance and similar conditions of service.[48] In *Remington Rand*, a further requirement of taking into account the total wage-packet, of basic wage and dearness allowance, in comparing the wage structure of an establishment with others in the region, was added.[49] In other words, it would not be safe to compare a comparatively small concern with a large concern in the same line of business and impose a wage structure prevailing in the larger concern as a rule of thumb, without considering the standing, the extent of labour, the extent of business and the extent of profits made by the two concerns, over a number of years.[50] Thus, where there is a large disparity between two concerns in the same business, in the same region, it would not be safe to fix the same wage-structure for the large flourishing concerns of long standing, as obtaining in a small struggling concern, without any other consideration.[51] In *French Motor Car*, Wanchoo J further observed that the tribunal has to compare wages scales prevalent in similar concerns in the region which are in the same line of business. Further, even in the same line of business, it would not be proper to compare a small struggling concern with a large flourishing concern. The question, whether there is a large disparity between the two concerns, is always a question of fact and it is not necessary for the purpose of comparison, that the two concerns must be exactly equal in all respects. All that the tribunal is to see is that the disparity is not so much as to make the comparison unreal. The learned judge held:

> ...where a particular concern is already paying the highest wages in its own line of business, the industrial courts would be justified in looking at wages paid in that region in other lines of business, it should take care to see that the concerns from other lines of business taken into account, are such as are as nearly similar as possible, to the line of business carried on by the concern before it. It should also take care to see that such concerns are not so disproportionately large as to afford no proper basis for comparison. [52]

In *Novex Dry Cleaners* (supra), Gajendragadkar J laid down a few tests for comparing an establishment with others in the same region, which comprise their standing, the extent of the labour force employed by them, the extent of their respective customers; and a comparative study of the profits and the losses incurred by them for some years before the date of award. Then, in *Williamson*, the same learned judge held that in considering the question about comparable concerns, tribunals should bear in mind all the relevant facts in relation to the problems, *viz the extent of the business carried on by the concerns, the capital invested by them, the profits made by them, the nature of the business carried on by them, their standing, the strength of their labour force, the presence or absence and the extent of reserves, the dividends declared by them, and the prospect about the future of their business* - these and all other relevant facts have to be borne in mind.[53] These principles were reiterated in other cases, which can be re-stated as follows:

(i) Their standing;

(ii) the strength of the labour force employed by them;

(iii) the extent of their respective customers;

(iv) the position of the profits or losses incurred by them for some years, before the date of the award;

(v) the extent of the business carried on by the concerns;

(vi) the capital invested by them;

(vii) the nature of the business carried on by them;

(viii) the presence and absence and the extent of their reserves;

(ix) the dividends declared by them; and

(x) the prospects of their business in the future.

In *Kamani Metals*, Hidayatullah J observed:

> The observations, no doubt, lay down the principle guidelines, but they are not intended to operate with the rigidity of a statutory

> enactment. The court has indicated what lines of inquiry are likely to lead to the discovery of correct data for the fixation of fair wages...but fruitless inquiries into matters of no particular importance to a case, are hardly to be insisted upon, because rather than prove to be of assistance, they might well frustrate the very object in view. Each case requires to be considered on its own facts.[54]

In *Hindustan Antibiotics*, it was canvassed that a public sector undertaking could not be compared with companies in the private sector, for the purpose affixation of wages. The Supreme Court repelled the contention of management and held that the principles as have been laid down for employers in the private sector apply with equal force to the employers in the public sector as well.[55] In *Unichem* (supra), it was contended on behalf of the management that no unit doing business in collaboration with a foreign concern, though doing the same kind of business, could ever be considered for the purpose of comparison, for such concerns have the distinct advantages of international research facilities and reputation in business, which enable them to market their products more easily and thus, enable them to pay higher wages to their employees. Repelling the contention, the court observed that:

> So long and to the extent that concerns having foreign collaboration are doing business in India and in a particular concerned region, we do not see any reason why they should not be taken into account for purposes of being treated as comparable units, provided the tests for such purposes, as laid down by this court, are satisfied. No doubt, some of those concerns may be having advantage in various matters. But merely, because they possess such advantage in the field of business, is not a circumstance for eliminating such concerns for purposes of comparability. The object of industrial adjudication is, as far as possible, to secure uniformity of service conditions amongst the industrial units in the same region. If a concern having a foreign collaboration, properly satisfies the tests of comparability, it would be improper to regard such a unit as uncomparable, merely on the ground that it is a concern with a foreign collaboration or interest and that the unit with which it is sought to be compared is entirely of Indian origin and resources.[56]

In *Chandan Metal Products* the Gujarat High Court upheld the validity of the recommendations of the wage board for engineering industries. The wage board, in the context of engineering industries, after referring to the various products that the industry was engaged in manufacturing, definitely undertook a relevant exercise of classifying the industry and the classification according to the strength of the unit, provided a rational and intelligible criterion for classification. A regional and size classification, ultimately enabled the wage board to determine the paying capacity region-wise and class-wise. From the extensive examination carried out by the board in formulating its recommendations, it clearly appeared that it took into consideration, all the relevant factors and the established principles of region-cum-industry, evolved by the Supreme Court. In view of the fact that the wage board had correctly examined the paying capacity of the units region-wise or size-wise, no exception could be taken of its findings and it was not open to an independent unit to complain that it had no capacity to implement the recommendations of the wage board. There was no error in the award of the tribunal, refusing to examine the capacity of the industry to meet the likely additional burden, which could be imposed upon a particular unit which was called upon to implement the recommendations of the wage board.[57]

In dealing with the comparable character of industrial undertakings, industrial adjudication should not usually rely on oral evidence alone, because these questions cannot be decided merely on the interested testimony, either of the workmen or of the employer and his witnesses. The question has to be considered in the light of material facts and circumstances, which are generally proved by documentary evidence.[58] In *Madura Coats*, where the tribunal rejected the demand for an upward revision of wages and allowances, on the ground that the financial position of the company was not sound, Rebello J of the Bombay High Court, while partially allowing the award, held that the tribunal should have considered the wages prevailing in comparable concerns in the region, before deciding to reject the demands on the ground that the financial position of the company was not sound.[59] This observation is absolutely misplaced in the facts and circumstances of the case. It was not the case of the union that the wages being paid in the company were below subsistence level. It is a well-settled law that the lower limit of a fair wage is set by the minimum wage and its upper limit, by the capacity of the industry to pay, which, in turn, depends not only on the present economic position of the industry, but also on its future prospects. Between these two limits, the actual wages will depend on a consideration of the following factors:

(a) the productivity of labour;

(b) the prevailing rates of wages in the same or similar occupations, in the same or neighbouring localities;

(c) the level of national income and its distribution; and

(d) the place of the industry in the economy of the country.[60]

Applying the said principles, governing the determination of a 'fair wage', as laid down by Gajendragadkar CJI in *Millowners'Association*,[61] what ostensible purpose could be served by a mere consideration of the comparable wage structure, when the employer does not have the financial capacity to pay? It is not as if the industrial tribunal is a branch office of the bureau of statistics, to engage itself in the futile exercise of collecting and comparing data relating to wages and allowances, if such data is incapable of being applied to the case at hand. The mere fact that other concerns in the same or similar line of business in the region, are paying higher wages, is no valid ground to impose additional burden on a company, which is on a downhill course. The ratio of *New Egerton Woollen Mills*,[62] on which Rebello J apparently relied, could be pressed into service, if only the other condition laid down by Shelat J is satisfied, ie, such additional burden does not cause an undue strain on the financial resources of the company, and not otherwise. When this principle, is applied to the case of *Madura Coats*, the conclusion that the company was not in a position to bear any additional financial burden, is inescapable. Even so, the trial court granted certain demands like privilege leave, encashment, leave travel, educational allowance, conveyance allowance, food subsidy and gratuity, while disallowing other demands which were accepted by the management, despite the precarious financial position of the company. At any rate, it was a finding of fact recorded by the tribunal, after applying its mind to the oral and documentary evidence produced before it, and the High Court could not, in a writ jurisdiction, go into the questions of fact, or reappreciate the evidence and reach a different conclusion. The reasoning and conclusion of Rebello J run counter to the principles governing wage revision *vis-à-vis* the financial condition of industrial undertakings, and is wholly misconceived and perverse.

In *Hindustan Motors*, the Supreme Court observed that it is ordinarily desirable, to have as much uniformity as possible, in the wage scales of different concerns of the same industry, working in the same region. It may, however, not always be possible to attain this object because of the different financial capacities of different concerns. Bur where no such obstacle is present, industrial adjudication always tries to secure the same wage-rates for the different concerns in the same industry, in the same region. The court, therefore, applied the wage scales awarded by the third major engineering tribunal in Bengal.[63] In *French Motor Car*, (supra), the court held that so far as the clerical staff and the subordinate staff are concerned, it might be possible to take into account even those concerns, which are engaged in different lines of business, for the work of the clerical and subordinate staff is more or less the same in all kinds of concerns. When the inconsistency in the above two decisions was highlighted, in *Greaves Cotton*, Wanchoo J responded thus:

> ...in applying the industry-cum-region formula for fixing wage scales, the tribunal should lay stress on the industry part of the formula, if there are a large number of concerns in the same region, carrying on the same industry; in such a case, in order that production cost may not be unequal and there may be equal competition, wages should generally be fixed on the basis of the comparable industries, namely, industries of the same kind. But where the number of industries of the same kind in a particular region is small, it is the region part of the industry-cum-region formula which assumes importance, particularly in the case of the clerical and sub-ordinate staff, for as pointed out in the *French Motor Car Co's* case... there is not much difference in the work of this class of employees, in different industries.[64]

According to the decision in *French Motor Car*, where greater stress is laid on the region part of the formula, care has to be taken to see that the comparison is made with concerns as nearly similar as possible to the concern in question. But in *Greaves Cotton*, two reasons appear to have weighed with the Supreme Court:

(a) the four companies were carrying on different businesses and the main company was an investment and financing company and it was not clear from the record, whether there were several comparable concerns in the same region; and

(b) in the documents filed by both the parties, there were certain concerns which were, according to both the parties, comparable concerns. It is on these facts that the court held that the tribunal was not wrong in the case of the clerical. and subordinate staff, in leaning towards the region part of the formula and comparing the companies under consideration, with those concerns which were comparable according to both the parties.[65]

In *Orient Paper*, the tribunal found that there were no other concerns in the same line of business as the appellant company, in the region, which could be compared with it. There were only two other paper mills in the region. But the appellant company was an old, established business, manufacturing paper on a very large scale, whereas both the other two paper mills were of a recent origin, as compared to the appellant company. The strength of the labour force and the annual production of the other two paper mills was also much lower and their profits much smaller than those of the appellant company. In these circumstances, the tribunal took the view that it would not be proper to compare the wage-structure of these paper mills, with that of the appellant company and compared the wages paid by other industries in the region, namely, three collieries, a cement factory and an aluminium company, which were situated not very far away from the place where the company had its factory, for fixing the minimum wages for the workmen of the appellant company. In appeal, the Supreme Court held that the comparison was justified.[66] In *Tata Chemicals*, the production of the company was

considerably higher than the combined production of two other two units in the Saurashtra region. There was no other heavy chemicals concern in the region, which could be favourably compared with the company, insofar as the nature and extent of business, capital outlay, percentage of gross and net profits, strength of labour, reserves, dividends on equity share and prospects of future business were concerned. The company held a unique position in heavy chemicals, in the region. In view of these facts, the company was compared with the industries outside the Saurashtra region of the State of Gujarat, for the purposes of linking the dearness allowance to the textile dearness allowance, paid to the industrial workers at Ahmedabad, which was based on the report of the family living survey among the industrial workers at Ahmedabad in 1958-59, compiled as a result of the joint investigation carried on in a rational and scientific manner, by several institutions. Jaswant Singh J held:

> It cannot also be lost sight of, that with the march of time, the narrow concept of industry-cum-region is fast changing and too much importance cannot be attached to region. The modern trends in industrial law seem to lay greater accent on the similarity of industry rather than on the region. It was observed by this court in *Workmen of New Egerton Woollen Mills v New Egerton Woollen Mills* ,[67] that where there are no comparable concerns in the same industry, in the region, the tribunal can look to concerns in other industries in the region for comparison, but in that case, such concerns should be as similar as possible and not disproportionately large or absolutely dissimilar. On the parity of reasoning, it is reasonable to conclude that where there are no comparable concerns, engaged in a similar industry, in the region, it is permissible for the industrial tribunal or court to look to such similar industry or industries, as nearly similar as possible, in adjoining or other regions in the state, having similar economic conditions.[68]

In *Food Corpn of India*, the Supreme Court allowed parity in the matter of scales of pay, allowances and terms and conditions of service for the departmental labour employed by the corporation, throughout the country.[69] In *Hindustan Transmission*, the workmen and staff working in the head office, claimed that they should be given wage scales, dearness allowance and other benefits, at par with the workmen and staff working in the factory. But the tribunal refused to award accordingly, in view of the fact that the hours and conditions of work in the head office and the factory were quite different. However, for considering the question of wages, etc, the tribunal considered three comparable concerns, out of which it selected one which was comparable to the concern in this case. The Bombay High Court upheld the award of the tribunal, as it did not find any reason for interference with the same, in its writ jurisdiction.[70]

Equal Pay for Equal Work

The doctrine of 'equal pay for equal work' has been enshrined in Art. 39(d) in Pt IV of the Constitution, which is one of the directive principles of the state policy, requiring the state to secure 'equal pay for equal work, for both men and women'. The directive principles, though not enforceable in any court, are nevertheless fundamental in the governance of the country and it is the duty of the state to apply these principles in making the laws. In the language of Chinnappa Reddy J, 'equal pay for equal work' is not a mere demagogic slogan. It is a constitutional goal capable of attainment through constitutional remedies, by the enforcement of constitutional rights'.[71] In *G Sreenivasa Rao*, Kuldip Singh J stated:

> The doctrine of 'equal pay for equal work' cannot be put in a straight-jacket. Although the doctrine finds its place in the directive principles, but this court, in various judgments, has authoritatively pronounced that the right to 'equal pay for equal work' is an accompaniment of the equality clause enshrined in Articles 14 and 16 of the Constitution of India. Nevertheless, the abstract doctrine of 'equal pay for equal work' cannot be read in Article 14. A reasonable classification, based on intelligible criteria, having nexus with the object sought to be achieved, is permissible.[72]

However, in subsequent cases, the court has gone even to the extent of saying that the principle of 'equal pay for equal work' has assumed the status of a fundamental right in service jurisprudence, having regard to the constitutional mandate of equality in Arts. 14 and 16 of the Constitution. It has ceased to be a judge-made law, as it is a part of the constitutional philosophy which ensures a welfare socialistic pattern of a state, providing equal opportunity to all and 'equal pay for equal work' for similarly placed employees of the state. The principle not only applies to the state as such, but it also applies to state instrumentalities. This right has been zealously enforced as a fundamental right in effectuating the constitutional goal of equality and social justice, by the Supreme Court.[73] This principle should also apply to industrial employees, with equal vigour. In the year 1976, the Parliament enacted the Equal Remuneration Act 1976 (Act No 25 of 1976):

> To provide for the payment of equal remuneration to men and women workers and for the prevention of discrimination on the ground of sex, against women, in the matter of employment and for matters connected therewith or incidental thereto.

This Act enacts the provision of the Equal Remuneration Ordinance 1975, promulgated to implement the provisions of Art. 39(d) of the Constitution, in the year which was being celebrated as the International Women's Year. Dealing with the provisions of this Act, in *Mackinnon Mackenzie*, the Supreme Court held that the Act does not permit the management to pay to a section of its employees, doing the same work or work of a similar nature, lesser pay, contrary to s 4(1) of the Act, only because it is not able to pay equal remuneration, to all and further observed that the applicability of the Act does not depend upon the financial ability of the management to pay equal remuneration, as provided by it.[74] In this case, the lady stenographers were paid less remuneration than the male stenographers. Section 4 of the Act requires that in order to get relief, the employee should establish that the remuneration paid by the employer is at rates less favourable than those at which remuneration is paid to the employees of the opposite sex, for performing the same work or work of a similar nature. In deciding whether the work is the same or is broadly the same, the authority should take a broad view and also adopt a broad approach in ascertaining whether any differences are of practical importance, because the very concept of 'similar work' implies a difference in detail. But that should not defeat a claim of equality on trivial grounds. Actual duties performed should be looked at and not those that are theoretically possible. For the purpose of making a comparison, the duties generally performed by men and women should be looked at. In view of the fact that the lady stenographers were getting less remuneration, the court granted the relief under s 4(1) of the Act.

In *Randhir Singh*, the Supreme Court stated that though the principle of 'equal pay for equal work' is not expressly declared to be a fundamental right, it is a constitutional goal. The requirements of Art. 39(d) of the Constitution, *viz*, 'equal pay for equal work, for both men and women' means 'equal pay for equal work' for everyone and as between the sexes. Hence, the concept of 'equal pay for equal work' is accentuated and has assumed the status of a fundamental right in service jurisprudence. Directive principles, therefore, have to be read into the fundamental rights as a matter of interpretation. Article 14 of the Constitution enjoins on the state, not to deny any person 'equality before the law' and the 'equal protection of the laws' and Art. 16 declares that there shall be equality of opportunity for all citizens, in matters relating to employment or appointment to any office under the state. Hence, on the construction of Arts. 14 and 16, in the light of Art. 39(d) and the Preamble to the Constitution, the principle of 'equal pay for equal work' partakes the character of a fundamental right and has to be applied to 'cases of unequal scales of pay, based on no classification or on irrational classification, though drawing different scales of pay, doing identical work, under the same employer.' Elaborating the concept of 'equal pay for equal work' and its application, the court observed:

> Where all things are equal, that is, where all relevant considerations are the same, persons holding identical posts may not be treated differentially in the matter of their pay, merely because they belong to different departments. Of course, if officers of the same rank perform dissimilar functions and the powers, duties and responsibilities of the posts held by them vary, such officers may not be heard to complain of dissimilar pay, merely because the posts are of the same rank and the nomenclature is the same...and there are different grades in a service, with varying qualifications for entry into a particular grade, the higher grade often being a promotional avenue for officers of the lower grade. The higher qualifications for the higher grade, which may be either academic 'qualifications or experience based on the length of service, reasonably sustain the classification of the officers into two grades, with different scales of pay. The principle of 'equal pay for equal work' would be an abstract doctrine, not attracting Article 14, if sought to be applied to them. [75]

The mere fact, that the nature of work in two sets of employment is more or less the same, will not entitle the workmen in such employments to the same scale of pay. The scales of pay, in governmental departments, public sector undertakings, and even industrial undertakings, are fixed by expert bodies like the pay commission, which consist of persons having a specialised knowledge of the subject and have to go in depth, of all the relevant factors, including the nature of the work. Apart from the nature of work, educational qualifications, responsibilities of the posts and experience etc, are taken into account for fixing the pay scales. In *Delhi Veterinary Assn*, the Supreme Court observed that apart from the nature of work, the pay structure should reflect many other values and stated that the employer should follow certain basic principles in fixing pay scales for various posts and cadres. The degree of skill, strain of work, experience involved, training required, responsibility undertaken, mental and physical requirements, disagreeableness of the task, hazard attendant on the work and fatigue involved, are, according to the third pay commission, some of the relevant factors which should be taken into consideration in fixing pay scales. The method of recruitment, the level at which the initial recruitment is made in the hierarchy of service or cadre, minimum educational and technical qualifications prescribed for the post, the nature of dealings with the public, avenues of promotion available and horizontal and vertical relativity with other jobs in the same service or outside, are also relevant factors. [76]

Then, elaborating the same theme, in *JP Chaurasia*, the court said that apart from the nature of the work or the volume of the work done, the other relevant factors to be taken into account are 'evaluation of duties and responsibilities of the respective posts'. Even if the functions of two posts or jobs appear to be same or similar, there may be differences in the degree of performance. The quantity of work may be the same, but the quality may be different. That cannot be determined

by relying on the averments in the affidavits of the interested parties. These factors can best be determined by expert bodies, like a pay commission, who would be best equipped to evaluate the nature of duties and responsibilities of posts. The determination by such bodies should normally be accepted and the court should not try to tinker with such equivalence, unless it is shown that it was made with extraneous considerations.[77]

The above decision was followed by the court in *Pramod Bhartiya*.[78] In this case, the lecturers working in higher secondary schools had failed to establish that the distinction between their scales of pay and that of the non-technical lecturers working in technical schools, is either irrational and has no basis, or that it was vitiated by *mala fides*, either in law or in fact. In *Shyam Babu Verma*,[79] the claim by a group of pharmacists for equal pay, was rejected on the ground that the classification made by the body of experts, after a full study and analysis of the work, should not be disturbed except for strong reasons, which indicate that the classification made was unreasonable. In *Hari Narayan Bhowal*, the court observed that the principle of 'equal pay for equal work', therefore, can only be enforced if the claiming persons satisfy the court that not only is the nature of the work identical, but in all other respects also, they belong to the same class and there is no apparent reason to treat 'equals as unequals'. In the absence of a very clear case, satisfying the court that the scales provided to a group of persons, on the basis of material produced before it, amounts to discrimination, without any justification, the court should not take upon itself the responsibility of fixing the scales of pay, particularly when different scales of pay have been fixed by the pay commission or pay revision committees, comprising persons who are experts in the field, after examining all the relevant materials. In the process undertaken by the court, an anomaly in different services may be introduced, of which the court may not be conscious, in the absence of relevant materials before it. Therefore, the claimants must produce relevant material before the court to satisfy it that 'they have not been treated as equals within the parameters of Art. 14 '. And in the absence of such material, the court should be reluctant to issue any writ or direction to treat them as equal, particularly when a body of experts has found them not to be equal. In this case, the court rejected the claim of the volunteers enrolled under the West Bengal National Volunteer Force Act 1949, to be treated at par with the constables employed in the West Bengal Police Force, because they formed two different classes in public service, particularly when the scales of pay had been fixed by an expert body, after taking into account all relevant materials. The Supreme Court pointed out that merely because the academic qualifications and physical requirements of both were similar or that the *agragamies* were also given certain fire fighting training, along with other training, it could not be inferred that they performed similar duties, functions and responsibilities as the firemen.[80]

In *Basavalingappa*, in the absence of relevant material, the general question as to whether on the basis of educational qualification, different pay scales could or could not be prescribed, was not considered by the court and the case was decided on the facts and circumstances of the case, that an instructor will perform the same duties and will do the same work, in spite of the fact that he may be a certificate holder or a diploma holder. Consequently, different pay scales could not be enforced for the same post, merely on the basis of the holding of a certificate or a diploma.[81] In *Supreme Court EW Association*, on a review of its earlier dicta, the court observed that although the doctrine of 'equal pay for equal work' does not come within Art. 14 of the Constitution as an abstract doctrine, if, however, any classification is made relating to the pay-scales and such classification is unreasonable or if unequal pay is based on no classification, then Art. 14 will at once be attracted and such classification is liable to be struck down and 'equal pay for equal work' must be directed. In short, where unequal pay has brought about a discrimination within the meaning of Art. 14 of the Constitution, it will be a case of 'equal pay for equal work' as envisaged by Art. 14 of the Constitution. If, therefore, the classification is proper and reasonable and has a nexus to the object sought to be achieved, the doctrine of 'equal pay for equal work' will not have any application, even though the persons doing the same work are not getting the same pay. In the absence of any discrimination within the meaning of Art. 14 of the Constitution, the abstract doctrine of 'equal pay for equal work', as envisaged in Art. 39(d) of the Constitution, has no application and in view of the provisions of Art. 37, it will not be enforceable.[82] In *CCE Stenographers*, the Supreme Court held that 'equal pay for equal work is a fundamental right', because it is 'a concomitant of Art. 14 of the Constitution '. Therefore, 'equal pay for unequal work' will be a negation of the right. However, the court pointed out that 'equal pay' must depend upon the nature of the work done, and it may not be judged by the mere volume of the work, there may be qualitative difference as regards the reliability and responsibility; while the functions may be the same, the responsibilities would make a difference. Often the difference is a matter of degree and there is an element of value-judgment by those who are charged with the fixing of the scales of pay and other conditions of service. The value-judgment, however, has to be made *bona fide*, reasonably, on an intelligible criterion, which has a rational nexus with the object of the differentiation, and then, such differentiation will not amount to discrimination. Speaking for the court, Sabyasachi Mukharji J held:

> The same amount of physical work may entail different qualities of work, some more sensitive, some requiring more tact, some less-it varies from nature and culture of employment. The problem about equal pay cannot always be translated into a mathematical formula. If it has a rational nexus with the object to be sought, for, as reiterated before, a certain amount of value-judgment of the administrative authorities who are charged with fixing the pay scale, has to be left with them and it cannot be interfered with by the court, unless it is demonstrated that either it is irrational or based on no basis or arrived at mala fide, either in law or in fact.[83]

In *Deb Kumar Mukherjee*, the Supreme Court, while setting aside the order of High Court, noted that though the duties performed by the inspectors in Grade I and II may be the same, no fault could be found with the classification done by the Pay Commission, as a classification in the cadre on the ground of selection based on merit, is permissible. With regard to the directions of the High Court, that the inspectors in the housing department should be given the same pay scale as was given to the inspectors of the animal husbandry department, the court observed that there was a patent fallacy in the reasoning, as there was nothing common in the housing department and the animal husbandry department.[84] In *Grih Kalyan Kendra*, there was no discrimination between the claimant workmen and other equally situated persons. The claim, therefore, was held to be unsustainable.[85] Likewise, in *IN Misra*, the classification between the principal private secretary and private secretaries to the Chief Justice and yet another grade for the remaining private secretaries, was held to be proper and valid and not suffering from any constitutional infirmity.[86] Similarly, in *TTD*, a school belonging to *Tirumala Tirupati Devasthanam* was closed and the teachers were retrenched. They were re-employed in another school and at the time of re-employment, the salary which they were getting at the closed school was protected, which was more than those of the teachers in the new school. The teachers already working in the new school made a grievance that the transferred teachers were junior to them and were being paid a higher salary. The High Court of Andhra Pradesh, in its writ jurisdiction, granted to them the same salary as was paid to the teachers who were transferred from the closed school. In appeal by special leave, against the decision of the High Court, the Supreme Court noted that since the school in which the teachers were serving, was closed, the proper and legal course for the *Devasthanam* was to transfer them to the other school and protect their higher salary, which they were drawing in the old school. In the facts and circumstances of the case, the application of the principle of 'equal pay for equal work' was unwarranted.[87] In *KS Mahalingegowda*, the Government of Karnataka adopted and implemented a centrally sponsored scheme of vocationalisation of secondary education, with the object of providing diversified educational opportunities and a supply of skilled manpower, and also to provide an alternative to those students, who did not wish to pursue academic studies beyond the tenth class. The teachers employed under the scheme were employed on a part-time basis and their terms and conditions were altogether different from those of the teachers teaching in the regular courses of education in the state. The teachers employed under the scheme, however, claimed that they should be regularised in service, in the same pay-scales and under the terms and conditions of service as were being given to the non-vocational teaching staff in the state. In view of the fact that there was no parity between the two in imparting training and education or in other terms and conditions of employment, the Supreme Court held that the claim of the vocational teachers was not tenable.[88]

Similarly, in *Purna Chandm Nanda*, the Supreme Court rejected the claim of the appellant, who was holding the post of a dairy overseer and claimed that he had been promoted to the post of a dairy supervisor and was posted as a farm manager in the district livestock breeding farm, and therefore, was entitled to 'equal pay for equal work' as a farm manager, with the observation that merely because the posts of dairy supervisor and the farm manager were inter-changeable, the dairy supervisor did not automatically become entitled to be the holder of the post of a farm manager and for the same scales of pay. In view of the fact that the scales of pay of the two posts were different, the court pointed out that a direction to grant 'equal pay' to the appellant, would allow him to jump the queue and land on a higher ladder.[89] In *Fertilizer Corpn*, the Supreme Court held that there was no discrimination in fixing the pay of the two categories of employees, one who had not acquired the officers' grade and the other who had already acquired the officers' grade, keeping in view their designation as well as their pay scales obtaining on the relevant date, because they were in different classes. The court observed that these two categories were unequal and the claimants could not, in law, make any grievance if different principles were adopted in fixing their respective pay scales.[90] In *Ramashraya Yadav*, the Supreme Court observed that the principle of 'equal pay for equal work' will not apply where the qualifications prescribed, mode of recruitment and the nature of duties are different for regular employees and a temporary employee. Therefore, the claim of the temporary investigator-cum-computer, for payment of salary at par with the regular investigator-cum-computer, could not be sustained.[91] In *Prem Singh Soda*, the employee was employed on an *ad hoc* basis, against an unsanctioned post. He was immune from the rigours of disciplinary action and responsibility. It was, therefore, held that he was not entitled for equal pay as was paid to regular employees discharging the same work.[92] On the other hand, in *MP Singh*, in the facts and circumstances of the case, the classification of officers in the cadre of sub-inspectors, inspectors and deputy superintendents of police, in the central investigation units of the central bureau of investigation, into two groups, namely, deputationists and non-deputationists, for paying different rates of special pay, did not pass the test of classification permissible under Arts. 14 and 16 of the Constitution, as it did not bear any rational relation to the objects of the classification.[93] In *Tannery and Footwear Corpn*, the Supreme Court directed the revision of the pay scales of the employees of the Tannery and Footwear Corporation of India, so that they were at par with the pay scales of such employees employed in the Cotton Corporation of India. The court held that though the two corporations were distinct legal entities, at the same time, it could not be ignored that both were instruments of the Government of India, and who were bound by the directions contained in Pt IV of the Constitution. This direction was made in view of the fact that the nature of the work and duties performed by the employees in both the corporations, was the same.[94]

In *R Kumar*, in view of the specific provision under s 77(l)(a) of the Presidency Town Insolvency Act, as amended by the

Tamil Nadu Management (Madras Act 5 of 1943), the Chief Justice of the Madras High Court recommended that the employees in the Official Assignee attached to the High Court, should be treated at par with those equal categories in the Madras High Court Service and Tamil Nadu Secretariat Service, in the matter of fixing their pay, because the duties, responsibilities and qualifications prescribed were similar in both, High Court's Service and the Official Assignee Service. The court observed that it would be in violation of Art. 229 of the Constitution of India, if the recommendations of the Chief Justice of the Madras High Court, in this connection, are not accepted by the government. Therefore, a direction was issued to change the nomenclature of the staff members of the High Court Official Assignee Service, at par with those equal categories in the Madras High Court Service and the Tamil Nadu Secretariat Service and revise the pay scales of the members of, Official Assignee Service, and bring them at par with the equal categories of the Madras High Court Service and the Tamil Nadu Secretariat Service.[95] In *G Krishna Rao*, there were two grades of district judges, *viz*, grade 1, and grade 2. If a district judge grade 1, was appointed as chairman of the industrial tribunal, he would get a salary in the scale of Rs 5000-6200, but if in the same post, a grade 2 district judge was appointed, such district judge was entitled only to Rs 3580-5380 scale. The duties performed by the chairman, industrial tribunal, whether he was a grade 1 or grade 2 district judge, were the same and identical. Therefore, denying the scale attached to the post of a chairman, occupied by a grade 2 district judge, was held to be wholly arbitrary and without any basis.[96] In *Balo Rai*, the subsisting wage structure of the piece-rated coal unloading workers was covered by an agreement subsisting between the parties. The Patna High Court upheld the claim of such piece-rated workers and observed that the right of the workers to claim a proper pay-scale, could not be prevented on the plea that their wage structure was covered by an agreement.[1] In *T Krishnan Unni*, in the light of the principles stated by the Supreme Court, a single judge of the Kerala High Court held that a scale of pay lower than that of the promotees, being given to the direct recruits is unjustified, as it is not based on any rational basis. From the above discussion, it is evident that the court has applied the doctrine of 'equal pay for equal work', depending upon the fact-situations of each case.[2] The undernoted case,[3] along with several others is the further illustration of the application of the doctrine. These decisions arose out of employment under the state, and are governed by the provisions of Arts. 14 and 16 of the Constitution. This doctrine will apply to employees in industrial employment, wherever permissible, with equal force.

'Rates of Wages' and 'Scales of Wages'

'Rates of wages' and 'scales of wages' are two different expressions, with two different connotations.[4] The substance of the statutory, as well as the dictionary meanings of the term 'wages' is that it is an 'amount paid periodically, especially by the days of week or month, for the time during which the workman or the servant is at the employer's disposal'. The use of the word 'rate' in the expression 'rates of wages', has not the effect of limiting its connotation. The expression, therefore, means the manner, mode or standard of the payment of remuneration for work done, whether at the start or in subsequent stages. 'Rate of wages' would thus include 'scales of wages' and there is no antithesis between the two expressions, the former expression being applicable both to the initial, as well as, the subsequent amounts of wages. In other words, the larger connotation of the expression 'rates of wages' is capable of comprising in its scope and ambit, 'the scale of wages'.[5] The fixation of the rates of wages, which includes within its compass, the fixation of the scales of wages, and the fitment of workmen into wage scales, will also depend on the paying capacity of the industry.

Fitment of a Workman

Implicit and intrinsically connected with the questions of revision of the wage-scales, is the question of the fitment of employees into the wage scales and a flat or an *ad hoc* increase of the salaries of workmen, wherever considered necessary. This is elementary and fundamental to the jurisdiction of the industrial tribunal, in revising wage-scales. An industrial tribunal, therefore, when deciding upon the wage-scales of the employees of an establishment, would have full liberty to propose an *ad hoc* increase of salaries, as part of the revision of the wages, because the fitment into the revised pay scales is itself a part of the revision of pay-scales.[6] Normally, in the question of 'fitting-in', the length of the service of the employee is taken into account and in the absence of any evidence that another uniform rule was followed by the employer, the length of the service is the only criterion available, to be adopted in laying down the rules of 'fitting-in'.[7] These considerations are proper and relevant for industrial tribunals to adopt, while revising the wage-scales of the employees of a concern. But there is no rule, statutory or otherwise, which prescribes that, whenever there is a revision of the pay-scales of the employees of an establishment, either as a result of an award of a tribunal or by agreement, if an employee's basic salary is out of step in the scale prescribed, the same should be raised to bring it on to a step higher in the scale. The considerations which may be appropriate for revising the wage-scales of the employees of a concern, cannot be taken into account by an industrial tribunal in determining whether the basic salary of an employee should be raised to bring it on a step higher in the scale.[8] In the words of Bhargava J:

> It has to be kept in view, that a scale is provided with two objectives. One is that a workman should, while improving in efficiency with experience, receive some compensation in the form of increments, in a scale of pay. The second principle for prescribing a scale of pay is that a workman, when he starts his service, has usually more restricted requirements, which increase with the lapse

> of time. It has been envisaged that a workman, when first joining service, may have only himself to feed, or at the most two mouths, so as to include his wife. An average family of a workman under the present conditions, is envisaged to include two or three children at a later stage, and, with this development in the family, the burden on the workman increases. One of the reasons for granting a scale of pay is to make a provision for this increased burden.[9]

Further, even an unskilled *mazdoor* is in the same position and considering the present social concept, it would be fair even if an unskilled *mazdoor* is given a scale of pay, stretched over a period of ten years, within which he can be expected to stabilise his family burden.[10] In *French Motor Car* (supra), Wanchoo J observed:

> ...generally, adjustments are granted when scales of wages are fixed for the first time. But there is nothing in law to prevent the tribunal from granting adjustments even in cases where previously, pay-scales were in existence, but that has to be done sparingly, taking into consideration the facts and circumstances of each case. The usual reason for granting adjustments, even where wage scales were formerly in existence, is that the increments provided in the former wage-scales were particularly low and therefore, justice required that an adjustment should be granted a second time.[11]

It was, therefore, held that there was no justification for making an adjustment in the manner which had been provided by the tribunal, when new scales were fixed and all that should reasonably have been provided in the matter of adjustment was that, when an employee was brought on to the new scale, his pay should have been stepped up to the next stage in the new scale, in case there was no such pay in the old scales. In *Hindustan Times* (supra), Das Gupta J observed:

> ...what adjustment should be given when fixing the wage-scales, whether for the first time or in place of an old existing scale, has to be decided by industrial adjudication after a consideration of all the circumstances of the case. It may well be true that in the absence of any special circumstances, an adjustment of the nature as allowed in this case, by allowing a special increment in the new scale, on the basis of service already rendered, may not be appropriate. [12]

In *Greaves Cotton*, referring to the earlier cases, the court observed that the question as to whether an adjustment should be granted or not, would always depend upon the facts and circumstances of each case. On a comparison of the scales of pay of the company and those prevalent in other concerns, the court found that the pay-scales were not high, as compared to the pay-scales in comparable concerns, and if, anything, they were on the lower side and in the concerns of the company, the first rate of increments was generally on the lower side and lasted for a longer period than in the case of comparable concerns. In this situation, the holding of the tribunal, awarding increments by way of a adjustment, was upheld, although this resulted in raising the pay-packet of the workmen, which would stand in comparison with some of the best concerns in the region.[13] Similarly, the court affirmed the award of the tribunal in *Gramophone Co*, ordering that the workers should be fixed in the awarded scale according to their present pay and if it did not coincide with any of the new scales, they should be stepped up to the nearest higher stage and thereafter, the workmen, who had completed three years of service, should be given one increment and those who had completed six years of service, or more, should be given two increments. In view of the fact that some grades were enforced in the company earlier, the court found no reason to interfere with the provision made by the tribunal, in the matter of adjustments.[14] But later, in *Calcutta Insurance*, where the scales prevalent in the company were unusually low, as compared to those of other comparable concerns, before the date of the award, and unless the length of the services of the workmen was taken into consideration, great hardship was likely to be inflicted on the existing workmen, when compared with the salary and dearness allowance which new workers would get, the pay and dearness allowance of the workmen fixed by the tribunal was held to be fairly comparable to those of the workmen working in other comparable concerns. Thus, by fitting the workers in the new scales of pay, taking into account their length of service, the company would be rehabilitating them to a certain extent, even though they might have suffered in the past, on account of the inadequacy of the scales of pay and dearness allowance. In view of the fact that the wage scales and dearness allowance were low even as compared to other comparable concerns and to the financial capacity of the employer to bear the burden, the award of the tribunal was affirmed and the court declined to modify it with respect to the question of adjustment of the workmen into the new scales.[15]

In *National Tobacco*, the tribunal directed that when fitting workmen in the new grades, each workman should only be stepped up to the next stage in the new scale, just above the salary which the workman was getting in the existing scale applicable to him. This direction was challenged before the Supreme Court, on behalf of the workmen, on the ground that it would result in a loss of benefit to those workmen who had put in long years of service, because, in some cases, even the new workmen, employed for the first time, may become entitled to the same salary in the new scale, as would be payable to a workman who had put in service for a longer period, with the company. It was, therefore, contended that the tribunal should have directed that each workman would be entitled to one increment in the new scales, for over three years of service, with a maximum of five increments. Since the grades of pay had not been revised for a large number of years and

the scales of pay had become outdated, the court partially accepted the contention of the workers, that the adjudication of the fitment in the new scales, should take into account the length of the service put in by the workmen, under the old scales. Speaking for the court, Bhargava J, held that it would be unjust that a workman with a long period of service should be made to draw the same salary in the new scale as a new entrant and thus, be deprived of all the benefits of his earlier long service and, on this view of the matter, directed that all the workmen should be fitted at the amount of salary being drawn already, or, if there be no such stage in the new scale, at the next higher stage or at the stage in the new scale to which he would be entitled, if he were deemed to start in that new scale and was given one increment for every three years of service, with a maximum of five increments, whichever was higher.[16] In *Indian Link Chain*, while prescribing the consolidated wage scales of daily wages, the tribunal had neither adopted the scales of wages claimed by the union, nor did it fix them on a point-to-point basis. Setting aside the award, Jaganmohan Reddy J observed:

> This principle, in our view, recognises that the payment in a graduated wage-scale should reflect the years of service of an employee in that grade. When the graduated wage-scale is first fixed and a fitment is made therein, a subsequent revision in the wage-scales does not require any further fitment, because the original fitment will continue to give them the advantage of their service. [17]

Classification of Employees for Wage Fixation

While fixing wages, it is necessary for the tribunal, who is entrusted with this task, to see the nature of the work which a workman is required to perform and then place him in a category to which he belongs. Such classification or categorisation is incidental to wage fixation and therefore, will fall within the jurisdiction of the tribunal under s 10(4). However, the tribunal has to apply its mind and then decide as to which classification or category a particular workman belongs. If a classification is based on no material, such classification will not be sustainable.[18] The classification of workmen for the purposes of wages, has to be two-fold, namely,

(a) classification of jobs, and

(b) fitting of existing staff into the various classified jobs. The fitment of the employees into various categories and classes has been dealt with in the foregoing topic.

The classification of jobs, has to be dealt if it is in dispute, between the employer and the workmen, with by the tribunal itself but fixing of individual workmen in particular classified jobs can best be done by the management, in consultation with the union of workmen. The disputed cases may be referred for adjudication, under this category.[19] In *Indian Hume Pipe*,[20] the management and the workmen agreed before the industrial tribunal, that the categories and classifications of the respective employees shall be as provided under an earlier award between them. But the tribunal reclassified certain categories of workmen so as to be inconsistent with the agreement. The direction of the tribunal in this respect, was set aside by the Supreme Court. The usual pattern of the categories of workmen are: unskilled, semi-skilled and skilled, but in some cases, there are further sub-divisions of these classifications. In *Greaves Cotton*, the tribunal introduced a 'higher unskilled' category. The Supreme Court, in appeal, observed that it could not be understood:

> ...how the unskilled category can be sub-divided into two, namely, 'lower' and 'higher' unskilled, though we can understand the semi-skilled and skilled categories being sub-divided, depending upon the amount of skill. But there cannot be degrees of a want of skill, among the unskilled class.[21]

Piece-Rate System

Piece-rate is what is paid by results or the output of work, which is often described as a 'task'. There is greater consideration to quantity in fixing piece-rates in some particular types of work, in some industries, with a guaranteed minimum. The same standard may not be appropriate in all types of piece-work. With reference to a particular work, the importance of man rather than the machine employed, may have to be dealt with differently. Even in piece-rates, it will be necessary to look around to find same correlation with time-rates of the same or similar class of workers; for example, the contribution of the worker to the job, the nature of the work, the part played by the machine, the incentive to work and above all, protection against any creation of industrial unrest, because of the existence side by side, of two categories of workers, particularly if there is no possibility of transfer of labour from one type of work to the other, from time to time. Again, there may be some work where a special skill of the worker, with or without machine, may be necessary and that factor will have to be then, considered. It will vary from industry to industry and from one process to another. No hard and fast rule can be laid down, nor is it possible or helpful. In industrial adjudication, the tribunal will have to see that the

piece-rates do not drive workers to fatigue or to the limit of exhaustion and hence, will have to keep an eye on the time factor in work. Then again, a guaranteed minimum may also have to be provided, so that for no fault of a diligent worker, he does not stand to lose on any account. There may be a misty penumbra, which has got to be pierced through upon all available materials on record and also what the tribunal, in fairness, can lay its hands on, with notice to the parties, for the purpose of fixing the piece-rates, while balancing all aspects. These are broadly, the bare outlines of approaching a matter so involved and sensitive as wage fixation, particularly when no one at the present time, can shut one's eyes to the rising spiral of prices of essential commodities. The wages of the piece-rated workmen have to be kept in line with the wages of the time-rated workmen, with the object of avoiding discrimination and heart-burn among workers and for the maintenance of industrial peace among them.[22] In *British India Corpn*,[23] two types of employees, *viz*, checkers and perchers, were doing the same work on two different stages, in the weaving unit of a textile mill. The checkers were paid on piece rate and daily wages basis, while perchers were paid on a monthly rate basis. A single judge of the Allahabad High Court held that the award of the industrial tribunal, directing that the checkers should also be paid on a monthly basis, was valid and justifiable. He further observed that it was a case of fixing the wages on a monthly basis and there was no question of revising the wages in the industry.

Inter-State Concerns

In *Dunlop Rubber*. which an all India concern, the Supreme Court held that it would be advisable to have uniform conditions of service and, if uniform conditions prevail in any such concern, they should not be easily changed. But cases may arise where, if necessary, on the basis of the industry-cum-region basis, changes may have to be made, even where the conditions of an all India concern are uniform. Even though uniformity may be desirable in an all India concern, the tribunal should not abstain from seeing that fair conditions of service prevail in the industry with which it is concerned. If any scheme, which may be uniformly in force throughout India in such a concern appears to be unfair and not in accordance with the prevailing conditions in the region, it would be the duty of the tribunal to make changes in the scheme, to make it fair and bring it in line with the prevailing conditions, particularly in the region in which the tribunal is functioning, irrespective of the fact that the demand is made by only a small minority of the workmen employed in one place, out of the many where the all-India concern carries on its business.[24] Though this case was dealing with the introduction of the scheme of gratuity, the principle equally applies to the formulation of a wage-structure. In *Remington Rand* (supra), the claim for a lunch allowance, on the basis of a similar allowance being given in some other branches, was rejected by the court.

Standardisation of Wage Scheme

Standardisation means levelling up of those whose, terms and conditions of service which are less favourable than the standardised ones, and levelling down those of such others, whose terms and conditions are more favourable than the standardised ones. It is well known that a standardisation of the conditions of service, in industrial adjudication, generally does not recognise exceptions. If the wage-structure is standardised, it is intended to make wages uniform in the whole industry brought under the working of the standardisation scheme.[25] The whole purpose of introducing a standardisation scheme with respect to wages, is to standardise wages by raising them to the standardised level where they are low and by reducing them where they are high, in order to fit them in the standardised scheme. When a standardisation scheme of wages comes into force, it is an integrated whole and may sometimes result in some categories of workmen getting less than what they were getting before. However, it would not be against the basic principles of standardisation, to protect the wages of individual workmen, who might be getting more than the wages fixed in the standardised scheme at the time when such a scheme is brought into force. The tribunal, however, has discretion to decide whether it will protect these individual workmen or not. If it gives no direction for such protection to individual workmen, they will not be protected and their wages will have to be lowered, in case they are higher than those fixed in the standardisation scheme. But if the tribunal considers that it will be more in consonance with justice, to protect the wages of the individual workmen, it may give a direction to that effect, even though they may be more than the wages fixed in the standardisation scheme. Wanchoo J laid down the following three conditions:

(a) There can be no further raising of the wages of the protected workmen, by the management, after the standardisation scheme comes into force, for any such further raise will be against the principle of standardisation;

(b) If the standardisation scheme fixes incremental scales of wages and if a protected workman is getting a wage which is between the minimum and the maximum and he is not entitled, in accordance with the length of his service, to that wage, but to something less in the grade, the extra amount that he may be getting, will have to be absorbed in future increments, till he is properly 'fitted-in' in the incremental scale, according to the length of his service; and

(c) When any workman's service comes to an end, for any reason whatsoever, no other employee, whether new or old, would be entitled to claim the pay which the outgoing employee was getting, on the ground that a vacancy with the higher pay has arisen.[26]

In *DCM*, the Bombay scheme of standardised wages (for textile industry) was applied by the textile mills in Delhi, according to which, two looms were the normal assignment of one weaver. The employer equated one Turkish loom in its mills, to two plain looms and enforced the deduction in wages in accordance with para 7 of the Bombay scheme but there was nothing in the Bombay scheme to justify the assumption that one Turkish loom would be equivalent to two ordinary looms. The Supreme Court held that there was no justification for introducing a deeming provision in the scheme, that a person working on one Turkish loom should be deemed to be working on two ordinary looms, so as to enable the employer to enforce a deduction in the wages of the weavers attending to three or more looms. When the wages were fixed on a piece-rate basis, and the workmen were able to effect their production by attending to more looms as a result of an improvement in the machinery, there could be no justification for any deduction in their wages. It is the essence of a piece-rate basis, that more the production by the workmen, the proportionately larger would be their wages, subject to such conditions as might be prescribed in this behalf.[27] In *National and Grindlays Bank*, the tribunal awarded that the employees of the Kanpur branch of the bank would be entitled to medical aid and expenses, up to a monetary limit of Rs 250 per year, which would be available to the employees as well as to the members of their families, as defined in a bipartite settlement. The award was challenged before the Supreme Court, not only on the ground that it was discriminatory and showed an unwarranted favour to the employees of one of the branches of the bank at Kanpur, but also that it was against the principles of standardisation, which was the basis of the bipartite agreement. The court noticed that the object of the bipartite agreement was to standardise the facility in respect of medical aid and expenses, but when it was found that one of the branches of the bank was not able to fall in line, that point was left for further negotiation, but nonetheless, it was made manifestly clear, that standardisation should be achieved to bring them in line with the workmen of the other branches of the bank, in regard to medical aid expenses. The court held that there was no cogent reason upon which the tribunal could distinguish the claim of the workmen at Kanpur and single them out for a beneficial treatment, which was not applicable to the workmen engaged in other branches. On this view of the matter, the court held that the workmen located at Kanpur should be treated on par with the employees of the other branches, who were similarly situated.[28]

Revision of Wage Structure

In dealing with the question of a revision of the wage scales, the technical considerations of *res judicata* cannot bar industrial adjudication.[29] For a detailed discussion of the principle of *res judicata*, see notes and comments under s 10(4) of the Industrial Disputes Act.

(a) Increase in Wage-Structure

The same principles will govern the revision of a wage structure as they govern the formulation of a wage structure in the first instance, by industrial adjudication, because there is no difference between a revision of the pay scale and a fixation of the wage structure. The revision of a wage-structure, like constructing a wage structure in the first instance, is a delicate task and the tribunal has to bear in mind, as against the labour's demand for a higher wage, the problem of the additional burden which a revision of the wage scales would impose. In revising the wage-structure, therefore, industrial adjudication has to take into account, a broad and overall view of the financial position of the employer and then, to make an attempt to reconcile the natural and just claim of the employees for a fair wage, with the capacity of the employer to pay. In determining such capacity, allowance must be made for the legitimate desire of the employer to make a reasonable profit. In *National Insurance*, from the revised scales awarded by the tribunal, it was manifest that except for one grade, the scales for the rest of the grades offered by the employer company, to the union, in its notice, compared favourably with those granted by the tribunal. In these circumstances, the Supreme Court did not think it proper to interfere with the scales of wages. Shelat J observed:

> ...to harmonise the conflicting claims of labour and capital on a reasonable basis, and so, if it appears that the employer cannot really bear the burden of the increased pay bill, industrial adjudication cannot refuse to examine his case and should not hesitate to give him relief, if it is satisfied that if such relief is not given, the employer may have to close down his business.[30]

In enhancing a wage-structure, as in constructing a wage-structure for the first lime, the nature of the work, the quantum of the work available for the worker, the average wages that he would earn for each item of work during a month, and the paying capacity of the industry, have to be taken into consideration and an enhancement can be awarded only after having due regard to all these factors.[31] In *New Egerton Woollen Mills*, while professing to treat the establishment in question, with another, as a comparable concern, the tribunal did not fix the revised wage scales so as to equalise them with those prevailing in the other concern. From a comparison of the wage scales in the two concerns, the disparity between them was apparent. The Supreme Court, therefore, held that since the tribunal held the other concern to be the only comparable unit

in the region, it would not, for any reason, fix wage scales at levels lower or less favourable than those existing in the other concern. Since there was no question of the company not having the requisite financial capacity, the Supreme Court itself, modified the wage scales awarded by the tribunal, so as, to at least, bring them in line with those in the other concern.[32]

(b) Reduction in Wages

In *Millowners Assn*, Gajendragadkar CJI held that the decision of this problem must also be based on the major consideration, that the conflicting claims of labour and capital must be harmonised, on a reasonable basis. The learned Chief Justice observed:

> ...If it appears that the employer cannot really bear the burden of the increasing wage bill, industrial adjudication, on principle, cannot refuse to examine the employer's case and should not hesitate to give him relief, if it is satisfied that if such relief is not given, the employer may have to close down his business. It is unlikely that such situations would frequently arise, but on principle, if such a situation does arise, a claim by the employer for the reduction of the wage structure, cannot be rejected summarily.[33]

In *Crown Aluminium Works*, Gajendragadkar J held:

> We do not think it would be correct to say that in no conceivable circumstances, can the wage structure be revised to the prejudice of workmen ... theoretically, no wage structure can or should be revised to the prejudice of workmen, if the structure in question falls in the category of the bare subsistence or the minimum wage'. ... it would be open to the employer to claim its revision, even to the prejudice of the workmen, provided a case for such revision is made out on merits, to the satisfaction of the tribunal.[34]

In *Indian Hume Pipe*, the tribunal, having found that the financial position of the company was sound, nevertheless accepted the case of the company for a change in the dearness allowance system. The Supreme Court observed that the entire approach of the tribunal was erroneous. The court held that there was no reason to change the slab system, to the detriment of the workmen, without compelling reasons, which should have existed for a long period of time. Speaking for the court, Khalid J observed:

> Normally, the answer would be in the negative. Tribunals and courts can take judicial notice of one fact; and that is that the wages of workmen, except in exceptionally rare cases, fall within the category of mere 'subsisting-wages'. That being so, it would be inadvisable to tinker with the wage-structure of workmen, except under compelling circumstances. Employers have seldom displayed a co-operative attitude where wage structure of workmen is devised. They have never showed a willingness for the involvement of labour with the capital, so as to engender a participative labour capital relationship. This is a reality that tribunals and courts have to reckon with, that being so, courts and tribunals have necessarily to keep their hands off from upsetting a wage-structure that has satisfactorily worked for a long time. The sweat of the labour is never reflected in any balance sheet, although the latent force behind every successful industry is this sweat. With their present wage structure, the labour just exists. No one should try to deny them even this bare source of existence.[35]

Then again, in *Raptakos Brett*, the employer sought to restructure its dearness allowance scheme, by abolishing the slab system and substituting the same by a scheme prejudicial to the workmen, on the ground that the slab-system had resulted in over neutralisation, thereby, landing the workmen in the high-wage island. The court held that the dearness allowance scheme which had stood the test of time for almost 30 years and had been approved by various settlements between the parties, could not have been justifiably abolished by the industrial adjudicator and the High Court.[36]

Retrospective Award of Wages

It is now well established that the tribunal has power to give retrospective effect to its award. Hence, the tribunal has discretion to give effect to the wage-structure formulated by it, from a retrospective date, a date anterior to the date of the award. As to the date from which the award should come into force, industrial adjudication has treated the date of demand and the date on which the award comes into force, as two extreme points. It has, however, the discretion to fix any intermediate date, depending upon the circumstances of each case. When the tribunal has fixed the date with effect from which the award of wages should be effective, in a proper exercise of its discretion, the courts will be reluctant, in judicial review, to interfere with the date so fixed.[37] The date from which the award of wages should be made effective, has to be decided by the tribunal on consideration of the circumstance of each case and no general formula can be laid down in this connection.[38] It is, therefore, a matter to be decided by the tribunal, in its discretion, on a careful consideration of the peculiar circumstances of each case, which would obviously include the financial capacity of the employer to bear the

burden of a retrospective fixation of the new scales of wages.[39] In *Lipton*, the Supreme Court did not regard the fact that the labour union had presented its charter of demands to Lipton Ltd, for the first time, towards the end of December 1963, as sufficient in itself, for giving a retrospective effect to the new scales of pay from that point of time.[40]

In *United Collieries*, a demand for an increased wages was found justified on merits by the tribunal and the benefit of the increased wages was given, in the circumstances of the case, to the concerned workmen, with effect from retrospective dates. The award was confirmed by the Supreme Court in appeal, with certain modifications.[41] In *Hydro Engineers*, the tribunal directed the employer to give effect to the award retrospectively, approximately from the date of the demand, presumably because by that time, the cost of living index had gone up considerably and not to have done so would have resulted in depriving the workmen of the minimum wages commensurate with that rise. The Supreme Court, in appeal by special leave, did not think this to be a fit case for it to interfere with the retrospective date of the award.[42] In *National Insurance* and *National Tobacco* (supra) the Supreme Court declined to interfere with the retrospective operation of the award on the ground that, on facts, the tribunal could not be said to have exercised its discretion improperly or unreasonably. In *Filmistan*, however, the court noticed a number of infirmities in the award of the tribunal and particularly, that it had not properly considered the financial capacity of the employer and also, that it had not taken into consideration, other relevant factors, in fixing the wage-scales, and remanded the case for fresh hearing. Notwithstanding the demand of the workmen for retrospective operation of the award, the tribunal directed that the award will have effect from 4 November 1965, ie, the date on which the case was remanded by the Supreme Court to it. In appeal, the Supreme Court noticed that such retrospective operation would be casting a heavy burden on the management. The Court, though felt that it should not interfere with the award, yet having regard to the facts and circumstances, ordered that the wages and dearness allowance awarded would be enforceable with effect from 10 November 1966.[43]

70 *Remington Rand of India Ltd v Workmen* (1967) 2 LLJ 866 [LNIND 1967 SC 226] : AIR 1968 SC 224 [LNIND 1967 SC 425] (SC), per Mitter J.

71 *Director, State Farms Corpn of India Ltd v IT & LC* (2003) 3 LLJ 81 : 2003 (3) WLC 83 (Raj .) per AD Singh J.

72 *Indian Overseas Bank Ltd v Workmen* CA No 480 of 1966 (1967) : [1968] 38 Comp Cas 395 (SC), per Hidayatullah J.

73 *Polychem Ltd v RD Tulpule* (1972) 2 LLJ 29 [LNIND 1972 SC 169] : AIR 1972 SC 1967 [LNIND 1971 SC 666] (SC), per Dua J.

74 *Shaw Wallace & Co Ltd v First IT* 1986 Lab IC 2030, 2036 (Cal), per UC Banerjee J.

75 *Hindustan Aeronautics Ltd v Workmen* (1975) 2 LLJ 336 [LNIND 1975 SC 249] : AIR 1975 SC 1737 [LNIND 1975 SC 573] (SC), per Untwalia J.

76 *Kamani Metal & Alloys Ltd v Workmen* (1967) 2 LLJ 55 [LNIND 1967 SC 18] (SC), per Hidayatullah J.

77 *Hindustan Antibiotics Ltd v Workmen* AIR 1967 SC 948 [LNIND 1966 SC 319] (960) : (1967) 1 LLJ 114 [LNIND 1966 SC 319] : [1967] 1 SCR 652 [LNIND 1966 SC 319] (SC), per Subba Rao, CJI.

78 *Workmen of Indian Oxygen Ltd v Mgmt* CA No 806 of 1982 (2-5-1982) (SC), per Desai J.

79 Government of India (1969), *Report of NCL-I*, p 239.

80 Ibid, p 238.

81 *Killick Nixon Ltd v KACE Union* (1975) 2 LLJ 53 [LNIND 1975 SC 201], 56 : AIR 1975 SC 1778 [LNIND 1975 SC 201] (SC), per Goswami J.

82 *Mgmt of Shri CVKUS Mandali Ltd v Industrial Court* (1979) 2 LLJ 383 [LNIND 1979 SC 357], 386 : AIR 1980 SC 31 [LNIND 1979 SC 357] (SC), per Kailasam J.

83 *Hindustan Lever Ltd v BN Dongre* 1995 Lab IC 1136, 1143 (SC), per Ahmadi J.

84 *Hindustan Antibiotics Ltd v Workmen* (1967) 1 LLJ 114 [LNIND 1966 SC 319], 127 : AIR 1967 SC 948 [LNIND 1966 SC 319] (SC), per Subba Rao CJI.

85 Government of India (1969), *Report of NCL-I*, p 239.

86 Ibid.

87 *Killick Nixon Ltd v Killick & Allied Companies Employees' Union* (1975) 2 LLJ 53 [LNIND 1975 SC 201], 55-56 (SC), per Goswami J

88 Government of India (1969), *Report of NCL-I*, p 239.

89 *Wenger & Co v Workmen* (1963) 2 LLJ 403 [LNIND 1962 SC 420], 412 (SC), per Gajendragadkar J.

90 *Workmen of Indian Oxygen Ltd v Indian Oxygen Ltd* CA No 806 of 1982 (2-5-1985) (SC), per Desai J.

91 *Workmen of Orient Paper Mills Ltd v Orient Paper Mills Ltd* (1969) 2 LLJ 398 [LNIND 1968 SC 205], 403 (SC), per Bhargava J.

92 *Rambagh Palace Hotel v Rajasthan HW Union* 1976 Lab IC 1474, 1475 : AIR 1976 SC 2303 [LNIND 1976 SC 2] (SC), per Krishna Iyer J.

93 *Bengal Chem & Pharma Works Ltd v Workmen* (1969) 1 LLJ 751 [LNIND 1968 SC 279], 758 : AIR 1969 SC 360 [LNIND 1968 SC 279] (SC), per Vaidialingam J.

1 *Union Drug Co Ltd v Fifth Industrial Tribunal* (1963) 1 LLJ 172 (Cal), per BN Banerjee J.

2 *Manton & Co Ltd v State of West Bengal* (1962) 2 LLJ 444 (Cal), per BN Banerjee J.

3 *Ahmedabad Millowners' Assn v Textile Labour Assn* (1966) 1 LLJ 1 [LNIND 1965 SC 185],28 (SC), per Gajendragadkar CJI.

4 *Filmistan Pvt Ltd v Workmen* (1966) 1 LLJ 744 [LNIND 1965 SC 299] (SC), per Gajendragadkar CJI.

5 *Shivraj Fine Arts Litho Works v State IC* 1978 Lab IC 828 (SC), per Kailasam J.

6 *Gokak Mills Ltd v Industrial Tribunal* 1970 Lab IC 337, 341-42 (Mys) (DB), per Gopivallabha Iyengar J.

7 *Art Bangles Pvt Ltd v The Workmen* CA No 918 of 1966 (3-12-1968) (SC), per Vaidialingam J.

8 *Karam Chand Thapar & Bros Pvt Ltd v Workmen* (1973) 2 LLJ 115 [LNIND 1973 SC 119] (SC), per Vaidialingam J.

9 *Symonds & Co Pvt Ltd v Symonds & Co Karamchari Sangh* 1980 Lab IC (NOC) 77 (All) (DB).

10 *Workmen of Jagjiwandas Narotamdas Metal Factory v Mgmt* (1951) 2 LLJ 778 (LAT).

11 *Workmen of GEB v Gujarat Electricity Board* (1969) 2 LLJ 791 [LNIND 1968 SC 388], 796-98 : AIR 1970 SC 87 [LNIND 1968 SC 388] (SC), per Bhargava J.

12 *Press Employees' Assn v The Statesman Ltd* (1954) 1 LLJ 167 (LAT).

13 *Kapoor Silk Mills v Mill Mazdoor Sabha*, (1967) 2 LLJ 89 (Bom) (DB), per Patel J.

14 *Ghaziabad Engineering Co Pvt Ltd v Workmen* (1969) 2 LLJ 777 [LNIND 1969 SC 217] : AIR 1970 SC 390 [LNIND 1969 SC 217] (SC), per Shah J.

15 *Silk & Art Silk Mills' Assn Ltd v Mill Mazdoor Sabha* (1972) 2 LLJ 175 [LNIND 1972 SC 243] : AIR 1972 SC 2273 [LNIND 1972 SC 243] (SC), per Mathew J.

16 *British India Corpn v Industrial Tribunal* 1984 Lab IC 14, 15 : AIR 1984 SC 362 [LNIND 1983 SC 215] (SC).

17 *Workmen of Indian Oxygen Ltd v Indian Oxygen Ltd CA No* 806 of 1982 (1985) (SC) per Desai J.

18 *West Coast Paper Mills Ltd v West Coast PME Union* 1990 Lab IC 1945, 1953 (Bom) (DB), per Suresh J.

19 *Buckingham & Carnatic Co Ltd v Workers* (1951) 2 LLJ 314 (LAT).

20 *Clerks of Calcutta Tramways v CTC Ltd* (1956) 2 LLJ 450 [LNIND 1956 SC 79], 453 : AIR 1957 SC 78 [LNIND 1956 SC 79] (SC), *per* Govinda Menon J.

21 *Associated Cement Companies Ltd v Workmen* (1953) 2 LLJ 845 (LAT).

22 *Tata Oil Millis Co Ltd v Workmen* (1953) 2 LLJ 492 (LAT).

23 *Clerks of Calcutta Tramways v Calcutta Tramways Co Ltd* (1956) 2 LLJ 450 [LNIND 1956 SC 79] (SC), per Govinda Menon J.

24 *Hindustan Times Ltd v Workmen* (1963) 1 LLJ 108 [LNIND 1962 SC 431] (SC), per Das Gupta J.

25 *Bengal Chemical & Pharma. Works Ltd v Workmen* (1969) 1 LLJ 751 [LNIND 1968 SC 279], 757 (SC), per Vaidialingam J.

26 *Killick Nixon Ltd v KAC Employees Union* (1975) 2 LLJ 53 [LNIND 1975 SC 201], 64 (SC), per Goswami J.

27 *Mazgaon Dock Ltd v Assn of Engg Workers* 1990 Lab IC 1061, 1069 (Bom) (DB), per Sawant J.

28 Government of India (1969), *Report of NCL-I*, p 243.

29 *Mgmt of SCVKUS Mandali Ltd v IC* (1979) 2 LLJ 383 [LNIND 1979 SC 357], 387 : AIR 1980 SC 31 [LNIND 1979 SC 357] (SC), per Kailasam J.

30 *Hindustan Lever Ltd v BN Dongre* 1995 Lab IC 1136, 1143 : AIR 1995 SC 817 [LNIND 1994 SC 1260]: (1994) 6 SCC 157 [LNIND 1994 SC 1260] (SC), per Ahmadi J.

31 *Monthly Rated Workmen at Wadala Factory of Indian Hume Pipe Co. Ltd. v Indian Hume Pipe Co. Ltd. Bombay*, (1986) 1 LLJ 520 [LNIND 1986 SC 122], 527-28 (SC, per Khalid J) : AIR 1980 SC 1794 .

32 *Mazgaon Dock Ltd, Bombay v Assn of Engineering Workers, Bombay*, 1990 Lab IC 1061, 1088-89 (Bom) (DB), per Sawant J.

33 *Hindustan Lever Ltd v BN Dongre* 1995 Lab IC 1136 : AIR 1995 SC 817 [LNIND 1994 SC 1260]: (1994) 6 SCC 157 [LNIND 1994 SC 1260] (SC), per Ahmadi J.

34 *'A Guide to CPI Numbers', Labour Bureau, Ministry of Labour and Employment*, pp 172-73.

35 Cited in *Ahmedabad Millowners' Assn v Textile Labour Assn* (1966) 1 LLJ 1 [LNIND 1965 SC 185], 20 (SC), per Gajendragadkar J.

36 *'A Guide to CPI Numbers'*, Labour Bureau, Ministry of Labour and Employment, p 5.

37 *Ahmedabad Millowners Assn v Textile Labour Assn* (1966) 1 LLJ 1 [LNIND 1965 SC 185] (SC), per Gajendragadkar CJI.

38 *Royal Calcutta Golf Club v Third Industrial Tribunal* (1960) 1 LLJ 464 (Cal), per Sinha J.

39 *Workmen of Indian Oxygen Ltd v IOL* CA No 806 of 1982 (SC), per Desai J.

40 Source: "*Consumer Price Index: An anatomy*" published by Labour Bureau, Simla.

41 *Jardine Henderson Ltd v Employees* (1961) 1 LLJ 641 [LNIND 1961 SC 15] : AIR 1967 SC 515 [LNIND 1961 SC 15] (SC), per Wanchoo J.

42 *Greaves Cotton & Co Ltd v Workmen* (1964) 1 LLJ 342 [LNIND 1963 SC 254], 348 : AIR 1964 SC 689 [LNIND 1963 SC 254] (SC), per Wanchoo J.

43 *Workmen of WIMCO v Western India Match Co Ltd* (1962) 1 LLJ 660, 661 : AIR 1966 SC 976 [LNIND 1962 SC 161] (SC), per Mudholkar J.

44 *Associated Power Co Ltd v Workmen* (1964) 1 LLJ 743 [LNIND 1963 SC 253], 745 (SC), per Gajendragadkar J.

45 *India General Navigation and Rly Co Ltd v Workmen* (1960) 1 LLJ 561 [LNIND 1960 SC 89] (SC), per Wanchoo J.

46 *Swastic Cashew Industries Pvt Ltd v IT* (1967) 1 LLJ 30, 41 (Mys) (DB), per Gopivallabha Ayyanagar J.

47 *Workmen of Hindustan Motors Ltd v Mgmt* (1962) 2 LLJ 352 [LNIND 1962 SC 265], 355-56 (SC), per Das Gupta J.

48 *Vishuddhananda Saraswathi Marwari Hospital v Workmen* (1952) 2 LLJ 327 (LAT).

49 *Workmen of HML v Hindustan Motors Ltd* (1962) 2 LLJ 352 [LNIND 1962 SC 265], 356 (SC), per Das Gupta J.

50 *Hindustan Times Ltd v Workmen* (1963) 1 LLJ 108 [LNIND 1962 SC 431], 115 : AIR 1963 SC 1332 [LNIND 1962 SC 451] (SC), per Das Gupta J.

51 *Ahmedabad Millowners' Assn v TLA* (1966) 1 LLJ 1 [LNIND 1965 SC 185] (SC), per Gajendragadkar CJI.

52 *Kamani Metals & Alloys Ltd v Workmen* (1967) 2 LLJ 55 [LNIND 1967 SC 18], 58 (SC), per Hidayatullah J.

53 *Karam Chand Thapar & Bros Pvt Ltd v Workmen* (1973) 2 LLJ 115 [LNIND 1973 SC 119] (SC), per Vaidialingam J.

54 *Phaltan Sugar Works Ltd v Employees* (1961) 2 LLJ 136 [LNIND 1960 SC 119], 139 (SC), per Das Gupta J.

55 *Indian Vegetable Products Workers' Union v Mgmt* (1954) 2 LLJ 441 (LAT).

56 *Kamani Metals & Alloys Ltd v Workmen* (1967) 2 LLJ 55 [LNIND 1967 SC 18], 58 (sq, per Hidayatullah J.

57 *Remington Rand of India Ltd v Workmen* (1962) 1 LLJ 287 [LNIND 1962 SC 87], 290 (sq per Gajendragadkar J.

58 *Bengal Chem & Pharma Works Ltd v Workmen* (1969) 1 LLJ 751 [LNIND 1968 SC 279], 758 (SC), per Vaidialingam J.

59 *Workmen of NEW Mills v New Egerton Woollen Mills* (1969) 2 LLJ 782 [LNIND 1969 SC 96], 788-89 (SC), per Shelat J.

60 *Bengal Chem and Pharma Works Ltd v Workmen* (1969) 1 LLJ 751 [LNIND 1968 SC 279], 759 : AIR 1969 SC 360 [LNIND 1968 SC 279] (SC), per Vaidialingam J.

61 *Cinema Theatres v Workmen* (1964) 2 LLJ 128 [LNIND 1964 SC 106] (SC), per Wanchoo J.

62 *Remington Rand of India Ltd v Workmen* (1968) 1 LLJ 542 [LNIND 1967 SC 225] : AIR 1968 SC 224 [LNIND 1967 SC 425]: (1967) 1 LLJ 866 (SC), per Mitter J.

63 *Karam Chand Thapar & Bros Pvt Ltd v Workmen* (1973) 2 LLJ 115 [LNIND 1973 SC 119] : AIR 1973 SC 1266 [LNIND 1973 SC 119] (SC), per Vaidialingam J.

64 *Phaltan Sugar Works Ltd v Employees* (1961) 2 LLJ 136 [LNIND 1960 SC 119] : AIR 1967 SC 330 [LNIND 1960 SC 119] (SC), per Das Gupta J.

65 *SSLight Rly Co v IT* 1971 Lab IC 308 [LNIND 1970 DEL 63], 311 (Del), per Rangarajan J.

66 Government of India (1969), *Report of NCL-I*, p 145.

67 *Patna Electric Supply Co Ltd v Workers Union* (1959) 2 LLJ 366 [LNIND 1959 SC 75] 372-73 : AIR 1959 SC 1035 [LNIND 1959 SC 75] (SC), per Gajendragadkar J.

68 *Tocklai Experimental Station v Workmen* (1961) 2 LLJ 694 [LNIND 1961 SC 361], 698-99 : AIR 1962 SC 1340 [LNIND 1961 SC 361] (SC), per Gajendragadkar J.

69 *United Salt Works & Industries Ltd v Workmen* (1962) 1 LLJ 131 [LNIND 1961 SC 141] (SC), per Gajendragadkar J.

70 *Mohammed & Sons v Workmen* CA No 338 of 1966 (27-7-1967) (SC), per Wanchoo CJI.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER I Preliminary

S. 2. Definitions.—

Burden of Proof and Procedure

Burden of Proof

It is open to an employer or establishment, to plead a financial inability to implement the burden of the increased wage-structure. On such a plea being taken, the tribunal would frame a specific issue. But the burden of proof, to show that he has no financial capacity to stand the burden imposed upon him, would be upon the employee.[44] The employer knows his financial position best and the conclusive proof of that may be the balance sheet, which normally is in his possession. In other words, what the financial position of a company is, is within the special knowledge of the company and the burden of proof, consequently, to show that it has no financial capacity to stand the burden imposed upon it, would be upon it.[45] It is, therefore, for the employer to show what his financial position is, and how it is going to place an undue or impossible burden upon him, to implement the demanded wage. Of course, the justification of the plea of a want of financial capacity, will depend upon the evidence of the financial position of the employer or the unit, as the case may be, over a period of years, showing that it cannot bear the burden, or that it is only a temporary or fortuitous situation, with every possibility of a financial improvement in the immediate future. The determination of the wage-structure by the tribunal will be, on the evidence produced before it, according to the financial capacity of the employer or the unit. Once this is finally determined, the employer or the unit cannot continue to assert that it has no financial capacity to implement the award.[46]

Procedure

Even where the wages are to be fixed on the industry-cum-region basis, it is open to the industry to plead that it has not got the financial capacity to bear the increased burden.[47] When such a plea is specifically raised, it is the duty of the tribunal to determine whether the increased burden could be borne by the particular industry. It is incumbent upon the tribunal to give a real and effective opportunity to the employer, to establish his case, where he has pleaded and sought to prove that the increase in the existing rates of wages, is beyond his financial capacity to bear.[48] Before fixing a wage structure, the tribunal must examine the financial position of the employer. In a controversy between the parties, regarding the question of financial capacity, the tribunal is bound to record a finding as to whether the employer is so capable. It is only on being satisfied, that the employer is financially capable of bearing the burden, that the tribunal would be justified in awarding increased wages. An award, imposing an additional burden, in the shape of increased wages, without giving a definite finding as to the financial capacity, would be improper.[49] In *Cochin State Power,* where the tribunal, despite its conclusion that in view of the higher rate of dearness allowance paid to them, the workmen could not claim higher wage scales than those prevalent in another similar concern, where dearness allowance at a lower rate was paid to the workmen, fixed wage-scales higher in some respects, than those prevailing in the other concerns, the Supreme Court set aside the award of the tribunal in this respect and remanded the case for reconsideration.[50] Similarly, where the tribunal directed an *ad hoc* increase in the piece rate wages, on the ground that the wages were fixed some 10 years ago, without considering other relevant factors, including the capacity of the employer to bear the burden of the proposed increase, the award was quashed in writ proceedings and the tribunal was directed to consider the issue in its proper perspective.[51] Where the tribunal did not consider the financial capacity of various major concerns of managing agency companies, for fixing the wage scales or dearness allowance, Sinha J of Calcutta High Court quashed the award on the ground that, in the absence of a reference to

the financial capacity of the companies to pay, the determination of wage scales was not proper.[52] Where the wage board did not consider the financial capacity of a particular jute mill, but recommended certain scales of wages and dearness allowance on the basis of some large jute mills in another part of the country, it was held that the approach of the wage board determining uniform wage scales and dearness allowance for the entire jute industry suffered from an inherent weakness and a manifest error.[53]

Clause (s): WORKMAN

Evolution of the Concept

Origin and Evolution

section 2(k) of the repealed Trade Disputes Act 1929, contained the definition of 'workman'. In the Industrial Disputes Act 1947, the definition of 'workman', as originally enacted in s 2(s), was as follows:

> 'Workman' means any person employed (including an apprentice) in any industry, to do any skilled manual or clerical work, for hire or reward and includes, for the purpose of any proceedings under this Act, in relation to an industrial dispute, a workman discharged during that dispute, but does not include any person employed in the naval, military or air service of the Crown.

This clause underwent changes in the course of amendments, the latest being the 2010 amendment. The NCL-II recommended the gender-neutral expression 'worker', instead of 'workman', that is currently found in the Industrial Disputes Act and certain other Acts.[54] In *Ganeshi Lal*, Pasayat J (for self and Sathasivam J) held that a peon, who is engaged on daily wages and attached to the public prosecutor, is not a workman, as the Law Department of the Government can by no stretch of imagination be considered to be an industry within the meaning of the Act.[55]

Ingredients of the Definition of 'Workman'

The ingredients of the definition of a 'workman' may be treated under the following heads:

Any Person Employed... but does not Include any Such person

The definition of a 'workman' in s 2(s), in connection with persons employed in an industry, falls in three parts. The first part of the definition gives the statutory meaning of a workman. This part of the definition determines a workman by reference to a person (including an apprentice) employed in an 'industry', to do any manual unskilled, skilled, technical, operational, clerical or supervisory work, for hire or reward.[56] This part determines what a 'workman' means. This is the signification or denotation of the word or what the word denotes. The second part is designed to include something more in what the term primarily denotes. By this part of the definition, persons who have been dismissed, discharged or retrenched in connection with an industrial dispute, or whose dismissal, discharge or retrenchment has led to an industrial dispute; for the purposes of any proceedings under the Act in relation to such industrial dispute, have been included in the definition of workman. This part gives an extended connotation to the expression workman. The third part specifically excludes the categories of the persons specified in cll (i) to (iv) of this subsection. The third part connotes that even if a person satisfies the requirements of any of the first two parts, but if he falls short in any of the four categories in the third part, he shall be excluded from the definition of workman. The first part brings in the concept of the contract of employment between the employer of an industrial establishment and the employee. Unless there is a contract of employment between the two or, in other words, there is a relationship of employer and employee between them, the definition of a 'workman' will not come into play. But once the relationship of employment is established, its duration would not be material. Even a temporary or casual, employee would fall within the ambit of this part of the definition of workman. [57] In *Hutchaih*, a single judge of Karnataka High Court held that the definition does not state that a person, in order to be a workman, should have been employed in a substantive capacity or on a temporary basis in the first instance, or after he is found suitable for the job, after a period of probation. In other words, every person employed in an industry, irrespective of his status-be it temporary, permanent or of a probationer-would be a workman.[58] In *SK Verma*, the Supreme Court held that a 'development officer' of the Life Insurance Corporation of India, was a workman.[59]

However, the court did not indicate as to under what rubric, the duties of a 'development officer' would fall and proceeded on a pragmatic, rather than a pedantic approach of construction, that the entire labour force should be included in the definition, while the managerial-force should be excluded. The Gujarat High Court held that a *badli* workman will fall within the definition of a workman.[60] The Rajasthan High Court held that a telephone operator, who does not fall in any of the exceptions contained in the definition is a workman.[61]From the words used in the definition, it is clear that not only the persons who are actually employed in an industry, but also those who have been discharged, dismissed or retrenched in connection with or as a consequence of an industrial dispute; and whose dismissal, discharge or retrenchment has led to

that dispute, would fall within its ambit. But the inclusive part of the definition in s 2(s), talks of any proceedings under this Act in relation to a 'industrial dispute.' In other words, the second category of persons included in the definition, would fall in the ambit of the definition, only for the purposes of any proceedings under this Act, in relation to an 'industrial dispute' and for no other purpose.[62] For determining the question as to whether an employee is a workman or not, it is the date of reference that is relevant. What is, therefore, to be seen is whether on the date of the reference, there was any dispute in respect of the workman, which could be referred for adjudication to the tribunal. Hence, once a tribunal is vested with the jurisdiction to entertain the dispute which is validly referred to it, does not cease to continue that jurisdiction merely because subsequently, the workman ceases to be a workman.[63] A daily wager is a workman entitled to the protection of s 25F.[64] In *Kamyani Vidya Mandir*, the facts disclosed that it was an educational institution imparting training to the mentally challenged children. The dominant purpose of hiring employees by the institution was only to train the mentally challenged children and to look after them. The respondent in this case was a 'teacher' engaged on a temporary basis from August 1992 to April 1993. Her service was terminated resulting in an industrial dispute. While holding that she was not a 'workman' within the meaning of s 2(s), the Bombay High Court observed that the articles were made by children together with the teachers; the mentally challenged persons were not paid money for the products which they were trained to manufacture; and that in these circumstances, there was neither employer-employee relationship nor any systematic activity for the production of goods.[65]

Apprentice

The expression 'apprentice' has not been defined in the Act. In the *Shorter Oxford Dictionary*, an 'apprentice' has been defined as a 'learner of a craft; one who is bound by a legal agreement to serve an employer for a period of years, with a view to learn some handicraft, trade, etc, in which the employer is reciprocally bound to instruct him.' In the *Chambers Dictionary*, to serve apprenticeship means 'to undergo training of an apprentice'. *Stroud's Judicial Dictionary* defines an 'apprentice' as 'a person bound to another for the purpose of learning his trade or calling; the contract being of nature that the master teaches and the other serves a master with the intention of learning'.[66] According to *Halsbury's Laws of England*,[67] under the contract of apprenticeship, 'the apprentice is bound to serve a master faithfully, in a trade or business, for an agreed period and the master undertakes to give the apprentice instruction in it and either to maintain him or pay his wages'. In other words, by 'the contract of apprenticeship', a person is bound to another for the purpose of learning the trade or calling, the apprentice undertakes to serve the master for the purpose of being taught and the master undertakes to teach him.[68] In the language of Goswami J:

> ... the heart of the matter in apprenticeship is, therefore, the dominant object and intent to impart on the part of the employer and to accept on the part of the other person learning, under certain agreed terms. That certain payment is made during the apprenticeship, by whatever name called, and that the apprentice has to be under certain rules of discipline, do not convert the 'apprentice' to a regular employee under the employer. Such a person remains a learner and is not an employee.[69]

Thus, the contract of apprenticeship accentuates teaching on the part of the master and learning on the part of the apprentice, as the primary object of the 'contract of apprenticeship'. Where, therefore, this object is only ancillary and not primary, the contract is one of service, rather than that of 'apprenticeship'. In s 2(s) of the Industrial Disputes Act 1947, an 'apprentice' has specifically been included in the definition of 'workman' but in the subsequent legislation,*viz*, the Apprentices Act 1961 (Act No 52 of 1961), s 2 (aa) defines the term 'apprentice' to mean 'a person who is undergoing 'apprenticeship' training in a designated trade in pursuance of a contract of apprenticeship' and s 18 of that Act further provides thus:

> **S. 18. Apprentices are trainees and not workers.—**Save as otherwise provided in this Act—
>
> (a) every 'apprentice' undertaking apprenticeship training in a designated trade in an establishment shall be a trainee and not a worker, and
>
> (b) the provisions of any law with respect to labour shall not apply to or in relation to such apprentice.

Statutory vs Non-Statutory Apprentice - Legal Status and Distinction

A few questions that engaged the attention of courts were:

(i) what is the legal status of statutory apprentices engaged under Apprentice Act 1961?

(ii) do they have the right to absorption in the regular services of the employer?

(iii) what are the legal consequences of engaging statutory apprentices without executing the contract of apprenticeship as required under the Act? and

(iv) what are the effects of continuing a statutory apprentice as such, after the expiry of the period stipulated in the contract?

A survey of the decisions rendered by High Courts and the Supreme Court unfolds a disturbing trend, in that the learned judges across-the-board, have failed to come to grips with the expressions 'apprentice' and 'trainee' as well as in distinguishing a 'statutory apprentice' from a 'non-statutory apprentice/trainee'. In the result, it has to be stated, with great respect, court decisions in this regard have been consistently wrong. These expressions appear in several enactments including the Apprentices Act 1961 and Industrial Disputes Act 1947. Before going into the judgments properly, it is worthwhile to take a look at the origin and evolution of the expressions 'apprentice' and 'trainee' in the Indian context. Leaving the above enactments aside for a moment, it is important to recognise the fact that the words 'apprentice' and 'trainee' have been in use not only in the industrial context, but also in other professions such as law and medicine. The Industrial Disputes Act, which is an earlier law (1947) defines 'workman' in s 2(s),*inter alia*, as any person including an 'apprentice'. The Model Standing Orders framed by the Central and State Governments under the Industrial Employment (Standing Orders) Act 1946 (IESOA 1946) recognise 'apprentice/trainee' as one of the classes of workmen alongside casual, temporary, probationer, etc. At the time when IESOA and IDA were enacted, there was no Apprentices Act, which took birth some 14 years later in 1961. It is not in dispute that prior to 1961 there was nothing like a 'statutory apprentice' and no employer was required to engage a given number of apprentices for imparting training under the National Employment and Training Policy. Prior to 1961, industrial employers did engage trainees or apprentices under their own training schemes for imparting training in several trades and occupations before regularising or confirming them as permanent workmen. It is also conceded that such company-specific training programmes continued, and are continuing, even after the enactment of Apprentices Act 1961.

The Apprentices Act 1961 requires industrial employers to engage certificate holders in different trades such as turners, fitters, electricians, welders, etc, through the auspices of the State or Central Apprenticeship Advisers for a specific period ranging from one year to 18 months and impart training. The number of apprentices is determined as a proportion to the number of permanent employees engaged in each trade. The Act requires that the apprentices should be sponsored by the Apprenticeship Adviser and the contracts of apprenticeship should be registered with the Apprenticeship Adviser, who represents the government. This mandatory requirement goes to establish that in the absence of registration of the contract of apprenticeship, the apprentice or trainee ceases to be a 'statutory' apprentice and becomes a non-statutory or voluntary apprentice. The stipend paid by the employer to the apprentices is partly reimbursed by the government in certain classes of establishments subject to certain conditions. Most importantly, the Act does not impose any obligation on the employer either to absorb the apprentices in his organisation after the completion of training or even to give preferential treatment to them while recruiting permanent employees in any of the trades. Section 18 of the Apprentices Act stipulates that the '*apprentices are trainees and not workers*', and further states that the '*provisions of any law with respect to labour shall not apply to or in relation to such apprentice*'. It is significant to note that the said section used both the expressions 'apprentice' and 'trainee', interchangeably, to mean the same thing, and distinguished both of them from 'worker'. The question then is: *what is meant by the expression 'such apprentice' appearing in the last part of cl (b) of s 18* ? Should it be taken to mean 'any apprentice or trainee engaged under any scheme of whatsoever nature' or should it be confined to 'such of those apprentices or trainees, who have been specifically sponsored by, and whose contracts of apprenticeship have been registered with, the Apprenticeship Adviser in accordance with the provisions of the Apprentices Act 1961'? The answer to the question is decided in favour of the latter, and does not present any difficulties. Reverting to the controversy, till the Apprentices Act was enacted there was no confusion with regard to the legal status of an apprentice or trainee because of the inclusion of the term 'apprentice' in the definition of workman in s 2(s) of IDA. Moreover, till 1961 there was no need for differentiating an 'apprentice' from a 'statutory apprentice', in the light of the fact that there was only one class ie, the former to the exclusion of 'statutory apprentice'.

While a 'statutory apprentice' is governed by the provisions of the Apprentices Act, an (non-statutory) apprentice or trainee *simpliciter* is governed by individual contracts and/or standing orders. Again, the pre-fixes 'statutory' and 'non-statutory' came to be used only after the enactment of the Apprentices Act 1961, and not before, with the ostensible purpose of distinguishing the one class from the other. The service of a 'non-statutory' apprentice/ trainee can be terminated at any time during the period of apprenticeship/training without assigning any reason and without notice or compensation in lieu thereof, whereas the contract of apprenticeship of a 'statutory' apprentice cannot be terminated before the expiry of the period, without the written permission from the Apprenticeship Adviser, as provided in sub-ss (2) and (3) of s 7 of the Act. A 'statutory apprentice' or 'statutory trainee' engaged under the Apprentices Act is manifestly outside the ambit of labour laws in terms of s 18, whereas a non-statutory apprentice or trainee is governed by all the labour laws like any other 'workman' or 'employee' or 'worker', as the case may be.[70]It is relevant to note that the word 'apprentice' as defined in s 2(aa) of the Apprentices Act 1961 shall only be a trainee and not a 'worker' and the provisions of 'any law with respect to labour' shall not apply to or in relation to him. The employees under various labour laws have been defined

by different expressions. For instance, in the Factories Act, the expression 'worker' has been used; in the Employees' State Insurance Act 1948, the expression' employee' has been used while in s 2(s) of the Industrial Disputes Act, the expression 'workman' has been used, which means 'any person (including an apprentice) employed in any industry...'.

In *TELCO*, after considering the scheme of the Apprentices Act 1961, particularly the definition of 'apprentice' in s 2(aa) and the provisions of s 18 of that Act and the definition of 'employee' in s 2(9) of the Employees' State Insurance Act 1948, the Supreme Court held that an 'apprentice' is not an 'employee' as defined in the Employees' State Insurance Act. In order to buttress its decision, the court made a significant observation that if the legislature intended to enlarge the definition of the word 'employee' in s 2(9) of the ESI Act, it could have included the word 'apprentice' in it, as has been done in s 2(s) of the Industrial Disputes Act. Such a deliberate omission on the part of the legislature can be attributed only to the well-known concept of 'apprenticeship' which the legislature assumed and took note of for the purpose of the Act. That is not to say that if the legislature intended, it could not have enlarged the definition of the word 'employee' even to include an 'apprentice', but the legislature did not choose to do so.[71] In *Hanuman Choudhary*, the question whether an 'apprentice' in view of the definition of 'apprentice' in s 2(aa) and the provisions of s 18 of the Apprentices Act 1961, will not be a'workman' as defined in s 2(s) of the Industrial Disputes Act despite having specifically been included in the definition, came before a single judge of the Rajasthan High Court. In this case, referring to the observations of the Supreme Court in connection with the inclusive definition of 'workman' contained in s 2(s) of the Industrial Disputes Act, the court pointed out that the Supreme Court had not considered the definition of 'workman' in s 2(s) of the Industrial Disputes Act in conjunction with the provisions of s 18 of the Apprentices Act 1961 as in that case it was primarily concerned with the question as to whether an apprentice could be regarded as an employee under s 2(9) of the Employees State Insurance Act 1948. Therefore, that decision 'cannot be read as laying down that in spite of the provisions of s 18 of the Apprentices Act, an 'apprentice' governed by the Apprentices Act is to be treated as a 'workman' under s 2 (s) of the Industrial Dispute Act. The court, therefore, held that an 'apprentice' governed by the Apprentices Act is not a 'workman' for the purpose of the Industrial Disputes Act and the provisions of the Industrial Disputes Act would not be applicable to him.[72]

In coming to the above conclusion, it gave a two-fold reason. Firstly, that the Apprentices Act is not an exhaustive Act to cover all types of apprentices as it is applicable only to 'apprentices' undergoing 'apprenticeship training' in pursuance of the contract executed under s 4 of that Act. There may be persons, though engaged as 'apprentices' but not covered by that Act. Hence, such 'apprentices' would fall within the definition of 'workman' in s 2(s) of the Act and would be governed by its provisions. Secondly, the Industrial Disputes Act is a general law applicable to all categories of workmen whereas the Apprentices Act is a particular law enacted with special reference to 'apprentices' postulated by that Act. The definition of 'workman' in s 2(s) of the Industrial Disputes Act was enacted in 1956 prior to the enactment of the Apprentices Act in 1961. The provisions of s 18 of the Apprentices Act would, therefore, prevail over the provisions contained in s 2(s) of the Industrial Disputes Act relating to 'apprentices' and an 'apprentice' as defined in that Act cannot be regarded as a 'workman' under s 2(s) of the Industrial Disputes Act. This holding of the single Judge of the Rajasthan High Court is not correct law because the first reason given by him truncates while the second reason completely castrates the definition of 'workman' in s 2(s) of the Industrial Disputes Act insofar as it relates to 'apprentices'. It is submitted that the doctrine of 'implied repeal' is not applicable as the two enactments,*viz*, the Industrial Disputes Act 1947 and the Apprentices Act 1961 do not occupy the same field nor does the latter lay down an exhaustive Code in respect of the subject-matter replacing the former law.[73]Furthermore, it is well established law that while construing and applying welfare statutes, the welfare of the weaker party, particularly the working class, should be protected. It is also noteworthy that s 18 of the Apprentices Act uses the word 'worker' while the definition in s 2(s) of the Industrial Disputes Act uses the word 'workman' which specifically includes an 'apprentice' and these are two different concepts. Therefore, the word 'apprentice' in the definition of 'workman' in s 2(s) of this Act cannot be abrogated by the general language of s 18 of the Apprentices Act.

In view of the provisions of s 22 of the Apprentices Act, it is not obligatory on the part of the employer to offer any employment to an apprentice who has completed the period of his 'apprenticeship' training in his establishment nor is it obligatory on the part of the apprentice to accept employment under the employer, where such apprentice is covered by that Act. This provision is however, subject to the *non-obstante* clause in s 22(2) which leaves no doubt that despite the provisions contained in sub-s (1), the employer is under an obligation to offer suitable employment to the apprentice if the 'contract of apprenticeship' contains a condition that the apprentice shall serve the employer after the successful completion of the training. *A priori*, when such an offer is made, the apprentice on his part is bound to serve the employer in the capacity in which he was working as an apprentice. In *Narinder Kumar*, on the construction of the relevant clause in the contract of apprenticeship to the effect that the apprentice 'shall be absorbed in the department if there are vacancies' and the general text of the contract, the Supreme Court held that it created a reciprocal obligation on both the parties as 'it binds the employer to offer the employment to the apprentice (if there is a vacancy) and equally, it binds the 'apprentice' to accept the offer' because the object of this provision is to guarantee to the extent of the existence of vacancies that the apprentices will not be rendered jobless after they complete their training. In order to be a workman under s 2(s) of the

Industrial Disputes Act, it has to be established that the apprentice is not covered by the provisions of the Apprentices Act. Even if he is such an apprentice, he has further to establish that he is employed in the establishment.[74] In other words, any person, whether he is an apprentice or not, can be regarded as a 'workman' only if he is employed in that establishment to do any work of the nature contemplated in the definition. It is not enough to establish that the person claiming such a status is an 'apprentice'.[75]

In *Patel Somnath*,[76] the idea of engaging apprentices for one year in this case was to give them practical training for one year. The contract of apprenticeship specifically mentioned the period of one year, specifically stipulating that at the expiry of one year, the services of the apprentices shall be treated as terminated. In view of this contractual situation, a single Judge of the Gujarat High Court held that the apprentice was not entitled to any allowance allowed to regular employees. In *Abdul Aziz*,[77] the period of apprenticeship was for one year but on completion of the period of training, the apprentice applied to the employer that his apprenticeship should be extended, but no such extension was granted by the employer. However, he continued to work for some years. A single judge of the Rajasthan High Court held that his continuation in work did not clothe him with any higher status than that he had at the time of entry in the apprenticeship contract. But in *Jagdish Vyas*, a Division Bench of the same High Court distinguished this decision where a person appointed as an apprentice for one year was allowed to continue in employment for more than three years without any specific order extending the apprenticeship or otherwise and held that the employee has to be considered as a 'workman' entitled to the vacant post.[78] A statutory apprentice engaged after executing the contract as required under the Apprentices Act 1961, does not become a workman merely because the period of apprenticeship was extended by five months, and there is no violation of ss 25G & H in the event of termination of the apprenticeship contract.[79] No provision of any labour law applies to an apprentice under the Apprentices Act 1961, and an apprentice is not a workman within the meaning of s 2(s), and the labour court has no jurisdiction to order reinstatement of an apprentice holding that his services were terminated in violation of s 25F.[80] But where an apprentice was engaged for more than 240 days after the expiry of one year of contract period, and was terminated at the end of it, it was held that the provisions of s 25F apply and that the order of reinstatement with full back wages passed by the labour court is justified.[81] Where the employer engaged apprentices purported to be under the Apprentices Act 1961 but did not get the apprenticeship contracts registered as required under s 4 of the said Act, and the apprentices claimed that they continued in service beyond the maximum period allowed under the Apprentices Act and were performing regular duties like any other workman, the labour court has jurisdiction to go into the facts and grant appropriate relief.[82]

Where the *UPSEB*, having terminated the service of an employee designated as an 'apprentice' and contended that no labour law applied to him in terms of the provisions of the Apprentices Act 1961, Vineet Saran J, of the Allahabad High Court rejected the plea of the management on the ground that no contract of apprentice ship was registered with the Apprenticeship Adviser nor was it shown that the employee was appointed as a trainee under a scheme framed in that behalf. The learned judge further pointed out that the said employee was engaged on regular work in all the three shifts and held that, in the light of these facts, he was a 'workman' within the meaning of s 6(z) of UPIDA.[83] In another case involving the same employer, the facts disclosed that the Board had sent the Apprentice contract of an apprentice draftsman to the Apprenticeship Adviser, but the latter kept it pending with him without formally registering. His apprenticeship was terminated by the Board on the completion of the period stipulated in the contract of apprenticeship. The labour court set aside his termination on the ground that he was a 'workman' and that his termination without complying with the provisions of UPIDA was illegal since he had completed 240 days service. Quashing the award of labour court, Chauhan J, of Allahabad High Court held that the Board could not be held responsible for the failure of the Apprenticeship Adviser in registering the contract of apprenticeship, and that person was very much an 'apprentice'.[84] It is submitted that this case was rightly decided. In *Trambak Rubber*, the facts disclosed that the company terminated the services of some 72 employees on the ground that they were 'trainees' and not 'workmen'. The issue before the industrial court was whether they were merely trainees or 'employees' (workmen) within the meaning of s 3(5) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 (MRTU & PULP Act 1971). The industrial court recorded a finding that they were only 'trainees' and upheld their termination, which award was quashed by the High Court. In appeal, the Supreme Court, speaking through Venkatarama Reddi J (for self and Balakrishnan J), held that the High Court was right in setting aside the impugned award passed by the industrial court, and further observed that the management evidently came forward with a false plea dubbing the 'employees/workmen' as 'trainees' so as to resort to summary termination and deny them their legitimate benefits.[85]

In another case involving the same company, the facts were: a few workers filed a complaint alleging non-payment of minimum wages and exploitation in the form of extended hours of work against the management. While the complaint was pending before the industrial court, the management terminated their services. The industrial court accepted the contention of management that the applicants were trainees and not workers, and passed an award accordingly. In a writ petition, the High Court quashed the order of industrial court, and held that there was an error of law apparent on the face of record, and that merely because no appointment letters were issued to the applicants they would not cease to be workmen, and ordered reinstatement in service but without back wages.[86] In *Audco India*, the facts were: the company terminated the service of

an apprentice. The labour court ordered reinstatement on the ground that the management did not comply with s 25F, which award was challenged in the High Court. Quashing the award, the Madras High Court held that even if the finding of the labour court with regard to the status of the apprentice as a 'workman' was acceptable, his case would come within the exception of sub-clause (bb) of s 2(oo), and that the labour court misdirected itself on the question of construing the term of apprenticeship given to the second respondent as well as the effect of s 2(oo)(bb).[87] In *State of Haryana*, the facts briefly were: a person engaged as an 'apprentice' under the provisions of the Apprentices Act, was subsequently terminated resulting in an industrial dispute, which was referred for adjudication. The labour court held that he was a 'workman' u/s 2(s) of the IDA and ordered reinstatement. Quashing the award, Raina J, of the Punjab and Haryana High Court held that reading of definition of "apprentice" in ss 2(aa) and 2(r) read with s 18 of the Apprentices Act leaves nothing to doubt that it was a special Act and could not cover workmen and the it precludes the application of any other labour law - be it UPIDA or IDA (Central Act). That being so labour court or tribunal would not have any jurisdiction to entertain any dispute arising therefrom, and that the award passed by the labour court cannot be sustained as it suffers from incurable jurisdictional infirmity.[88]

UPSEB v SM Singh - A Landmark Decision for all the Wrong Reasons

In *UP State Electricity Board v Shiv Mohan Singh* , the facts disclosed that the Board did not register some of the contracts with the Apprenticeship Adviser. The point urged before the Supreme Court was that, in view of the said breach in the face of the mandatory requirement to register the contracts, the legal status of the said apprentices stood changed from that of 'apprentices' under the Apprentices Act to that of 'workmen' under the IDA. The only question relevant for reaching a just and fair conclusion was: 'what is the legal effect of non-registration of the contracts of apprenticeship?' Justice Mathur (for self and Hegde J,Sinha J, concurring) held that none of them was entitled to be treated as a 'workman' within the meaning of the IDA. A few observations made by Mathur J have been identified for analysis below. The learned judge observed:

> From the scheme of things it is more than apparent that the Apprentices Act, 1961 is a complete Code in itself and it lays down the conditions of the apprentices, what shall be their tenure, what shall be their terms and conditions and what are their obligations and what are the obligations of the employer. It also lays down that the apprentices are trainees and not workmen and if any dispute arises then the settlement has to be done by the Apprenticeship Adviser as per Section 20 of the Apprentices Act, 1961 and his decision thereof is final. *Now, under the scheme of these things, it clearly shows that the nature and character of the apprentice is nothing but that of a trainee and he is supposed to enter into a contract and by virtue of that contract he is to serve for a fixed period on a fixed stipend. This will not change the character of the apprentice to that of a workman under the employer where he is undergoing the apprentice training.* Sub-section (4) of Section 4 only lays down that such contract should be registered with the Apprenticeship Adviser. But by non-registration of the contract, the position of the apprentice is not changed to that of a workman. () .... The purpose is to train the people for employing them in the industries, it was never the intention that those trained candidates automatically become the workmen. ... The definition makes it clear that they are apprentices for a purpose undergoing a training and in Section 18 it has been clearly mentioned that they will not be treated as a workmen and they will be treated as a trainee and no labour laws will apply in relation to such apprentices. *Viewing the expression "shall" in this context, cannot be construed as a mandatory*....It is purely administrative act and not forwarding contract of the apprenticeship to the Apprenticeship Adviser will not change the character of the incumbent and it will not render the contract of apprenticeship invalid or void. *If the contract of apprenticeship is to be treated as a mandatory and contract is not sent then the effect will be that the apprentice will not be entitled to any benefit flowing from the Act. In fact, by treating the expression "shall" here as a mandatory it will be more counter productive to the interest of the trainees rather than for their benefit. The employer can take a shelter under the plea that since the contract of the employment has not* been *registered with the Apprenticeship Adviser, therefore, he is not under any obligation to pay stipend to the apprentice trainees and he is not under an obligation to impart the training to him also*… () ... We are, therefore, are of the *considered view that non-registration of the contract of apprenticeship would not render the same nugatory*.[89] ().

Observation I

> Now, under the scheme of these things, it clearly shows that the nature and character of the apprentice is nothing but that of a trainee and he is supposed to enter into a contract and by virtue of that contract he is to serve for a fixed period on a fixed stipend. *This will not change the character of the apprentice to that of a workman under the employer where he is undergoing the apprentice training.*

The above observation is wrong both on facts and law. Once it is recognised that there are two classes of apprentices/trainees - one under the provisions of the Apprentices Act and the other under the Industrial Disputes Act with different terms and conditions governing their engagement - the conclusion that they are distinct legal entities is inescapable.*Secondly*, the two enactments serve totally different objects. The former is merely confined *to impart training*

to the candidates sponsored by the Apprenticeship Adviser for a determinate period of time, and the latter for investigation and settlement of disputes mainly between the *employer and his workmen*. *Thirdly*, as already stated in the preceding paragraphs, the need to distinguish the two classes of apprentices was necessitated after the enactment of Apprentices Act 1961, and not before. *Fourthly*, prior to 1961, the expression 'statutory apprentice' was unknown and beyond legal conception. *Fifthly*, until the enactment of the Apprentices Act 1961, 'apprentice' and 'trainee' were being used synonymously to mean the same class, as can be seen from the Model Standing Orders as well as Certified Standing Orders of different industrial establishments in force during that period. *Sixthly*, the expression 'apprentice' was expressly included in the definition of 'workman' in s 2(s), which means that he is entitled to pursue the remedy provided under the ID Act, whereas the 'apprentice' under Apprentices Act was excluded from the operation of any of the labour laws including the ID Act. *Seventhly*, in respect of an 'apprentice' engaged under the company's training scheme, the employer is under no obligation to send the contract of training to, or get it registered with the Apprenticeship Adviser or any other external authority, whereas in respect of a 'statutory apprentice', the employer is mandated to get the contract registered with the Apprenticeship Adviser. It does not stop there. In terms of r 6 of the Apprenticeship Rules 1992, the Central Government may specify and model the 'contract form' as provided for in Sch V (for trade apprentices), which has to be used by the employer while engaging apprentice, whereas the employer is free to design and draft his own contract of training in respect of the trainees/apprentices engaged under its own training scheme. *Eighthly*, while an employer has the power to terminate the services of an 'apprentice', ie, a 'workman' answering to s 2(s) of the ID Act as provided for in the individual contract, he is not free to dispense with the services of an 'apprentice' answering to the definition under s 2(aa) read with s 2(e) of the Apprentices Act. In terms of s 7 (2) & (3), any premature *termination of the apprenticeship contract could only be effected by an order passed by the Apprenticeship Adviser, and not by the employer*. *Ninthly*, the stipend paid to the statutory apprentices is partially reimbursed and/or shared by the government in respect of industrial establishments employing less than 150 workers, whereas no such reimbursement/sharing is contemplated in the case of 'apprentices'/'trainees' engaged by an establishment under its own training scheme. *Tenthly*, r 8 of Apprenticeship Rules 1992 stipulates that, in the event of pre-mature termination of the apprenticeship of a statutory apprentice due to the failure on the part of employer, the employer has to pay compensation equivalent to three months last drawn stipend, whereas the training of a trainee/apprentice engaged under the company's training scheme can be terminated without notice or compensation at any time during the period of training. *Eleventhly*, a trainee or apprentice engaged under the company's training scheme can raise an industrial dispute under s 2A read with s 11A of ID Act and seek remedy through the medium of conciliation, adjudication, etc, whereas a statutory apprentice engaged under the provisions of Apprentices Act cannot seek the remedy provided under the ID Act in view of s 18 of the Apprentices Act which prohibits the application of any labour law to statutory apprentices. He can only appeal to the Apprenticeship Adviser for relief. *Twelfthly*, in the case of a statutory apprentice, s 5 of the Act provides for '*Novation*' of the apprenticeship contract, which concept is wholly foreign to industrial employment with no application, whatsoever, to the trainees engaged under the company's training scheme. *And, lastly*, in addition to the expression 'apprentice', the Apprentices Act also defines '*worker*' [s 2(r)] to mean "any person who is employed for wages in any kind of work and who gets his wages directly from the employer, *but shall not include an apprentice referred to in clause (aa)*", whereas ID Act defines 'workman' which includes 'apprentice'. In the face of these glaring facts, to hold that it *will not change the character of the apprentice to that of a workman under the employer where he is undergoing the apprentice training*, not only sounds strange, but also runs counter to the scheme of Apprenticeship under the Apprentices Act, given that the rights and liabilities as well as the remedy and relief contemplated under Apprentices Act are totally different from those prescribed under the ID Act.

Observation II

> *Viewing the expression "shall" in this context, cannot be construed as a mandatory. ... It is purely administrative act and not forwarding contract of the apprenticeship to the Apprenticeship Adviser will not change the character of the incumbent and it will not render the contract of apprenticeship invalid or void.*

To say that the *non-forwarding and the non-registration of the contract with the Apprenticeship Adviser cannot be construed as mandatory* is a misconception of law. The word 'shall' appearing in the provision can by no stretch of imagination be construed as merely directory. If the contract is not registered with the Apprenticeship Adviser, then the apprentice ceases to be a statutory apprentice and gets transformed into a trainee engaged by the company voluntarily or under its training scheme, if such a scheme exists. The further implication of non-registration is that none of the provisions of the Apprentices Act, which grant protection and/or certain additional facilities to the apprentice, which are not normally available to voluntary trainees as, for instance: (i) payment of stipend at the rates prescribed from time to time, (ii) casual leave with pay @ 12 days/annum, (iii) medical leave with pay @ 15 days/annum, (iv) extraordinary leave with pay @ 10 days/annum (*making it a total 37 days paid leave*), (v) protection against non-payment of stipend, (vi) prohibition of engaging the apprentice in night shifts, ie, between 10.00 PM and 6.00 AM, (vii) releasing the apprentice for Related Instruction (RI) Classes with full stipend for the period of absence, (viii) protection against deductions from the stipend, etc. Many of these facilities are not available to a trainee/apprentice engaged under the company's training scheme. To

illustrate, a trade union which *is not registered* under the Trade Unions Act 1926 ('TU Act') may still call itself a 'union' and may even raise an industrial dispute on behalf of its members, but it certainly *cannot claim the criminal and civil immunity granted to a registered union under ss 17 & 18* of the TU Act. Similarly, an unregistered union cannot have perpetual succession and common seal nor could it acquire or alienate property, much less sue or be sued in its name. *Could it still be said that a non-registered union stands on the same legal footing as a registered union? Applying the same analogy to a non-statutory apprentice whose contract of apprenticeship has not been (or is not required to be) registered with the Apprenticeship Adviser, could it reasonably be argued that he stands on the same footing as a statutory apprentice? Is it possible to brand the registration of apprenticeship contract as a mere administrative act bordering on an empty and useless formality?* The learned judge virtually reproduced the entire Apprentices Act in his judgment running into a staggering 126 paragraphs spanning some 39 pages. At the end of all that hard labour, what is it that he had decided? With great respect, this decision is wrong on all counts.

Observation III

> If the contract of apprenticeship is to be treated as a mandatory and contract is not sent then the effect will be that the apprentice will not be entitled to any benefit flowing from the Act. *In fact, by treating the expression "shall" here as a mandatory it will be more counter productive to the interest of the trainees rather than for their benefit.* The employer can take a shelter under the plea that since the contract of the employment has not been registered with the Apprenticeship Adviser, therefore, he is not under any obligation to pay stipend to the apprentice trainees and he is not under an obligation to impart the training to him also. ... We are, therefore, of the *considered view that non-registration of the contract of apprenticeship would not render the same nugatory*.

The above observations, as to the consequences of non-registration, are no less frightening! To say that "*by treating the expression 'shall' as mandatory would be counter-productive to the interests of the trainee*" is like putting the cart before the horse, for the reasons already enumerated in the preceding paragraph. It is only by virtue of registering the contract, the apprentice gets covered by the provisions of the Act and will be entitled to the benefits and facilities contemplated thereunder. If, on the other hand, the contract is not registered, he ceases to be a statutory apprentice and becomes a trainee/apprentice engaged under the company's programme, and acquires the legal status of 'workman' within the meaning of s 2(s) of the ID Act. What is meant by the further observation: "*the employer can take shelter under the plea that since the contract ... he is not under any obligation to pay stipend ... not under obligation to impart the training"?* Is it possible for an employer to engage someone for imparting training or to work for him and still get away without paying stipend or wages, that too, in the present age? Can the learned judge, with decades of experience at the bar and bench, cite at least one instance where an employer has engaged workers for work and denied the wages in their entirety in an industrial context, and got away with it? Assuming that the employer has not paid wages, the worker has the option of quitting the company for good, apart from filing a complaint under s 15 of the Payment of Wages Act or under s 33C of the ID Act for recovering the money due to him.*Contrary to what has been concluded by the learned judge (in Para 125), the fact remains that the non-registration of contract of apprenticeship renders it very much nugatory in so far as the apprentice ceases to be an 'apprentice' under the Apprentices Act*.

The learned judge approved the view taken by the Rajasthan, Kerala and Allahabad High Courts as against those of Gujarat and Madhya Pradesh. With great respect, the conclusion reached by Mathur J, runs counter to his reasoning in so far as having recognised the fact that the contracts were not registered as required under the Act (at p 5023), the learned judge nevertheless proceeded to hold that they were still apprentices under Apprentices Act and hence could not be treated as workmen within the meaning of s 2 (s) of the IDA. In *National Small Industries*, a similar issue fell for decision. Briefly stated, the facts were: the respondent was initially appointed as a casual labourer. Three years later, he was called for an interview for the post of, and selected as, Apprenticeship Trainee (Shop Assistant), and was appointed as such on a monthly salary of Rs 750. Thereafter he was asked to perform several duties such as dispatch work, etc, before being terminated after one year. The Labour Court and the High Court rightly ordered reinstatement on the ground that, notwithstanding the nomenclature, the workman was working as a regular employee. In appeal, Altamas Kabir J, committed the same error and quashed the order of the courts below on the ground that he was an apprentice under the Apprentices Act.[90] If the respondent were an apprentice under the Apprentices Act, would it have been possible for the employer terminate his apprenticeship contract abruptly and unilaterally without bringing the Apprenticeship Adviser into picture in view of s 7 of the Act? Did the learned judge ask right questions before coming to the conclusion that the respondent was an apprentice under the Apprentices Act? With great respect, *it is submitted that the learned judges of Supreme Court have been consistently committing grave errors of law in so far as they have failed to distinguish a 'statutory' apprentice (non-workman under ID Act) from a 'non-statutory' apprentice/trainee (workman under ID Act).* As already stated in the preceding paragraphs, the word 'apprentice' appearing in s 2(s) of the IDA refers exclusively to a 'non-statutory' apprentice and such 'apprentices' and/or 'trainees' are very much 'workmen' under the IDA with all the concomitant rights to claim absorption in the regular services of the undertaking and to raise an industrial dispute and claim relief, if their services are dispensed with wrongfully.[91]

The learned judges have not been able to display any depth in their analysis of these expressions, apart from failing to grasp the fundamental distinction between the two classes of trainees/apprentices - *statutory vs non-statutory*. As was held in *Assam Oil Co*, if the validity of termination of the service of a voluntary (non-statutory) apprentice is challenged in industrial adjudication, it would be competent to the Industrial Tribunal to enquire whether the impugned order of discharge was passed in the *bona fide* exercise of the power conferred by the contract.[92] With great respect for Mathur, Sinha and Kabir JJ, the decisions in *Shiv Mohan Singh* and *National Small Industries* were founded on a defective appreciation of facts coupled with misapplication of law thereto, and are patently unfair, inequitable, illegal and wrong. The view taken by Gujarat and Madhya Pradesh High Courts was right, and that of the Supreme Court is clearly wrong. In *Mahanadi Coal Fields*, Mathur J, held that the employer is under no obligation to offer employment to statutory apprentices engaged under the Apprentices Act 1961 in the absence of any conditions in the contract of apprenticeship to that effect; and that no writ of *mandamus* can be issued to the company to give appointment to the apprentice.[93]

'Employed in an Industry'

In order to bring a person within the definition of 'workman' it must *inter alia* be proved that he was employed in an industry. In the absence of existence of this relationship, there can be no question of that person being a workman.[94] Once it is established that the activity in question is an 'industry' as defined in s 20, the question then arises, as to whether the persons concerned are employed in such industry. The expression 'employed in an industry' would take in the employees who are employed in connection with operations incidental to the main industry. For instance, in *Basti Sugar Mills Ltd v Ram Ujagar* ,[95] the workers employed by a contractor to remove press-mud from the sugar factory were held to be 'workmen' employed by the factory because removing press-mud was considered ordinarily to be a part of the sugar factory. In *Saraspur Mills*, the workers of a canteen run by a co-operative society were held to be the 'workmen' of the factory because the factory was under an obligation to maintain and run the canteen for its employees under theFactories Act and the rules made thereunder.[1] In *JK Cotton*, the Supreme Court observed that it was not easy to decide as to what is the field of employment included in the principle of 'incidental' relationship? and what would be the limitations of the said principle? and it is not easy to draw a line. In this case, the court held that the *malis* employed in the residential bungalows allotted to the officers and the directors of the textile mill, as provided in the terms and conditions of the employment of such officers and directors, were 'workman' because their work was 'incidental' to the main work of the industry. In support of this view, the court drew sustenance from the analogy of the bus drivers employed by the company to operate the buses run by it for providing transport amenities to its employees.[2] The analogy is neither elegant nor apposite. Though the court recognised the need to prescribe a limitation in dealing with the question of 'incidental relationship' with the main industrial operations, so as to exclude operations, or activities whose relation with the main industrial activity may be remote, indirect and far-fetched, it did not lay down any such test and contented itself with the ambivalent statement that it is hardly necessary to emphasise that in modern world the industrial operations have become complex and complicated and for the efficient and successful functioning of any industry, 'incidental' operations are called in aid and it is the totality of these operations that ultimately constitutes the industry as a whole.'

In *Food Corpn of India*, Desai J held that the essential condition of a person being a workman within the terms of the definition is that he should be employed to do the work in that industry and in other words, that there should be, an employment of his by the employer and that there should be relationship between the employer and him as between the employer and employee or master and servant. Unless a person is thus employed, there can be no question of his being a 'workman' within the definition of the term; that where a contractor employs a workman to do the work which he contracted with a third person to accomplish on the definition as it stands, the workman of the contractor would not without something more, become the workman of third person.' In this view of the law, the court held that when the contract system was in vogue in the corporation, the workmen employed by the contractor were not the workmen of the corporation.[3] Employees engaged by a contractor running the canteen of a factory cannot be held to be the employees of management.[4] There is no master and servant relationship between Telco convoy drivers and the management of Telco, as the control over the drivers was vested with the Telco contract transport contractors association, that no memorandum of settlement was ever arrived at between Telco and the convoy drivers, that in earlier series of litigations also, no court had ever declared the relationship of employer and employee between the convoy drivers and Telco, and hence, the dispute raised by the convoy drivers for absorption in the company was without merit.[5]

'For Hire or Reward'

In order to bring a person within the ambit of definition, the work for which he is employed should be for 'hire or reward', whether the terms of employment be express or implied. The work must be for wages or other remuneration. Otherwise, there will be no consideration for the work done, and without consideration there can be no contract of any kind.[6] The legislature has used the words hire or reward' rather than the word 'wages' with a view to enlarging the scope of the definition. 'Hire or reward' may take any form.[7] There is a distinction between the words 'hire' and 'reward'. The word 'hire' necessarily imports an obligation to pay. The further inclusion of the second word 'reward' is not merely for the

purpose of giving an alternative word to 'hire' meaning the same thing, but for the purpose of bringing in a subject-matter which does not include 'hire' and includes cases where there is no obligation to pay.[8] Remuneration may be paid on pro rata basis or even on commission basis.

Relationship of Employment

In the words of Bhagwati J:

> The essential condition of a person being a workman within the terms of this definition is that he should be employed to do the work in that industry, that there should be, in other words, an employment of his by the employer and that there should be the relationship between the employer and him as between employer and employee or master and servant. Unless the person is thus employed there can be no question of his being a 'workman' within the definition of the term as contained in the Act.[9]

The relationship of employer and employee is constituted by a contract, express or implied between employer and employees. A contract of service is one in which a person undertakes to serve another and to obey his reasonable orders within the scope of the duty undertaken.[10] The terms of the contract creating such relationship of employment may be express or implied, ie, a contract of employment may be inferred from the conduct which goes to show that such a contract was intended although never expressed,[11] as when there has, in fact, been employment of the kind usually performed by employees.[12] In other words, creation of relation need not be, by written or verbal consent;[13] it may, and very often does rest, on the implication of circumstances.[14] Any such inference, however, is open to rebuttal,[15] as by showing that the relation between the parties concerned was on a charitable footing,[16] or the parties were relations,[17] or partners,[18] or were directors of a limited company which employed no staff.[19] Proof of existence of the relation can be made out as fairly and fully by circumstantial evidence as it can be by evidence which is direct.[20] While the employee, at the time, when his services were engaged, need not have known the identity of his employer, there must have been some act or contract by which the parties recognised one another as master and servant.[21]

In law, the time-honoured expression 'master and servant' indicates the relationship which exists when one person who employs another to do certain work exercises the right of control over the performance of the work to the extent of prescribing the manner in which it is to be executed. The employer is the master and the person who is employed is the servant.[22] The words 'employer and employee' are the out-growth of the old terms'master and servant'; they have been adopted by reason of the shift of the relation in general from a personal to an impersonal one and are the terms now commonly used to describe the relationship.[23]It would seem that the terms 'employer' and 'employee' make a better designation of the relation in this industrial age. In the Industrial Disputes Act 1947, the terms 'employer' and 'workman' have been used whereas in the Payment Bonus Act 1965, the terms 'employer' and 'employee' have been used.

Independent Contractor v Employee

'Few problems in the law have given greater variety than the cases arising on the borderline between what is clearly an employer-employee relation and what is clearly an independent entrepreneurial dealing,[24] for 'it is often easy to recognise a contract of service when you see it, but difficult to say where the difference lies'.[25] Problems of this kind have come before the courts with the advent of social legislation in England during the last ninety years and in India during the last fifty years. Consequently, a considerable body of case-law has developed under the recent social welfare legislation. There has been an extraordinary variety of relationship which has come before courts at one time or another, and it is now clear that it is impossible to define a contract of service in the sense of stating a number of conditions which are both necessary to, and sufficient for, the existence of such a contract. This position has been succinctly stated in the American jurisprudence. 'It is the element of control of the work that distinguishes the relationship of master and servant from the independent contract relationship. The most important test in determining whether one employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved to the employer'.[26] In other words, the identifying mark of the servant is that he should be under the control or supervision of the employer in respect of the details of the work.[27] In *Mersey Docks*, Lord Porter held:

> Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject-matter under discussion but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged.[28]

In other words, the 'direction and control' are the telling factors in determining the relationship of employment. This test, however, as pointed out by Lord Mcmillan, does not exclude other factors as well because the 'question in each case turns on its own circumstances, decisions in other cases are rather illustrative than determinative'.[29] But from the development of the law during the last quarter of the century in this field, it would appear that the emphasis has shifted and no longer rests so strongly upon the question of control. In the words of Roskill J, control is obviously an important factor. In some cases it may still be a decisive factor, but it is wrong to say that in every case it is the decisive factor. It is now, as I venture to think no more than a factor, *albeit* a very important one.[30] The test of control is, therefore, not as determinative as used to be thought to be the case, though no doubt, it is still of value in that the greater the degree of control exercisable by the employer, the more likely it is that the contract is one of service.[31] To distinguish between an independent contractor and a servant, the test is whether or not the employer retains the power, not only of directing what work is to be done, but also of controlling the manner of doing the work. If a person can be overlooked and directed in regard to manner of doing his work, that person is not a contractor'.[32] The control of the management, which is necessary element of the relationship of master and servant, is not directed towards providing or dictating the nature of the article to be produced or the work to be done, but refers to the other incidents having a bearing on the process of work the person carries out in the execution of the work. The manner of work is to be distinguished from the type of work to be performed.[33] The distinction is also drawn between 'contract for services' and 'contract of service'. The distinction is; in one case that the master can order or require what is to be done, while in the other case that he can not only order or require what is to be done, but how itself it shall be done.[34] In the words of Lord Denning:

> ... under a contract of service, a man is employed as a part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.[35]

But, '... the test of being a servant does not rest nowadays on submissions to orders. It depends on whether the person is part and parcel of the organisation'.[36] Between 'complete control' and 'complete independence', a variety of circumstances may exist, and the law recognises that many types of services involve a wide field of initiative and discretion being left to the servant.[37] Occasionally, there may be hybrid cases which have, so to speak, elements of both within them, that cannot easily be lodged in pigeon-holes labelled as 'master and servant' and 'self-employed'. It may, therefore, be exceedingly difficult to know as to in what pigeon-hole one can properly put the relationship.[38] 'The duties to be performed may depend so much on special skill or knowledge or they may be clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail may exist'.[39] Under modern industrial conditions, the actual control is more often than not in the hands of a foreman or manager who is himself a servant. A further illustration is of the captain of a vessel who may well be able to assert *de facto* control over the crew, but he is not legally its master; they are fellow-servants.[40] Lord Parker CJ observed that when one is dealing with a professional man, or a man of some particular skill and experience, there can be no question of an employer telling him how to do the work, therefore, the absence of control and direction in that sense can be of little, if any use as a test. What in fact matters is lawful authority to command so far as there is scope for it.[41] And there must always be some room for it if only in incidental or collateral matters.[42] The question, therefore, is not whether the control is exercised; it is as to where is the right of control? The distinction between the physical control and the right of control is important.[43] Hence various considerations, such as the nature of the undertaking, the freedom of action given, the magnitude of the contract amount, the manner in which it is to be paid for, the power of dismissal or circumstances in which the payment of reward may be withheld, bear on the solution of the question.[44] In other words, the determination of the question would depend upon the terms of the contract entered into between the parties and no general proposition of universal application can be laid down.[45]

The control includes the power of deciding the thing to be done, the way in which it will be done, the means employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted. To find where the right resides one must look first to the express terms of contract and if they deal fully with the matter, one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication. The obligation to do work subject to other party's control is a necessity, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract and the person doing the work will not be a servant.[46] These tests are not necessarily concurrent nor is it necessary that each test in itself is controlling. Furthermore, it is now clear that it is impossible to define a contract of service in the sense of stating a number of conditions which are both necessary to and sufficient for, the existence of such a contract. In marginal situations, it is reasonable to keep in mind the general policy considerations underlying the whole doctrine. But it is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service serves a useful purpose. It is now too plain that past attempts to formulate principles and tests of universal validity applicable to cases give rise to

many difficulties. The position has been stated by Atiyah in his valuable book, *Vicarious Liability in the Law of Torts*, in the following words:

> The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones. The plain fact is that in a large number of cases the court can only perform a balancing operation, weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction. In the nature of things it is not to be expected that this operation can be performed with scientific accuracy.[47]

It would thus be clear that no one fact is determinative and that all the relevant facts have to be taken into account. It is axiomatic that every case must turn upon its own facts. The court has to approach a particular case not so much by reference to the facts in other cases, arising sometimes under similar legislation, sometimes under different legislation, but by reference to the facts of the particular case as found and then in the light of those facts as so found, apply the pointers afforded by the well-established principles by the earlier cases for the purpose of determining whether a particular contract of employment is a 'contract of service' or a 'contract for services' and thus decide whether the particular person is a person employed under a contract of service or whether he is a self-employed person. The court, however, has to avoid too much reference to the facts of other cases though it has to bear in mind, the principles laid down by those cases. Since the principles laid down in the judgments cannot perhaps be formulated with scientific accuracy, the court has to hazard the risk of performing a balancing operation.[48]

International trends

It may be of some interest to study the development of this branch of law in different countries, *viz*, England, United States, Australia, Canada and India.

In England:

In the earlier cases, it seems to have been suggested that the most important test, if not the all-important one, was the extent of control exercised by the employer over the servant. This distinction (*viz*, between telling a servant what to do and telling him how to do it) was based upon the social conditions of an earlier age; it assumed that the employer of labour was able to direct and instruct the labourer as to the technical methods he should use in performing his work. In a mainly agricultural society and even in the earlier stages of the industrial revolution, the master could be expected to be superior to the servant in the knowledge, skill and experience which had to be brought to bear upon the choice and handling of the tools. The control test was well suited to govern relationships like those between a farmer and an agricultural labourer (prior to agricultural mechanization), a craftsman and journeyman, a householder and a domestic servant, and even a factory owner and an unskilled 'hand'. It reflects a state of society in which the ownership of the means of production coincided with the profession of technical knowledge and skill in which that knowledge and skill was largely acquired by being handed down from one generation to the next by oral tradition and not by being systematically imparted in institutions of learning from universities down to technical schools. The control test postulates a combination of managerial and technical functions in the person of the employer ie, what to modern eyes appears as an imperfect division of labour.[49] However from the development of the law during the last quarter of the century, it would appear that the emphasis has shifted and no longer rests so strongly upon the question of control. In the language of Mocatta J:

> The test of control is, therefore, not as determinative as used to be thought to be the case, though no doubt, it is still of value in that the greater the degree of control exercisable by the employer, the more likely it is that the contract is one of service.[50]

As pointed out by Roskill J:

> Control is obviously an important factor. In some cases it may still be a decisive factor, but it is wrong to say that in every case it is the decisive factor. It is now, as I venture to think no more than a factor, *albeit* a very important one.[51]

In *J & W Henderson*, a case decided by the House of Lords under the Workmen's Compensation Act, Lord Thankerton recapitulated with approval, the four indicia of contract of service derived by Lord Clark J from the authorities referred to by him in the judgment under appeal, *viz*:

(i) the master's power of selection of his servant;

(ii) payment of wages or other remuneration;

(iii) the master's right to control the method of doing the work; and

(iv) the master's right of suspension or dismissal; and further observed that modern industrial conditions have so much affected the freedom of the master in cases in which no one could reasonably suggest that the employee was thereby converted into an independent contractor, that, if and when an appropriate occasion arises, it will be incumbent on this house to reconsider and to restate these indicia.[52]

For example, (i), (ii), and (iv) and probably also (iii) are affected by the statutory provisions and rules which restrict the master's choice to men supplied by the labour bureau, or directed to him under the essential work provisions, and his power of suspension or dismissal is similarly affected. These matters are also affected by the trade union rules which are, at least primarily, made for the protection of the wage earners. It was, then, suggested that the particular requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, and that this factor of superintendence and control has frequently been treated as critical and decisive of the quality of the relationship. However, it has been apparent for long that an analysis of the extent and the degree of such control is not in itself decisive. It is left to the courts of law to decide what the 'contract of employment' or 'service' is in the circumstances of each case. Broadly speaking, there are three tests for discerning the 'contract of employment', *viz*:

(i) the 'traditional' or 'control' test;

(ii) 'organisation' or 'integration' test; and

(iii) 'mixed' or 'multiple' test.

The 'traditional' or 'control' test refers to the control of an employee by another, not only as to what he must do but also as how and when he must do.[53] This test, has been described by Mc Cardie J in *Performing Right Society*, as the final test.[54] This test, however, has been found increasingly difficult to apply to modern industrial relationships. An attempt, at first was made to extend the 'control' test by making control of the manner in which work was to be done, to be a decisive test rather than simply the control of what the worker did. In *Mersey Docks*, Lord Simons observed that the test should turn on 'where the authority lies to direct or to delegate to, the workman, the manner in which the work is to be done.' By this device, the subordination to the employer's managerial power was made the criterion.[55] But inadequacy of this test was pointed out by Somervell LJ in *Cassidy*, criticising statement of Hillbery J in *Collins*,[56] when he alluded to the case of a certified master of a ship. The master may be employed by the owner under what is clearly a contract of service and yet the owner has no powers to tell him how to navigate the ship.[57] The decision in this case holding that a hospital was vicariously liable for an injury suffered by a patient following negligent treatment by full time medical staff, was a further landmark in this direction. This holding provoked juristic thinking to suggest, that the 'organisation' test, *viz*, did the alleged servant form part of the alleged master's organisation, would be a decisive test?[58] In *Morren*, Lord Parker pointed out that when one is dealing with a professional man or a man of some particular skill and experience, there can be no question of an employer telling him how to work; therefore, the absence of control and direction in that sense can be of little, if any, use as a test.[59] Cases like this illustrate how a contract of service may exist even though the control does not extend to prescribing how the work shall be done. On the other hand, there may be cases when one, who engages the other to do work, may reserve for himself full control of how the work is to be done, but nevertheless the contract is not a contract of service.[60]

Inspired by the bold criticism of the 'control' test by Somervell LJ in *Cassidy*, Lord Denning in *Stevenson, Jordan and Harrison*, adumbrated the 'organisation' or 'integration' test, *viz*, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business; is not integrated into it but is only accessory to it.[61] This point was illustrated by giving instances of a ship master, a chauffeur and reporter on the staff of a newspaper who are all employed under a contract; but a ship pilot, a taxi man and a newspaper contributor are employed under the contract for services. Shortly afterwards, in *Bank Voor*, Lord Denning LJ again observed: *that test of being a servant does not rest now-a-days on submission to orders. It depends on whether the person is part and parcel of the organisation.*[62] This observation was criticised in *Ready Mixed Concrete*, where Mackenna J, clearly took the view that those four indicia or at least two of them were in the present day, no longer determinative of the question whether the contract is one of service.[63] In this case, it was stated that the contract of service exists if three conditions are fulfilled, ie:

(i) a servant agrees that in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master;

(ii) he agrees, expressly or impliedly, that in the performance of that service he will be subject to other's control in a sufficient degree to make the other, master; and

(iii) the other provisions of the contract are consistent with its being a contract of service.

In *Argent*, Roskill J suggested that 'the matter can be determined by reference to what in modern parlance is called economic reality'. In other words, all these relevant matters have to be borne in mind. One has to look at the totality of the evidence, at the totality of the facts and then apply them to the language of the statute.[64] One cannot do better than echo the words of Somervell LJ in *Cassidy* (supra), *viz*, 'one perhaps cannot get much beyond this, 'was his contract a contract of service within the meaning which an ordinary person would give to the words? Thus, the 'organisation' or 'integration' test also does not provide a clear and candid answer in a myriad of situations in modern industrial employment. This has led the courts in recent times to prefer the more resilient 'multiple mixed test'. At its most casuistic level, this is simply said to be a 'common sense' approach of the 'reasonable man'. Apart from this, various criteria have been suggested, such as the employer's power of selection and dismissal, and form of payment of wages, and in addition, the employer's right to control the method of doing the work. Most recently, it has been suggested that a 'multiple' test should be applied in two stages. First, it must be asked whether there is control. This is a necessary but not a sufficient test. Secondly, it must be asked whether the provisions of the contract are 'consistent with its being a contract of service'. In other words, are there indications that the worker is an entrepreneur rather than an employee? For example, has he invested in tools and taken the chance of profit or the risk of loss? On the other hand, the mere fact that he is paid on an incentive basis or that he is expressly declared to be 'self-employed' is not conclusive. The entrepreneurial element is clearly of importance. But it begs the question to ask whether the contract is 'consistent with a contract of service'. Had it been asked whether the contract was consistent with a contract of services, precisely the opposite result would have been reached. In other words, the form of the question will dictate the answer given.[65]

In the United States of America:

A few cases, while dealing with statutory definitions, have laid down that the terms such as 'employees' need not be confined to conventional limitations or the traditional common law conceptions or some other distilled essence of their local variations, for determining the jural relationship of master and servant. However, the courts in the United States of America too have not completely given a go-by to the common law conceptions, especially the application of the supervision and control test.[66] The law on the subject has been stated in American Jurisprudence in the following words:

> The really essential element of relationship is the right to control and the right of one person, the master, to order and control another, the servant, in the performance of work by the latter, and the right to direct the manner in which the work shall be done. It is, however, essential that the master shall have control and direction not only of the employment to which the contract relates, but also of all its details, and if these elements of control and direction are lacking, no relationship of master and servant exists. The test of employer-employee relation is the right of the employer to exercise control of the details and method of performing the work.[67]

The case of *Silk*, is the most important of the cases on the topic decided by the Supreme Court of the United States of America. The case disposed of two suits raising the question whether men working for the plaintiff, Silk and Greyvan were 'employees' within the meaning of that word used in the Social Security Act 1935. The judges of the court agreed upon the test to be applied though not in every instance upon its application to the facts. It was not to be what they described as 'the common law test', *viz*, 'power of control whether exercised or not, over the manner of performing service to the undertaking'. The test was whether the men were employees 'as a matter of economic reality'. The important factors were said to be 'the degrees of control, opportunities of profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation'. The facts of the case were that Silk sold coal by retail, using the services of two classes of workers, unloaders and truck drivers. The unloaders moved the coal from railway vans into bins. They came to the yard when they wished and were given a wagon to unload and a place to put the coal. They provided their own tools and were paid a certain amount per ton for the coal they shifted. All the nine judges of the Supreme Court held that these men were employees. The court said thus:

> Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the unloaders in the *Silk* case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act. They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders

have often been held to be employees in tort cases. [68]

Silk's drivers owned the trucks in which they delivered coal to Silk's customers. They paid all the expenses of operating their trucks including the wages of any extra help they needed or chose to employ. They came to the yard when they pleased and were free to haul goods for other people. They were paid for their deliveries at a rate per ton. Greyvan carried on a road hauler's business. Their drivers too owned their trucks and were required to pay all the costs of operation. They were not allowed to work for anyone else but Greyvan, and had to drive the trucks themselves, or if they employed a relief driver, to be present when he drove. They had to follow all the rules, regulations and instructions of Greyvan. They were paid a percentage of the tariff which Greyvan charged the customers. A majority of the court held that both sets of drivers were independent contractors. The court held thus:

> ...Where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance, they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.[69]

The reasoning of the American Supreme Court apparently required that there should be some power of control vested in the driver if he is to qualify as an independent contractor. That the power need not be very extensive appears from the facts in *Greyvan's* case. The driver's investment, and the risk undertaken by him, seem to be important issues of consideration. In determining whether one acting for another is a servant or independent contractor, the following among others, are the commonly recognised tests.[70]

(i) as to who has the right to direct what shall be done and when and how it shall be done;

(ii) existence of a contract for the perfomance by a person of a certain piece or kind of work at a fixed price;

(iii) independent nature of his business or his distinct calling;

(iv) his employment of assistants with the right to supervise their activity;

(v) his obligation to furnish necessary tools, supplies and materials;

(vi) work except as to final results;

(vii) the time for which the workman is employed;

(viii) the method of payment to be made, by time or job; and

(ix) whether work is part of the regular business of the employer.

In the *Re-statement of the Law*, it is stated that with reference to the common law concept of the relationship of master and servant, more than one factor will have to be taken into consideration for determining the existence of a jural relationship of master and servant. These have been enumerated below:

(a) the extent of control which, by agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation with reference to whether, in the locality the work, is usually done under the directions of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalites, tools and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of regular business of the employer; and

(i) whether or not the parties believe they are creating the relationship of master and servant.

The comment on factor (e) above is in these words:

> *Ownership of instumentalities*: The ownership of the instrumentalities and tools used in the work is of importance. The fact that a worker supplies his own tools is some evidence that he is not a servant. On the other hand, if the worker is using his employer's tools or insturmentalities, especially if they are of substantial value, it is normally understood that he will follow, the directions of the owner in their use, and this indicates that the owner is a master. This fact is, however, only of evidential value.[71]

This implies that in effect the employer's ownership of the instrumentalities is relevant only because of a rebuttable presumption that the parties meant him to control the use of his own property. It also says that the worker's ownership is evidence that he is not a servant, but it does not say why. If the reason is the same in both cases, and the worker's ownership is evidence only because of its bearing on control, it is plainly not the correct position. It would, however, appear that the importance of the provision of instrumentalities and tools lies in the simple fact that, in most circumstances, where a person hires out a piece of work to an independent contractor he expects the contractor to provide all the necessary tools and equipment. Indeed, it may well be that little weight can today be put on the provision of tools of a minor character, as opposed to the provision of plant and equipment on a large scale. In the latter case, the real object of the contract is often the hiring of the plant, and the services of a workman to operate the plant are purely incidental'.[72]

In Australia:

The law obtaining in Australia has been discussed in some detail in *Queensland Stations*, in which the question was whether a payment made by the company to a driver was 'wages' within the meaning of a Pay-roll Tax Assessment Act, which depended on whether the relation between the company and the driver was that of master and servant. The driver was employed under a written contract to drive 317 cattles to a destination. The contract provided that he should obey and carry out all lawful instructions and use the whole of his time, energy and ability in the careful driving of the stock, that he should provide at his own expense all men, plant, horses and rations required for the operation, and that he should be paid at a rate per head for each of the cattle safely delivered at the destination. He was held to be an independent contractor. Speaking for the court, Dixon J held:

> There is, of course, nothing to prevent a driver and his client forming the relation of employee and employer ... But whether they do so must depend on the facts. In considering the facts it is a mistake to treat as decisive a reservation of control over the manner in which the driving is performed and the cattle are handled. For instance, in the present case, the circumstance that the driver agrees to obey and carry out all lawful instructions cannot outweigh the countervailing considerations which are found in the employment by him of servants of his own, the provision of horses, equipment, plant, rations, and a remuneration at a rate per head delivered. That a reservation of right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract..."[73]

In a later case, *viz*, *Humberstone*, the same judge dealt with the question; whether the owner-driver of a truck was a servant under a contract of service so as to be covered by Workmen's Compensation Act? For a number of years, the owner had taken his truck at about the same time each day to the factory where he had been given goods to deliver to the customers of the factory owners. He maintained the truck, supplied the fuel at his own expense, and was paid for goods carried at a rate per car-mile. He carried on delivering goods until about the same time each evening, when he was knocked off. From these facts, it was inferred that there was a continuing contract between the factory owner and the truck owner which was not a contract of service. For this conclusion, Dixon J gave the following reasons:

> The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but 'whether ultimate authority over the man in the perfomance of his work resided in employer so that he was subject to the latter's order and directions'. In the present case, the contract by the deceased was to provide not merely his own labour but the use of heavy mechanical transport, driven by power, which he maintained and fuelled for the purpose. The most important part of the work to be perfomed by his own labour consisted in the operation of his own motor truck and the essential part of the service for which the respondents contracted was the transportation of their goods by the mechanical means he thus supplied. The essence of a contract of service is the supply of the work and skill of a man. But the emphasis in the case of the present contract is upon mechanical traction. This was to be done by his own property in his own possession and control. 'There is no ground for imputing to the parties, a common intention that in all the management and control of his own vehicle, in all the ways in which he used it for the purpose of carrying their goods, he should be subject to the

commands of the respondents'.[74]

It would appear that if the obligation to provide the truck, etc, were relevant only as evidence of intention in the matter of control, it would cease to be relevant where the parties had expressed their intention in that matter, and if as in *Queensland* the contract expressly provided that the drover should be subject to the other party's control, he would be a servant. But in *Queensland*, it was decided that the driver's contract was an 'independent contract': his obligation to provide the men, the horses, etc, determined its nature and made it, notwithstanding his submission to control, something other than a contract of service. Hence, the view taken in *Queensland* is preferable to that of *Humberstone*.[75] This also finds support from the observation of Dixon CJ in *Zuijs*, to the effect that what matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, for only in incidental or collateral matters.[76]

In Canada:

The position of this branch of law in Canada has been succinctly summed up by Lord Wright in *Montreal Locomotive Works.* In this case there were two questions, *viz*:

(i) whether a corporation was the occupant of an armament factory so as to be liable to pay an occupation tax; and,

(ii) whether it was carrying on a business in the factory so as to be liable to pay business tax.

The answer to both the questions depended on whether the corporation was acting as the government's agent in the manufacture of armaments or as an independent contractor. All the funds necessary for the enterprise were provided by the government which bore all the financial risks. The corporation was subject to the government's control in making the armaments and received a fee for each unit of production. It was held, on these facts, that the corporation was not liable to pay the taxes. Lord Wright expressed his opinion in the following words:

> In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have to be applied. It has been suggested that a four-fold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also to trade union regulations. In many cases, the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.[77]

This opinion of Lord Wright has been commented upon by Mac Kenna J in *Ready Mixed Concrete.* The substance of the gloss is: In the opinion of Lord Wright of the shipowner, the charterer and the shipmaster, the control is shown in two ways not to be conclusive. Though, the shipowner had delegated to the charterer his right to give directions to the shipmaster, and in that limited sense no longer had control, he was still the master. Again, though the charterer had the power of giving directions, and in that sense had control, he was not the master. The second illustration shows that a right of control limited by law or by trade union regulations may be sufficient for the relation of master and servant. This does not go far in the direction of a four-fold test. It is easier to relate Lord Wright's (2), (3) and (4) to the case mentioned in the last sentence of the quotation. If a man's activities have the character of a business, and if the question is whether he is carrying on that business for himself or for another, it must be relevant to consider which of the two owns the assets 'the ownership of the tools' and which bears the financial risk ('the chance of profit', 'the risk of loss'). He, who owns the assets and bears the risk is unlikely to be acting as an agent or a servant. If the man performing the service must provide the means of performance at his own expense and accept payment by results, he will own the assets, bear the risk, and be to that extent unlike a servant. There does not appear anything in the *Montreal* case to support the view that the ownership of the asset is relevant only to the question of control. Lord Wright seems to have treated his three other tests as having a value independent of control in determining the nature of the contract.[78]

In India:

The case of *Shivanandan Sharma*, can be taken as the convenient point where the tests for determining the question whether a person is an 'employee' or 'independent contractor', was considered by the Supreme Court for the first time and

'supervision and control' was held to be the crucial test for determining the relationship.[79] In *Dharangadhara Chemical*, the court held that the test of 'supervision and control' may be taken as the *prima facie* test for determining the relationship of employment.[80] While discussing the English decisions, Bhagwati J, preferred to adopt this test in the absence of restatement of law as pointed out by Lord Thankerton in *J & W Henderson*, that there is need to reconsider and restate indicia of contract of service. The *prima facie* test, therefore, for determining the relationship was held to be the existence of the right in the master to 'supervise and control' the work done by the servant not only in matter of directing what work the servant is to do but also the manner in which he is to do his work.[81] But since the nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition,[82] the court suggested that correct method of approach, would be to consider whether having regard to the nature of work there was due control and supervision by the employer. To use the language of Fletcher Moulten LJ:

> ...the greater the amount of direct control exercised over the person rendering the services by the person contracting for them, the stronger the ground for holding it to be a contract of service.[83]

The control and supervision test laid down in *Dharangadhara* case was reaffirmed by the court, in *Chintaman Rao*, in which the court was dealing with the definition of worker' in s 2(1) of the Factories Act. Giving restricted meaning to the words 'directly or through an agency' in the definition, it was held that 'worker' was a person employed by the management and that there must be a contract of service and a relationship of master and servant between them.[84] In *Shankar Balaji Waje*, the Supreme Court clarified:

> Control of the management, which is a necessary element of the relationship of master and servant is not directed towards providing or dictating the nature of the article to be produced or the work to be done, but refers to other incidents having a bearing on the process of work the person carries out in the execution of the work. The manner of work is to be distinguished from the type of work to be performed.[85]

In *VP Gopala Rao*, the court held that it was a question of fact in each case whether the relationship of master and servant exists between the management and the workmen and there could be no abstract *a priori* test of the work control required for establishing the contract of service.[86] It is, therefore, not surprising that in recent years, the 'control' test, as traditionally formulated, has not been treated as an exclusive test. However, 'it is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a 'contract of service' from a 'contract for services' will serve any useful purpose. The most, what profitably can be done, is to examine all the factors that have been referred to in the cases on the topic. Clearly, not all of these factors would be relevant in all these cases or have the same weight in all cases. It is equally clear that no magic formula can be propounded which factors should in any case be treated as determining ones. The plain fact is that in a large number of cases, the court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite direction. In *Silver Jubilee Tailoring House*, Mathew J pointed out that:

> It is in its application to skilled and particularly professional work that control test in its traditional form has really broken down. It has been said that in interpreting 'control' as meaning the power to direct how the servant should do his work, the court has been applying a concept suited to a past age. [87]

During the last three decades, the emphasis in the field has shifted and no longer rests so strongly upon the question of control. Control is obviously an important factor and in many cases, it may still be the decisive factor but it is wrong to say that in every case, it is decisive. It is now no more than a factor, although an important one. The fact that generally, the workers attend the shop which belongs to the employer and work there, on the machines, also belonging to him, is a relevant factor. When the services are performed generally in the employers' premises, this is some indication that the contract is a contract of service and it is possible that this is another facet of the incidental feature of employment. Likewise, the fact that the workers work on the machines supplied by the proprietor of the shop is an important consideration in determining the nature of the relationship. The further fact that a 'worker can be removed' which means nothing more than that the employer has the liberty not to give further work to an employee, who has not performed his job according to the instructions of the employer or who has been absent from the shop for a long time, would be, speaking of control and supervision, consistent with the character of the business. The supply of equipment also is some indication as if the employer provides the equipment, it may indicate that the contract is a contract of service whereas if the other party provides the equipment it may provide some evidence that he is an independent contractor. This is not based on the theory that if the employer provides the equipment he retains some greater degree of control for the control arises only from the need to protect one's own property, little significance can be attached to the power of control for the purpose of

determining the nature of the contract. It seems, therefore, that the importance of the provision of equipment lies in the simple fact that, in most circumstances, where a person hires out a piece of work to an independent contractor to provide all the necessary tools and equipment, whereas if he employs a servant he expects to provide them himself. Hence, no sensible inference can be drawn from this factor in circumstances where it is customary for servants to provide their own equipment. Relying on these principles in *Shining Tailors*, the court held that the piece-rated workers working for a big tailoring establishment were workmen of the establishment. Speaking for the court, Desai J, observed:

> The right of removal of the workman or not to give work has the element of control and supervision' which was amply satisfied in the fact of this case. In the premises, the tribunal was not right in holding that the piece-rate itself indicates a relationship of independent contractor which was an error apparent on the record disclosing a total lack of knowledge of the method of payment in various occupations in different industries.[88]

From these decisions, it would appear that the law in India too is not static. In the words of Krishna Iyer J: To crystallise criteria conclusively is baffling but broad indications may be available from decisions.[89] By and large, for determining the contractual relationship as to whether a person is employed as an 'independent contractor' or as an 'employee' or whether the contract is 'of service' or 'for services', the same principles as obtaining in England would apply. In *Hussainbhai*, the Supreme Court stated the law in the following words:

> Where a worker or group of workers labour to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' subsistence, skill, and continued employment. If he, for any reason, chokes off, the worker is, virtually, laid off. The presence of intermediate contractor with whom alone the workers have immediate or direct relationship *ex contractu* is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different perfect paper arrangement, that the real employer is the management, not the immediate contractor...If the livelihood of the workmen substantially depends on labour rendered to produce goods and services for the benefit and satisfaction of an enterprise, the absence of direct relationship or the presence of dubious intermediaries or the make-believe trappings of detachment from the management cannot snap the real-life bond. The story may vary but the inference defies ingenuity. The liability cannot be shaken off. Of course, if there is total dissociation in fact between the disowning management and the aggrieved workmen, the employment is, in substance and real-life terms, by another. The management's adventitious connections cannot ripen into real employment.[90]

In *Kerala State Coir Corpn*, a single judge of the High Court held that security personnel supplied by a registered society to work in the factory of the Kerala State Coir Corporation Limited were employed by the corporation because it controlled them, allotted work to them and decided the nature of the work they had to render while the society's role was only to supply the persons to do the work.[91] In *Atma Parkash*, a single judge of the Punjab and Haryana High Court held that where the facts disclosed that the state handloom corporation supplied material to weavers for making carpets and also provided market facilities, and the weavers weave the carpets and supply the same to the corporation on piece-rate basis, and there is no question of rejecting the carpets so weaved and supplied, there was no control whatsoever over the work of the weavers and no master-servant relationship existed between the corporation and the weavers, and such weavers were not workmen within the meaning of s 2(s).[92] In *Nestle India*, the Punjab and Haryana High Court held that an agent appointed to collect milk from farmers for which he was being paid a commission as an agent is not a workman of the company within s 2(s), as the company had no control over the way the agent operated and the agent was free to appoint others to do his job, and that the agreement which was terminated by the company was purely a commercial agreement.[93] In *Indian Banks Assn*, it was held that in the light of the fact that the 'deposit collectors' engaged by a bank were accountable to the bank and were under the control of the bank, and there was master-servant relationship between the bank and the deposit collectors, they were workmen within the meaning of s 2(s), notwithstanding the fact that they have no fixed time and are free to regulate their own hours of work, which was due to the nature of the job which involves contacting depositors at such times as required by the latter. Even so, the work they were doing was completely different from the work, which the regular employees were doing. There could thus be no question of absorption and there was also no question of the 'deposit collectors' being paid the same pay scales, allowances and other services of the regular employees of the banks.[1] From the decided cases, no criterion of general application is discernible, as the question in each case turns on its own facts and circumstances. The decisions, therefore, are rather illustrative than determinative. Some illustrative cases, therefore, have been collected under the following four headings, *viz*:

(i) Employed under contract of service;

(ii) Independent contractors;

(iii) Miscellaneous cases;

(iv) Workers employed by the contractors.

Employed under a Contract of Service - Legal Position:

Agarias engaged in a salt manufacturing company working under the supervision and control of the officers of the company but free to engage others to assist them who were paid by the company on the basis of per maund of salt.[2] A bidi manufacturing concern engaged certain persons on contract for getting the work of rolling bidis done, who in turn further engaged a certain number of persons for the work of rolling the bidis. The intermediaries were taking home the bidi leaves for cutting in proper shape and the persons employed by them used to do the work of rolling the bidis in the premises of such, intermediaries with the material supplied to them by the intermediaries.[3] The workers of a match factory who used to carry home raw materials and return finished products in a stipulated time and at fixed rates.[4] A treasurer employed by a bank under contract for running a pay office who was on the evidence on record, found to be in charge of nomination of staff appointment and dismissal, etc.[5] A carpenter employed in a soap factory for making packing.[6] Coolies employed in a mill through a contractor but being treated by the mill as its own employees regarding bonus and leave, etc.[7] Cartmen employed in a salt manufacturing factory by a mistry to load and transport the salt bags from the site of the firm to the railway siding were the workmen *qua* the factory.[8] An employee recruited by the coal field recruiting organisation to work in a particular colliery was held to be a workman.[9] The weavers in question paid on piecework basis, there being regularity of attendance, and had to work on the specified warps supplied to them by the management though having freedom to weave as many pieces as they liked of two restricted qualities of cloth, and were entitled to the benefit of weekly holidays and the management had the right to frame charges for misconduct and remove the weavers from work.[10] The tailors working in the establishment of a tailoring house. The fact that some of the tailors also did work for other tailoring establishments was not considered as militating against their being employees of the proprietor of the shop where they attended for work.[11]

An employer had adopted two systems for getting beedis made. One was to get beedis maufactured from the licenced persons who took the tobacco and leaves from the employer which they distributed to different other persons who made the beedis according to specifications. The beedis were then supplied by the licencee to the employer on agreed rates. The second method was that the employer supplied tobacco and leaves to different persons which they took to their homes and made beedis and supplied the same to the employer at a fixed rate. These persons were known as pass-book holders because they were supplied with pass-books in which the materials given to them and the supplies of beedis made by them, were regularly entered. The employer also took deposit from such persons. In the circumstances and on the facts of the case, the pass-book holders were held to be 'employees' of the employer while the 'licencees' were held not to be 'employees'.[12] The Punjab National Bank gave a certain allowance to facilitate its area manager to employ a driver. The area manager paid this amount of allowance drawn by him by way of salary to the driver but the jeep which he was to drive belonged to the bank. The expenses of petrol, oil and maintenance were also incurred by the bank. The area manager had no vehicle of his own. In the circumstances, it was held that the driver was the employee of the area manager and not of the bank.[13] The court does not appear to have correctly comprehended the scope of the 'control and direction' test and it is a case of clear misapplication of the principle. The employees working in a canteen within the premises of the mills and the management of which was entrusted to a trust were held to be employees of the mills.[14] The tiny deposit agents employed in the deposit mobilisation activity of the bank have been held to be falling within the definition of 'workmen' and not independent contractor.[15]

Independent Contractors - Whether Workmen:

On the facts found in the case, it held that there was no relationship of master and servant between the owner of a *bidi* factory and the concerned persons who used to roll the bidis in the factory and were independent contractors.[16] Handloom workers working as casual piece workers and who had no fixed hours of work and were paid by piece rate.[17] A person engaged under a contract as a medical officer for attending to the employees of a company, in its various establishments daily at a prescribed time for which he was paid a fee in the shape of retainer, and who could, at his discretion, engage another medical officer to do the same duties in his absence.[18] Goldsmiths engaged by a gold merchant for manufacturing jewels for him, where such goldsmiths were asked to finish jewels within a given time and when it was open to such goldsmiths to finish jewels within a given time or earlier and engage themselves in other of their own.[19] A goldsmith who undertook the manufacture of ornaments like other goldsmiths which he was asked to manufacture and would receive remuneration which would depend upon the nature of the work done, was held not to be under the order or control of the proprietor of the concern for whom he was doing it.[20] Jewellers employed by a firm of jewellery manufacturers to make their standard products, at fixed or agreed rates and where the firm gave no general directions and had no general directions and had no general control over these persons who could employ their own helpers of their own accord.[21] A salesman previously working on salary basis but later shifting to commission basis plus travelling allowance and not entitled to any provident fund or leave facilities though his tour programme were approved by the employer.[22] A dairy commission agent engaged to sell milk for a dairy, in the facts and circumstances of the case was held not to be a

'workman' because the agreement for selling milk with commission was not a contract of service.[23] There is no relationship of master and servant between a lawyer engaged by a company on retainer basis to look after its interests before labour courts and conciliation authorities.[24] In *Puri Urban Coop Bank*, a two judge Bench of the Supreme Court held that an appraiser engaged by the bank for the purpose of weighing, testing and appraising the quantity, value and purity of the gold ornaments pledged with the bank for raising loan is not a 'worker' within the meaning of s 2(s), on the basis of the sole test of control and supervision.[25] This holding is not only contrary to the earlier dicta of the court, but is also inconsistent with the modern trends of law as the test of 'control and supervision' which once held the field has receded into the background.[26]

Jewel appraisers appointed by Indian Overseas Bank are not workmen of the Bank in the light of the fact that: (i) they are not required to sign in the attendance register of the bank; (ii) they were not required to make any leave application; (iii) they were paid a minimum amount every month - in the instant case, not by the Bank, but by the loanee, (iv) they are required to weigh the ornaments brought to the Bank for pledge and to appraise quality, purity and value, but they could not be directed as to the manner in which it was to be done; and (v) it was not obligatory for the Bank to allot work to any particular jewel appraiser. On facts, Pasayat J (for self and Arun Kumar J), held that Jewel Appraisers were not the employees of the Bank.[27] In *Electronics Corporation*, the facts disclosed that the persons were appointed on retainership basis for repair of TV sets manufactured by the Corporation. There were no regular posts like Service Engineers or Licencees or Retainer in the company and such contracts are entered into by the company to attend to additional work as and when required. The company was entering into individual contracts with its retainers and there was no compulsion whatsoever to enter into the contract year after year. Some of the workmen of the Corporation opted for working in terms of those individual contracts as they found the same to be more lucrative and paying rather than being regular employees. No appointment letter was ever given to them by the company. They had not enrolled their names with the employment exchange. The retainers used to visit the company for collecting complaints, collecting components, for receiving payments and for repairing the called back sets. The tribunal held that there was no employer-employee relationship between the Corporation and the said retainers and that they were not the workmen of the corporation, which was set aside by the High Court. Quashing the orders of the High Court and restoring the award of the tribunal, Pasayat J (for self and Panta J), held that in the light of the fact that the retainers were getting Rs 90/- per set, an amount equivalent to 2.24% was being deducted from their bills towards income tax, and that, in the event of a dispute, cl 15 of the agreement provided for arbitration, under the Arbitration Act 1940, the said agreement was a job contract and hence they were not the employees of the corporation.[28]

Employees engaged on Miscellaneous works - Whether Workmen:

A *chowkidar* working in the bungalow of the governing director of a company outside the premises without evidence about his actual employment by the company or his being paid by the company or his working under the control of the company was held not to be a workman.[29] A person whose employment is prohibited by law such as a child below the age of 15 whose appointment is prohibited by s 69 of the Factories Act will not be a workmen within the meaning of the definition.[30] A teacher employed in a primary school run by a factory was held not to be a workman.[31]A teacher working in an educational institution is not covered by the definition of'workman', though the institution where he is teaching may be an industry, and consequently a reference under s 10(1)(d) of the Act is not maintainable.[32] A canteen worker employed in a textile mill was held not to be performing duties of a clerical nature; hence was found not to be a workman.[33] Domestic servants will not come under the definition of workman, as they are not employed in an industry[34] A person who retires from service and receives bonus will not fall within the definition.[35] In *Mineral Exploration Corporation*, the facts briefly were: the corporation engaged a few workmen as 'contingency' workers for years together, whereas the standing orders provided only for 'casual' and 'temporary' workmen. The said 'contingency' workers were transferred from project to project and were posted in places far away from civilization and facilities and they did not get amenities with regard to the health and residence although such facilities are available to the permanent workmen doing similar work. The workmen lived away from their families while working on a project and faced all types of hardships. The apex court speaking through Lakshmanan J (for self and Panta J) observed:

> Usual practice of the Corporation has been to keep contingent workmen for long duration of time and offering regular appointment periodically which abruptly has stopped due to unfair attitude of the Management. Reduction in work leading to poor physical and financial performance has been a result of incompetent and poor Management which cannot be allowed to play with the future of thousands of employees and their families. ... We feel its just and proper to issue the following directions to the Tribunal which is directed to consider the following directions and pass appropriate orders after affording opportunities to both the parties.
>
> 1. The Tribunal is directed to again scrutinize all the records already placed by the appellant-Union and also the records placed by the Management and discuss and deliberate with all the parties and ultimately arrive at a conclusion in regard to the genuineness and authenticity of each and every claimant for regularization. This, exercise shall be done within nine months from the date of receipt of this judgment.

2. Subject to the outcome of the fresh enquiry of the award, the respondent-Corporation should absorb them permanently and regularize their services, the persons to be so appointed being limited to the quantum of work which may become available to them on a perennial basis.
3. The respondent-Corporation may absorb on permanent basis only such of those workmen who have not completed the age of superannuation.
4. The respondent-Corporation are not required to absorb on permanent basis such of the workmen who are found medically unfit for such employment.
5. The absorption of the eligible workmen on a regular and permanent basis by the Corporation does not disable the Corporation from utilizing their services for any other manual work for the Corporation upon its needs.
6. In the matter of absorption, the persons who have worked for longer period as contingent workmen/ad hoc/temporary shall be preferred to those who have to be in shorter period of work.
7. The workman should have worked for more than 240 days in a year. The conduct and behaviour of the workman should be good.[36]

Part-time workers - Whether Workmen:

In *Silver Jubilee Tailoring* (supra), the Supreme Court held that tailors working on a part-time basis in a tailoring shop fall within the definition of 'workman'. Part-time carpenters and polishmen engaged in the factory were workmen.[37] A doctor employed in the industry for rendering medical aid to its employees on a part-time basis was a workman.[38] The definition is sufficiently wide to include 'a part-time employee.[39] A class IV employee working on a part-time basis was a workman.[40] However, the High Courts of AP,[41] and Kerala,[42] held that a part-time employee would not fall within the definition of 'workman' within the meaning of 2(s). A person, who is a permanent employee of some other employer and working under another employer as a temporary employee on a part-time basis, is not a workman within the meaning of s 2(s) entitled to raise an industrial dispute as against the second employer, and is not entitled to compensation under s 25F in the event of his termination.[43] However, a single Judge of the Rajasthan High Court took a different view and observed that the word 'part-time' had nothing to do with the nature of employment; it only regulates the duration of working hours of the employee; a part-time employee also falls within the definition; and that, at the most, he might be paid back-wages as he had been paid as part-time employee and that he could not claim back wages on the basis of wages which a full-time employee was entitled to.[44] In *Municipal Board, Pratapgarh*, Garg J of Rajasthan High Court held that a part-time worker is a 'workman' within the meaning of the Act and that the illegality or irregularity in making the appointment could not be a ground for refusing to comply with s 25F.[45]A workman employed on a part time basis but under the control and supervision of an employer is a workman in term of s 2(s) of the Act, and is entitled to claim the protection of s 25F thereof, should the need so arise.[46] This controversy was set at rest by Supreme Court in *Devinder Singh*, in which Singhvi J (for self and Ganguly J), observed:

> The source of employment, the method of recruitment, the terms and conditions of employment/contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether or not a person is a workman within the meaning of Section 2(s) of the Act. ... It is apposite to observe that the definition of workman also does not make any distinction between full-time and part-time employee or a person appointed on contract basis. There is nothing in the plain language of Section 2(s) from which it can be inferred that only a person employed on regular basis or a person employed for doing whole-time job is a workman and the one employed on temporary, part- time or contract basis on fixed wages or as a casual employee or for doing duty for fixed hours is not a workman. ... Whenever an employer challenges the maintainability of industrial dispute on the ground that the employee is not a workman within the meaning of Section 2(s) of the Act, what the Labour Court/Industrial Tribunal is required to consider is whether the person is employed in an industry for hire or reward for doing manual, unskilled, skilled, operational, technical or clerical work in an industry. Once the test of employment for hire or reward for doing the specified type of work is satisfied, the employee would fall within the definition of 'workman'.[47] (Italics supplied)

Sub-contractor - Whether Workman:

It has been seen that a contractor is not a workman within the meaning of s 2(s). The same principle will govern a sub-contractor. Hence, 'a sub-contractor is not the servant of the contractor employing him'.[48] Likwise, a servant of a sub-contractor is not *prima facie* the servant of the person who engages the contractor.[49] A few illustrations are: The employer company had agreed to see that the contract labour was paid in the manner indicated in the settlement. But there was no evidence to show that the labourers so employed by the contractor were employees of the employer company. It was, therefore, held that there was no relationship of master and servant between the company and the labourers employed by

the contractor.[50] A labourer employed by an independent contractor who looked only to the contractor for his wages and over whom the company for whom the contractor was working had no control or supervision was held not to be a workman of the company.[51] The labourers working in a colliery under a contractor were held not to be workmen of the colliery and the fact that the manager of the colliery had the power to suspend such labour under the Mining Act was held immaterial in determining the employer-employee relationship.[52]

Place of Work - Its relevance in determining whether a person is Workman:

The location of a worker is of no material consequence, because all would contribute directly or indirectly to the ultimate planned result. The preposition in before 'any industry' in the definition of 'workman' has been used by the legislature to signify the inclusion of the persons employed, and not their position or location in the industry as a whole. Applying this principle, it was held that the domestic servants in the quarters of the officers employed by the employer company in connection with the sugar manufacturing business were workmen.[53] Likewise, the *malis* (gardeners) employed in the bungalows of the officers and directors of a company were held to be 'employed in the industry' to do the work which was incidentally connected with the main industry.[54] In the under-noted cases,[55] the fact that the bidi workers and intermediaries were doing the rolling of the bidis in their own houses was held not to be inconsistent with the existence of the relationship of the master and servant between the employer and the bidi rollers. In *UP Sugar and Cane Development Corporation*, it was held that a demand for declaring seasonal workers employed in a sugar mill as permanent workmen is not a case of mere fitment as per the nature of duties performed, but one which involves the exercise of managerial function, and that a labour court cannot give such declaration.[56]

Contract Workers employed in canteens - Whether Workmen:

On the question, 'whether the workmen employed in the canteens, provided by the industrial or commercial-establishments, are the employees of such establishments'?, there was a divergence of judicial opinion. In *Saraspur Mills* (supra), the Supreme Court held that the workers employed in such a canteen, even if run by a co-operative society, were the workmen of the factory, as it was under a mandatory obligation to maintain and run the canteen. In *MMR Khan,* ealing with the canteens run by various railway establishments, the court classified such canteens into three categories, ie:

(a) statutory canteens, ie, canteens compulsorily required to be provided by statute, ie, section 46 of the Factories Act 1948 or any other provision of law;

(b) non statutory recognised canteens set up as a staff welfare measure, but with prior approval and recognition of the railway board as per the procedure detailed in the railway establishment manual; and

(c) non-statutory, non-recognised canteens, ie, those which were established without prior approval or recognition of the railway board.[57]

In this case, the workmen employed in the statutory canteens were held undoubtedly to be the employees of the railway establishments, and in view of the provisions of railway establishment manual, the workmen employed in the non-statutory recognised canteens were also held to be the employees of the railway establishments. But the employees of the non-statutory, non-recognised canteens were held not to be the employees of the railway establishments. In *All India Rly Institute Employees Assn*, Sawant J held that the employees in railway institutes/clubs could not be treated as employees of the railways because the provision of such institutes/clubs was not mandatory as they were established only as a part of welfare measure for the railway staff.[58] However, in *Parimal Chandra Raha*, the learned judge enunciated the following principles:

(i) Where, as under the provisions of the Factories Act, it is statutorily obligatory on the employer to provide and maintain canteen for the use of his employees, the canteen becomes a part of the establishment, and therefore, the workers employed in such canteen are the employees of the management.

(ii) Where, although it is not statutorily obligatory to provide a canteen, it is otherwise an obligation on the employer to provide a canteen, the canteen becomes a part of the establishment and the workers working in the canteen, the employees of the management. The obligation to provide a canteen has to be distinguished from the obligation to provide facilities to run canteen. The canteen run pursuant to the latter obligation, does not become a part of the establishment.

(iii) The obligation to provide canteen may be explicit or implicit. Where the obligation is not explicitly accepted by or cast upon the employer either by an agreement or an award etc, it may be inferred from the circumstances, and the provision of the canteen may be held to have become a part of the service conditions of the employees. Whether the provision for canteen services has become a part of the service conditions or not, is a question of fact to be determined on the facts

and circumstances in each case. Where to provide canteen services has become a part of the service conditions of the employees, the canteen becomes a part of the establishment and the workers in such canteen become the employees of the management.

(iv) Whether a particular facility or service has become implicitly a part of the service conditions of the employees or not, will depend, among others, on the nature of the service/facility, the contribution the service in question makes to the efficiency of the employees and the establishment, whether the service is available as a matter of right to all the employees in their capacity as employees and nothing more, the number of employees employed in the establishment and the number of employees who avail of the service, the length of time for which the service has been continuously available, the hours during which it is available, the nature and character of management, the interest taken by the employer in providing, maintaining, supervising and controlling the service, the contribution made by the management in the form of infrastructure and funds for making the service available etc.[59]

In view of this statement of law, the court held that the canteen had become a part of the establishment of the life insurance corporation. The canteen committee, the cooperative society of the employees and the contractors engaged from time to time were in reality, the agencies of the corporation and there was only a veil between the corporation and the canteen workers who, in fact, were the employees of the corporation. The court, therefore, directed the corporation to prescribe different service conditions for different types of employees and pending such prescription of service conditions, the corporation should pay to all the employees the minimum of the salary presently being paid to class 4 employees together with allowances and special facility, if any, and other benefits available to class 4 employees. But in *Reserve Bank of India*, a larger Bench of the court noticed that admittedly, there was no statutory liability cast on the bank to run a canteen under s 46 of the Factories Act 1948 and also observed that the Industrial Dispute Act does not contain extended definition of 'employer'. Therefore, in the absence of any obligation statutory or otherwise, regarding running of a canteen by the bank, similar to Factories Act or railway establishment manual, and in the absence of any effective or direct control in the bank to supervise and control the work done by various persons, the workers in the canteens run by the implementation committee (canteen committee) could not come within the ratio of *MMR Khan* (supra). In this case, by way of subsidy, the bank bore to the extent of 90 per cent of the expenses incurred by the canteen for payment of salary, provident fund contribution, gratuity and uniform etc. The bank, also provided premises, fixtures, utensils, furniture, electricity, water etc, free of charge. The canteens were run either by 'implementation committee (canteen committee)' or a 'co-operative society' or 'contractors'. The dispute, in this case, was as to 'whether 166 employees engaged in various canteen establishments of the Reserve Bank of India at Bombay were the workers of the Reserve Bank of India'? In the fact of this case, the court held:

In the absence of any statutory or other legal obligation and in the absence of any right in the bank to supervise and control the work or the details thereof in any manner regarding the canteen workers employed in three types of canteens, it could not be said that the relationship of master and servant existed between the bank and the various persons employed in the three types of canteens. [60]

Therefore, the 166 persons mentioned in the list attached to the reference were not workmen of the Reserve Bank of India. Hence, the demand for their regularisation was unsustainable and they were not entitled to any relief. The court considered it unnecessary to go into the questions as to what extent propositions the no. (iii) and (iv) stated in *Parimal Chandra*, were required to be clarified or modified. The facts of the *Parimal Chandra* and *Reserve Bank* were quite similar and, in both the cases, it was not mandatory for the employers to provide canteens but the application of the principles stated in *Parimal Chandra* is irreconcilably at variance with *Reserve Bank*. In *Coates of India*, the court had to deal with the question, as to 'whether the workmen employed in the canteen run on the premises of the factory were the employees of the company'? The stand of the employer was that they were the employees of the contractor who was running the canteen in the factory premises. The court observed that some requirement under the Factories Act of providing a canteen in the industrial establishment was by itself not decisive of the question or sufficient to determine the status of the persons employed in the canteen. In these circumstances, the court refrained from expressing its opinion on the question in view of the findings of fact recorded by the High Court to the effect that the workmen were employed only by the contractors who were running the canteen and they were not the employees of the company. Thus, the court concluded that these workmen could not be held to be employed by the company. [61]

In *Bombay Canteen Employees'Assn*, in view of certain admission made by the employees, the Supreme Court took the view that such employees were not 'workmen' within the meaning of the definition of s 2(s) of the Act. Therefore, the industrial adjudication on a reference under s 10(1) of the Act was not permissible. The court, however, suggested that since the canteen was a statutory canteen, the remedy of approaching the administrative tribunal under s 19 of the Administrative Tribunals Act 1985 and the extraordinary remedy by way of writ petition under Art. 226 are available to

such employees and it is open for them to resort to such remedies.[62] In *State Bank of India*, the Supreme Court held that the employees working in the canteens run by the local implementation committees at the branches of State Bank of India as per the welfare scheme of the bank were non-statutory and non-recognised canteens, and that the employees of such canteens would not become the employees of the bank as there was no statutory or contractual obligation or obligation, under the Sastri award, on the bank to run such canteens.[63] Even though postal department discharges sovereign functions, nevertheless the activity of running a departmental non-statutory canteen for the employees is not a sovereign activity, is severable and is an industry and the person employed as a cook in such a canteen is a 'workman' within the meaning of s 2(s).[64] Following the decision of the apex court rendered in *Bombay Telephone CE Assn*, the Bombay High Court held that, in terms of the notifications issued by the Government of India, all posts in the canteen and tiffin rooms run departmentally in the Central Government offices or establishments are civil posts, and hence, the employees cannot be called as 'workmen' within the meaning of s 2(s) of the ID Act.[65] In *NTPC*,[66] and *MDNL*,[67] Rajendra Babu J, relied upon a passage extracted from the *SAIL* case, which runs thus:

> We have gone thorough the decisions of this Court in *VST Industries'* case,[68]*GB Pant University's* case,[69] and *Mohammed Aslam's* case.[70] All of them relate to statutory liability to maintain the canteen by the principal employer in the factory/establishment. That is why in those cases, as in the *Saraspur Mills'* case,[71] the contract labour working in the canteen were treated as workers of the principal employer. These cases stand on a different footing and it is not possible to deduce from them the broad principle of law that on the contract labour system being abolished under sub-section (1) of section 10 of the CRLA Act (*sic*) the contract labour working in the establishment of the principal employer has to be absorbed as regular employees of the establishment. () ... An analysis of the cases, discussed above, shows that they fall in three classes: (i) where contract labour is engaged in or in connection with the work of an establishment and employment of contract labour is prohibited either because the industrial adjudicator/Court ordered abolition of contract labour or because the appropriate Government issued notification under section 10(1) of the CLRA Act, no automatic absorption of the contract labour working in the establishment was ordered; (ii) where the contract was found to be a sham and nominal, rather a camouflage, in which case the contract labour working in the establishment of the principal employer were held, in fact and in reality, the employees of the principal employer himself. Indeed, such cases do not relate to abolition of contract labour but present instances wherein the Court pierced the veil and declared the correct position as a fact at the stage after employment of contract labour stood prohibited; (iii) where in discharge of a statutory obligation of maintaining a canteen in an establishment the principal employer availed the services of a contractor the Courts have held that the contract labour would indeed be the employees of the principal employer."[72] ()

The reliance placed by Rajendra Babu J on the above observations of the Constitution Bench in *SAIL case* calls for some analysis. At the time of deciding *Saraspur Mills*, the Contract Labour Act was not in force, as the matter relating to its Constitutional validity was pending in the apex court. Hence, the facts of the said case or the decision rendered therein can be of no help in deciding the issues raised in *MDNL* and *NTPC*. In *GB Pant University* the facts disclosed that the employees working in the university cafeteria were not engaged through the medium of contractor, but were appointed by the Food Committee which had a specific role in the management and control of the cafeteria. The Contract Labour (Regulation and Abolition) Act 1970 (CLRAA) was neither applicable to the case nor were the provisions of the said Act cited by counsel on either side before the Supreme Court. Hence, this decision too cannot throw any illuminating light on the cases at hand. In *VST Industries*, Rajendra Babu J (for self and Variava J), having quashed the writ of *mandamus* issued by the Andhra Pradesh High Court on the ground that it was beyond its jurisdiction, surprisingly allowed the said order to stay! The relevant observations of the learned judge are reproduced below:

> We *do agree that the respondents have a strong case on merits*. Since *we have held that the High Court had no jurisdiction to entertain a petition under Article 226 of the Constitution, we would have set aside the order made by the High Court. However, in the special features of the case, although we do not agree with the High Court on the first question raised, we feel, after clarifying the legal position, that we should not disturb the decision given by the High Court.* The appeal, therefore, stands dismissed subject to what is stated in regard to writs to be issued by the High Court in respect of persons or authorities exercising public duty or otherwise.[73] (Italics supplied).

Prima facie, this is a perverse decision for the reason that once it is held that the *mandamus* issued by the High Court was without jurisdiction, *status quo ante* stands automatically restored, and nothing would be left for the court to decide thereafter. It is true that the respondents had a strong case, but, then, where does the remedy lie - is it in the Constitution of India or in the Industrial Disputes Act? Having held that the High Court had no jurisdiction to entertain a petition under Art. 226, what was the provocation for the learned judge to allow the order of the High Court to stand?*What are the so-called special features of the case that enchanted and persuaded the learned judge?* Could it still be said that this can be classified as a '*judicial decision' properly so called?* Reverting to the cases cited in *SAIL* and relied upon by Rajendra Babu J, the fourth one is that of *Mohammed Aslam*, which centred round the short question 'whether the employees in the

unit-run canteens of defence services are government employees, and whether Central Administrative Tribunal had jurisdiction to entertain applications by them under the provisions of the Administrative Tribunals Act, 1985'. Again, CLRAA had no application to that case, and neither side had cited the Act nor had raised any issue thereunder. Thus, none of the cases referred to by Rajendra Babu J, barring *VST Industries*, was relevant to the issues raised in the case at hand, and *VST Industries* was decided by himself in a desolate manner, as explained above.

The mere fact that an employer is under a statutory obligation to provide for a canteen in his factory does not give rise to the further presumption that he is required to engage regular workers in running the canteen. Factories Act and Contract Labour Act serve different objects and the one has nothing to do with the other. With great respect, it has to be stated that Rajendra Babu J, has decided all the three cases, ie, *VST Industries*, *MDNL* and *NTPC* in a perfunctory manner, with absolutely no application of judicial mind. In striking contrast, the decision rendered by Ashok Bhan J in *Haldia Refinery* places the law in the proper perspective. The learned judge held that the mere fact that the management exercises effective control over the contractor in the running of the canteen does not mean that the employees working in the canteen become the employees of the management. The learned judge further observed that canteen employees would be employees of management only for limited purpose of Factories Act, and they cannot claim absorption or regularisation in the services of management.[74] It is submitted that *Haldia Refinery* lays down the correct law. In the event of any doubt as to the engagement of contract workers in statutory canteens, it will do well for any court at any level to follow *Haldia Refinery* and reject all the other three cases, namely, *VST Industries*, *MDNL* and *NTPC* outright as being perverse and absurd. In *Rourkela Shramik Sangh*, the litigagtion relating to the absorption of contract workers in the regular services of Rourkela Steel Plant had long history. In order to appreciate the issues raised in this case, it is necessary to take a look at the decision rendered in *RK Panda*, in which the workers of the Rourkela Steel Plant filed a writ petition before Supreme Court, *inter alia*, for a direction to the effect that that they were entitled to be paid the same pay as is paid to the regular employees; that they be treated as such on the premise that they had been employed by various contractors and were doing jobs which are perennial in nature and identical to what were being done by regular employees of the Plant. The relevant portion of the direction is reproduced below:

> (i) All labourers, who had been initially engaged through contractors but have been continuously working with the respondent for the last ten years on different jobs assigned to them in spite of the replacement and change of the contractors, shall be absorbed by the respondent, as their regular employees subject to being found medically fit and if they are below 58 years of age, which is the age of superannuation under the respondent.
>
> …
>
> (vi) The respondent shall be at liberty to retrench workmen so absorbed, in accordance with law. This order shall not be pleaded as a bar to such retrenchment.
>
> (vii) If there is any dispute in respect of the identification of the contract labourers to be absorbed as directed above, such dispute shall be decided by the Chief Labour Commissioner (Central), on material produced before him by the parties concerned.
>
> (viii) This direction shall be operative only in respect of 142 jobs out of 246 jobs, in view of the fact that contract labour has already been abolished in 104 jobs.[75]

The appellant workmen had filed interlocutory applications with the following prayers:

> (a) That the respondents be directed to regularize the service of all the workmen working in any of the 246 jobs at the time of filing of this petition and continuously working since then;
>
> (b) Clarify that the standards of medical fitness to be applied in case of these workmen should be the standards used for regular workmen for their retrenchment;
>
> (c) Clarify that this judgment dated 12-5-94 would also apply to those workmen who had been retrenched in 1990 and 1992 and have not yet been taken back in employment;
>
> (d) Direct the respondents to pay wages to those 292 workmen who were kept out of employment for the period 22-5-89 to 30-11-89, contrary to the orders of this Court.

The workmen did not press prayers (a) & (b), whereas in respect of prayers (c) & (d), the Supreme Court clarified that if any of the workmen is not absorbed/regularized despite this court's directions/orders, the workmen concerned would be at liberty to pursue any other remedy or may approach any other authority prescribed under law. Pursuant thereto 5340

applications were received and out of said applicants 2677 applicants were found eligible for absorption, whereas the remaining cases of 2663 workmen were referred to the CLC in terms of the said judgment. The CLC passed his detailed orders on January 4, 1995. Reverting to the present case, the interpretation placed by Delhi High Court on an order passed in *RK Panda* (supra), was challenged by the union before the Supreme Court. Dismissing the petition, Sinha J (for self, Khare and Lakshmanan JJ) held:

> ... the appellants were fully aware of the fact that they were required to approach the Industrial Tribunal in terms of the provisions of the Industrial Disputes Act for ventilating their grievances. ... The order of this Court dated 16th October, 1995, as quoted supra, is absolutely clear and unambiguous.The term 'authority' used in this Court's order dated 16th October, 1995 must be read in the context in which it was used. The appellant in terms thereof could seek a reference which would mean a reference in terms of Section 10 of the Industrial Disputes Act. It could also approach 'the authority in accordance with law' which would mean authority under a statute. The High Court, by no stretch of imagination, can be an authority under a statute. ... Furthermore, even otherwise, a disputed question of fact normally would not be entertained in a writ proceeding. ... In any event, the orders of the Chief Labour Commissioner dated 4th January, 1995 also shows that other documents which were placed on record by the workmen had also been scrutinized and they had not been found reliable. ... We are, therefore, of the opinion that no case has been made out for interference with the impugned judgment.[76]

Burden of proof:

The burden of proof is on the workman to establish the employer-employee relationship. In other words, where a person asserts the relationship and it is denied by the employer, it is for him and not for the employer to prove the fact.[77] In order, therefore, to bring a dispute within the ambit of the definition of 'industrial dispute', the workmen have to plead and prove the relationship of employment between them and the employer in relation to an establishment, by adducing evidence before the tribunal. In discharging the burden, the workmen may call for the books of accounts or any other records or documents in possession of the employer. If he refuses to produce them an inference may be drawn against him that if the documents had been produced, they would have shown what the opposite party wanted to make out. But in the absence of a specific plea taken by the workmen that the employer-employee relationship exists between them and the employer, no adverse inference against the employer can be drawn from the fact that he did not produce his books of accounts.[78] Once the relationship of employer and employee is established, then it is for the employer to show that the employee concerned fails in one of the excepted categories and as such is not a workman.[79] The question, whether the relationship between the parties is one of employer and employee, is a pure question of fact.[80] But the status of a workman has to be inferred as a matter of law from the facts found and if the question involved is one of drawing a legal inference as to the status of a party from the facts found, that is not a pure question of fact. If the inference drawn by the tribunal in regard to the status of the workman involves the application of certain legal tests, that necessarily becomes a mixed question of fact and law.[81] The question, whether the relationship of employer and employee exists ought to be raised as a preliminary issue because on the determination of this issue will depend the validity of the reference. The mere fact that a preliminary issue is raised with respect to the existence of relationship does not mean that sufficient evidence should not be adduced by the parties in support of their respective contentions. In the absence of relationship of employer and employee, the reference will be invalid and the tribunal will have no jurisdiction to adjudicate upon the dispute. But where tribunal after considering the evidence comes to the finding that such relationship exists, the writ court will normally not interfere with such a finding of fact.[82] However, the issue being a jurisdictional issue will be amenable to judicial review, if the finding is manifestly or obviously erroneous or perverse.[83]

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44 *Novex Dry Cleaners v Workmen* (1962) 1 LLJ 271 [LNIND 1962 SC 50] (SC), per Gajendragadkar J.

45 *Thomas Duff and Co (India) Ltd v Fourth IT* 1983 Lab IC 1243, 1248-49 (Cal) (DB), per MK Mukherjee J.

46 *Mgmt of Kirlampudi Sugar Mills Ltd v Industrial Tribunal* (1971) 2 LLJ 491 [LNIND 1971 SC 414], 503 (SC) : (1973) 3 SCC 626 [LNIND 1971 SC 414], per Jaganmohan Reddy J.

47 *Mgmt of Shri CVKUS Mandali Ltd v IC* (1979) 2 LLJ 383 [LNIND 1979 SC 357], 392 (SC), per Kailasam J.

48 *TM Abdul Rahim & Co v North Arcot DBW Union* (1958) 2 LLJ 736 (Mad), per Rajagopalan J.

49 *Airlines Hotel Pvt Ltd v Workmen* (1961) 1 LLJ 663 [LNIND 1961 SC 16], 666 (SC) AIR 1962 SC 676 [LNIND 1961 SC 16]: 1961 (3) FLR85:, per Das Gupta J.

50 *Cochin State Power, Light Corpn Ltd v Workmen* (1964) 2 LLJ 100 [LNIND 1963 SC 143] (SC), per Wanchoo J.

51 *KEH Abdul Samad Saheb & Co v IT* (1963) 1 LLJ 504, 507 (Mad), per Veeraswami J.

52 *Bangur Bros Ltd v Govt of West Bengal* (1961) 2 LLJ 351, 359-60 (Cal), per Sinha J.

53 *Workmen of Shri Bajrang Jute Mills v The Employers* (1970) 2 LLJ 6 (SC), per Vaidialimgam J.

54 Government of India (2002), *Report of NCL-II*, chap 13, p 38, para 6.32.

55 *State of Rajasthan v Ganeshi Lal* AIR 2008 SC 690 [LNIND 2007 SC 1440]:: [2007] 1 SCR 1197 [LNIND 2007 SC 1440] : 2008 (2) SCC 533 [LNIND 2007 SC 1440] : 2007 (13) JT 423 : 2007 (14) SCALE 61 [LNIND 2007 SC 1440], per Pasayat J.

56 *Hutchiah v Karnataka State Road Transport Corpn* (1983) 1 LLJ 30, 36 (Kant) (DB), per Rama Jois J.

57 *Elumalai v Mgmt of Simplex Concrete Piles (India) Ltd* (1970) 2 LLJ 454 (Mad) : 1970-83-LW 317, per Ismail J.

58 *Hutchiah v Karnataka State Road Transport Corpn* (1983) 1 LLJ 30, 37 (Kant) (DB), per Rama Jois J.

59 *SK Verma v Mahesh Chandra* 1983 Lab IC 1483 [LNIND 1983 SC 233], 1485 (SC), per Chinnappa Reddy J.

60 *Sarabhai Chemicals v Subhas N Pandya* (1984) 2 LLJ 75, 77 (Guj) (DB), per Poti CJ.

61 *Satyendra Singh Rathore v Rajasthan Rajya Pathya Pustak Mandal Jaipur* (1989) 2 LLJ 289, 292 (Raj) (DB), per Byas J.

62 *R Antony v Renusagar Power Co Ltd* (1996) 2 LLJ 329 [LNIND 1995 ALL 886] (All), per VN Mehrotra J.

63 *RG Makwana v Gujarat SRTC* (1987) 1 LLJ 172 -73 (Guj) (DB), per Kokulakrishnan CJ.

64 *Dy Executive Engineer v Prafulbhai V Virda* (2008) 2 LLJ 958 (Guj), per Rathod J.

65 *Kamyani Vidya Mandir v Sangeeta Eknath Sanghpal* (2008) 1 LLJ 712 [LNIND 2007 BOM 1145] (Bom) : 2007 (6) Bom CR50.

66 *Stroud's Judicial Dictionary*, 1986, 5th ed, Vol 1, p 159.

67 *Halsbury's Laws of England*, Vol 16, p 377.

68 Cf *R v Edingale (Inhabitants)* [1930] 1 QB & C 379.

69 *Employees' State Insurance Corpn v Tata Engineering & Locomotive Co Ltd* (1976) 1 LLJ 81 [LNIND 1975 SC 393] (SC), per PK Goswami J.

70 EM Rao, *Industrial Jurisprudence: A Critical Commentary*, 2015, 2nd ed, pp 161-3.

71 *Employees 'State Insurance Corpn v Tata Engg & Locomotive Co Ltd* (1976) 1 LLJ 81 [LNIND 1975 SC 393], 85 (SC) : AIR 1976 SC 66 [LNIND 1975 SC 393]: (1975) 2 SCC 835 [LNIND 1975 SC 393], per PK Goswami J.

72 *Hanuman Prasad Choudhary v Rajasthan SEB* 1986 Lab IC 1014 (Raj) per SC Agrawal J.

73 Cf, *Deep Chand v State of Uttar Pradesh* AIR 1959 SC 648 [LNIND 1959 SC 31,665 per SR Das CJI.

74 *Narinder Kumar v State of Punjab* 1985 Lab IC 541 -42, per Chandrachud CJI.

75 *Mgmt of Tungabhadra Sugar Works Pvt Ltd v LC* 1983 Lab IC 1185, 1187-88 (Kant) (DB), per Malimath J.

76 *Patel P Somnath v Gujarat State LDC Ltd* 1992 Lab IC 2370, 2380-81 (Guj), per SD Shah J.

77 *Abdul Aziz v Rajasthan SRTC* [1992] 2 WLC 558 (Raj).

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER I Preliminary

S. 2. Definitions.—

Contract Labour (Regulation & Abolition) Act 1970:

The principles enunciated in the earlier dicta have been incorporated in the Contract Labour (Regulation & Abolition) Act 1970. It has been enacted by the Parliament for regulating the employment of contract labour in certain establishments and to provide for its abolition, in certain circumstances, and for matters connected therewith. The Act came into force on and from 5 September 1970 and it applies to:

(a) every establishment in which 20 or more workmen are employed or were employed as contract labour on any day of the preceding 12 months; and

(b) to every contractor who employs or employed on any day of the preceding 12 months 20 or more workmen.

The Act further gives liberty to the 'appropriate government' to apply its provisions to any establishment employing such number of workmen less than 20 as may be specified in the notification. The Preamble declares that the statute has been enacted for two purposes, *viz*:

(a) to regulate the employment of contract labour; and

(b) to provide for its 'abolition' in certain circumstances and for matters connected therewith.

It is evident that the Act does not contemplate the total abolition of contract labour system. It provides for its abolition only in certain circumstances and to regulate employment of 'contract labour' in certain establishments. In other words, while realising the need for abolishing the contract labour system in certain circumstances, the Parliament also felt the need to continue it in other circumstances by properly regulating the same. It makes specifically clear that the Act will not apply to an establishment in which work, only of intermittent or casual nature, is performed. The Act makes provisions for registration of establishments employing contract labour and licensing of contractors. It also contains provisions ensuring the welfare and health of the contract labour by providing canteens, rest rooms, first aid facilities. It makes the principal employer ultimately responsible for seeing that the provisions of the Act are complied with and the payment of wages made to the contract labour. It also empowers the 'appropriate government' to prohibit the employment of contract labour under certain circumstances. The Central Government has made rules in exercise of the powers under the Act namely Contract Labour (Regulation and Abolition) Rules 1971 which were brought into force wef 10 February 1971.

From the provisions of the Act and scheme of the rules, it is evident that every contractor engaging contract labour for the establishment, is required to obtain a registration certificate and licence respectively from the authorities under the Act. Furthermore, if the contract labour is employed for doing the same type of job as is done by the direct employees of the principal employer, the same wages are to be paid and the same facilities are to be given to the contract labour as are being paid or given to the direct employees. The contravention of the provisions of the Act, the rules and the conditions of the licenses granted to the contractor is made a penal offence. Section 10 empowers the 'appropriate government' to prohibit

employment of contract labour in any process, operation or other work in any establishment, after consultation with the central board or the state board, as the case may be, by notification in the Official Gazette. Before issuing the notification prohibiting the employment of contract labour in any establishment, the 'appropriate government' shall have regard to the conditions of work and benefits provided for the contract labour in the establishment and other relevant factors such as:

(a) whether the process, operation or other work is incidental to or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment;

(b) whether it is of a perennial nature, ie, it is of sufficient duration having regard to the nature of the industry, trade, business, manufacture or occupation carried on in the establishment;

(c) whether it is done ordinarily through regular workmen in that establishment or an establishment similar thereto; and

(d) whether it is sufficient to employ considerable number of whole-time workers.

The explanation to that section makes the decision of the 'appropriate government' final with regard to the question: whether the process, operation or other work is of perennial nature? The effect of non-registration of an establishment under the Act is that the establishment cannot employ contract labour. So also, the effect of non-licensing of the contractor is that the contractor is precluded from undertaking or executing any work through contract labour. The constitutional validity of the Act has been upheld by the Supreme Court in *Gammon India.*[84]The effect of this Act on the jurisdiction of the industrial tribunals, to adjudicate upon disputes relating to abolition of contract labourer the absorption of such labour by the principal employer was considered by the Supreme Court in *Vegolis.*[85] In this case, apart from employing a large number of workmen for its main work, the employer company employed labour through a contractor for loading and unloading and some other work. The regular workmen raised an 'industrial dispute' claiming that the system of work of loading and unloading etc, done through the contractor should be abolished, which was referred to an industrial tribunal for adjudication. The tribunal held that the contract system should be abolished and the employer must employ only permanent workers for doing the work which was being done through the contract labour. It buttressed its view with the provisions of the Contract Labour (Regulation and Abolition) Act. In appeal, before the Supreme Court against the award of the tribunal, apart from questioning the decision of the tribunal on merits, the employer company also challenged the jurisdiction of the tribunal to consider the question of abolition of contract labour system in view of the provisions of the Act. On consideration of the scheme of the Act and examination of its provisions, the court held that the tribunal's directions to the company not to engage any labour through the contractor for the work of loading and unloading must be set aside, because the jurisdiction to decide about the abolition of the contract labour, or, to put it differently, to prohibit employment of contract labour, has now to be done in accordance with s 10 of the Act and the question whether the contract labour should be abolished or not, is left to the 'appropriate government', under it. Therefore, the tribunal had no jurisdiction to give directions with respect to abolition of the contract labour after the date of coming into operation of the Act'.

It will thus appear from this decision, firstly, that an industrial dispute can be raised, by the direct workmen of the establishment for abolition of the contract labour system. Secondly, although on the date the dispute was raised, the Act was not in force, hence the dispute with regard to the abolition of the contract labour system had to be decided by the tribunal. But since the Act came into force at the time of the decision, the dispute had to be decided in accordance with the provisions of the Act. Hence on and after the coming into force of the Act, no direction could be given by an industrial tribunal to abolish the contract labour system, since the jurisdiction to give directions with regard to the prohibition of contract labour is vested in the 'appropriate government'. In *Food Corpn,* the facts disclosed that a contractor was engaged for handling foodgrains at Siliguri depot and the Corporation had nothing to do with the manner of handling done by the contractor. The labour was employed by the contractor and payments were made by him. In this fact-situation, there was no privity of contract of employment between the corporation and the workmen. Referring to the expression 'employed' in the definition of 'workman' in s 2(s), speaking for a three judge Bench of the Supreme Court, Desai J said:

> The expression 'employed' has atleast two known connotations but as used in the definition, the context would indicate that it is used in the sense of relationship brought about by express or implied contract of service in which the employee renders service for which he is engaged by the employer and the latter agrees to pay him in cash or kind as agreed between them or as statutorily prescribed. It discloses a relationship of command and obedience. The essential condition of a person being a workman within the terms of the definition is that he should be employed to do the work in that industry and that there should be, in other words, an employment of his by the employer and that there should be relationship between the employer and him as between employer and employee or master and servant. Unless a person is thus employed, there can be no question of his being a 'workman' within the definition of the term as contained in the Act.[86]

In this view of law, the court held that where a contractor employs workmen to do the work which he contracted with a third person to accomplish, on the definition as it stands, the workmen of the contractor would not without something more become the workmen of that third person. Therefore, when the contract system was in vogue, the workmen employed by the contractor were certainly not the workmen of the corporation. In *Mathura Refinery*, the Supreme Court refused to direct the Indian Oil Corporation to absorb the contract labour in its employment saying that contract labourers have not been found to have direct connection with the refinery. In other words, there was no relationship of employer and employee between the corporation and the contract labourers concerned.[87] In *Dena Nath*, the court was dealing with the question 'whether the persons appointed by the principal employer through a contractor would be deemed to be the direct employees of the principal employer or not where the principle employer does not get registration under s 7 and/or the contractor does not get a licence under s 12 of the *Act*? A two-judge Bench pointed out that the Act has two purposes to serve, *viz*:

(i) to regulate the conditions of service of the workers employed by the contractor who is engaged by a principal employer; and

(ii) to provide for the abolition of contract labour altogether, in certain notified processes, operation or other works in any establishment by the appropriate government under section 10 of the Act. [88]

In *Gujarat Electricity Board*, he facts were: the thermal power station of the Board employed a large number of skilled and unskilled manual labourers to carry out loading and unloading work etc. The union of the workmen raised a dispute as to 'whether the workers whose services are engaged by the contractors, but who are working in the thermal power station of Gujarat Electricity Board at Ukai, can legally claim to be the employees of Gujarat Electricity Board?' This dispute was referred for adjudication to an industrial tribunal who, after taking the relevant evidence and the law laid down by various judicial decisions into account, held that the workmen concerned in the reference could not be the workmen of the contractors. Therefore, all the workmen employed by the contractor should be deemed to be the workmen of the board. The tribunal also gave consequential directions to the board for payment of wages etc to the workmen. The award of the tribunal was upheld by the High Court of Gujarat. In an appeal against the order and judgment of the High Court, the main contention advanced before the Supreme Court on behalf of the board was that 'after coming into force of the Act, it is only the 'appropriate government' which can abolish the contract labour system, after consulting the central board or the state board, as the case may be, and no other authority including the industrial tribunal has jurisdiction either to entertain such dispute or to direct abolition of the contract labour system. Furthermore, in any case, neither the 'appropriate government' nor the industrial tribunal has the power to direct that workmen of the erstwhile contractor should be deemed to be the workmen of the principal employer such direction is contrary to the provisions of the Act. The Central Government or the industrial tribunal, as the case may be, can only direct the abolition of the contract labour system as per the provisions of the Act. But the Act does not permit either of them to declare the erstwhile workmen of the contractor to be the employees of the principal employer. Sawant J, laid down the following propositions:

(i) In view of the provisions of section 10 of the Act, it is only the appropriate government which has the authority to abolish genuine labour contract in accordance with the provisions of the said section. No court including the industrial adjudicator has jurisdiction to do so.

(ii) If the contract is sham or not genuine, the workmen of the so called contractor can raise an industrial dispute for declaring that they were always the employees of the principal employer and for claiming the appropriate service conditions. When such dispute is raised, it is not a dispute for abolition of the labour contract and hence the provisions of section 10 of the Act will not bar either the raising or the adjudication of the dispute. When such dispute is raised, the industrial adjudicator has to decide whether the contract is sham or genuine. It is only if the adjudicator comes to the conclusion that the contract is sham, then he will have jurisdiction to adjudicate the dispute. If, however, he comes to the conclusion that the contract is genuine, he may refer the workmen to the appropriate government for abolition of the contract labour under section 10 of the Act and keep the dispute pending. However, he can do so if the dispute is espoused by the direct workmen of the principal employer. If the workmen of the principal employer have not espoused the dispute, the adjudicator, after coming to the conclusion that the contract is genuine, has to reject the reference, the dispute being not an industrial dispute within the meaning of section 2(k) of the ID Act. He will not be competent to give any relief to the workmen of the erstwhile contractor even if the labour contract is abolished by the appropriate government under section 10 of the Act.

(iii) If the labour contract is genuine a composite industrial dispute can still be raised for abolition of the contract labour and their absorption. However, the dispute, will have to be raised invariably by the direct employees of the principal employer. The industrial adjudicator, after receipt of the reference of such dispute will have first to direct the workmen to approach the appropriate government for abolition of the contract labour under section 10 of the Act and keep the

reference pending. If pursuant to such reference, the contract labour is abolished by the appropriate government, the industrial adjudicator will have to give opportunity to the parties to place the necessary material before him to decide whether the workmen of the erstwhile contractor should be directed to be absorbed by the principal employer, how many of them and on what terms. If, however, the contract labour is not abolished, the industrial adjudicator has to reject the reference.

(iv) Even after the contract labour system is abolished, the direct employees of the principal employer can raise an industrial dispute for absorption of the ex-contractor's workmen and the adjudicator on the material placed before him can decide as to who and how many of the workmen should be absorbed and on what terms. The court pointedly noticed that, as a matter offact, on abolition of the contract labour system, the workmen are in a worse position as they could neither be employed by the contractor nor an obligation is cast on the principal employer to engage them in his establishment. This is a vital lacuna in the Act which could only be removed by a suitable amendment of the Act, because neither section 10 nor any other provision of the Act or the rules made thereunder provides for determination of the status of the workmen of the erstwhile contractor once the 'appropriate government' abolishes the contract labour system. [89]

The basic question, 'whether on abolition of the contract labour system, the contract labour is entitled to be absorbed by the principal employer'?, came up again before a three judge Bench of the court in *Air India.* In addition to the aforesaid basic question, on the basis of the respective contentions of the parties, the court formulated further four ancillary questions, *viz*:

(i) whether the High Court under Article 226 has power to direct their absorption?;

(ii) whether it is necessary to make a reference under section 10 of the ID Act for adjudication of disputes *qua* absorption of the contract labour?;

(iii) whether the view taken by this court in *Dena Nath and Gujarat Electricity Board* cases (supra) is correct in law?; and

(iv) whether the workmen have got a right for absorption and, if so, what is the remedy for enforcement?[90]

The court did not agree with *Dena Nath* case as according to Ramaswamy J its 'ratio falls foul of constitutional goals of the trinity; they are free launchers to exploit the workmen'. Therefore, this case does not lay down the correct law.[91] And according to Majmudar J, Each of the conclusions reached in that case...flies in the face of the very scope and ambit of the Act and frustrates the very scheme of abolition of contract labour envisaged by the Act'. And such a conclusion cannot be countenanced, 'as it results in a situation where relatives of the patient are told by the operating surgeon that operation is successful but the patient has died.[92]*Gujarat Electricity Board* was also faulted by Ramaswamy J for the reason that the award-proceedings suggested therein were beset with several incongruities and obstacles in the way of the contract labour, for immediate absorption. Since, the contract labour gets into the service of the principal employer, the union of the existing employees may not espouse their cause for reference under s 10 of the ID Act. The workmen, who on abolition of contract labour system have no right to seek reference under s 10 of ID Act. Moreover, the workmen immediately are kept out of job to endlessly keep waiting for award and thereafter resulting in further litigation and delay in enforcement. The management would always keep them at bay for absorption. It would be difficult for them to work out their right. Moreover, it is a tardy and time-consuming process and years would roll by. Without wages, they cannot keep fighting the litigation endlessly. The right and remedy would be a teasing illusion and would be rendered *otiose* and practically compelling the workman at the mercy of the principal employer. Since these shortcomings were not brought to the attention of the court in that case, its decision is not correct.[93] Agreeing with this, Majmudar J echoed that the scheme envisaged in *Gujarat Electricity Board* was not workable and to that extent the said judgment cannot be given effect to.[94]*Dena Nath* and *Gujarat Electricity Board* were, therefore, overturned. In the end, the court concluded that 'though there is no express provision in the Act for absorption of the employees whose contract labour system stood abolished by publication of the notification under s 10(1) of the Act, in a proper case, the court as *sentinal in the qui vive* is required to direct the appropriate authority to act in accordance with law and submit a report to the court and based thereon proper relief should be granted.[95] In this view of law, it was held:

> The moment the contract labour system stands prohibited under section 10(1), the embargo to continue as a contract labour is put an end to and direct relationship has been provided between the workmen and the principal employer. Thereby, the principal employer directly becomes responsible for taking the services of the workmen hitherto regulated through the contractor' (*sic*).[96] And further that 'the linkage between the contractor and the employee stood snapped and direct relationship stood restored between the principal employer and the contract labour as its employees. Considered from this perspective, all the workmen in the respective services working on contract labour are required to be absorbed in the establishment' of the employer.[97]

Accordingly, the court affirmed the decision of the Bombay High Court that on a writ court can direct the principal employer to absorb contract labour after its abolition, even though some of the contractors have violated s 12 and the principal employer has violated the provisions of s 7 of the Act and upheld the direction to the principal employer to absorb the contract labour after the abolition of the contract labour system and to regularise their services with effect from the respective dates of the judgments of the High Court with all consequential benefits. This decision creates more problems than it cures as it loses sight of the different incidents of employment of the workmen by the contractors and by the principal employers particularly when such employers happen to be highly organised large-scale undertakings. The employment in such undertakings is governed by rules and regulations which include qualifications, cadres, retiral age, grades and scales of pay etc, whereas no such factors are taken into account in the employment by contractors. Contractors keep on shifting their labour force from one establishment to another as required by the exigencies of their own business. On the day of the abolition of the contract labour system in an establishment, the contractor may be having excessive number of people or he may be having superannuated and unqualified people in his employment. They all, by *ipse dixit* of this holding, will become the employees of such undertaking. There may be workmen who might have worked just for a day or two before the abolition of the contract system. They too will be entitled to be absorbed in the service of the principal employer. Thus, there may be two categories of employees, one direct employees, the other inherited from the contractors. This is apt to mess up the whole organisational system of the undertaking regarding qualifications, retirement age, grades and scales of pay etc. Furthermore, by forcing the workforce of the contractor on the principal employer, it may create chaotic budgetary conditions. From the report of the judgment, the attention of the court does not appear to have been called to such consequences of absorption of the contract labour force by the principal employer. These were perhaps some of the considerations which the Parliament had in mind for not making it incumbent on the principal employer to absorb the labour force employed by the contractor after the abolition of the contract labour system. However, *Air India* was overruled by a Constitution Bench of the Supreme Court in *SAIL*. Quadri J held:

> We have already noticed above the intendment of the CLRA Act that it regulates the conditions of service of the contract labour and authorises in section 10(1) prohibition of contract labour system by the appropriate government on consideration offactors enumerated in sub-section (2) of s 10 of the Act among other relevant factors. But, the presence of some or all those factors, in our view, provide no ground for absorption of contract labour on issuing notification under sub-section (1) of section 10. Admittedly, when the concept of automatic absorption of contract labourer as a consequence of issuing notification under section 10(1) by the appropriate Government, is not alluded to either in s 10 or at any other place in the Act and the consequence of violation of section 7 and 12 of the CLRA Act is explicitly provided in sections 23 and 25 of the CLRA Act, it is not for the High Courts or this Court to read some unspecified remedy in section 10 or substitute for penal consequences specified in sections 23 and 25 a different sequel, be it absorption of contract labour in the establishment of principal employer or a lesser or a harsher punishment. Such an interpretation of the provisions of the statute will be far beyond the task of ironing out the creases and the scope of interpretative legislation and as such dearly impermissible. We have already held above, on consideration of various aspects, that it is difficult to accept that the Parliament intended absorption of contract labour on an issue of abolition notification under section 10(1) of CLRA Act. (para 105, at p 167)...On the issuance of prohibition notification under section 10(1) of the CLRA Act prohibiting employment of contract labourer or otherwise, in an industrial dispute brought before it by any contract labourer in regard to conditions of service, the industrial adjudicator will have to consider the question whether the contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse/camouflage to evade compliance of various beneficial legislations so as to deprive the workers of the benefit thereunder. If the contract is found to be not genuine but a mere camouflage, the so-called contract labourer will have to be treated as employees of the principal employer who shall be directed to regularise the services of the establishment subject to the conditions as may be specified by it for that purpose...' (para 125(5), at p 172)...If the contract is found to be genuine and the prohibition notification under section 10(1) of the CLRA Act in respect of the concerned establishment has been issued by the appropriate Government, prohibiting employment of contract labourer in any process, operation or other work of any establishment and where in such process, operation or other work of the establishment the principal employer intends to employ regular workmen he shall give preference to the erstwhile contract labourer, ifotherwise found suitable and, if necessary, by relaxing the condition as to maximum age appropriately taking into consideration the age of the workers at the time of their initial employment by the contractor and also relaxing the condition as to academic qualifications other than technical qualifications.[98] [para 125(6), at p 172].

The above decision of the Constitution Bench in *SAIL* is a significant departure from the disturbing trends of judicial expansionism witnessed during last quarter of 20th century. It is not in dispute that that nowhere does the Contract Labour (Regulation and Abolition) Act stipulate that 'abolition' of contract labour system means the 'automatic absorption' of the contract workers in the services of principal employer, nor, for that matter, the *expression*'regulation' appearing in the short title of the Act could mean 'regularisation' of their services under the principal employer. Neither the CLRA Act nor any other law in this branch provides for such implied transfer of the contract of employment from one employer to

another. Viewed from the perspective of statutory construction, Quadri J, firmly established the principle that the judicial legislation through the medium of interpretation is 'interstitial' and should be confined to filling 'molecular' gaps. Quadri J, resurrected the proposition that placing a wild interpretation on statutory provisions beyond the contemplation of legislature is not the same thing as 'ironing out creases', to quote the phrase of Lord Denning MR. On this issue, the recommendation of NCL-II is as follows:

> The Commission is conscious of the fact that in the fast changing economic scenario and changes in technology and management, which are entailed in meeting current challenges, there cannot be a fixed number of posts in any organisation for all time to come. Organisations must have the flexibility to adjust the number of this workforce based on economic efficiency. It is essential to focus on core competencies if an enterprise wants to remain competitive. We would, therefore, recommend that contract labour shall not be engaged for core production/services activities. However, for sporadic seasonal demand, the employer may engage temporary labour for core production/ service activity. We are aware that off-loading, perennial, non-core services like canteen, watch & ward, cleaning, etc. to other employing agencies has to take care of three aspects:
>
> (1) there have to be provisions that ensure that perennial core services are not transferred to other agencies or esrablishments;
>
> (2) where such services are being performed by employees on the payrolls of the enterprises, no transfer to other agencies should be done without consulting, bargaining (negotiating) agents; and
>
> (3) where the transfer of such services does not involve any employee who is currently in service of the enterprise, the management will be free to entrust the service to outside agencies. The contract labour will, however, be remunerated at the rate of a regular worker engaged in the same organisation doing work of a comparable nature or if such worker does not exist in the organisation, at the lowest salary of a worker in a comparable grade, ie unskilled, semi-skilled or skilled. The principal employer will also ensure that the prescribed social security and other benefits are extended to the contract worker. There is a reason that compels us to make this recommendation. At many of the centers we visited, we were told during evidence, that there were cases of contractors making deductions from the wages of contract workers as their contribution towards social security, and then absconding without depositing either the contribution realised from the workers or their own contributions into the appropriate social security fund.[1]

As already noted, in *Gujarat Electricity Board*, the court noticed the vital lacuna of not providing for absorption of workmen of the contractor after abolition of the contract labour system, but it left it at that as the lacuna could only be removed by suitable amendment of the Act. Lacuna is Roman for the word 'gap'. In view of the principle that a matter, which should have been, but has not been provided for in a statute, cannot be supplied by the courts, as to do so will be 'legislation and not construction'.[2] In other words, it is not permissible for a court to fill in the gap in an Act of the legislature. In England, in *Seaford Court Estate*, Lord Denning LJ suggested a purposive approach as against the traditional literal approach to solve a question of interpretation. He said thus:

> A judge should ask himself the question: If the makers of the Act had themselves, come across this ruck in the texture of it, how would they have straighten it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.[3]

This statement was severely criticised by the House of Lords in *Magor & St. Mellons*,[4] where Lord Simonds described it as a 'naked usurpation of the legislative function under the guise of interpreration.' He pertinently stated that the proposition, that 'the court having discovered the intention of the Parliament...must proceed to fill in the gaps...what the legislature has not written, the court must write' cannot be supported. 'And it is the less justifiable when it is guess work with what material the legislature would, if it had discovered the gap, have filed it in. If a gap is disclosed, the remedy lies in an amending Act'. In the court of appeal, Lord Denning LJ protested and repeated what he said in *Seaford Court Estate*:

> We do not sit here to pull the language of Parliament and of ministers to pieces and make nonsense of it. That is an easy thing to do and that is a thing to which lawyers are too oftenprone. We sit here to find out the intention of Parliament and of ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it upto destructive analysis.[5]

By this statement of law, all he meant was that the court may fill in the gap for making sense of the enactment where otherwise absurd consequences will follow. That is why he hastened to caution that a judge must not alter the material of which the statute is 'woven but he can and should iron out the creases. He never meant that in the guise of construction of

the statute, the court should embark on the journey in the tertitory of 'judicial legislation'. It is evident from the clear and candid language in a subsequent statement:

> Judicial power rests on the combined wisdom of the judges. Their jurisdiction is more restrictive than creative. Their principal function is to restrain the abuse of power by others in the state...So far as creative work is concerned, so far as creative policy is concerned there the judges have no hand. They cannot direct the government to spend money on this or that. They cannot do any thing to help the poor or the unemployed. They cannot provide housing for the homeless. All social reform must be left to others. So must all political reforms. The doctrine of 'presumed intent' is occasionally pressed into service for construction of contracts or family arrangement agreements but it is not permissible to use this doctrine for interpretation of statutes which have to be construed in accordance with recognised principles of interpretation of statutes.

The function of the court is to apply the law, interpret the law and in this country, even to strike-down the law where it is inconsistent with the constitutional mandates. Where the language of the statute is plain and unambiguous, no construction is needed. But where the language is not plain or is ambiguous or literal construction would lead to absurdity, it is open to the court to interpret it to give effect to the intent of the Parliament. In construing welfare statutes, if two constructions are possible it is permissible for the court to adopt such construction as may be more beneficial to the weaker sections of the society but neither by ingenuity of interpretative techniques nor by extending the frontiers of the power of judicial review, it is permissible for the court to stray into the territory of judicial legislation. However, noble and benevolent the personal predilections or ideological inclinations of a judge be, they are no licence for trespassing into the forbidden area of legislation. So also the works and thoughts of political and social thinkers. The three organs of the state, *viz*, legislature, judiciary and executive are like the head, heart and hands of the human body. According to the basic scheme of the Constitution, neither of these three separate organs of the government can take over the functions assigned to the others.[6] If they do not work in union and harmony and trespass into the others' territories, the result will be chaos. In the language of Khare J, it is not safe 'to bend the arm of law only for adjusting equity'.[7]The object of the Act is to 'regulate the employment of the contract labour' and to provide for its abolition. Neither the scheme nor any provision of the Act purports to provide for the employment of the contract labour on the abolition of the contract labour system. In *Air India*, the court itself noticed that there is no provision in the Act for absorption of employees, whose contract stood abolished by publication of the notification under s 10(1) of the Act but it justified its excursion in the legislative territory with the observation that 'the power of the court is not fettered by the absence of any statutory prohibition. Accordingly, it directed that after the abolition of the contract labour system, the workmen employed by the erstwhile contractor automatically become entitled to be absorbed by the principal employer. Itis submitted that this holding requires reconsideration. *Firstly*, it is in conflict with the holding of another three judge Bench in *Food Corpn*, in which Desai J unequivocally held that the essential condition of a person being a workman within the meaning of definition in s 2(s) is that there should be a relationship of employment between him and the employer and 'unless a person is thus employed, there can be no question of his being a workman'. Such relationship cannot be created either by adding words to the statute or by extending the scope of judicial review. In either case, it will be judicial legislation. Even the wide jurisdiction of Art. 142 would not warrant an excursion into the territory of judicial legislation. *Secondly*, the direction that the employees of the erstwhile contractor will automatically become the employees of the principal employer on the abolition of the contract labour system is naked usurpation of the legislative function. *Thirdly*, the court had not adverted to the practical organisational difficulties, as earlier pointed out, which is apt to create chaotic conditions in the establishment of the principal employer.

Nature of Work

For an employee in an industry to be 'workman' under the definition, after its amendment by the amending Act of 1982, it is manifest that he must be employed to do:

(a) Manual work;

(b) Unskilled work;

(c) Skilled work;

(d) Technical work;

(e) Operational work;

(f) Clerical work;

(g) Supervisory work.

The question as to whether an employee is a 'workman' as defined in s 2(s) of the Industrial Disputes Act, has to be determined with reference to his principal nature of duties and functions. Such question is required to be determined with

reference to the facts and circumstances of the case and the materials on record. It is not possible to lay down any strait-jacket formula which can be determinative of the real nature of duties and function being perfomed by an employee in all cases. In any case, where an employee is employed to do any type of work enumerated in the definition, there is hardly any difficulty in treating him as a 'workman' under the appropriate classification. But in the complexity of industrial or commercial organisations, quite a large number of employees are often required to do more than one work. In such cases, it becomes necessary to determine under which classification the employee will fall for the purpose of deciding whether he comes within the definition of' 'workman' or goes out of it.[8] In *Burmah Shell*, a three judge Bench of the Supreme Court held that in order to bring an employee within the ambit of the definition of 'workman' the nature of the work performed by him must fall within one or other of the above seven classifications. The rationale of this holding was that if every employee of an industry was to be a workman, except those in the four exceptions, these seven classifications need not have been mentioned in the definition and a workman could have been defined as a person employed in an industry except in a case where he was covered by one of the exceptions. Hence, the specifications of the seven types of work obviously was intended to lay down that an employee is to become a 'workman' only if he is employed to do work of one of those types while there may be employees who, in doing any such work would not be out of the scope of the work without any resort to exceptions. An apposite example was that of a person employed in canvassing and promoting sales for an industry. Though such a person may be an employee but he would not fall within the definition of 'workman' because his work would not fall within anyone of the classifications enumerated in the definition.[9] In this view of the law, 'sales engineering representatives' and 'district sales representatives' were held not to be workmen as their work did not fall within the specified categories. This holding was followed by various High Courts in the undernoted cases,[10]holding that the sales representatives employed for sales promotion work would not fall within the definition of 'workman' but the subsequent enactment-Sales Promotion Employees (Conditions of Service) Act 1975, brings sales representatives employed for sales promotion, in medical and pharmaceutical concerns within the purview of workman. This enactment also enables the Central Government by notification to apply its provisions to any other establishment engaged in any notified industry. In other words, if an industry is notified under this Act, the provisions of the ID Act would also be attracted to these types of workmen.

In *TP Srivastava*, the Supreme Court discarded the contention on behalf of the appellant that he was a workman as he was covered by the provisions of the Sales Promotion Employees (Conditions of Service) Act 1976. The court observed that since that Act was enacted subsequent to the termination of the service of the appellant, he was not covered by the provisions of that Act which was not retrospective in effect. Futhermore, there was no notification under the enactment applying the provisions of that Act to the employees of the industry in which he was employed. Therefore, since the duty of the appellant was of imaginative and creative nature, it could not be termed as either manual, skilled, unskilled or clerical in nature. The supervision element involved in his work was merely incidental.[11] But in this case, the attention of the court was not drawn to its earlier holding in *SK Verma*, where a three-judge Bench of the Supreme Court held that the words qualifying the word 'work' are intended to limit or narrow the amplitude of the definition of 'workman'. On the other hand, they indicate and emphasise the broad sweep of the definition which is designed to cover all manner of persons employed in any industry, irrespective of whether they are engaged in skilled or unskilled work, manual work, supervisory work, technical work or clerical work. The broad definition is to take in the entire labour force and exclude the managerial force.[12] It could not be the intention of the Parliament to keep out of the purview of the legislation small bands of employees who, though not on the management side of the establishment, are yet to be denied the ordinary rights of the force of labour for no apparent reason at all. This holding renders all the expressions qualifying the word 'work' in the definition redundant in taking the view that the broad intention of the legislature is 'to take in the entire 'labour force' and exclude 'managerial force'. If this was the object which the legislature by insertion of the expression 'operational' aims to achieve, that could have been achieved unequivocally by deleting all the adjectival words qualifying the word 'work' in the definition instead of inserting an ambivalent expression like 'operational'. This decision is in conflict with the rationale of *May & Baker* and *Burmah Shell* (supra). However, the Bombay High Court in *SG Pharmaceuticals*, held that the medical representatives employed for canvassing and promoting sales of products of the employer company did not fall within the definition of workman.[13] But, a single judge of the Karnataka High Court in *Ram Mohan*, followed *SK Verma*, being the later decision, while holding that an employee working as a sales promotion representative fell within the definition of workman. [14] Likewise, in view of the duties performed by a person designated as sales representative, a single judge of the Bombay High Court held that he was a 'workman'.[15] In *A Sundrambal*, the court held that a teacher employed in an educational institution cannot be called a 'workman' because imparting of education which is the main function of the teachers, cannot be considered as skilled or unskilled, managerial or supervisory work or technical work or clerical work. Speaking for the court, Venkataramiah J said:

> Imparting of education is in the nature of a mission or a noble vocation. A teacher educates the children; he moulds their character, builds up their personality and make them fit to become responsible citizens. Children grow under the care of teachers. Clerical work, if any, they may do, is only incidental to their work of teaching. [16]

The court relied upon the decision in *May & Baker*. But attention of the court does not appear to have been invited to the conflict between this line of cases and the later decision in *SK Verma's* case (supra). No effort has been made to reconcile the contradictory viewpoints even in a subsequent decision in *SK Maini v Carona Sahu Co Ltd.* [17] However, in *OM Bhargava v Satyavati Bhargava* ,[18] a two-judge Bench of the court, on noticing the conflict, has recommended to the Chief Justice of India for consideration as to whether it would be appropriate to constitute a three-judge or five-judge Bench, to hear the matter. An interesting question arose before a single judge of the Kerala High Court where the *archakas* or priests in a temple claimed to be workmen. In view of the evaluation of the *archaka* or priest, the court held that the services of the *archaka* would not fall in any of the categories as contemplated by the definition. The court observed that the diety he propitiates cannot be looked upon as a profit-producing scheme or setup. Nor can the temple be equated to an industry or a commercial employer. The priest stands away from the general queue, with his distinctive dress, decorum, discipline and devotion and with his distinct duties and subtle services. There is all the difference between a mahout, cook or clerk, active in the precincts of temple or its corridors and office rooms and a priest placed in the sanctum sanctorum and silently saying his prayers.[19] In *Carona Sahu*, Ray J said:

> ... the designation of an employee is not of much importance and what is important is the nature of duties being perfomed by him. The determinative factor is the main duties of the concerned employee and not some work incidentally done. In other words, what is in substance, the work which employee does or what is in substance he is employed to do. Viewed from this angle, the employee is mainly doing supervisory work but incidentally or for a fraction of time, does also some manual or clerical work, the employee should be held to be doing supervision work. Conversely, if the main work is of manual, clerical or technical nature, the mere fact that some supervisory or other work is also done by the employee incidentally or only a small fraction of working time is devoted to some supervisory work, the employee will come within the purview of the 'workman' as defined in Section 2(s) of the Industrial Disputes Act.[20]

In this case, on a close scrutiny of the nature of the duties and functions of the shop manager with reference to the admitted terms and conditions of service of the employee, it was held that he was not a workman. Where an employee who was originally employed as a typist-clerk is subsequently designated as an officer-in-charge but his principal job on change of the designation was not shown as that of an officer nor was there any change in the remuneration, the change of the designation would not take him out of the definition of 'workman'.[21] Nor will the difference in salary make any difference.[22] In *Hongkong and Shanghai Banking Corporation,* the Calcutta High Court upheld the finding of fact recorded by the tribunal to the effect that the principal duties of the employee, whose service was terminated, were clerical in nature notwithstanding his promotion as 'staff officer' by the petitioner-bank. On this view of the matter, Chattopadhyay J, held that there was no ground to upset the said finding of tribunal that the employee was 'workman' within the meaning of s 2(s).[23]However, if the service 'conditions of certain workmen are changed by an agreement between the workmen and they can be held as members of the management staff and not workmen within the meaning of the Act, such workmen will cease to be workmen because of altered conditions but such an agreement will not take away the right of the workmen under this Act to raise a dispute that, in fact, they still continue to be workmen on account of the real nature of their duties. If, on consideration of the nature of the duties performed by the employees, they are, in fact, found to be workmen as defined in the Act, simply because they had agreed to be included in the catagories of officers, they cannot be precluded from claiming that they are still workmen.[24] It is the nature of duties and not the designation which determines as to whether an employee is a workman.[25] The test is the nature of the main duties of the employee. In other words, what is in substance the work which he does or what he was in substance employed to do. In the language of Desai J:

> Where an employee has multifarious duties and a question is raised whether he is a workman of someone other than a workman, the court must find out what are the primary and basic duties of the person concerned and if he is incidentally asked to do some other work, may not be necessarily in tune with the basic duties, these additional duties cannot change the character and status of the person concerned. In other words, the dominant purpose of employment must be first taken into consideration and the gloss of some additional duties must be rejected while determining the status and character of a person.[26]

For instance, if he is mainly doing supervisory work but incidentally or for a fraction of the time also does some clerical, manual or technical work, it would have to be held that he is employed in a supervisory capacity,[27] which excludes him from the definition of the 'workman'. Likewise, if the manual, clerical or technical work is only a small part of the main duties or is incidental to his main work which is not manual, clerical or technical, then again the workman will not fall in the definition of 'workman'.[28] In *Burmah Shell* (supra), it was held that if the main work is of manual, clerical or technical nature, the mere fact, that some supervisory or other work is also done by the employee incidentally or as a small fraction of his work, will not take him out of the purview of the definition of a 'workman'. It is not casual or occasional work which a particular employee does which is decisive of what is the nature of his employment nor decisive of the question whether he is employee at all falling within the definition. The principle is now well-settled that an employee must be held

to be employed to do that work which is the main work he is required to do even though he may be incidentally doing other type of work. In cases where an employee is employed to do purely one of the seven types of work, enumerated in the definition of 'workman', there would be no difficulty in treating him to be a 'workman' under the appropriate classification. However, in the complexity of the industrial and commercial organisations in practice, quite a large number of employees are frequently required to do more than one kind of work. An employee may be doing manual work as well as supervisory work, or he may be doing clerical work as well as supervisory work or he may be doing technical work as well as clerical work or technical work as well as supervisory work. In such cases, it would be necessary to determine under which classification he would fall for the purpose of finding out whether he falls in or goes out of the definition of 'workman'. The principle is now well settled that for this purpose, a workman must be held to be employed to do the work which is the main work he is required to do, even though he may be incidentally doing other type of work.[29]

Even if the main work of an employee involves some manual, clerical or technical work that by itself would not bring the employee with in the definition of workman' when such work is incidental to the main work, for instance, canvassing orders and promoting sales.[30] A distinction therefore, has necessarily to be made between the principal work of an employee and the ancillary duties involved in doing the principal work. In other words, even though a salesman is required to have some technical knowledge incidental to do some manual, clerical, or technical work in discharging his main duties, for instance promotion of sales of the employer's goods, he would not fall within the definition of 'workman' on account of the nature of his principal duties,[31] but an employee cannot be taken out from the category of a workman merely because he is described as a salesman. The question in each case will have to be decided with reference to the special facts and circumstances thereof. The mere description of a person as a salesman cannot be conclusive. The entire collocation of the duties assigned to him has to be considered.[32] If the main duty is of a manual, clerical or technical nature and selling is merely incidental to the duty, the situation would be different and the employee concerned would fall within the ambit of the definition of 'workman'.[33] The principal or main work in the employment of a person will have to be determined from the letter of appointment, the nature of the duty the employee is to perform in the course of his employment and other attending circumstances.[34]

Manual Work

'Manual work' in this definition is not necessarily confined to work by the application of hands but comprises work involving physical exertion as distinct from mental or intellectual exertion. Even workmen who do not do work with their hands but work with their legs or remain standing on duty would be doing manual work, for instance, members of watch and ward staff employed for security of the properties of a concern do the manual work.[35] However, if the manual work performed by a person is of an ancillary nature to his main duties which are not of a manual nature, he would not fall within the definition sheerly by virtue of such ancillary manual duty.[36] The labour appellate tribunal held that the work of a gate sergeant incharge of the watch and ward staff whose main duty is to look after the property of a factory by supervising his own men was not of a manual nature.[37] But in a later decision,[38] that tribunal held that the work of a jamadar of watch and ward staff, having no administrative control over the other members of the staff working under him was of a manual nature. This is the correct view of law while the correctness of the earlier decision is not free from doubt but the fact that the nature of a person's work was not 'supervisory' would not necessarily mean that his duties were mainly of a manual nature.[39]

Unskilled Work

An instance of unskilled work is provided in the decision of the Gujarat High Court in *Bata India,* where the workman was a salesman in a shoe shop. It was held that the nature of his work was of 'unskilled labour'. The fact that he tried to impress upon the customers that the shoes manufactured by the company were durable, was not his principal duty. The other instances of unskilled work are the work of loaders and unloaders of materials and goods in an industrial establishment. Likewise, the work of peons, daftries and sweepers is also the work of unskilled nature.[40]

Skilled Work

After the amendment, any type of skilled work performed by the employee will fall within the definition. The work of teachers teaching in schools has been held to be skilled work.[41] Likewise, the work of an artist employed by an advertising expert on work which could be done only by persons with artistic talent and requisite technique has also been held to be skilled work.[42] The work of a bench chemist in a sugar mill which consisted mainly of carrying out chemical analysis and recording results, with typing work, has been held to be skilled work.[43] Another instance of skilled work is the work of the compounder of a doctor.[44] The other instances of skilled work are the work of masons, carpenters and iron smiths etc. The Bombay High Court held that the functions performed by a laboratory assistant engaged by the directorate of health services of the state government were in the nature of a skilled artisan and, therefore, he would be a 'workman'.[45] Jewel appraisers engaged by a bank are workmen under s 2(s).[46]

Technical Work

The 'technical' nature of work was engrafted in the definition by the Amending Act of 1956. The word 'technical' has different meanings depending on the context in which it is used. The etymological meaning of the word 'technical' according to the *Oxford Dictionary* is 'of or pertaining to the mechanical arts and applied science generally, as in technical education, or technical school'.[47] The technical work depends upon the special mental training or scientific or technical knowledge of a person. The broad test is that if a person is employed because he possesses such faculties and they enable him to produce something as a creation of his own, he would be employed on 'technical work' even though in carrying out that work, he may have to go through a lot of manual labour; but if on the other hand, he is merely employed in supervising work of others, the fact that for the purpose of proper supervision, he is required to have technical knowledge, will not convert his supervisory work into technical work. In *Bombay Dyeing*, the Bombay High Court, held that a person can be said to be employed in a technical capacity, if he is in the first place a skilled person. Besides, he must have enough dexterity to discharge the work assigned to him with speed and accuracy. He must also have a skill. In the case of a person employed in a technical capacity, the application of a knowledge or art or a particular craft or work is the distinguishing feature. With the assistance of the knowledge he possesses, a person employed in a technical capacity is able to bring about a result which could not be brought about by a person, however skilled, who is to perform routine, repetitive work. A person employed in a technical capacity has to use his judgment and has to find out whether a particular work can be done in one manner or another and then do it in the manner in which he thinks it is better done. The work which results from the labour of such a person necessarily bears, at least in some small measure, the imprints of his personality and the knowledge of the person who does that work. It is not necessary that such a person must be innovative, but it must necessarily be a work, the contours of which are not predetermined before that work is actually performed by him in a technical capacity.[48]

Applying these tests, a camera operator working in the screen making department of textile mills was held not to be performing any technical work. An assistant engineer working in a sugar factory who was only looking after the work of workmen working under him as well as the concerned machines, and who was not responsible either for allocation of work to the workmen or for disciplinary control over the workmen was held to be doing technical work.[49] A chemist-in-charge of performing the work essentially of a technical nature, having power to recommend leave but no power to grant leave or to take disciplinary action is a workman.[50] Likewise, a qualified printing technologist appointed as a foreman in a job department of a printing press whose duty consisted of allocation of jobs, assignment of work, indenting materials, recommending leave, appraising work for promotion and also examining composed materials for getting mistakes corrected has been held to be a workman as his main function was that of a qualified printing technologist and the supervisory work was simply incidental to his main work.[51] The work of giving advice and guidance cannot be held to be an employment to do technical work.[52] Further, the mere possession of technical education is not sufficient. In order to fall within the ambit of the expression 'technical' as used in the definition, the employee must also have been 'employed' in the industry to do 'technical' work.[53] Highly qualified teachers possessing technical qualifications were held not to be workmen because they were not employed to do any 'technical' work. In *Bharat Bhawan*, the Supreme Court held that the 'artists' engaged by the trust, whose main object was the promotion of art and culture, could not be treated as skilled workmen, as their work was creative art, and no goods were produced in the trust nor was it meant for business purposes, and hence they were not workmen as defined under s 2(s).[54] On the construction of the definition prior to the amendment of 1956, the Supreme Court, in *Dimakuchi Tea Estate*, had held that persons belonging to the 'medical or technical staff were a different category from workmen.[55] But the Assam High Court has taken the view that besides the technical work of engineers or technicians, etc, the expression 'technicial' would also cover the work of a doctor who possesses the knowledge of human anatomy and pointed out that even in *Dimakuchi* (supra), the Supreme Court regarded a medical practitioner as a member of technical staff.[56]

By the amending Act 1956, two more categories of work were added to the categories of work, namely, 'supervisory' and 'technical' but a person who is employed in a supervisory capacity and draws wages exceeding Rs 500 per month or exercises functions mainly of the managerial nature, is excluded from the definition. No such restriction has been placed on a person doing 'technical' work. Nevertheless, the effects of the words, 'but does not include any such person', in the end of the first part of the definition read with cll (iii) and (iv), would be that any person employed to do 'technical' work would fall outside the purview of the definition of 'workman', if he: (i) is employed mainly in a managerial or administrative capacity; or (ii) being employed in supervisory capacity draws wages exceeding Rs 500 per mensem or exercises, either by nature of his duties attached to the office or by reason of the powers vested in him functions mainly of a managerial nature. Unless, therefore, a person employed to do any 'technical' work is excluded by virtue of cll (iii) and (iv), he will fall within the ambit of the definition of 'workman' irrespective of the amount of salary he draws or the nature of duties he performs. After the amendment, persons doing technical work such as draftsmen, engineers, assistant engineers, foremen, glass technologists, medical officers, compounders and doctors, etc, would fall within the definition of workmen. For instance, chemists working in *Burmah Shell* were held to be performing technical work and not working in a supervisory capacity. On the contrary, sales representatives and transport engineer were held to be falling outside the

definition of workman because the nature of their work did not fall in any of the four specified categories, in particular, the technical work, as their duty was to promote sales which could not be held to be technical work.[57]

The work of a personnel manager who was a qualified lawyer in giving advice and guidance to the management with respect to labour laws was held not to be of a technical nature.[58] A film cameraman has been held to be a 'workman' as film photography is technical work.[59] The pilots flying aircrafts of the air companies are treated as workmen irrespective of the fact that they draw heavy remuneration.[60] No doubt, a medical officer of an establishment will fall within the purview of the definition of workman as the nature of his work is 'technical',[61] the doctors, however, rendering only professional services to various establishments where no relationship of employment is created between parties will not be entitled to claim the status of a workman. It could not be the intendment of legislation to cover the professional doctors who have no relationship of employment with the establishment they serve in the definition of workman. A graduate apprentice who was appointed as a senior foreman and on the relevant date was working as a development officer carrying basic salary of Rs 1050 and dearness allowance of Rs 210, on the facts and in the circumstances of the case, was held to be a workman doing only technical work and not supervisory, administrative or managerial work.[62] A geologist working in a company is a workman. The mere fact that he was assisted by a driver, who was only to drive his vehicle and a helper, who was only assisting him in transportation of instruments could not make him a person performing supervisory duties.[63] A physiotherapist, who is performing the duties as assigned to him by the department or medical superintendent, exercises no function of managerial nature and is a workman as defined in the Act.[64] A general duty medical officer, who is in charge of a first-aid and male nurse, nursing attendant, sweeper and ambulance driver and all of them working under him in the first-aid post and taking instructions from him, is not a workman within the meaning of s 2(s).[65] A Draftsman working under the supervision of superiors is a workman.[66]

Operational Work

The expression 'operational' qualifying the word 'work' has been introduced by the Amending Act 46 of 1982.[67]The word 'operational' or any of its derivatives, has not been defined anywhere in the Act. The insertion of this expression, therefore, at once introduces superfluity and ambiguity. According to *Black's Law Dictionary*,[68] an 'operative' is 'a workman, a labour man, an artisan, particularly one employed in factories.' The *Shorter Oxford English Dictionary* says that an operative is a workman 'concerned with manual, or mechanical work' or 'a person engaged in work on production as a workman or artisan.'[69]*Webster's Third International Dictionary*,[70] defines an 'operative' as a person who is to do physical operations by hand or machines; occupied in productive labour; a skilled or unskilled person employed in an industry; one who operates or works in any branch of industry, trade or profession, a worker; a workman in any industry, art and an artisan or mechanic. From these etymological meanings ascribed to the word 'operative', it is obvious that any type of work in an industrial establishment performed by the workers, is 'operational' work. Every type of'operational work' would also fall in the other categories of work, *viz*, manual, unskilled, technical, clerical or supervisory, as well. The workers doing operational work may be called operatives. Though the contours of the other expressions used in qualifying the word 'work' have been delineated by judicial dicta, the dimensions of the expression 'operational' are hazy and vague. If the legislature intended to bring all types of work performed by the workmen in an industry within the perimeter of the definition, it was not necessary to use so many expressions to qualify the word 'work'. It would have been advisable to delete all the words after the words 'to do any' and before the word 'work' in the opening part of the definition. Then the relevant portion will read: 'workman' means any person (including an apprentice) employed in any industry to do any work for hire or reward'. This object could have been better achieved with precision and clarity by deleting all the adjectival expressions after the words 'to do any' qualifying the word 'work' in the opening part of the definition instead of adding an ambivalent expression like 'operational'. This would have obviated obscurity.[71]

Clerical Work

In common parlance, a clerk is one employed for doing routine work as a writer, copyist, account-keeper or correspondent in office. His work implies stereotype work, without power of control or dignity or creativeness. Clerical work, as ordinarily understood, is synonymous with routine, stereotype work which does not involve any initiative, control or dignity.[72] A clerk employed to do general office duties may be styled as a general assistant, but this does not necessarily confer upon him the rank of an officer.[73] Both manual and clerical work, in the sense in which these terms have been used in s 2(s), connote more or less routine work, skilled or otherwise, which does not require any material amount of initiative in its performance, the employee entrusted with such work not being required to perform substantial duties of a supervisory, directional or controlling nature. In ascertaining the true status of an employee, regard must be had not to any temporary arrangement that might be made as a measure of convenience but to his substantive position.[74] The duties of a clerk are not inconsistent with a limited amount of supervision and control over other employees, but in each case it will be essential to examine the facts and to determine what is the nature of the work. The question as to whether a particular person is doing clerical work or not, has to be decided by finding out the dominant nature of the work done by an employee.[75] The question is essentially one of fact and no general answer which can cover all cases is possible.[76]

In *Madikal Service Co-op Bank*,[77] the bank manager of a co-operative bank claimed to be a workman because certain of his duties involved clerical work. A single judge of the Kerala High Court found that the manager was in immediate and near control of the functions of the branch and was responsible for the executive administration even though he was functioning under the secretary and was subject to the control of the board of directors. The nature of his duries and functions were mainly managerial and whatever clerical work he might have been doing was only negligible. Since his employment was mainly of managerial and administrative nature, he would not fall within the definition of a 'workman'. A legal assistant, who is not discharging any functions of a managerial nature nor employed in a supervisory capacity, but tendering only legal advice as and when called upon by the management is a workman as defined in s 2(s).[78] A salesman who discharges the duties of providing service to farmers, maintaining records and expenditure connected with function of service centres, and timely submission of reports, etc, is essentially doing a job of clerical nature, and is a workman within the meaning of s 2(s) [79]but a single judge of the Gujarat High Court took a different view and held that a 'salesman' who collects the material and despatches the same as per the same order booked by him would not answer to the definition of workman, and he cannot invoke the machinery provided under the Industrial Disputes Act.[80] The tour executive of a travel agency, whose job is to look after the tourists arriving at the airways and their lodging, make out and verify their bills, etc, is a workman within the meaning of s 2(s).[81] In *Sanjeev Kumar,* the Punjab and Haryana High Court held that it would be dangerous to adjudge the nature of work from the allowance a man was getting. The nature of work was allotted to him by virtue of his post. A senior accounts assistant, re-designated as accounts executive, doing the work of preparation of vouchers, details of cheques, etc, and having no managerial or administrative powers, would be a workman within the meaning of s 2(s).[82]

(i) Illustrations of Clerical Work:

An employee working as an accountant in the branch office of a company doing mainly clerical work, ie, maintenance of general ledgers, journals, store-ledger and the preparation of drafts and letters in connection with the maintenance of his accounts was directed to take charge of the branch office from the branch manager temporarily and he was doing the additional work of supervising the work of the other clerks, disbursing salaries and replying to the letters received by the office, according to instructions from the head office for some time. In the facts and circumstances of the case it was held that the employee was doing the work of a clerical nature and the addition of some duties temporarily did not alter his status as a clerk.[83] An assistant manager of a bank whose duties were purely of a clerical nature and who put up notes regarding leave and staff matters to the manager who passed orders on them was held to be doing clerical work.[84] A cashier whose duties were not of any directional or supervisory nature was held, to be performing duties of clerical nature.[85] A depot superintendent and an assistant depot superintendent employed by an oil distributing company performing duties substantially of a clerical nature were held to be clerks.[86] The work of a draughtsman employed by a machinery manufacturing company to make copies of drawings was held to be of a skilled clerical nature.[87] A godown keeper whose work was of a purely clerical nature was held to be a clerk.[88] The work of an inspector in a joint audit department of a commercial organisation was held to be mainly of a clerical nature.[89] Proof-readers in offices of newspapers who read and correct proofs which involves no judgment and the nature of whose work is more or less mechanical were held to be mainly doing clerical work.[90] The work of a sub-agent at the main office branch of a bank whose duties were purely of clerical nature, but who had incidentally to do some supervisory work also was held to be clerical.[91] A lady secretary engaged to do stenographical, clerical or secretarial work of a confidential nature was held to be doing work only of clerical nature.[1] The work of a time-keeper whose duty was only to check arrivals and departures was held to be a work of clerical nature.[2] A touring representative employed by a film distributing company to check sales and sale proceeds at various centres who had to submit reports of checking sales to the company was held to be doing work only of a mechanical nature and hence purely of clerical nature.[3] A watch and ward inspector in a sugar factory who had also to purchase materials for stores, spare parts, secure permits and fitness certificates, submit reports, maintain a diary of the work done all under the direction of the management without any independent initiative and who during the working season had to perform some supervisory duties along with maintaining a number of registers involving a lot of clerical work was held to be a workman on account of the preponderance of clerical duties over supervisory duties.[4]

(ii) Illustrations of Non-clerical Work:

The work of an advertising manager, employed *inter alia* for securing advertisement for a journal and to devise ways and means of increasing the circulation.[5] The work of chemists employed in sugar mills even though they had incidentally to record the results of their chemical analysis coupled with ancillary work of typing.[6] Doctors and compounders employed in the dispensaries of industries.[7] The work of sub-editor of a story-magazine to make additions, alterations or corrections in news items, stories or articles and select strories and perform duties which involve literary talents of a high order which also involve exercise of judgment, initiative, and creation.[8] The work of a person employed as an engineer, later resident engineer incharge of a very important engineering construction which required technical knowledge, initiative and independent judgment and was not merely a routine mechanical type of work.[9] The duties of a gate sergeant incharge of watch and ward staff in a tannery to look after the property of the factory by supervising his own men.[10] The work of

welfare officers in a commercial education institution.[11] The work of teachers working in education institutions.[12] Porters and Graders waiting in the marketing yard and engaged by merchants and growers for loading, unloading and grading of agricultural products are not the workmen of the Cooperative Marketing Society - a society which was formed with the object of protecting the growers from exploitation by traders - as they are neither appointed by the society nor does the society exercise any control over them.[13] The view expressed by Chalapathi J of the Punjab and Haryana High Court in *Darshan Lal*,[14] did not seem to have found favour with the Supreme Court. A legal assistant in a sugar mill performing duties such as preparing written statements and notices, recording enquiry proceedings, giving opinions to management, drafting, filing pleadings and representing management in all cases and also conducting departmental enquiries does not perform a stereotype job. His job involves creativity and hence, he cannot be said to be workman.[15] In *Muir Mills*, the facts disclosed that the respondent-workman was appointed by the appellant-company as a legal assistant. It was found that he was working in a supervisory capacity and was supervising court cases and whenever necessary preparing draft replies to matters that were pending in the court. Drawing a distinction between profession and occupation, Lakshmanan J (for self and Kabir J) observed:

> ... if we draw a distinction between occupation and profession we can see that an occupation is a principal activity (job, work or calling) that earns money (regular wage or salary) for a person and a profession is an occupation that requires extensive training and the study and mastery of specialized knowledge, and usually has a professional association, ethical code and process of certification or licensing. Classically, there were only three professions: ministry, medicine, and law.These three professions each hold to a specific code of ethics, and members are almost universally required to swear some form of oath to uphold those ethics, therefore "professing" to a higher standard of accountability. Each of these professions also provides and requires extensive training in the meaning, value, and importance of its particular oath in the practice of that profession. ... A member of a profession is termed a professional. However, professional is also used for the acceptance of payment for an activity. Also a profession can also refer to any activity from which one earns one's living, so in that sense sport is a profession. ... it is clear that respondent No.1 herein is a professional and never can a professional be termed as a workman under any law.[16] (Paras 36-38)

In yet another case involving a similar set of facts in *Glaxo Smithklin Pharmaceuticals*, a person, who was appointed as 'Industrial Relations Assistant', was found to have been performing functions, such as tendering legal advise to the management from time to time, preparation of draft enquiry report, conducting domestic enquiries and holding conferences with advocates in relation to the company's acts. It was further found that, as an employee in the category of management staff, his conditions of service were different than those provided for the workers of the company, and that the leave and pension scheme applicable to him were not covered by the settlement reached between the company and its workmen. Pasayat J (for self and Panta J), upheld the decision of the High Court to the effect that, in the light of the nature of functions performed by the appellant which are managerial in nature, he could not be considered to be a workman within the meaning of the Act.[17]

Supervisory Work

Section 2(s), as it originally stood, defined a workman as meaning, *inter alia*, any person employed (including an apprentice) in any industry to do any skilled or unskilled, manual or clerical work for hire or reward. Under this, employers often claimed that the workmen concerned were officers or members of the supervisory staff and as such did not fall under s 2(s), and workmen used to contend that they were doing merely clerical or mechanical work and did not fall in the class of officers and supervisors. Under the present definition, a person engaged to do supervisory work unless he falls within the exception of cl (iv) shall fall within the definition. It is, however, evident from the definition that the employee in order to fall within the definition of workman must have been 'employed' in a 'supervisory capacity'. Merely performing some supervisory duties will not take the employee out of the definition of workman. The word 'supervision' means to oversee, to look after. Therefore, 'supervision' which is relevant in this connection is the supervision done by an employee in a higher position over the employees in the lower position. Such supervision is the supervision of the work which is in connection with the industry in question.[18] In the words of Hidyatullah J:

> The word 'supervise' and its derivatives are not words of precise import and must often be construed in the light of the context, for unless controlled, they cover an easily simple oversight and direction as manual work coupled with a power of inspection and superintendence of the manual work of others.[19]

The words have to be construed in the context of the definition but what determines the question whether a person is doing supervisory work or not is the nature of the duties and functions assigned to him. Supervision may be in relation to the supervision of an automatic plant. The person who attends on such a machine may do either technical or manual work but he does not do supervisory work merely because he looks after the machine. The word 'supervisor' means a person who oversees the work of others. It means 'overseer'. A person can be said to be a supervisor if there are persons working under

him, over whose work he has to keep a watch. In other words, he is that person who examines and keeps a watch over the work of his subordinates and if they err in any way, corrects them. It is his duty to see that the work in any industrial unit is done in accordance with the manual, if there is one, or in accordance with the usual procedure. It is not his function to bring about any innovation. It is not his function to take any managerial decision, but it is his duty to see that the persons over whom he is supposed to supervise, do the work assigned to them according to the rules and regulations. The central concept of supervisor is the fact that there are certain persons working under him. If a person is doing any work which does not require him to look after or inspect or examine the work of persons who are subordinate to him or working under him, that person cannot be said to be a supervisor. Supervision necessarily refers to persons working under the supervisor and it does not extend to supervision of plant and machinery. Checking the plant and the machinery will not make a person supervisor. In other words, supervision means 'supervision over men and not machines'.[20] The essence of 'supervisory' work is the supervision by one person over the work of the others. Supervision contemplates direction and control. A 'supervisor', as understood in s 2(s) really means that the person exercising supervisory work is required to control the men and not the machine.[21] It is not necessary that a supervisor must be supervising his fellow employees. It is enough that the supervisory work must be working in relation to the industry in which the person is employed but the work in relation to the industry may be done by an independent contractor whose work may also require some supervision.[22] His duty is to see how the employees will be engaged in different works of production and maintenance.[23]

The Patna High Court in *Bipin Bihari*, observed that merely because it has not been shown that the development officers of the Life Insurance Corporation of India have no power of assigning duties and distribution of work among insurance agents working in their area, it cannot be held that their work is not supervisory in character. Likewise, the power of appointment and dismissal or disciplinary power are not necessary incidents of supervisory power, they more properly appertain to managerial power. Even in the absence of such power, a person can supervise the activities of other employees working under the same master.[24] For exercising 'supervisory' power, it may often be necessary that the 'supervisor' himself must have technical expertise, otherwise he may not be in a position to exercise proper supervision of the workmen handling sophisticated plants and machineries. But if a person is required to render his technical knowledge in the matter of production alongwith other workmen as directed by other supervisors, then he cannot be said to be exercising supervisory works or administrative works.[25] Ordinary supervision work is not of a 'supervisory' nature for the purposes of the definition.[26] Having regard to the categories of service indicated by the use of different words like 'supervisory', 'managerial' and 'administrative', it is not necessary to import the notions of one into the interpretation of the other. Such words are advisedly loose expressions with no rigid frontiers and too much subtlety in trying to precisely define where supervision ends, management begins or administration starts should not be encouraged for that would be theoretical and not practical. It should be broadly interpreted from common sense point of view where tests will be simple both in theory and their application. Interpreting so:

(i) a supervisor need not be a manager or an administrator;

(ii) he can be a workman so long as he does not exceed the wage limit of Rs 1600 per month (as it then was); and

(iii) irrespective of his salary, he is not a workman who is to discharge functions mainly of managerial nature by reason of the duties attached to his office or the powers vested in him.[27] A superintendent, quality control, drawing a salary exceeding Rs 1600 per month (as it then was) is not a workman.[28]

Dealing with the disputes with respect to the nature of the work performed by an employee as to whether it was of supervisory nature or otherwise, industrial adjudication generally considers the essence of the matter and does not attatch undue importance to the designation of the employee or the name assigned to the class to which he belongs. It is always a matter of determining what the primary duties of an employee were—Does he do clerical or manual work? If the answer is in affirmative, he is a workman. Or are his duties of supervisory nature? If the answer is in affirmative, he is not a workman. In considering the latter aspect of the problem, industrial adjudication generally has taken the view that the supervisor or an officer should occupy a position of command or decision and should be authorised to act in certain matters within the limits of his authority without the sanction of the manager or other supervisors.[29] To come to a conclusion that a person is working in a supervisory capacity, it is necessary to prove that there were at least some persons working under him whose work he is required to supervise. The mere fact that a person is incharge of a section, would not make him a supervisor if there is nobody else in the section whose work is to be supervised. A person cannot be said to be working in a supervisory capacity merely because he is to supervise the person, who helps him in doing the work, which he himself is to perform. For instance, a clerk who has been given the assistance of a peon, cannot be said to be working in a supervisory capacity. Likewise, training by a chief analytical chemist to an apprentice as a part of work by itself cannot become supervisory work. It is necessary to prove that the person is working in a supervisory capacity or exercising supervisory power.[30] When one talks of a person working as a supervisor, one understands it to mean a person who is watching the work being done by others to see that it is being done properly.[31] Thus, in determining the status of an employee, his designation is not decisive; what determines the status is the consideration of the nature of his duties and the functions

assigned to him.[32] Even the fact, that the work performed by a workman is of responsibility and onerous nature, would be immaterial for determining the question as to whether his work is of supervisory character or not.[33]

These principles, though on their face appear to be simple, in their application have often vexed the courts. In *May & Baker* (supra), on the construction of the definition of 'workman' before its amendment in 1956 in which the word 'supervisory' did not occur, the Supreme Court held that the employee concerned whose main work was that of canvassing and incidental to that work he did some clerical or manual work as well, was not a 'workman' within the meaning of s 2(s). As the use of the word 'mainly' accentuates its significance, the employee was held not to be a 'workman' because, the manual work was merely incidental to his main duties. Later, in *South India Bank*, referring to the work of an accountant who occasionally acted in place of the agent, the court observed that the mere fact that he was designated as accountant would not take him out of the category of 'workman'. He was merely a senior clerk, doing mainly clerical duties going by the designation of the accountant and was in reality in place of the agent when the agent was absent, did not form part of his principal and main duties.[34] In *Ananda Bazar Patrika*, it was held:

> The question, whether a person is employed in a supervisory capacity or on clerical work, in out opinion, depends upon whether the main and principal duties carried out by him are those of a supervisory character, or of a nature carried out by a clerk. If a person is mainly doing supervisory work, but, incidentally or for a fraction of the time, also does some clerical work, it would have to be held that he is employed in supervisory capacity; and, conversely, if the main work done is of clerical nature the mere fact that some supervisory duties are also carried out incidentally or as a small fraction of the work done by him will not convert his employment as a clerk into one in supervisory capacity.[35]

In *State Bank of Hyderabad*, the Supreme Court had to consider the claim of certain employees for payment of special allowance granted to 'supervisors' under certain bank awards, ie, Shastri and Desai awards. The stand of the bank was that in order to claim supervisory allowance, the employees must establish that the main or essential duties entrusted to them and actually discharged by them were duties and functions of a supervisory nature. The court observed:

> Before a person can claim the supervisory special allowance, he must establish that he has discharged the duties and functions which are similar to or the same as the duties or functions assigned to supervisors coming under category...In deciding the status of an employee claiming the special allowance, the designation of the employee is not decisive and what determines the status is a consideration of the nature of the duties and functions assigned to the employee concerned.[36]

Where the labour court, having held that the employee was holding a supervisory position and hence not a workman within the meaning of s 2(s) and hence the reference was liable to be rejected, yet directed the management to pay Rs 75000 as compensation, the High Court quashed that part of the award of the labour court by which compensation was awarded and held that the remedy of the employee could lie in the civil court only.[37] The accountant of a company whose predominant and primary duties were supervisory in nature and his main duty was to supervise the accounting section of the factory of which he was the head, is not a workman, even though some of the work he was doing in the absence of the clerks or in association with clerks in the preparation of accounts, which was only incidental to his main job to oversee the work of his subordinates.[38] Maintenance supervisor, who is treated as part of management personnel having separate pension and gratuity schemes and was delegated the duties of recommending leave, calling for requisition from stores and evaluating the work of employee below him is not a 'workman' within the meaning of s 2(s).[39] A senior service engineer, whose job was installation, servicing and repair of xerox machines, is a 'workman' within the meaning of s 2(s), although he was drawing a salary of Rs 3400 per month, more so, when no evidence was led by the employer to show that his job was managerial or supervisory in nature.[40] The question whether an employee performs supervisory duties or not is pre-eminently a question of fact.[41] A person who is doing manual, clerical and technical work will come within the definition of workman if incidentally he does some supervisory work also. In determining as to whether certain categories of employees would fall in the definition of workmen or not or in order to exclude a man from the definition of industry, the employer has specifically to plead and prove the fact that the employee concerned worked mainly and principally in supervisory capacity or in managerial or administrative capacity or supervisory capacity and was drawing wages exceeding Rs 1600/-, now Rs 10,000/-. In the absence of precise and positive evidence to prove the exact nature of work which the employee was performing, it cannot be held that he was doing administrative or supervisory work.[42] A traffic inspector working in a road transport corporation whose duties were predominantly supervisory in character, could not be held to be an artisan and, therefore, not a workman.[43]

(i) Illustrations of Supervisory Work:

The work of an employee as head of a department having power of control, supervision and direction over his department for the purpose of recruitment, promotion, etc.[44] The work of labour officer in a jute mill involving exercise of initiative,

tact and independence.[45] The job of an assistant engineer working as shift engineer having control over workmen working under him.[46] The duties of a person employed as district mains engineer employed by an electricity supply company who has to see other employees working under him discharge their duties properly.[47] The work of a gate sergeant incharge of the watch and ward staff of a tannery whose main duty was to look after the property of the factory by supervising his own men.[48] The work of an assistant weaving supervisor in a jute mill.[49] The work of the depot superintendents, and assistant depot superintendents involving a considerable amount of initiative to perform them; the duties performed by transport engineers; blending supervisors and the foreman and depot superintendent the foreman (chemicals) are supervisory in nature in view of the principal duties performed by them. Incidentally, they were also drawing salary in excess of Rs 500 per month in terms of the exception under sub-clause (iv).[50] The work of a personnel manager who was a qualified lawyer in giving advice and guidance to the management with respect to labour laws was held to be of supervisory nature.[51] Development officers of the Life Insurance Corporation of India supervising the work of the agents in promoting the sales of the insurance policies are doing supervisory work.[52] Workmen who were promoted as sub-managers and are governed by separate terms and conditions were not 'workmen' within the meaning of s 2(s).[53]

(ii) Illustrations of Non-supervisory Work:

The work of an auditor performing the duties of checking of accounts which is purely mechanical in nature and does not involve any supervisory function.[54] The work of a teller in a bank which does not show any element of supervisory character.[55] The duties performed by the fuelling superintendent were held not to be mainly or substantially of supervisory nature but were mainly of a manual nature. Hence, they were not excluded from the definition of workman by exception (iv) though they were drawing salary of more than Rs 500 per month.[56] A mechanic doing ordinary supervisory work of supervising automatic machines would not be doing 'supervisory' work.[57] An inspector of an insurance company, whose main duties involve procuring business to the management, organising and developing the business within the allotted area, is not a 'workman' within the meaning of s 2(s). If in the process of procuring business, he collects cash and gives receipt, it is only an incidental duty being performed by him along with his main duties, which would not make him a workman.[58]

Officers:

An officer is generally invested with the power of supervision and control in contradistinction to the stereotype work done by a clerk.[59] He generally occupies a position of command or decision and is authorised to act in certain matters within the limits of his authority without the sanction of his superiors.[60] In *SK Verma* (supra), from the terms and conditions of the appointment of a Development Officer of LIC, the Supreme Court noticed that he was a whole-time employee of the corporation. His principal duty was to organise and develop the business of the corporation in the areas allotted to him and for that purpose to recruit active and reliable agents, to train them to canvass new business and to render post-sale services to policy-holders. He was expected to assist and inspire the agents; he was expected to stimulate and excite the agents to work and thus he was to be a friend, philosopher and guide of the agents working within his jurisdiction and no more, but he had no authority whatsoever to bind the corporation in any way. He had no authority to appoint agents or take disciplinary action against them. Nor did he supervise the work of the agents. The agents were not his subordinates. Nor did he have any subordinate staff. In these circumstances, the court held that he was a 'workman'. This case was wrongly decided apart from reflecting gross judicial indiscipline on the part of the learned judge, in so far as the issues raised in the case were squarely covered by *May & Baker* and *Burmah Shell* (supra).

It was in *HR Adyanthaya* that a Constitution Bench finally and flatly rejected the judicial aberrations of grave magnitude surfaced in the decision of Reddy J, in *SK Verma*, and very rightly so. Justice Sawant (for self, Singh, Mohan, Ray and NP Singh JJ), peremptorily held that *SK Verma* was decided *per incuriam*.[61] The question raised in *Adyanthaya* was: whether a 'medical representative' is a workman within the meaning of s 2(s) ? Justice Sawant referred to the relevant provisions of SPECSA and held in the negative, as the nature of work they perform could not be said to fall under any of the expressions, ie, 'skilled', 'clerical, 'technical' or 'operational'. The learned judge highlighted the fact that in *Ved Prakash Gupta* too, the Bench did not refer to *May & Baker*, *WIMCO* and *Burmah-Shell* cases. The learned judge did not, however, hold *Ved Prakash Gupa* as *per incuriam*. But, the fact remains that *Ved Prakash* too was indeed *per incuriam*, in the light of the fact that the said decision was given contrary to, and in total ignorance of, the earlier decisions which were binding on the Bench. In *Mukesh Tripathi*, the facts briefly were: the appellant was appointed by LIC as apprentice development officer to be imparted training for a period of one year, whereafter he was to be appointed as a development officer, provided his work and conduct were found satisfactory. His apprenticeship was terminated at the end of one year. The tribunal held that since he was terminated after completing one year, he was a workman, which was set aside by the High Court. Upholding the decision of High Court, Sinha J, observed:

> It may be true...that *SK Verma* (*supra*) has not been expressly overruled in *HR Adyanthaya* (supra) but once the said decision has been held to have been rendered *per in curiam*, it cannot be said to have laid down a good law. This Court is bound by the decision

> of the Constitution Bench. ... A 'workman' within the meaning of Section 2(s) ...must not only establish that he is not covered by the provisions of the Apprenticeship Act but must further establish that he is employed in the establishment for the purpose of doing any work contemplated in the definition.[62]

It is submitted that *Adyanthaya* and *Mukesh Tripathi* were consistent with the principles laid down in 1960s and 1970s and were right, whereas the decisions in *SK Verma* and *Ved Prakash Gupta* were *per incuriam*, wholly misconceived and completely flawed. The apex court has rightly rejected the faulty reasoning and perverse conclusion in these cases. A purchase officer, in a company manufacturing printed packing material work involving specialized knowledge of machinery and material purchased and of the market, performs mainly managerial functions, and hence is not a workman.[63] In another case involving a similar set of facts, the learned judge held that a person who was appointed as Asst Puchase Officer (Logistics Management) and performs functions such as appraisal of staff, assessing and verifying the work done by subordinates is a 'workman'.[64] In *Kirloskar Electric Co*, Agarwal J, of Delhi High Court observed that the designation of Accounts Officer or Assistant Manager is only a misnomer as long as the nature of duties performed by the incumbent suggest that he was performing clerical duties, and that the employee was being appointed for a fixed term of three years and renewing the contract every time only with a view to deny the benefits available to him under the Act. On this view of the matter, the learned judge held that there was no merit in the writ petition.[65] In *Standard Chartered Bank*, the facts were: the respondent workman was appointed as a Personal Financial Consultant and the duties assigned to the incumbent included "*achieving allocated business targets, ensuring high quality customer service, ensuring external and internal compliance on all branch transactions, handling difficult customer situations and contributing to the overall achievement of business growth*." While setting aside the award passed by labour court directing her reinstatement, Chandrachud J, of Bombay High Court held that the labour court had erred in so far as it did not have regard to the dominant nature of duties assigned to her.[66] It is significant that this decision of the learned single judge was upheld, in appeal, by the Division Bench of Bombay High Court comprising Ms Ranjan Desai and Mr Ranjit More, JJ[67]A surgeon employed in a eye hospital is a professional who is required to use his skill and knowledge in diagnosing and treating patients, and he cannot be said to be a 'workman' within the meaning of ID Act.[68]

Persons Excluded

The definition specifically excludes all such persons who fall in any of the following four cases even though they may be satisfying the requirements of the main section. Once it is shown that the concerned employee is performing any skilled or unskilled, manual, supervisory, technical or clerical work, then he shall be considered to be a 'workman' unless he falls under any of the excluded cases. The exclusion has to be proved by the party which claims that the case falls in any of the excluded categories.

Sub-clause (i): Armed Forces

This clause excludes the following categories of persons from the definition who are subject to:

(1) The Air Force Act 1950 (45 of 1950), or

(2) The Army Act 1950 (46 of 1950), or

(3) The Navy Act 1957 (62 of 1957).

Section 9 of the Army Act 1950 (46 of 1950) does not make any person subject to the Army Act, but it only declares civilians of defence services to be on active service. The employees employed in the engineering stores depot of the defence establishment under the Ministry of Defence, therefore, would not be subject to the Army Act 1950. Accordingly, the employees not being in active defence service cannot be excluded from the definition of workmen.[69]

Sub-clause (ii): Police and Prisons

This clause excludes any person who is in the police service or an officer or other employee of a prison. In *Hussan Mhasvadkar*, the Supreme Court held that the powers of the Inspector appointed by the Bombay Iron and Steel Labour Board constituted under Maharashtra Mathadi, Hamal and Other Manual Workers (Regulation of Employment) Act 1969, and the duties and obligations cast upon him are identical and akin to law enforcing agency or authority and are also at part with a prosecuting agency in the public law field, and hence he is not a 'workman' under s 2(s).[70]

Sub-clause (iii): Managerial or Administrative Capacity

This clause excludes the persons working in 'managerial or administrative capacity' from the purview of the definition, even though they may be satisfying other ingredients of the definition.[71] The words 'managerial or administrative capacity'

have not been defined in the Act, therefore, have to be interpreted in their ordinary sense. In order to be in a position of management, it is not necessary that the employee should be at the top of the heirarchy or that he should have absolute power in any respect. It is not even necessary that the individual should be in the sole control of an organisation or of a department of that organization. The clause speaks of persons 'employed mainly in a managerial or administrative capacity'; it does not say what they have to be in management. But it is not difficult to say that the management which the section envisages and with which a person may be entrusted may be in respect of matters falling within a department, sector or compartment of the establishment. It would not be right to say that a person is not in a position of management unless he has jurisdiction over any definite territory; managerial position can be attained also inside a department. It is not necessary that the person should have the power of making appointments. If an individual has officers subordinate to him whose work he is required to overlook, if he has to take decisions and also the responsibility for ensuring that the matters entrusted to his charge are efficiently conducted and an ascertainable area or section of work is assigned to him, an inference of a position of management would be justifiable.[72] Managerial or administrative functions require a person to control the work of others. For instance, a branch manager of a bank exercising all managerial powers on account of the nature of the duties attached to the post of a manager could not come under the definition of 'workman'[73] It does not mean that a person, who does some work and gets assistance for doing that work, can be described as a person who is working in a managerial or administrative capacity.[74]

The mere designation by which a person is designated is not conclusive of his status as an officer; industrial adjudication has to look to the nature of the duties assigned to the person concerned.[75] In order to take an employee out of the definition of a 'workman', it is necessary to show that he is employed, in fact and substance, mainly in a managerial or administrative capacity.[76] The fact whether the supervisory functions predominate or the functions are mainly of a managerial nature is very difficult to assess and almost impossible to determine without clear and adequate evidence.[77] The mere designation of a person as a manager or administrator of an industry is not sufficient to conclude that he is not a workman. An adjudicator has to see whether he is or was employed in the industry to do any managerial or administrative work. It is, however for the employee to specifically state and establish before the adjudicator that he was a workman and was not employed mainly in a managerial or administrative capacity.[78] An employee whose substantial duty was only that of a security inspector at the gate of the factory premises could not be excluded from the definition of 'workman' because he was not performing the duties either of managerial or supervisory nature.[79] The management has to raise a specific plea before the adjudicator that the workman is not a workman for the reason of being employed in a managerial or administrative capacity. In case another plea is taken, for instance, that the employee was not a workman being employed in a supervisory capacity and drawing wages more than Rs 1,600 which is rejected by the tribunal, the management will not be permitted to make a somersault and take the plea that the employee was employed in a managerial or administrative capacity.[80] Mere reference of the dispute pertaining to a manager cannot confer jurisdiction on the labour court or tribunal, having regard to the fact that the employee was not a workman under s 2(s).[81] A person appointed as assistant electrical engineer and promoted to the level of factory administrator and manager (special assignment) is not a 'workman', and hence, not entitled to relief under the Act.[82]

An employee designated as manager (research and development) and entrusted with the job of promoting and projecting company's image, creating new products, continuous investigation and identification of alternative materials for substitution in the existing product range, finding remedies for existing problems in order to improve quality and efficiency, etc, is a workman.[83] The development officer of LIC of India is not a person in administrative or managerial cadre and as such is a 'workman' within the meaning of s 2(s).[84] Where the management had treated the employee as workman under s 2(s) for the purpose of issuing charge sheet and conduct of enquiry, it is estopped from taking the stand before the labour court that the delinquent was not a workman.[85] The secretary of a cooperative society whose responsibility is the management of affairs and executive administration of the society, as stipulated in its bye-laws, is not a workman within the meaning of s 2(s).[86] In *Press Trust of India*, a single judge of Madras High Court held that persons performing managerial or supervisory functions and are drawing more than Rs 1600/- pm (now Rs. 10,000/-), on facts are not workmen within the meaning of s 2(f)(i) and (ii) of the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act 1955 [WJONE (CoS) & MPA 1955].[87] A Pastor in a Church is not a workman under s 2(s) of IDA.[88] In a yet another interesting case in *Manoranjan Chakraborty*, the employer issued a charge-sheet to an employee and conducted domestic enquiry as provided for in the standing orders of the company culminating in his dismissal from the service. The tribunal passed an award holding that the reference of the dispute by the government was not maintainable as he was not a 'workman' within the meaning of the ID Act. Aggrieved by the said award, the employee approached the High Court. While remanding the case to the tribunal, PK Ray J, of Calcutta High Court held that the respondent-employer led the employee to believe that he was a 'workman' and conducted domestic enquiry as per certified standing orders; hence the company was estopped from pleading that the petitioner was not a workman but supervisor. The learned judge observed that the aforesaid point was not considered by the tribunal with the result its decision was vitiated with perversity and illegality.[89] Branch Manager of a co-operative bank is not a 'workman'.[90]

Sub-clause (iv): Supervisory Capacity

A person doing work of a 'supervisory' nature has been added in the definition of 'workman' by the Amending Act of 1956 but this clause excludes such a person who being employed in supervisory capacity:

(1) draws wages exceeding Rs 1,600 per month; or

(2) exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.[91]

Thus, any person employed in an industry to do any supervisory, technical or clerical work for hire or reward is a 'workman'. But cl (iv) contemplates that a person employed in a supervisory capacity will also be a workman provided he does not draw wages exceeding Rs 1,600 per mensem.[92]Ordinarily, a supervisor or an officer occupies a position of command or is authorised to take independent decisions and is authorised to act in certain matters within the limits of his authority without the sanction of his supervisors.[93] But in determining the question as to whether a person is employed in a supervisory capacity or otherwise, the mere designation is not decisive of the nature of employment. The question whether a person is employed in a 'supervisory' capacity or on clerical work, depends upon whether the main and principal duties carried out by him are those of a supervisory' character or of a nature carried out by a clerk. If a person is mainly doing 'supervisory' work, but, incidentally or for a fraction of the time, also does some clerical work, he would be deemed to be employed in a 'supervisory' capacity. For instance, a foreman working in the job department of a newspaper press whose duty required him to ensure output by efficiently managing the manpower, machines and materials and who was required to recommend leave, appraise work for promotion and indenting material has been held to be a supervisor.[94] Conversely, if the main work done is of a clerical nature, the mere fact, that some supervisory duties are also carried out incidentally or as a small fraction of the work done by him, will not convert his employment as a clerk into one of supervisory capacity.[95] An employee employed in the main capacity of a supervisor discharging the duties of allocation of jobs, assignment of work, recommendation of leave, carrying out of promotional appraisals, but incidentally discharging other technical work will not fall within the definition of 'workman'.[96] The question whether a person is a 'workman' or not is a mixed question of fact and law, and where it is found that the employee was working as quality assurance in-charge of the company, most of his duties are supervisory and managerial in nature, and he could not be said to be a workman.[97] In *Reserve Bank Employees' Assn*, an ingenious argument was worked up before the Supreme Court on behalf of the workmen for drawing a distinction between the word 'work' in the main part of s 2(*s*) and the word 'capacity' in cl (iv). It was suggested that the Amending Act 1956 was enacted recognising the same difficulty as was experienced in the United States of America in enacting the Taft-Hardey Act after the decision in *Packard Motor Car*,[98] and may be said to have adopted the same tests by making a distinction between 'work' and 'capacity'. It was argued that these tests provided for that twilight area where the operatives (to use a neutral term) seem to enjoy a dual capacity. But after noticing the changes introduced by the Amending Act of 1956, the court repelled the argument. Speaking for the court, Hidayatullah J, said:

> But the unity between the opening part of the definition and clause (iv) was expressly preserved by using the word 'such' twice in the opening part. The words, which bind the two parts, are not—'but does not include any person'. They are—'but does not include any such person' showing clearly that what is being excluded is a person who answers the description 'employed to do supervisory work' and he is to be excluded because being employed in a 'supervisory capacity' he draws wages exceeding Rs 500 per month, or exercises functions of a particular character.

Then after referring to the American statutes and the decision relied upon in the argument, the court went on to say:

> The scheme of our Act is much simpler, than that of the American statutes. No doubt, like the Taft-Hartley Act, the Amending Act of 1956 in our country was passed to equalise bargaining power and also to give the power of bargaining and invoking the Industrial Disputes Act to supervisory workmen.

And then concluded:

> Workman here includes an employee employed as supervisor. There are only two circumstances in which such a person ceases to be a workman. Such a person is not a workman if he draws wages in excess of Rs 500 per month or if he performs managerial functions by reason of a power vested in him or by the nature of duties attached to his office. The person who ceases to be a workman is not a person who does not answer the description 'employed to do supervisory work' but one who does answer that description. He goes out of the category of 'workmen' on proof of the circumstances excluding him from the category.[1]

For instance, assistant engineers employed by the Kerala State Electricity Board drawing salary over Rs 500 per month and performing supervisory duties were held to be falling under the excluded category and as such not to be workmen.[2] Likewise, the development officers of the Life Insurance Corporation of India supervising the development of the business of the corporation in promoting the sales of the insurance policies through the insurance agents working in their areas have been held to be performing supervisory work.[3] But an employee who was admittedly performing the duties of supervisory character was held to be a workman because the management had failed to show that he was drawing wages exceeding Rs 500 per month.[4] It is only the persons employed in 'supervisory capacity' drawing wages exceeding Rs 1,600 per month or performing functions mainly of managerial nature who have been excluded from the definition. Clause (iii) excludes the persons employed in an industry; if they are employed mainly in a 'managerial or administrative capacity'. But before a person who is doing supervisory work and whose wages do not exceed Rs 1,600 per month, can be taken out of the category of workmen, it must be shown that he is employed in fact and in substance mainly in a managerial or administrative capacity.[5] If a person is employed to do any work which is not in a managerial or administrative capacity, he will not be excluded from the definition of 'workman' even if he draws wages more than Rs 1,600 per month.[6] Hence a person employed to do technical work, for instance, an engineer, a pilot of an aircraft, a technologist or a doctor, will continue to be a workman even if his emoluments are far in excess of Rs 1,600, provided that his work is not of a supervisory nature or his functions are not mainly of managerial nature. This appears to be somewhat anomalous.

A person employed as a personal assistant to the managing director who used to sign affidavits and letters as a principal officer of the company and also used to enter into settlements and negotiations with the union on behalf of the company has been held to be discharging the function of a supervisory nature. Since he was drawing remuneration comprising salary of Rs 2,500 and conveyance allowance of Rs 1,000 he was held to be outside the purview of the definition of workman.[7] On the other hand, a private secretary attached to an officer with the duty to arrange his official functions and to maintain confidentiality in respect of matters she came across, has been held to be not working in a supervisory capacity or discharging managerial or administrative function.[8] A residential medical officer, who is responsible for the proper maintenance and financial matters of the hospital, is not a workman.[9] Station masters and traffic inspectors employed by the state road transport corporation, are persons whose work is supervisory in nature and drawing a salary of Rs 1600/- ,(now Rs 10,000/-) per mensem, and hence are not workmen within the meaning of s 2(s).[10] Where the duties of supervisor (process) comprised receiving raw material and dispatching finished product, the mere fact that he was incidentally looking after the work of plant foreman during his absence does not take him out of the purview of s 2(s).[11] Checking of bags and containers of employees at the entrance is not a job of supervisory nature; one or the other part of the job might be of a supervisory nature, but that does not make the same a dominant one.[12]Medical representatives who answer to the definition of 'sales promotion employees' within the meaning of s 2(d) read with s 6(2) of the Sales Promotion Employees (Conditions of Service) Act 1976, fall within the definition of 'workman' under s 2(s) of the ID Act except when they are engaged in supervisory or managerial or administrative capacity.[13]*Stressing the need for recasting the definition of workman,* NCL-II recommended as follows:

Relatively better off section of employees categorised as workmen like Airlines Pilots, etc. do not merely carry out instructions from superior authority but are also required and empowered to take various kinds of on the spot decisions in various situations and particularly in exigencies. Their functions, therefore, cannot merely be categorized as those of ordinary workmen. We, therefore, recommend that Government may lay down a list of such highly paid jobs who are presently deemed as workmen category as being outside the purview of the laws relating to workmen and included in the proposed law for the protection of non workmen. Another alternative is that the Government fix a cut-off limit of remuneration, which is substantially high enough, in the present context, such as Rs. *25,000/-* p.m. beyond which employees will not be treated as ordinary 'workmen'. It would be logical to keep all the supervisory personnel, irrespective of their wage/salary, outside the rank of worker and keep them out of the purview of the labour laws meant for workers. All such supervisory category of employees should be clubbed along with the category of persons who discharge managerial and administrative functions. The Commission would also recommend that such a modifed definition of worker could be adopted in all the labour laws. We expect managements to take care of the interests of supervisory staff as they will now be part of the managerial fraternity.[14]

Retired Employees- Whether Workmen:

In *Standard Chartered Bank*, the union raised dispute against the denial of pensionary benefits to the employees, who retired before November 1, 2001. Three questions came up for decision before the Calcutta High Court: (i) whether the retired employees of the Bank would answer to the definition of 'workman' under s 2 (s) ; (ii) whether the union of retired employees could raise an industrial dispute; and (iii) whether the union coud seek a direction to the Regional Labour Commissioner (Central) to submit a failure report to the Central Government. Rejecting the contentions, the High Court held that a retired employee is not a 'workman' within the meaning of ID Act, nor could he be a party to an industrial dispute. By the same token, no direction would lie to the Regional Labour Commissioner (Central) to submit a failure

report.[15]

Judicial Review

The question whether an employee is a workman or not cannot be properly adjudicated in writ proceedings under Art. 226 of the Constitution and the appropriate remedy is to raise an industrial dispute and have it referred for adjudication under s 10 of the Act,[16] because it involves several disputed questions of fact which may be proved either by oral evidence or documentary evidence and by evidence of conduct and circumstances and the ultimate decision will depend on careful consideration of the whole of the evidence.[17] The principle is that 'where basic facts are disputed and complicated questions of law and fact depending on evidence are involved, the writ court is not the proper forum for seeking relief. Similarly, the question, whether an employee working in any particular capacity such as technical, managerial and supervisory, is also a mixed question of fact and law, which cannot be satisfactorily decided on the basis of inconclusive evidence adduced for the limited purpose of deciding the preliminary issue. It has to be decided after recording full evidence, as the question would require overall consideration of all the aspects of the matter.[18] Mere letter of appointment of the employee is not sufficient evidence for deciding the question because in the course of his employment, his duty might be altered by the employer so as to change the capacity in which he works. Hence, apart from the letter of appointment, the subsequent events would be relevant evidence for determining the question. The tribunal will be in a position to satisfactorily determine the question only after taking full evidence on the issues, including the preliminary issue.

Protection of Managerial Personnel- Recommendations of NCL-II

The NCL-II observed that there was a need to provide a minimum level of protection to managerial and other (excluded) employees too, against unfair dismissals or removals, which should be done through adjudication by a labour court or the Labour Relations Commission or arbitration.[19]

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84 *Gammon India Ltd v Union of India* (1974) 1 LLJ 489 [LNIND 1974 SC 109] (SC) : AIR 1974 SC 960 [LNIND 1974 SC 109]: 1974 Lab IC 707 : (1974) 1 SCC 596 [LNIND 1974 SC 109], per Ray CJI.

85 *Vegolis Pvt Ltd v Workmen* (1971) 2 LLJ 567 [LNIND 1971 SC 461], 574 (SC) : AIR 1972 SC 1942 [LNIND 1971 SC 461]: (1971) 2 SCC 724 [LNIND 1971 SC 461] : [1972] 1 SCR 673 [LNIND 1971 SC 461], per Vaidialingam J.

86 *Workmen of Food Corpn of India v Food Corpn of India* (1985) 2 LLJ 4 [LNIND 1985 SC 71], 9 (SC) : AIR 1985 SC 670 [LNIND 1985 SC 71]: 1985 (1) SCALE 344 [LNIND 1985 SC 71] : (1985) 2 SCC 136 [LNIND 1985 SC 71], per Desai J.

87 *Mathura Refinery Mazdoor Sangh v Indian Oil Corpn Ltd* (1991) 2 SCC 176 [LNIND 1991 SC 92] (SC) : 1991 (1) SCALE 297.

88 *Dena Nath v National Fertilizers Corpn* (1992) 1 LLJ 289 [LNIND 1991 SC 617], 292 (SC) : AIR 1992 SC 457 [LNIND 1991 SC 617]: 1992 GLH (1) 144 : JT 1991 (4) SC 413 : 1992 Lab IC 75 : 1991 (2) SCALE 1081 : (1992) 1 SCC 695 [LNIND 1991 SC 617], per Yogeshwar Dayal J.

89 *Gujarat Electricity Board v Hind Mazdoor Sabha* (1995) 2 LLJ 790 [LNIND 1995 SC 638], 803, 815 (SC) : AIR 1995 SC 1893 [LNIND 1995 SC 638]: 1995 (3) SCALE 498 : (1995) 5 SCC 27 [LNIND 1995 SC 638], per Sawant J.

90 *Air India Statutory Corpn v United Labour Union* (1997) 1 LLJ 1113 [LNIND 1996 SC 2076] (SC) : AIR 1997 SC 645 [LNIND 1996 SC 2076]: 1996 (9) SCALE 70 [LNIND 1996 SC 2076] : (1997) 9 SCC 377 [LNIND 1996 SC 2076].

91 Ibid, pp 1146, 1148, per K Ramaswamy J.

92 Ibid, p 1154, per Majmudar J.

93 Ibid, pp 1149-50, per Ramaswamy J.

94 Ibid, p 1154, per Majmudar J.

95 Ibid, p 1149, per K Ramaswamy J and 1155, per Majmudar J.

96 Ibid, p 1146, per K Ramaswamy J.

97 Ibid, p 1149, K Ramaswamy J.

98 *SAIL v National Union of Waterfront Workers* (2001) 4 LLN 133 (SC) per Quadri J.

1 Government of India (2002), *Report of NCL-II*, chap 13, pp 47-48, para 6.109.

2 *Hansraj Gupta v Dehradun Mussoorie Electric Tramway Co Ltd* AIR 1933 PC 63, 65, per Lord Russel of Killowen.

3 *Seaford Court Estate Ltd v Asher* [1949] 2 KB 481, 489, per Lord Denning LJ.

4 *Magor & St Mellons RDC v New Port Corpn* [1952] AC 189 191, per Lord Simonds J.

5 Lord Denning, *Discipline of Law*, 1939, p 13.

6 Cf, *Indira-Nehru Gandhi v Raj Narain* AIR 1975 SC 2299, 2435, per Beg J.

7 *Ahmedabad Municipal Corpn v Virendra Kumar Jayantibhai Patel* (1997) 2 LLJ 765 [LNIND 1997 SC 973], 768 (SC), per Khare J.

8 *SK Maini v Corona Sahu Co Ltd* (1994) 2 LLJ 1153, 1158 (SC), per GN Ray J.

9 *Burmah Shell OS & D Co of India Ltd v Burmah Shell Management Staff Assn* (1970) 2 LLJ 590 [LNIND 1970 SC 452] (SC) : AIR 1971 SC 922 [LNIND 1970 SC 452]: (1970) 3 SCC 378 [LNIND 1970 SC 452], per Bhargava J.

10 *Shalimar Paints Ltd v Third IT* 1974 Lab IC 213, 216 (Cal) (DB), per BC Mitra J.

11 *TP Srivastava v National Tobacco Co of India Ltd* (1992) 1 LLJ 86 [LNIND 1991 SC 537]-87, per V Ramaswami J.

12 *SK Verma v Mahesh Chandra* 1983 Lab IC 1483 [LNIND 1983 SC 233], 1485 (SC), per Chinnappa Reddy J.

13 *SG Pharmaceuticals v VD Padamwar* 1990 Lab IC 24, 29 (Bom) (DB), per Deshpande J.

14 *A Ram Mohan v Labour Court , Bangalore* (1989) 2 LLJ 179 (Kant): 1989 (59) FLR 1, per Rama Jois J.

15 *Promer Sales Pvt Ltd v Manohar Sondhur* 1993 Lab IC 1762, 1766 (Bom), per Kantharia J.

16 *A Sundrambal v Govt of Goa, Daman & Diu* (1989) 1 LLJ 61 [LNIND 1988 SC 341], 65 (SC) : AIR 1988 SC 1700 [LNIND 1988 SC 341]: 1989 Lab IC 1317 : 1988 (2) SCALE 82 : (1988) 4 SCC 42 [LNIND 1988 SC 341], per Venkataramiah J.

17 *SK Maini v Carona Sahu Co Ltd* (1994) 2 LLJ 1153 (SC), per GN Ray J.

18 *S.K. Maini v M/s. Carona Sahu Company Limited* (1995) 1 LLJ 415 [LNIND 1994 SC 267] (SC) : AIR 1994 SC 1824 : (1994) 3 SCC 510 : [1994] 2 SCR 333.

19 *A Kesava Bhatt v Sree Ram Ambalam Trust* (1990) 1 LLJ 192 (Ker), per A Sukumaran J.

20 (1994) 2 LLJ 1153 (SC), per GN Ray J.

21 *Enamelnagar Dev Corpn Ltd v Second IT* 1986 Lab IC 1741, 1747 (Cal) (DB), per GN Ray J.

22 *Arkal Govind Raj Rao v Ciba Geigy of India Ltd Bombay* (1985) 2 LLJ 401 [LNIND 1985 SC 177], 405 (SC), per Desai J.

23 *Hongkong and Shanghai Banking Corporation v Central Government Industrial Tribunal* (2003) 2 LLJ 293 [LNIND 2002 CAL 145] (Cal .), per Chattopadhyay J

24 *Guest Keen Williams Ltd v Asst Labour Commr, West Bengal* 1986 Lab IC 1668 [LNIND 1986 CAL 232] (Cal) (DB), per GN Ray J.

25 *Sunita B Vatsaraj v Karnataka Bank Ltd* (1999) 3 LLN 497 (Bom).

26 *Arkal Govind Raj Rao v Ciba Geigy of India Ltd, Bombay* (1985) 2 LLJ 401 [LNIND 1985 SC 177], 403 (SC), per Desai J.

27 *Ananda Bazar Patrika Pvt Ltd v Workmen* (1969) 2 LLJ 670 (SC) per Bhargava J. .

28 *May & Baker (India) Ltd v Workmen* (1961) 2 LLJ 94 [LNIND 1961 SC 18], 97 (SC), per Wanchoo J.

29 *Burmah Shell OS&D Co of India Ltd v Burmah Shell Management Staff Assn* (1970) 2 LLJ 590 [LNIND 1970 SC 452], 596 (BC) : AIR 1971 SC 922 [LNIND 1970 SC 452]: [1971] (22) FLR 11 : (1970) 3 SCC 378 [LNIND 1970 SC 452] per Bhargava J.

30 *May and Baker (India) Ltd v Workmen* (1961) 2 LLJ 94 [LNIND 1961 SC 18], 97 (SC) per Wanchoo J.

31 *Shalimar Paints Ltd v Third IT* 1974 Lab IC 213, 217 (Cal) (DB), per BC Mitra J.

32 *Mgmt of Bharat Kala Kendra Pvt Ltd v RK Baweja* 1981 Lab IC 893 [LNIND 1980 DEL 273], 897-98 (Del) (DB), per Ranganathan J.

33 *Western India Match Co Ltd v Workmen* (1963) 2 LLJ 459 [LNIND 1963 SC 142], 463 (SC), per KC Das Gupta J.

34 *Ramendra Narayan Deb v Eighth IT* 1975 Lab IC 94, 97-98 (Cal) (DB), per SK Datta J.

35 *BLC Ltd v Ram Bahadur Jamadar* (1957) 1 LLJ 422 -23 (LAT).

36 *Burmah-Shell OS & D Co of India Ltd v Workmen* (1955) 2 LLJ 153 (LAT).

37 *Cawnpore Tannery v Workmen* (1955) 2 LLJ 459 (LAT).

38 *BIC Ltd v Ram Bahadar Jamadar* (1957) 1 LLJ 422 (LAT).

39 *May and Baker (India) Ltd v Workmen* (1961) 2 LLJ 94 [LNIND 1961 SC 18], 97 (SC), per Wanchoo J.

40 *Bata India Ltd v BH Nathani* 1978 Lab IC 386, 389 (Guj) (DB), per Obul Reddi CJ.

41 *A Sundarambal v Govt of Goa, Daman & Diu* (1983) 2 LLJ 491 [LNIND 1988 SC 341], 498 (Bom) (DB), per Jahagirdar J.

42 *SA Phenany v J Walter Thompson Co (Eastern) Ltd* 9 FJR 324 (LAT).

43 *Chintaman Martand Salvekar v Phaltan Sugar Works Ltd* (1954) 1 LLJ 499 (LAT).

44 *Lakshmi Devi Sugar Mills Ltd v State of UP* (1955) 2 LLJ 1 [LNIND 1955 ALL 82] (All) (DB), per Dayal J.

45 *CA Ribeiro v Directorate of Health Services, Govt of Goa* (1999) 3 LLN 517 (Bom) (DB), per Batta J.

46 *All India OBE Union v IT* (2001) 1 LLN 930 (Mad), per Kalifulla J.

47 *A Sundarambal v Govt of Goa, Daman & Diu* (1983) 2 LLJ 491 [LNIND 1988 SC 341], 498 (Bom) (DB) per Jahagirdar J.

48 *Bombay Dyeing and Mfg Co Ltd v RA Bidoo* (1990) 1 LLJ 98 [LNIND 1989 BOM 210], 101-02 (Bom) (DB) : 1989 (2) Bom CR 367 [LNIND 1989 BOM 210] : 1989 (91) Bom LR 219, per Jahagirdar J.

49 *Uttar Pradesh State Sugar Corpn Ltd v Deputy Labour Commy*, 1990 Lab IC 645 (All), per BN Misra J.

50 *Sudhirkumar v Ferro Alloys Corpn Ltd* 1992 Lab IC 657 (Bom), per Quazi J.

51 *Shrikant Vishnu Palwankar v PO, First LC* 1992 Lab IC 722, 726 (Bom), per Srikrishna J.

52 *Burmah Shell OS & D Co of India Ltd v Burmah Shell MS Assn* (1970) 2 LLJ 590 [LNIND 1970 SC 452] (SC), per Bhargava J.

53 *A Sundarambal v Govt of Goa, Daman & Diu* (1989) 1 LLJ 61 [LNIND 1988 SC 341], 63 (SC), per Venkataramiah J.

54 *Bharat Bhawan Trust v BBA Association* (2002) 1 LLN 54 (57) (SC), per Rajendra Babu J.

55 *Workmen of Dimakuchi Tea Estate v Dimakuchi Tea Estate* (1958) 1 LLJ 500 [LNIND 1958 SC 1] (SC) : AIR 1958 SC 353 [LNIND 1958 SC 1], per SK Das J.

56 *Bengal United Tea Co Ltd v Ram Labhaya* (1962) 2 LLJ 37 (Assam) (DB), per Mehrotra J.

57 *Burmah Shell OS & D Co of India Ltd v Burmah Shell MS Assn* (1970) 2 LLJ 590 [LNIND 1970 SC 452] (SC), per Bhargava J.

58 *Pabbojan Tea Co Ltd v LC* 1977 Lab IC 721, 730 (Gau) (DB), per Sarma J.

59 *Marshal Braganza v SR Samant* (1975) 2 LLJ 189 (Bom), per RL Aggarwal J.

60 *Mathur Aviation v Lieutenant Governor; Delhi* (1977) 2 LLJ 255, 261-62 (Del), per Dalip Kapur J.

61 *MM Wadia Charitable Hospital v Dr Uina Kanat Ramchandra Warerkar* (1997) 2 LLJ 549 (Bom .)

62 *Ashok Leyumd Ltd v A Vijayakumar* (1981) 2 LLJ 9 (Mad), per Mohan J.

63 *Mahajan Borewell Co v Rajaram Bhatt* (1998) 3 LLN 253 (Kant) (DB), per Sethi CJ.

64 *Choithram HR Centre v Capt DK Shukla* (1998) 3 LLN 453 (MP), per Tiwari J.

65 *Mgmt of HEC Ltd v PO, LC* 1998 (3) LLN 902 (SC), per Kirpal J.

66 *Maheshwar Singh v Indomag Steel Technology Ltd* (2010) 4 LLJ 51 (Del .): 170 (2010) DLT 682 [LNIND 2010 DEL 122] : [2010 (126) FLR 426], per Gambhir J.

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68 *Black's Law Dictionary*, 1968, revised 4th ed, p 1240.

69 *Shorter Oxford English Dictionary*, p 1452.

70 *Websters 3rd New International Dictionary*, p 1581.

71 *Toshniwal Bros Pvt Ltd v Delhi Administration* (1976) ILR 2 (Del) 548, per HL Anand J.

72 *Workmen of Macfarlane & Co Ltd v Fifth IT* (1964) 2 LLJ 556, 558 (Cal) per BN Bannerjee J.

73 *Burmah Shell OS & D Co of India Ltd v Workmen* (1955) 2 LLJ 228 (LAT).

74 *Mysore Vegetable Oil Products Ltd v LC* (1961) 2 LLJ 508, 510 (Mad), per Balakrishna Ayyar J.

75 *Sundarambal v Government of Goa, Daman and Diu* (1989) 1 LLJ 61 [LNIND 1988 SC 341], 63 (SC), per Venkatramiah J.

76 *Upper Jumna Valley Electricity Supply Co, Ltd v Workmen* (1955) 2 LLJ 50 (LAT).

77 *Madikal Service Co-op Bank Ltd v Labour Court* (1988) 2 LLJ 49, 53 (Ker), per Bhat J.

78 *Darshan Lal v Director, State Transport* (1998) 1 LLN 665 (P & H), per Chalapathi J.

79 *IFFCO Ltd v PO, LC* (1998) 4 LLN 442 (P&H), per Sat Pal J.

80 *Shaw Wallace and Co Ltd v NR Trivedi* (1999) 1 LLN 319 (Guj), per Pandit J.

81 *Aloysius Nunes v Thomas Cook India Ltd* (2000) 3 LLN 160 (Bom), per Rebello J.

82 *Sanjeev Kumar Gupta v PO, LC,* (2001) 1 LLN 447 (P&H) (DB), per Sudhalkar J.

83 *Mysore Vegetable Oil Products Ltd v LC* (1961) 2 LLJ 508, 510 (Mad), per Balakrishna Ayyar J.

84 *Punjab National Bank Ltd v Certain Workmen* (1953) 1 LLJ 368 (LAT).

85 *Janardana Mills Ltd v Certain Workmen* (1953) 1 LLJ 344 (LAT).

86 *Burmah Shell OS & D Co of India Ltd v LAT* (1954) 2 LLJ 155 (Mad), per Rajagopala Ayyangar J.

87 *East Asiatic Co Staff Union v East Asiatic Co* (India) Ltd (1954) 2 LLJ 730 (LAT).

88 *Janardana Mills Ltd v Certain Workmen* (1953) 1 LLJ 344 (LAT).

89 *Kilburn and Co Ltd v Dibendra Chandra Dey* [1956) LAC 393.

90 *Mitra Prakasan Ltd v Bramha Dutta Vidyarthi* 10 FJR 505 (LAT).

91 *Madan Gopal v Hindustan Commercial Bank Ltd* (1956) 1 LLJ 414 (LAT).

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2 *East India Industries (Madras) Ltd v IT* (1954) 2 LLJ 418 (Mad), per Rajagopala Ayyangar J.

3 *Manoranjan Pictures Corpn Ltd v Rawait Singh* (1957) 2 LLJ 102 (LAT).

4 *Mawana Sugar Work Ltd v Workmen* (1955) 2 LLJ 462 (LAT).

5 *Radio Television v KK Sharma* (1962) 2 LLJ 722 (Punj), per Shamsher Bahadur J.

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10 *Cawnpore Tannery Ltd v Workmen* (1955) 2 LLJ 459 (LAT).

11 *Certain Workmen of the BIET (I) Ltd v British Institute of Engg Technology (India) (1953)* 1 LLJ 592 (LAT).

12 *A Sundarambal v Government of Goa, Daman and Diu* (1989) 1 LLJ 61 [LNIND 1988 SC 341], 65 (SC), per Venkataramiah J.

13 *Workmen of Nilgiri Coop Mktg. Society Ltd v State of Tamil Nadu* AIR 2004 SC 1639 [LNIND 2004 SC 156]:: (2004) 3 SCC 514 [LNIND 2004 SC 156] : (2004) 2 LLJ 253 [LNIND 2004 SC 156] : 2004 LIC 905, per Sinha J.

14 *Darshan Lal v Director, State Transport* (1998) 1 LLN 665 (P & H), per Chalapathi J.

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16 *Muir Mills Union of NTC Ltd v Swayam Prakash Srivastava* AIR 2007 SC 519 [LNIND 2006 SC 1070]: (2007) 1 SCC 491 [LNIND 2006 SC 1070] : (2007) 1 LLJ 801 [LNIND 2006 SC 1070] : 2007 LIC 978, per Lakshmanan J.

17 *C Gupta v Glaxo Smithklin Pharmaceuticals Ltd* AIR 2007 SC (Supp.) 1244, per Pasayat J.

18 *Arkal Govind Raj Rao v Ciba Geigy of India Ltd, Bombay* (1985) 2 LLJ 401 [LNIND 1985 SC 177], 404 (SC) : AIR 1985 SC 985 [LNIND 1985 SC 177]: 1985 Lab IC 1008 [LNIND 1985 SC 177] : 1985 (1) SCALE 927 [LNIND 1985 SC 177] : (1985) 3 SCC 371 [LNIND 1985 SC 177], per Desai J.

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21 *Titaghur Paper Mills Co Ltd v First IT* 1982 Lab IC 307, 316 (Cal), per GN Ray J.

22 *Bipin Bihari Sinha v Union of India* 1983 Lab IC (NOC) 74 (Pat) (DB).

23 *Titaghur Paper Mills Co Ltd v 1st IT* 1982 Lab IC 307,316 (Cal), per GN Ray J.

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29 *Lloyds Bank Ltd v Panna Lal Gupta* (1961) 2 LLJ 18, 24 (SC), per Gajendragadkar J.

30 *SB Kulkarni v Indian Red Cross Society* (1988) 1 LLJ 411 -12 (Bom) (DB), per Sawant J.

31 *Mathur Aviation v Lieutenant Governor, Delhi* (1977) 2 LLJ 255, 261-62 (Del), per Dalip Kapur J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER II Authorities under the Act

S. 3. Works Committee.—

(1) In the case of any individual establishment in which one hundred or more workmen are employed or have been employed on any day in the preceding twelve months, the appropriate government may by general or special order require the employer to constitute in the prescribed manner a Works Committee consisting of representatives of employers and workmen engaged in the establishment, so however, that the number of representatives of workmen on the Committee shall not be less than the number of representatives of the employer. The representatives of the workmen shall be chosen in the prescribed manner from among the workmen engaged in the establishment and in consultation with their trade union, if any, registered under the Indian Trade Unions Act 1926 (16 of 1926).

(2) It shall be the duty of Works Committee to promote measures for securing and preserving amity and good relations between the employer and workmen and, to that end, to comment upon matters of their common interest or concern and endeavour to compose any material difference of opinion in respect of such matters.

LEGISLATIVE HISTORY

The provision for the Constitution of a works committee was, for the first time, made in the original Industrial Disputes Act of 1947. It has not undergone any amendment so far. These committees are analogous to the 'joint production committees' in the United States, Russia, and Britain.[1] The legislatures of certain states, who have enacted their own Acts for the investigation and settlement of industrial disputes, have also made provision for such committees. The Central Provinces and Berar Industrial Disputes Settlement Act 1947, by s 21 provided for the Constitution of a works committee.[2]Likewise, s 36 of the Madhya Pradesh Industrial Relations Act 1960 and s 48 of the Bombay Industrial Relations Act 1946 also provide for the Constitution of joint committees.

OBJECTS AND PURPOSES OF THE WORKS COMMITTEE

The Act postulates the investigation and settlement of an 'industrial dispute' through a three-fold process, ie:

(i) voluntary negotiation;

(ii) mediation or conciliation; and

(iii) arbitration or adjudication.

The institution of a works committee is the first step in the process of investigation and settlement of industrial disputes by the direct method of negotiations between the representatives of employers and the representatives of workmen engaged in an industrial establishment. The Royal Commission on Labour had suggested that works committees should be formed for establishing close contacts and cordial relations between managements and employees. Power, therefore, has been given to the appropriate government to require works committees to be constituted in every industrial establishment employing one hundred workmen or more, and their duties are to remove causes of friction between employers and workmen in the day to day working of the establishment and to promote measures for securing amity and good relations between them. Industrial peace will be most enduring where it is founded on voluntary settlement. A works committee, therefore, is created with a

view to rendering recourse to the remaining machinery, provided in the Act for the settlement of disputes.[3]A works committee, constituted under s 3 is one of the authorities under the Act. The intention of the legislature in creating a works committee and dubbing it as an authority under the Act is to secure industrial harmony between those who are connected with the working in the establishment concerned and to see that good and amicable relationship is prevalent between the employers and the workmen. Further, the object in the formation of a works committee is the promotion of amity and good relations between the employer and the workmen and to place all the matters before the said authority so that any difference between the employer and the workmen in the matters concerning the industry should be composed and settled. This, being the laudable object with which the works committee has been created by the Act as a statutory functionary, it is essential that the authorities who undertake the formation of such a works committee should see that the committee is really a works committee as contemplated by the Act and not a committee to subserve certain exclusive sectional interests.[4]

It has been provided that the works committee shall consist of at least equal number of representatives of workmen and representatives of the employer on the committee, with a view to ensure a democratic setup. Furthermore, it has been provided that the representatives of workmen shall be chosen in the prescribed manner from among the workmen engaged in the establishment. Part 7 (rr 38 to 57) of the Industrial Disputes (Central) Rules 1957, has made elaborate provisions for the Constitution of works committees, election of representatives of workmen, their term of office, dissolution of such committees, etc. In case, there is a registered trade union operating in the industrial establishment, in addition to compliance with the requirements of rr 38 to 57, representatives of the workmen shall have to be chosen in consultation with the trade union. The relevant rules of Industrial Disputes (Central) Rules 1957 are rr 38 to 43. Evidently, these rules do not contemplate nomination of representatives of workmen in any situation and circumstance whatsoever. Rule 38 requires an employer, to whom an order made under s 3(1) of the Act relates, to constitute a works committee in the prescribed manner. Rule 39 contemplates that the total members constituting a works committee shall not exceed 20 and further that the number of representatives of the workmen shall not be less than the representatives of the employer. This rule does not require that the number of the representatives of the employer and the representatives of workmen shall be equal. The true legal position appears to be that, their respective number may or may not be equal. But if it is unequal, the rule steps in and says that the number of representatives of the employer shall not be less than the number of representatives of the workmen which may either be equal or more than the representatives of the employer. In any case, the number of representatives of the workmen shall not be less than the number of representatives of the employer. Nomination of the representatives of the employer is no doubt contemplated by r 40. In fact, that is the only mode in which representatives of the employer may be brought on the works committee. Equally clear is the fact that the representatives of the workmen are to be always elected. The manner of this election may vary but there has to be an election. Rule 41 empowers an employee to ask for certain information whether any workmen of an establishment or numbers of a registered trade union and where he has a reason to believe that the information furnished to him by any trade union is false, he may, after informing the union, refer the matter to the assistant labour commissioner whose decision will be final.

The scheme of the rules for Constitution of works committees provides: Where there is a registered trade union having more than fifty per cent membership of the workers of the establishment, the total number of members of the works committee will be elected without distribution of any constituency; and if in an industry, no trade union registered under the Trade Unions Act represents more than fifty per cent of the members, then only, the election will be held in two constituencies; one from the members of the registered trade union or unions and the other from non-members of the trade unions. Only in the latter contingency, discretion is given to the employer to further sub-divide the constituency into department, section or shed. From this, it is evident that there may be a situation in a particular establishment where some sections may have no membership of any trade union at all, whereas in other sections, there may be membership of trade unions. In such a situation, under r 42 of the Central Rules, it has to divide into two constituencies, ie, members of the registered trade union and non-members. There may be further sub-division in order to provide for representation to any section of the workmen who have no representation in any trade union at all. Where there is a registered trade union in an establishment having more than fifty per cent membership, r 43 will not be attracted. If r 42 does not apply, there is no occasion for r 43 or the proviso therein to come into operation because the latter is not an independent substantive provision.[5]Rule 42 contemplates that the representatives of the workmen are to be elected in two groups but if in an establishment the majority of the workers are in one union, then no division in two groups is necessary. In that situation, the representatives of the workmen will be elected in a single group without any kind of division. There is no provision in the rules to the effect that if the union has majority of the workers as its members, then nomination of the representatives of the workmen may be done by the employer in consultation with the trade union. However, such works committees can only be required by the appropriate government to be constituted only in industrial establishments wherein one hundred or more workmen are employed or have been employed on any day during the twelve months preceding the day of the order of the government under s 3 and r 38. In this section, the expression ‘industrial establishment’ has to be understood as having the same meaning as the term ‘industry’ in s 2(j) of the Act. The order of the government be general or special, ie, the order may be addressed to employers in general in a particular area or in a particular industry employing one hundred or more workmen, or the order, may be addressed to a particular employer who employs one hundred or more person. It is

not obligatory on the 'appropriate government' to require the Constitution of a works committee.

SUB-SECTION (1): CONSTITUTION OF WORKS COMMITTEE

Sub-section (1) lays down that in the case of any industrial establishment in which one hundred or more workmen are employed or have been employed on any day in the preceding twelve months, the appropriate government may, by general or special order, require the employer to constitute in the prescribed manner a works committee of representatives of employers and workmen engaged in the establishment, so however that the number of representatives of the workmen on the committee shall not be less than the number of representatives of the employer.[6] Once an order, under sub-s (1) of s 3, is made in respect of an industrial establishment, it is obligatory on the employer to comply with the requirements of the order by constituting a works committee. But before a valid order under s 3(1) is made, the following conditions must exist:

(i) The establishment, with respect to which the order is made, must be an 'industrial establishment', ie, the requirement of section 2(j) must be satisfied.

(ii) There should be 100 or more workmen employed in such establishment on the day of the order or on any day during the twelve months preceding the day of the order.

(iii) Such workmen should be the workmen within the meaning of section 2(s) in relation to the employer on whom the order is made under section 3(1).

(iv) The government making the order should be the 'appropriate government'.

Rule 41 of the ID (Central) Rules 1957 prescribes the method of consultation with the trade unions as required by this provision but even if in some state Rules there is no such provision, the requirement of the section of consultation with the trade unions cannot be dispensed with. The Orissa High Court in *Prafulla Mohan Das*, held that though the Orissa Industrial Disputes Rules 1959 have not prescribed any manner of consultation with the trade union, the consultation as envisaged by s 3 of the Act, cannot be dispensed with. Therefore, the election held for electing works committee members without consultation with the trade union, is liable to be set aside.[7]

SUB-SECTION (2): FUNCTIONS AND DUTIES OF WORKS COMMITTEE

Sub-section (2) mandatorily enjoins on the works committee to promote measures for securing and preserving amity and good relations as between the employer and the workmen and, to that end, to comment upon matters of their common interest or concern and endeavour to compose any material difference of opinion in respect of such matters.[8] The powers of the works committee in regard to the range of subjects it can discuss, are very wide. There is no subject concerning the relations of employers and employees which the Works Committee is precluded from considering.[9] But the scope of the duties is confined to two things only, ie:

(i) to comment upon matters of common interest between employers and workmen, with a view to promote measures for securing and preserving amity and good relations between them; and

(ii) to endeavour to compose any material difference of opinion in respect of such matters of common interest or concern.

The expression 'comment' in its dictionary meaning means 'a note in explanation; criticism or illustration of something written or said; annotation; a remark as an observation or criticism'. The expression 'endeavour' means 'to try; exert effort; make an earnest attempt; strive'. The duty and authority of the works committee, therefore, cannot extend to anything more than making comments upon matters of common interest or concern and to endeavour to compose any material difference of opinion in respect of such matters. Neither 'comment' nor 'endeavour' could be held to extend to decide the question, on which differences have arisen or are likely to arise, one way or the other. Regarding the nature and functions of the works committee, Das Gupta J observed:

> The language used by the legislature makes it clear that the works committees were not intended to supplant or supersede the unions for the purpose of collective bargaining; they are not authorised to consider real or substantial changes in the conditions of service; their task is only to smooth away frictions that might arise between the workmen and the management in day to day work. By no stretch of imagination can it be said that the duties and functions of the works committee included the decision on such an important matter as the alteration in the conditions of service by rationalisation. ... The fact that the workmen's representatives on the committee agreed to a certain decision, would be no way binding on the workmen or their union. The works committee cannot consider important matters like rationalisation scheme,[10]

The works committees are normally concerned with the problems arising in the day to day working of the concern and the functions of the works committees are to ascertain the grievances of employees, and when the occasion arises to arrive at some agreement also. But the function and responsibility of the works committees, as their very nomenclature indicates, cannot go beyond recommendation, hence they are more or less bodies who, in the first instance, endeavour to compose differences and final decision rests with the parties as a whole. The comments of the works committee, though carry great weight, yet are not conclusive or binding in nature,[11] on the subject of 'employment' or 'non-employment' which would include the case of dismissal',[12] or the re-employment of a 'retrenched workman',[13] or questions involving pay scales or dearness allowance, etc.[14]

FUNCTIONING OF WORKS COMMITTEE IN THE INDUSTRY

In certain cases, works committees have functioned quite successfully to the mutual advantage of workmen and their employers in avoiding serious and difficult situations like litigation, strikes and lockouts, etc. Some of the factors that have generally contributed to the success of works committees are:

(a) existence of cooperation and cordial relations between workers and the management and also trade union;

(b) sympathetic attitude by management, especially in encouraging workers to put forward their grievances and suggestions;

(c) foresight of managements in having prior consultation with the works committees before bringing any changes in respect of welfare measures, service conditions, etc;

(d) higher education standards amongst workers; and

(e) framing of model Constitution and bye-laws for the works committees.

On the other hand, there have been formidable difficulties in the smooth functioning of the works committees some of which are:

(a) lack of appreciation on the part of the management and the workmen's representatives of the functions and significance of the committees;

(b) illiteracy and lack of understanding amongst the workers, especially those employed in backward areas;

(c) disinclination of workers' representatives on the works committee to participate in the deliberations of the committee;

(d) too high an expectation by workers from their representatives who, being unable to satisfy the high expectations, become unpopular and are disinclined to serve on the committees; and

(e) lack of cooperation of the trade union leaders and in some cases even their opposition to the Constitution and functioning of the works committees on account of the fear that their own representative character will cease, if works committees function.

There have been instances of trade unions regarding the works committees as their rivals; and of opposing the formation of works committees due to inter-union rivalry.[15] The NCL-II, while recognising that workers participation in management introduced statutorily through the institution of works committees had not been successful, perhaps because of the method of Constitution of works committees and the functions assigned to these committees, recommended that the works committee should be substituted by an industrial relations committee to promote in-house dispute settlement.[16]

DISSOLUTION OF WORKS COMMITTEE

Rule 57 of the Industrial Disputes (Central) Rules 1957, empowers an officer or authority to whom power under s 3 has been delegated under s 39, to dissolve a works committee, in the manner prescribed in that Rule, if the officer or authority is satisfied that the committee has not been constituted in accordance with the Rules (rr 38 to 57) or that not less than two-third of the number of representatives of the workmen have, without any reasonable justification, failed to attend three consecutive meetings of the committees, or that the committee has, for any other reason, ceased to function. This power cannot be further delegated. Before the election of successful candidates can be set aside, the rules of natural justice require that a notice on such members or on the union to which they belong, should be served. As no rule requires the employer to maintain a voters' list, the failure of the employer to prepare a voters' list before the election cannot be held to be an irregularity vitiating the election.[17] In *Jaspal Singh*, the order passed by Central Government under r 57 of Industrial

Disputes (Central) Rules dissolving the Works Committee on the ground that the election to the Committee was postponed beyond a date as provided in the r 46 thereof. Rule 46 runs thus:

> **46. Procedure for election**
>
> (1) The employer shall fix a date as the closing date for receiving nominations from candidates for election as workmen's representatives on the committee.
>
> (2) For holding the election, the employer shall also fix a date which shall not be earlier than three days and later than fifteen days after the closing date for receiving nominations.
>
> (3) The dates so fixed shall be notified at least seven days in advance to the workmen and the registered trade union or unions concerned. Such notice shall be affixed on the notice board or given adequate publicity amongst the workmen. The notice shall specify the number of seats to be elected by the groups, sections, shops or departments and the number to be elected by the members of the registered trade union or unions and by the non-members.
>
> (4) A copy of such notice shall be sent to the registered trade union or unions concerned. (Italics supplied)

Quashing the order of dissolution, Arun Mishra J of Madhya Pradesh High Court held that the simple fact that the date of election was postponed beyond the date fixed under r 46 was not enough to invalidate the fresh election held after the initial postponement. The learned judge observed that the dissolution order did not deal elaborately with the prejudice caused to the parties by alleged change in the list of voters and by the postponement of election, and directed the matter to be heard and decided afresh.[18] In *South Eastern Coalfields*, the brief facts were: the Central Government issued an order directing the company to constitute Works Committee. In reply the company made a representation to the Government to grant exemption under s 36B of ID Act in view of the fact that there was in existence in the company an effective Grievance Redressal Mechanism. The Government rejected the representation on the ground that a statutory committee cannot be substituted on by any other committee. (It is to be noted here that at that time s 9C was not yet enforced). Allowing the writ petition, Sujoy Paul J of Madhya Pradesh High Court held that on a conjoint reading of s 3 and s 36B, it was crystal clear that the test for deciding the question of exemption was "*whether there exists adequate provision for investigation and settlement of industrial disputes and that the litmus test was whether the provision and committee mentioned by the company were well equipped and suitable to investigate and settle the industrial disputes of workmen*." The learned judge observed that the application was rejected by the Government at threshold solely on the ground that the statutory committee could not be substituted by any other committee without going into the nature of activity, the grievance redressal mechanism and the scope of its intervention in industrial disputes, etc.[19]

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12 *Elgin Mills Co Ltd v Suti Mill Mazdoor Union* (1951) 1 LLJ 184 (LAT).

13 *JK Jute Mill Co Ltd v Rashtriya Mill Mazdoor Sabha* (1952) 1 LLJ 184 (LAT).

14 *Kemp & Co* (supra).

15 Ministry of Labour, Government of India, at the 17th session of the Indian Labour Conference, pp 72-74.

16 Government of India (2002), *Report of NCL-II*, Chap 13, p 116, para 12.48.

17 *Peerjade Husen Sab Mohadin v Commissioner of Labour* (1964) 2 LLJ 451 (Mys) (DB) : [1965(10)FLR12].

18 *Jaspal Singh v Union of India* (2003) 4 LLJ 886 (MP), per Mishra J.

19 *South Eastern Coalfields Ltd v Union of India* (2013) 4 LLJ 301 (MP) : ILR [2013] MP 2631, per Sujoy Paul J.

End of Document

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER II Authorities under the Act

S. 4. Conciliation Officers.—

(1) The appropriate government may, by notification in the Official Gazette, appoint such number of persons as it thinks fit, to be conciliation officers, charged with the duty of mediating in and promoting the settlement of industrial disputes.

(2) A conciliation officer may be appointed for a specified area or for specified industries in a specified area or for one or more specified industries and either permanently or for a limited period.

LEGISLATION

In the repealed Indian Trade Disputes Act of 1929, there was no provision for the appointment of conciliation officers. The conciliation machinery in that Act consisted only of a 'Board of Conciliation' which by experience proved to be inadequate to meet the situation. Consequently, s 18A was added to that Act in 1938 whereby the Central and provincial governments were authorised to appoint 'Conciliation Officers' to act as 'mediators' in 'trade disputes', and this provision has been reincarnated in s 4 of the Industrial Disputes Act 1947. It is discretionary on the part of the 'appropriate government' to appoint conciliation officers. If the government decides to make appointment of conciliation officers, the appointment shall be by a notification in the Official Gazette. The government again has the discretion to appoint any number of persons to be conciliation officers as it thinks fit. The duty of conciliation officers is to mediate in and promote the settlement of industrial disputes.

SUB-SECTION (1): APPOINTMENT OF A CONCILIATION OFFICER

Sub-section (1) empowers the 'appropriate government' to appoint any number of persons, as it thinks fit, to be conciliation officers to perform the duties of mediating in industrial disputes and promoting their settlement. Such appointment has to be made by a notification in the Official Gazette of the government. Any person whose appointment as conciliation officer has not been notified in the Official Gazette of the government cannot discharge the duties of a conciliation officer.[20] A notification issued under this provision cannot be retrospectively amended by adding new persons to be conciliation officers. Such amendment will be invalid in the eyes of law. Furthermore, if the earlier notification itself has already been superseded, the question of amendment of a non-existent notification would not arise.[21]

SUB-SECTION (2)

Appointment for Specified Area or Industries

Sub-section (2) further empowers the 'appropriate government' to appoint conciliation officers who have been appointed as such under sub-s (1), to discharge their duties in specified areas or for specified industries in a specified area or for one or more specified industries either permanently or for a limited period. The appointment of conciliation officers in such specified areas or industries as contemplated by this sub-section does not postulate such appointment to be made by a notification in the Official Gazette. The position, therefore, is that a person becomes a conciliation officer as soon as his appointment is made by the appropriate government 'by notification in the Official Gazette'. Further, the appointment of

such conciliation officers for a specified area or for specified industries in a specified area or for one or more specified industries is not required to be made by a notification in the Official Gazette. This point arose before the Supreme Court in *Jhagrakhand Collieries* (supra). However, as the fact of the appointment of the conciliation officer concerned, by a notification in the Official Gazette of the appropriate government, that itself was not clear from the record, hence the court did not decide the point on the basis of the inadequate facts.

Mediation

Mediation is a process wherein a third party attempts to secure settlement of labour disputes by persuading the parties either to continue their negotiations or to consider procedural or substantive recommendations that the mediator may make.[22]Section 2(d) defines 'Conciliation Officer' and s 2(e) defines 'conciliation proceedings'. Section 11 *inter alia*, lays down the procedure and powers of the conciliation officers. Under s 12, the duties of conciliation officers are prescribed. In case of public utility services, where notice of strike or lockout is given under s 22, it is obligatory on the conciliation officer to hold conciliation proceedings. In non-public utility services and in public utility services, where notice of strike or lockout is not given, the conciliation officer has, however, the discretion to decide whether or not to hold conciliation proceedings.[23] A conciliation proceeding in a public utility service is deemed to have commenced on the day on which the notice of strike or lockout under s 22 is received by a conciliation officer.[24]In connection with the proceedings in case of non-public utility service and in public utility service where no notice of strike or lockout under s 22 is given, the Act is silent. But in a non-public utility concern, from r 10 of the Central Rules, it appears that the conciliation proceedings will commence on the day mentioned in the formal notice given by the conciliation officer. However, the Act and the Rules are completely silent as to on what date the conciliation proceeding in a public utility concern where no notice of strike or lockout under s 22 is given and there is an 'industrial dispute' existing or apprehended, can be deemed to have commenced. Rule 12 of the Industrial Disputes (Central) Rules 1957, enjoins on the conciliation officer to conduct proceedings expeditiously in such manner as he deems fit. By s 11(2) of the Act and r 23 of the Industrial Disputes (Central) Rules 1957, the conciliation officer is empowered to enter the premises occupied by any establishment to which the dispute relates, after giving reasonable notice to parties, and inspect the same or any work, machinery, appliance or article therein, or interrogate any person therein in respect of anything situated therein or anything relevant to the subject-matter of the conciliation. Section 11 (4) of the Act empowers the conciliation officer to enforce attendance of any person for the purpose of examination of such person or to call for and inspect any document which he has ground for considering to be relevant to the dispute or necessary for the purpose of verifying the implementation of any award. In this connection, he enjoys the same powers as are vested in a civil court under the Code of Civil Procedure. Section 36(3) imposes a complete bar against the parties being represented by legal practitioners in any conciliation proceedings. The persons, by whom the parties are entitled to be represented, have been enumerated in s 36.

Nature of the Functions of Conciliation Officer in Conciliation Proceedings

The functions of a conciliation officer are not judicial or quasi-judicial but are administrative in nature but where the duties to be performed by him are judicial or quasi-judicial in nature, then, in connection with everything that they do, the formalities of a judicial trial will have to be observed, eg, they cannot ascertain from one side its views except upon notice to, or in the presence of the other party. It is but patent that no conciliation proceedings could be carried on under such conditions.[25] According to the judicial dicta, the functions of the conciliation officers under s 33 are the same as those of labour courts, tribunals or national tribunals.[26] Since the functions of the labour courts, tribunals and national tribunals are quasi-judicial, *a priori* the functions of the conciliation officer also should be treated as quasi-judicial. But this is anomalous as neither s 11 nor any other provision of the Act vests a conciliation officer with quasi-judicial powers. The law requires re-statement on this point.

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20 *Jhagrakhand Collieries Pvt Ltd v CGIT* 1975 Lab IC 137 (SC), per Sarkaria J.

21 *Workmen of Hindustan Construction Co Ltd v Mgmt* (1987) 1 LLJ 451 [LNIND 1986 MAD 245], 457 (Mad) (DB), per Chandurkar CJ.

22 Vermo H Jemons, *Bibliography on Dispute Settlement by Third Parties*, 572 (USA).

23 *Tata Collieries Labour Assn v Mgmt of Digwadhi Colliery* [1953] LAC 638.

24 Section 20(1) of the Industrial Disputes Act 1947, and notes thereunder.

25 *Royal Calcutta Golf Club Mazdoor Union v State of West Bengal* (1957) 1 LLJ 218 [LNIND 1956 CAL 118] (Cal), per Sinha J.

26 *Delhi Cloth and General Mills Co Ltd v Ludh Budh Singh* (1972) 1 LLJ 180 [LNIND 1972 SC 17], 199 (SC), per Vaidialingam J.

End of Document

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER II Authorities under the Act

S. 5. Boards of Conciliation.-

(1) The appropriate government may as occasion arises by notification in the Official Gazette constitute a Board of Conciliation for promoting the settlement of an industrial dispute.

(2) A Board shall consist of a chairman and two or four other members, as the appropriate government thinks fit.

(3) The chairman shall be an independent person and the other members shall be persons appointed in equal numbers to represent the parties to the dispute and any person appointed to represent a party shall be appointed on the recommendation of that party:

Provided that, if any party fails to make a recommendation as aforesaid within the prescribed time, the appropriate government shall appoint such persons as it thinks fit to represent that party.

(4) A Board, having the prescribed quorum, may act notwithstanding the absence of the chairman or any of its members or any vacancy in its number:

Provide d that if the appropriate government notifies the Board that the services of the chairman or of any other member have ceased to be available, the Board shall not act until a new chairman or member, as the case may be, has been appointed.

LEGISLATION

Section 6 of the repealed Trade Disputes Act of 1929, provided for the Constitution of boards while s 7 laid down the duties of the boards. The present section is based on s 6 of the repealed Act of 1929.

CONSTITUTION AND FUNCTIONS OF THE BOARD OF CONCILIATION

According to the present section, a board consists of a chairman and two or four other members, as the 'appropriate government' thinks fit, who are appointed in equal numbers to represent the parties to a particular dispute. The chairman of the board must be an independent person within the meaning of s 2(i) of the Act. The members appointed to represent parties are to be appointed on the recommendation of the parties or if a party fails to make a recommendation within the prescribed time, the appropriate government is to appoint such persons as it thinks fit to represent that party.[27] The quorum for conducting proceedings is two where the strength is three and three where the strength is five.[28] Where a dispute is of a complicated nature and the issues involved are important and require special handling, boards are preferred to conciliation officers. However, in recent years no board has been constituted by the Central Government. Disputes are referred to the boards under s 10(1)(a). Section 11 lays down the procedure and powers of the boards, while s 13 deals with the duties of the boards. Section 20 provides for the time limits at which the 'conciliation proceedings' before the board are to be deemed to have commenced and concluded. Section 16 provides for the form of the report of the board which requires

publication under s 17. Part 3 of the Industrial Disputes (Central) Rules 1957, prescribes the procedure, powers and duties, *inter alia* of the conciliation boards.[29]

CONCILIATION OFFICER Vs CONCILIATION BOARD

There are certain similarities and dissimilarities in the Constitution and functions of the conciliation officers and the boards.

Similarities

(a) Power to Enter Premises

Both the conciliation officer and members of a board have the power to enter the premises occupied by any establishment to which the dispute relates, after giving reasonable notice for the purpose of inquiry into any existing or apprehended industrial dispute.[30]

(b) Public Servants

The conciliation officers as well as the members of the board are to be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.[31]

(c) Settlement Report

In case of settlement arrived at during the conciliation proceedings before the conciliation officers as well as the board, both have to submit their reports to the appropriate government.[32]

(d) Failure Report

The conciliation officer as well as the board have to submit the failure report to the appropriate government if no settlement is arrived at.[33]

(e) Duty to Promote Settlement

The conciliation officers as well as the boards are charged with the same duties of promoting settlement of industrial disputes.[34]

(f) Powers under Section 33

The powers of the conciliation officers as well as of the board to grant or withhold approval or permission under section 33 to the action of the employer discharging or dismissing a workman during the pendency of conciliation proceedings are similar.

Dissimilarities

(a) Powers regarding Documents and Witnesses

The board has powers:

(1) to enforce the attendance of any person and examining him on oath;

(2) to compel the production of documents and material objects;

(3) to issue commissions for examination of witnesses; and

(4) in respect of other matters that may be prescribed, and every inquiry or investigation by a board is judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code.[35]

A conciliation officer, however, has only the power to enforce attendance of any person for the purpose of examination of such person or to compel the production and inspection of documents.[36]

(b) Procedure

The board has to follow the procedure like the courts and tribunals and subject to any rules that may be made in this behalf; whereas the conciliation officers are not bound by any procedural formalities, and the inquiry by a conciliation officer is of informal nature.[37]

(c) Initiation of Conciliation Proceedings

A conciliation officer can initiate proceedings in case of the public utility service only after a notice under section 22 has been given, and in any other case, he may in his discretion, hold the conciliation proceedings where an 'industrial dispute' is existing or is apprehended.[38]But the conciliation proceedings before a board can commence only after a reference has been made to it under section 10(1) of the Act by the 'appropriate government'.[39]

(d) Statement in Failure Report

The conciliation officer in his 'failure report' has only to state the facts and circumstances of the dispute along with the reasons on account of which, in his opinion, the settlement could not he arrived at,[40] whereas the board in its report has to state:

(1) the steps taken by it for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof;

(2) statement of facts and circumstances relating to the dispute and for bringing about a settlement thereof;

(3) its findings on the facts and circumstances of the dispute;

(4) the reasons on account of which, in its opinion, the settlement could not be arrived at; and

(5) its recommendations for the determination of the dispute.[41]

(e) Publication for Settlement or Failure Report

The settlement recorded or the failure report submitted by the board under section 13(3) is required to be published under section 17 ; whereas no such publication is required for the settlement recorded or the failure report submitted by the conciliation officer under section 12(4) of the Act.

(f) Period for Submission of Report

The period for submission of the conciliation officers' report is 14 days from the date of commencement of the proceedings or any other shorter period that may be fixed by the appropriate government and this period may be extended by agreement of the parties in writing[42] whereas the period for submission of the report of the board is two months from the date of reference of the dispute to it or a shorter period that may be fixed by the appropriate government and this period may be extended by agreement of all the parties in writing; or by the government for father time not exceeding two months in aggregate.[43]

(g) Commencement and Conclusion of Conciliation Proceedings

Before a conciliation officer, the conciliation proceedings commence on the date on which a notice of strike or lockout under section 22 is received by him in case of a public utility concern and in any other cases on the date indicated by him in formal notice under rule 10 of the Central Rules or the corresponding state rule, and conclude on the date of signing of the memorandum of settlement by the parties and in case of 'no settlement', on the date on which the appropriate government receives the report of the conciliation officer except in the case of a reference under section 10(1) of the Act being made during the pendency of the conciliation proceedings in which case the conciliation proceedings conclude on the date on which the reference is made. Before the board, the proceedings commence on the date the dispute is referred to it under section 10(1) (a) and conclude on the date on which the report of the board is published under section 17 of the Act.[44]

(h) Number of Members

A conciliation officer has to act singly for bringing about the settlement of the industrial dispute between the parties while the board consists of a chairman and two or four other members.

(i) Permanency of Tenure

A conciliation officer is a permanent employee on the rolls of the Government, usually belonging to the Labour Department, whereas a conciliation board is temporary in so far as it comes into being on being appointed by the appropriate government and stands dissolved once the purpose is served, i.e., after the settlement has been arrived at between the parties or a failure report has been submitted by the board to the government.

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27 Section 5 of the ID Act and r 6 of the Industrial Disputes (Central) Rules 1957.

28 Section 5(4) of the ID Act and r 14(1) of the Industrial Disputes (Central) Rules 1957.

29 Rules 9 to 30 of the Industrial Disputes (Central) Rules 1957.

30 Section 11(2).

31 Section 11(6).

32 Sections 12(3) and 13(2).

33 Sections 12(4) and 13(3).

34 Sections 4 and 5.

35 Section 11(3) and r 23 of the Industrial Disputes (Central) Rules 1957.

36 Section 11 (4).

37 Section 11(1).

38 Section 12(1) ; *KH Gandhi v Sinha (RNP)* (1958) 1 LLJ 82 (Pat) (DB), per Sinha J.

39 Section 13(1).

40 Section 12(4).

41 Section 13(5).

42 Section 12(6).

43 Section 13(5).

44 Section 20.

End of Document

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER II Authorities under the Act

S. 6. Courts of Inquiry.—

(1) The appropriate government may as occasion arises by notification in the Official Gazette constitute a court of inquiry for inquiring into any matter appearing to be connected with or relevant to an industrial dispute.

(2) A court may consist of one independent person or of such number of independent persons as the appropriate government may think fit and where a court consists of two or more members, one of them shall be appointed as the chairman.

(3) A court, having the prescribed quorum, may act notwithstanding the absence of the chairman or any of its members or any vacancy in its number:

Provided that, if the appropriate government notifies the court that the services of the chairman have ceased to be available, the court shall not act until a new chairman has been appointed.

LEGISLATION

This provision was enacted in the original Act of 1947. Rule 5 of the Industrial Disputes (Central) Rules 1957 provides that the appointment of a court of inquiry together with the names of persons constituting the court shall be notified in the Official Gazette.

COURT OF INQUIRY

Section 2(f) defines a 'court of inquiry'. Section 6 enables the 'appropriate government' to constitute a court of inquiry and the reference to that court of any matter appearing to be connected with or relevant to an industrial dispute has to be made under s 10(1)(b).[45]Section 11 prescribes the procedure and powers of the 'court of inquiry'. Section 14 lays down the duties of the court of inquiry. Section 16 provides for the form of the report which requires publication under s 17. During the pendency of proceedings before a court of inquiry, there is no bar against workmen going on strike, (s 22). Likewise, there is no bar against the employer declaring a lockout (s 23). Section 33, does not bar the employer from taking action against a workman during the pendency of proceedings before the court of inquiry.

45 *Ushodaya Publications Pvt Ltd v Govt of AP* 1983 Lab IC 580, 592 (AP) (DB), per Kuppuswami CJ.

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER II Authorities under the Act

[46][S. 7. Labour Courts.—

(1) The appropriate government may, by notification in the Official Gazette, constitute one or more labour courts for the adjudication of industrial disputes relating to any matter specified in the Second Schedule and for performing such other functions as may be assigned to them under this Act.

(2) A labour court shall consist of one person only to be appointed by the appropriate government.

(3) A person shall not be qualified for appointment as the presiding officer of a labour court, unless—

47[(a) he is, or has been, a judge of a High Court; or

(b) he has, for a period of not less than three years, been a district judge or an additional district judge; or

48[(c) ***];

49[(d)] he has held any judicial office in India for not less than seven years; or

50[(e)] he has been the presiding officer of a labour court constituted under any Provincial Act or State Act for not less than five years.]

51[(f) he is or has been a Deputy Chief Labour Commissioner (Central) or Joint Commissioner of the State Labour Department, having a degree in law and at least seven years' experience in the labour department including three years of experience as Conciliation Officer:

Provided that no such Deputy Chief Labour Commissioner or Joint Labour Commissioner shall be appointed unless he resigns from the service of the Central Government or State Government, as the case may be, before being appointed as the presiding officer; or

(g) he is an officer of Indian Legal Service in Grade III with three years' experience in the grade.]

LEGISLATION

The Industrial Disputes Act of 1947, as originally enacted did not contain provisions regarding the creation of labour courts. By the Industrial Disputes (Amendment and Miscellaneous Provisions) Act of 1956, for the old s 7, the present ss 7, 7 A, 7B, and 7C were substituted. Apart from s 7, which defines a 'labour court', the Second Schedule of the Act, was also inserted by the same amending Act of 1956. Section 7 has been amended by the Industrial Disputes (Amendment) Act 1964 (Act 36 of 1964), whereby cll (a) and (b) of the old sub-s (3) have been respectively relettered as cll (d) and (e) in the present sub-s (3) and present cll (a), (b) and (c) of sub-s (3) have been inserted afresh. As a result of this amendment, cll (a), (b) and (c) in sub-s (3) are now the same as cll (a), (aa) and (b) of sub-s (3) of the amended s 7A. By this amendment, the range of persons qualified to be appointed as presiding officers has been enlarged.

SUB-SECTION (1)

(i) Constitution of Labour Courts

The appropriate government has been empowered by sub-s (1) of s 7 to constitute one or more labour courts in a state. Thus, the provision is wide enough to enable the appropriate government to constitute more than one labour court. The Central Government may constitute labour courts in any state for adjudication of the matters in respect of which it is the 'appropriate government' while a State Government may constitute labour courts in its territories for adjudication of the matters in relation to which it is the 'appropriate government'. This section does not provide for any territorial limits to the jurisdiction of the labour courts so constituted. It is permissible for the appropriate government to refer any 'industrial dispute' in whatever territory of the state it may arise, to any of the labour courts, though no doubt for the purposes of convenience, it may decide to refer only disputes arising in a particular region to the labour court in that region.[52] The labour courts are to be appointed by a notification in the Official Gazette of the 'appropriate government'. This clause is self-contained so far as the Constitution of the labour courts is concerned. *As* soon as a notification under this clause is issued, the labour court is constituted. The government may take time to appoint a person as the presiding officer of the labour court but the appointment of the presiding officer cannot be held to be a part of the Constitution of the labour court. If for any reason a vacancy occurs in the office of the presiding officer of a labour court, the 'appropriate government' shall appoint another person to fill the vacancy under s 8 of the Act.[53]This sub-section merely provides for the Constitution of labour courts and lays down that they shall be competent to adjudicate upon any matters specified in the Second Schedule and to perform such other functions as may be assigned to them under the Act. But this provision does not indicate as to how a labour court will take congnizance of a dispute. From s 10, it is clear that the labour court can take cognizance of an industrial dispute only on a reference having been made to it under that section. Hence, a party to a dispute cannot approach a labour court directly for adjudication of an industrial disputes.[54]

(ii) Functions of Labour Courts

The labour courts shall be constituted for:

(a) adjudication of industrial disputes relating to any matters specified in the Second Schedule [section 7(1)] or matters appearing to be connected with or relevant to such disputes [section 10(1)(c)]; and

(b) performing such other functions as may be assigned to them under the Industrial Disputes Act [section 7(1) and s 33C(2)].

(a) Adjudication of Industrial Disputes

The Second Schedule specifically refers to s 7, which provides for the Constitution of labour courts for the adjudication of industrial disputes relating to matters in that schedule and for performing such other functions as may be assigned to them[55] but the first *proviso* to s 100) lays down that where the disputes relates to a matter specified in the Third Schedule, if it is not likely to effect more than 100 workmen, it can be referred to a labour court. Thus, disputes arising under Second Schedule can alone be adjudicated by a labour court unless the case falls under the first *proviso* to s 10(l) of the Act in which case the dispute under the Third Schedule can also be adjudicated upon by the labour court.[56] Therefore, if on the facts of a case, it appears that the dispute relating to a matter covered in the Third Schedule is likely to affect more than 100 workmen, the reference to the labour court would be invalid.[57] Item 6 of the Second Schedule is the residuary item under which, except the matters specified in the Third Schedule in respect of which, the industrial tribunal has exclusive jurisdiction, not only the labour court, but even the industrial tribunal will have jurisdiction to adjudicate.[58] The jurisdiction of the labour court to adjudicate upon matters enumerated in the Second Schedule, or matters in the Third Schedule in cases falling under the first *proviso* to s 10(1), or upon all matters other than those specified in the Third Schedule, springs from the reference made to it by the 'appropriate government' under s 10 of the Act.[59] Once a labour court is constituted to deal with 'industrial disputes', the 'appropriate government' has to refer to it such disputes as fall within its jurisdiction. However, if there are more than one labour courts so authorised in any area, there would obviously be a choice of forum, unless there were certain rules under which such choice is limited.[60] The functions of a labour court are of great public importance and are quasi-judicial in nature. The principles of adjudication of the disputes referred to the labour courts constituted under s 7, industrial tribunals constituted under s 7A and national tribunals constituted under s 7B are the same. The jurisdiction of the labour court stems from the order of reference and is sustained until it makes an award and the same becomes enforceable. Once the labour court is seized of jurisdiction by virtue of the order of reference made to it, it cannot be taken away by subsequent acts on the part of the parties.[61] Nor can the jurisdiction of the labour court be taken away by the government by cancelling, withdrawing or superseding the reference once made to it.[62]A labour court, constituted under s 7, cannot be abolished by the 'appropriate government', till it has made the awards in the references made to it, in the absence of a specific provision in the Act. Section 21 of the General Clauses Act cannot be pressed into service. Hence,

a notification cancelling a labour court constituted under s 7 and constituting a fresh labour court will operate from the date of that notification (and will not affect references made earlier) and the references made from the dates of the new notification will only be taken cognizance of by the new labour court.[63] It is not permissible for the labour court to entertain more disputes than are contemplated in the reference nor is it permissible for it to decline to adjudicate matters which clearly arise in the terms of the reference.[64]

(b) Performing such other Functions as may be Assigned under this Act

The word 'assign' means conferment of powers under the Act on one or more labour courts, as the case may be.[65] The other matters assignable to labour courts are:

(1) voluntary reference of industrial disputes by a written agreement between the parties under section 10(2) ;

(2) arbitration reference under section 10A ;

(3) application for 'permission' or 'approval' under section 33 ;

(4) application under section 33C(2) for computation of 'any money benefit' which is capable of being computed in terms of money;[66] and

(5) reference of awards or settlements for interpretation in cases of difficulty or doubt under section 36A.

These matters have been dealt with in their proper places under the relevant sections.

(iii) Presiding Officer

The labour court will consist only of one person and such person is to be appointed by the 'appropriate government'. Sub-sections (1) and (2) deal with different subjects. Sub-section (1) refers to the Constitution of labour court while sub-s (2) refers to the appointment of a person as presiding officer of the labour court. There may be a composite notification by which a labour court is constituted and a person is appointed as the presiding officer of that labour court. However, the source of power under each sub-section is distinct. Once a labour court is constituted under sub-s (1) of s 7, it need not be reconstituted again and again whenever there is a vacancy in the post of presiding officer and another person is appointed to that post. This position is clear from s 8 also, which refers to the appointment of a person in accordance with the provisions of the Act to fill a vacancy occurring in the office of the presiding officer of a labour court.[67]

(iv) Qualifications of the Presiding Officer of a Labour Court

The labour court is one of the authorities enumerated under Ch II. Sections 7, 7A and s 7B prescribe special qualifications for the presiding officers. These adjudicatory bodies are one man bodies and each of these sections prescribes the qualifications of the presiding officers of the authorities constituted thereunder. In*Statesman*, Hidayatullah CJI observed that the intention of legislature is that persons, who can be described as 'independent' and with sufficient judicial experience, must be selected. The mention of High Court judges and district judges in these sections indicates that ordinarily judicial officers from the civil judiciary must be selected at least so long as separation of judiciary from the executive in the public services is not finally achieved. The appointment of a person from the rank of civil judiciary carries with it an assurance which is unique. From a cursory glance of these sections, it would appear that the selection is most restricted in the case of national tribunals, and in varying degree less and less restricted in cases of tribunals and labour courts. A national tribunal, can only be presided over by a person who is or has been a judge of a High Court. These qualifications do not admit of any doubt or exception since the incumbent's qualifications are quite clearly laid down. In the case of tribunals, the range of selection is made wider by including a district judge or an additional district judge, who held the office for a period of not less than three years. The selection is made still wider in the case of labour courts by making competent, in addition, presiding officers of labour courts constituted under any Provincial Act or State Act for not less than five years, and persons holding judicial office for not less than seven years. This sub-section lays down that a person shall not be qualified for appointment as a presiding officer of a labour court unless:

(1) he is, or has been, a judge of a High Court; or

(2) he has for a period of not less than three years been a district judge or an additional district judge; or

(3) he has held any judicial office in India for not less than seven years; or

(4) he has been a presiding officer of a labour court constituted under any Provincial Act or state Act for not less than five years.

(5) *he is or has been a Deputy Chief Labour Commissioner (Central) or Joint Commissioner of the State Labour Department, having a degree in law and at least seven years' experience in the labour department including three years of experience as Conciliation Officer; or*

(6) *he is an officer of Indian Legal Service in Grade III with three years' experience in the grade*.

Note: *Items (5) and (6) above have been inserted in the year 2010, as indicated in the main section.*

In the same case, while considering the question whether a person, who had held the office of a magistrate for not less than seven years, would satisfy the requirement of judicial office within the meaning of s 7(3) (d) of the Act, the learned Chief Justice held that the phrase 'judicial office' postulates that there is an office and that office is primarily judicial. 'Office' means a fixed position for the purpose of duties. The distinction between 'judicial function' and 'judicial office' was held to be artificial and unsubstantial in view of the fact that the magistrate was holding a fixed position for 19 years and performing functions primarily of a judicial character. On this view of the matter, the learned Chief Justice refused to interfere by way of a writ of *quo warranto* with the appointment of the presiding officer of the labour court in view of the provisions of s 9 of the Act.[68] The Punjab and Haryana High Court has taken the view that the office of registrar to the pensions appeals tribunal is administrative in nature and not a judicial office, even if the tribunal be a judicial or quasi-judicial authority.[69] Likewise, the Bombay High Court held that assistant commissioner of labour in the service of the State Government could not validly be appointed as labour court judge.[70] In *Labour Law Practitioners Assn*, the Supreme Court quashed the notification issued by the Government of Maharashtra appointing assistant commissioners of labour as judges of labour courts, and observed that bearing in mind the principle of separation of powers and independence of the judiciary, judicial service contemplated a service exclusively of judicial posts in which there would be a hierarchy headed by a district judge. Persons presiding over industrial and labour courts would constitute judicial service so defined. Therefore, the recruitment of labour court judges has to be made in accordance with Art. 234 of the Constitution.[71]

(v) Court Subordinate to the High Court

The Patna High Court, had taken the view that the labour court constituted under s 7 of the Industrial Disputes Act, is a 'court subordinate' to the High Court within the meaning of s 115 of the Code of Civil Procedure. It was, however, observed that since the case has been placed before a Division Bench, it would make no difference whether the applications were under s 115 of the Code of Civil Procedure or under Art. 227 of the Constitution. For all intents and purposes the court said that the scope of application under s 115 of the Code of Civil Procedure or under Art. 227 of the Constitution is not very different.[72] The Gujarat High Court held that labour courts, industrial tribunals and national tribunals are courts within the meaning of s 3 of the Contempt of Courts Act 1971 for the purposes of s 10.[73]

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46 Sections 7, 7A, 7B and 7C subs by Act 36 of 1956, s 4, for s 7 (wef 10-3-1957).

47 Ins by Act 36 of 1964, s 3 (wef 19-12- 1964).

48 Clause (c) omitted by Act 46 of 1982, s 3 (wef 21-8- 1984).

49 Clauses (a) and (b) relettered as (d) and (e) respectively by Act 36 of 1964, s 3 (wef 19-12-1964).

50 Ins by Act 36 of 1964, s 3 (wef 19-12-1964).

51 Ins by Act 24 of 2010, s 4 (wef 15-9-2010 *vide* S.O. 2278 (E), dated 15-9-2010)).

52 *Muthe Steels (India) Ltd v LC*, 1979 Lab IC 325 [LNIND 1980 SC 275], 332 (AP) (DB), per Kuppuswamy J.

53 *East India Pharmaceutical Works Ltd v GS Verma* 1973 Lab IC 1501, 1502 (Pat) (DB), per SNP Singh J.

54 *Vishnu Sadav Bhattacharya v Cycle Industries* 1973 Lab IC 396, 397 (MP) (DB), per Raina J.

55 *South Indian Bank Ltd v AR Chacko* (1964) 1 LLJ 19 [LNIND 1963 SC 277], 21 (SC), per Das Gupta J.

56 *Sindhu Resettlement Corpn Ltd v IT* (1965) 2 LLJ 268, 273 (Guj) (DB), per Shelat CJ.

57 *Mgmt of Gauhati Transport Assn v LC* 1969 Lab IC 1568, 1573-74 (Assam & Nag), per Goswami J.

58 *Sindhu Resettlement Corpn Ltd v IT* (1965) 2 LLJ 268, 273 (Guj) (DB), per Shelat CJ.

59 *Working Journalists of 'Hindu' v 'Hindu'* (1961) 1 LLJ 288 [LNIND 1960 MAD 138] (Mad), per Veeraswami J.

60 *Chipping & Painting Employees Asm v AT Zambre* (1968) 2 LLJ 193, 198 (Bom) (DB), per Nain J.

61 *Working Journalists of 'Hindu' v 'Hindu'* (1961) 1 LLJ 288 [LNIND 1960 MAD 138] (Mad), per Veeraswami J.

62 *State of Bihar v DN Ganguli* (1958) 2 LLJ 634 [LNIND 1958 SC 92] (SC), per Gajendragadkar J.

63 *East India Pharmaceutical Works Ltd v GS Verma* 1973 Lab IC 1501, 1508-09 (Pat) (DB), per SNP Singh J.

64 *Mgmt Gauhati Transport Assn v LC* 1969 Lab IC 1568, 1573-74 (DB) (Assam & Nag), per Goswami J.

65 *Coromandal Fertilisers Ltd v State of AP* (1988) 2 LLJ 390, 391 (AP), per K Ramaswami J.

66 *South Indian Bank Ltd v AR Chacko* (1964) 1 LLJ 19 [LNIND 1963 SC 277], 21 (SC), per Das Gupta J.

67 *Mgmt of Bararee Coke Plant v Workmen* 1968 Lab IC 512, 514 (Pat) (DB), per Narasimham CJ.

68 *Statesman Pvt Ltd v HR Deb* AIR 1968 SC 1495 [LNIND 1968 SC 94], 1497-98 : 1969 (18) FLR 100 : 1968 Lab IC 1525 : [1968] 3 SCR 614 [LNIND 1968 SC 94], per Hidayatullah CJI.

69 *Haryana Coop Transport Ltd v State of Punjab* 1969 Lab IC 301 (P&H) (DB), per Shamsher Bahadur J.

70 *State of Maharashtra v LLP Assn* 1987 Lab IC 1061 (Bom) (DB), per Bharucha J.

71 *State of Maharashtra v LLP Association* (1998) 1 LLJ 868 [LNIND 1998 SC 189] (SC), per Sujata V Manohar J.

72 *Calcutta Chemical Co Ltd v Barman (DK)* 1969 Lab IC 1498, 1504 (Pat) (DB), per Untwalia J.

73 *Shaikh Mohammed bhikan Hussainbhai v Manager, Chandrabhanu Cinema* 1986 Lab IC 1749 (Guj) (FB).

End of Document

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER II Authorities under the Act

[74][S. 7A. Tribunals.—

(1) The appropriate government may, by notification in the Official Gazette, constitute one or more industrial tribunals for the adjudication of industrial disputes relating to any matter, whether specified in the Second Schedule or the Third Schedule [75][and for performing such other functions as may be assigned to them under this Act].

(2) A tribunal shall consist of one person only to be appointed by the appropriate government.

(3) A person shall not be qualified for appointment as the presiding officer of a tribunal unless—

(a) he is, or has been, a judge of a High Court; or

[76][(aa) he has, for a period of not less than three years, been a district judge or an additional district judge [77][***].

[78][(b) he is or has been a Deputy Chief Labour Commissioner (Central) or Joint Commissioner of the State Labour Department, having a degree in law and at least seven years' experience in the labour department including three years of experience as Conciliation Officer:

Provided that no such Deputy Chief Labour Commissioner or Joint Labour Commissioner shall be appointed unless he resigns from the service of the Central Government or State Government, as the case may be, before being appointed as the presiding officer; or

(c) he is an officer of Indian Legal Service in Grade III with three years' experience in the grade.]

(4) The appropriate government may, if it so thinks fit, appoint two persons as assessors to advise the tribunal in the proceeding before it].

LEGISLATION

There was no provision of any adjudicatory machinery in the repealed Trade Disputes Act 1929. Tribunals were created for the first time by s 7 of the Industrial Disputes Act 1947, for the purpose of 'adjudicating' upon 'industrial disputes', referred to them by the 'appropriate government', thus introducing 'compulsory adjudication' where voluntary negotiations or mediation through the machinery of conciliation authorities fail. But after the experience of a decade, the employers and workmen have been given the option to refer industrial disputes to voluntary arbitration by mutual agreement in writing under s 10A of the Act. By the Industrial Disputes (Amendment and Miscellaneous Provisions) Act 1956, original s 7 was replaced by the present ss 7, 7A, 7B and 7C. Section 7A empowers the appropriate government to constitute industrial tribunals. This section has been further amended by s 4 of the Industrial Disputes (Amendment) Act 1964, by the insertion of cl (aa). Consequently, now, even a person who has been a 'district judge' or 'additional district judge', for a period not less than three years, can be appointed as presiding officer of an industrial tribunal.

SUB-SECTION (1)

(i) Constitution of Industrial Tribunals

The appropriate government has been empowered by s 7A to constitute one or more industrial tribunals. The Central Government can appoint tribunals in any state for the adjudication of the 'industrial disputes' in relation to which it is the 'appropriate government'. A State Government may constitute one or more industrial tribunals in its territory, for adjudicating the matters in respect to which it is the appropriate government. The appointment of the industrial tribunals has to be made by the appropriate government by means of a notification in its Official Gazette. The moment a notification under this sub-section is issued in the Official Gazette. the establishment of the industrial tribunal is complete and permanent. The appointment of the presiding officer of the tribunal, though essential, is a separate matter. However, the appropriate government can constitute a tribunal and make an appointment of the presiding officer thereof simultaneously by a composite notification or by different notifications.[79]In terms of amendment of 1982, the tribunals have been given jurisdiction not only to adjudicate upon the 'industrial disputes' relating to any matter specified in the second or Third Schedule but also will have jurisdiction to perform 'such other functions as may be assigned to them under the Act'. This amending Act has relegated some functions to the industrial tribunals other than the adjudication of disputes on reference under s 10. Such other matters, therefore, have been covered by the amendment. However, s 10(1)(d) further provides that when a reference is made of an industrial dispute relating to any matter specified in the Second or Third Schedule, any matter appearing to be connected with or relevant to that dispute can be further referred to the tribunal for adjudication. It is immaterial whether any such 'matter appearing to be connected with or relevant to' the basic dispute relates to any matter specified in the Second or Third Schedule or not. It is sufficient that the matter is connected with or relevant to the dispute that has been referred for adjudication to the tribunal.

In *LIC of India*, the Central Government in exercise of powers under s 10(1) (d) of the Act referred an industrial dispute for adjudication to the Central Government Industrial Tribunal, Bombay between the Management of the Life Insurance Corpn of India, Bombay and its workmen represented by the All India Insurance Employees Association. The award of the tribunal arising out of this reference was challenged before the Bombay High Court on the ground that the Central Government Industrial Tribunal had no jurisdiction to entertain the dispute which will affect the functioning of the Life Insurance Corporation all over India. It was submitted that the Central Government Industrial Tribunal, Bombay had only limited territorial jurisdiction confined to Maharashtra and Gujarat and it had no jurisdiction to decide disputes which have effect all over India. Therefore, the national tribunal ought to have been constituted for this purpose under the Act, as the impugned award was without jurisdiction. On appraisal of the relevant language of the statute, the court held that the provisions of s 7B did not expressly or impliedly curtail the territorial jurisdiction of the Central Government Industrial Tribunal. The award therefore, could not be considered beyond the territorial jurisdiction of the Central Government Tribunal.[80]The correctness of this holding is not free from doubt. In the absence of any statutory rules or regulations, the appropriate government can regulate its public services in exercise of its executive powers. In *Paulose*, the Government entrusted the work of selection of candidates for the appointment of presiding officers of industrial tribunals and labour courts to the advocate-general. This mode of selection of the candidates was challenged by a writ petition in the High Court of Kerala on the ground that the government is bound to make appointment to this post after giving an opportunity to all eligible persons before considering for appointment by proper publicity through advertisement in newspapers. In the absence of such opportunity being given to all the persons having such prescribed qualification to be appointed, the method was unfair and arbitrary and, therefore, violative of Arts. 14 and 16 of the Constitution. A single judge of the Kerala High Court upheld the appointment holding that the action taken by the government was within the powers enjoined by law and it is not the requirement of law that for every recruitment to an office under the state, there must be an advertisement in the public press. Therefore, it is not necessary that the state must in every case of public employment issue an advertisement or notice inviting applications for an office.[81]

(ii) Term of the Tribunal

Under the provisions of s 7A, the appropriate government has ample power of constituting an industrial tribunal for a limited time intending thereby that its life would automatically come to an end on the expiry of that time. Again, the 'appropriate government' has wide discretion to appoint tribunals for any limited time or for a particular case or a number of cases or for a particular area. When a tribunal constituted for a limited period automatically comes to an end after the expiry of the period, the 'appropriate government' can constitute another tribunal and refer to it the disputes which were pending before the first tribunal and remained undisposed. On the life of a tribunal coming to end by efflux of time or by the disposal of the cases for the adjudication of which it was specifically constituted, no question of vacancy in the office really arises and it is not a case falling under s 8, but the situation that arises falls within the ambit of s 7A, ie, a new tribunal has to be constituted under s 7A, rather than filling in the vacancy under s 8.[82] The government can nominate a person to constitute an industrial tribunal for adjudication of 'industrial disputes' as and when they arise and refer them to it under s 10 ; or it may constitute a tribunal for a particular case or cases.[83] The scope of the two steps, *viz*, Constitution of industrial tribunal under sub-s (1) and appointment of presiding officers under sub-s (2) though may be notified in one

notification, is different from each other. The industrial tribunal is constituted for the adjudication of 'industrial disputes', while its presiding officer is appointed to preside over the tribunal. It is obvious that the tribunal may be constituted for a longer or indefinite period, while the presiding officer may be appointed only for a short or limited period. For instance, the tribunal may continue, while its presiding officer may abdicate his office, by retirement on attaining the prescribed age, resignation or death. Thus, the term of the tribunal is not co-extensive with that of its presiding officer. The tribunal constituted under s 7A is a permanent tribunal.[84] Under s 8, when a vacancy occurs in the office of a presiding officer another person may be appointed in his place, and the tribunal will then carry on from the stage at which the case was when the vacancy was filled.[85]

In *Minerva Mills*, the Supreme Court, construing a notification constituting an industrial tribunal to the effect that, '*under s 10(1)(c) of the Industrial Disputes Act, HH the Maharaja is pleased to direct that the tribunal now constituted under this notification shall hear and dispose of all the references made to the previous tribunal constituted under the notification of 15 June 1951, which have remained undisposed of on 15 June 1952*' observed that, 'this notification does not say that this new tribunal cannot hear the dispute *de novo*. If any prejudice is caused to the employers, it will be open to the newly constituted tribunal to begin the hearing of the disputes from the very first stage'. Thus, if in a case the tribunal ceases to exist, the appropriate government while constituting a new tribunal can, in the same notification, empower the new tribunal to begin hearing of the pending 'industrial disputes' from the stage at which they were left by the previous tribunal in the process of adjudication. If, however, the span of the tribunal itself comes to an end and a new tribunal is constituted in its place under s 7A, it is open to the newly constituted tribunal to begin *denovo*, if otherwise prejudice is likely to be caused to any party. It is, however, open to either party to point out and convince the new tribunal that prejudice will be caused if a *de novo* trial is not held. [86]

Once the tribunal has been constituted and its appointment has been duly notified, along with the name of the presiding officer who is appointed to it, disputes may be referred to such tribunal under s 10 by the 'appropriate government', for adjudication. It is, however, pertinent to note that reference is to the tribunal and not to its presiding officer. The two are conceptually distinct. In some states, a practice has developed to mention in the order of reference the name of the presiding officer, who for the time being may be presiding over the tribunal, because in such states the tribunals do not bear any distinctive serial numbers or other mark which may distinguish them from each other, such as first tribunal, second tribunal, etc. The name of the presiding officer of the tribunal, therefore, is intended to merely identify the tribunal concerned out of many that may be operating in a particular region to which the reference is intended to be made. An ingenious point was raised before the Delhi High Court in *Blue Star*.[87] The presiding officer of the labour court went on temporary leave and the government appointed another person as the presiding officer during his absence. The appointment of the temporary presiding officer was, however quashed by the High Court for the reason that the real presiding officer had not demitted his office and there was no vacancy under s 8 created by his going on leave.[88] In the meantime, a reference was made to the labour court constituted for the union territory of Delhi and presided over by the temporary presiding officer. When the real presiding officer resumed his office upon his return from leave, his jurisdiction to adjudicate on the reference was challenged on the ground that the reference was made to the other presiding officer and he alone could adjudicate on it. It was argued that since the appointment of the temporary presiding officer had been annulled by the High Court, the reference itself was invalid. The objection prevailed with the labour court and it held that it had no jurisdiction to adjudicate on the dispute on the ground that the reference had been made to the labour court presided over by the other presiding officer and that such a reference could be heard only by him and not by any other presiding officer of the labour court. Furthermore, since the appointment of the temporary presiding officer was itself invalid, the reference did not survive. This award of the labour court was quashed by the High Court holding that the reference was to the labour court then presided over by the temporary presiding officer which was otherwise presided over by the real presiding officer and not to the individual presiding officer.

A tribunal once appointed cannot be abolished by an executive act merely because the government chooses to put an end to it when a reference is pending before it, for the state cannot do indirectly what is not permissible to it to do expressly or impliedly under the Act. Hence, a dispute pending before such a tribunal cannot be referred to another tribunal under s 10(1) (d) as that can be done only under s 33B.[89] The fact that a tribunal derives its authority from an order of reference to adjudicate upon a dispute, does not extinguish the authority of the tribunal nor does it render the tribunal *functus officio*, when the tribunal communicates its decision to the 'appropriate government' which referred the dispute. On disputes being raised, the appropriate government is entitled to refer those disputes to an industrial tribunal, and the tribunal may make its award on the disputes referred to it, and for the purpose of the dispute so referred and decided by an award, the proceedings before the tribunal may be deemed to be concluded. But the tribunal does not become *functus officio qua* those disputes, nor does it come to an end with the making of an award. The government would, therefore, be entitled to make a reference under s 36A to a tribunal for clarification of a prior award, and a supplementary award of the tribunal on such reference would be valid.[90] In *Renjit Kumar*, s 7A(3)(a), as amended by the State of Kerala by Act 28 of 1961, was under challenge. More specifically, the issue was about the disparity in pay between the Presiding Officers of Industrial Tribunals and District Judges, by which the former were placed in a lower scale of pay. In a writ petition filed by the

respondents, the Kerala High Court directed the Government of Kerala to place the presiding officers in the same scale of pay as the district judges. Aggrieved, the State of Kerala moved the Supreme Court. Dismissing the appeal, Panta J (for self and Thakker J) held:

> The State Government had granted pay scale at par with that of the District Judges before the recommendations of the pay scales of the District Judges by the Shetty Commission by which District Judges were placed in higher scales which benefit has been denied to the Presiding Officers of Industrial Tribunals merely, on the ground that the Presiding Officers of the Industrial Tribunal are not appointed under Article 233 of the Constitution of India nor they are appointed to the Judicial Services of a State under Article 234 of the Constitution. The action of the State Government in treating the officers presiding over the Industrial Tribunal differently from the District Judges in the matter of pay scales on its face is in violation of Article 14 of the Constitution of India (para 9)... Having regard to the well-reasoned judgment of the Division Bench, we are of the view that the impugned judgment warrants no interference inasmuch as no illegality, infirmity or error of jurisdiction could be shown before us by the appellant-State.[91] (para 14).

(iii) Jurisdiction and Powers of the Tribunal

The first *proviso* to s 10(1), however, lays down that where the dispute relates to a matter specified in the Third Schedule and is not likely to affect more than one hundred workmen, the appropriate government has the discretion to make the reference to a labour court. Thus, whereas, questions arising under the Second Schedule can be adjudicated both by a tribunal as well as a labour court, questions arising from matters in the Third Schedule can be referred for adjudication to a tribunal alone, unless the case falls under the first proviso to s 10 (1)(d). There is a marked distinction between the jurisdiction of the labour court and that of the industrial tribunal. Whilst the labour court, functioning for all purposes enumerated under the Act, has certain duties and responsibilities as prescribed therein, the matters to be dealt with and which are within the jurisdiction of the industrial tribunal as prescribed under s 7A are entirely different.[92]The industrial tribunals constituted under this section are required not only to adjudicate industrial disputes but also may be required 'to perform such other functions as may be assigned to them under this Act'. The word 'assign' means conferment of powers under the Act on such tribunals. In other words, apart from the power to refer the matters for adjudication of industrial disputes relating to any matter whether specified in the Second Schedule or the Third. Schedule, such tribunals can be required to perform such other functions as may be assigned to them under the Act. For instance, functions of a labour court under ss 7 and 33C can also be assigned to an industrial tribunal and vice versa when the functions of a labour court under s 7A are assigned to an industrial tribunal constituted under s 7A, it can legally and validly discharge the functions of a labour court. For the sake of brevity, a compendious name such as industrial tribunal-cum-labour court has been coined.[93]

(iv) Tribunal's functions are of Quasi-judicial Nature

Though, industrial tribunals are not courts, in the strict sense of the term, they have to discharge quasi judicial functions. Their powers are derived from the statute that created them and they have to function within the limits imposed by it and to act according to its provisions.[94] Being judicial or quasi-judicial bodies, these tribunals are bound to serve notices upon the parties to a reference. The service of such notices is essential and any award made without serving of such notices will be fundamentally wrong.[95] The nature of the functions of the industrial tribunals was considered by the Supreme Court in *Bharat Bank*, in which Mukherjea J held that the functions and duties of an industrial tribunal are very much like those of bodies discharging judicial functions, although it is not a court. Its powers in some respects are different and far wider from those of an ordinary civil court. It has jurisdiction and power to give reliefs which a civil court, administering the law of the land, does not possess in the discharge of its duties; for instance, ordering as a judicial body the reinstatement of a discharged or dismissed workman.[96] All the four judges who delivered their opinions touching upon the subject. After consideration of the provisions of the Act, Kania CJI held that it seemed that 'the tribunal is discharging functions very near to those of a court, although it is not a court in the technical sense of the word'.[97] Fazal Ali J precisely pointed out that 'there can be no doubt that the industrial tribunal has, to use a well-known expression, "all the trappings of a court" and performs functions which cannot but be regarded as judicial. This is evident from the rules by which the proceedings before the tribunal are regulated'.[98] Mahajan J elaborated:

> The adjudication of the dispute has to be in accordance with evidence legally adduced and the parties have a right to be heard and being represented by a legal practitioner... the industrial tribunal has all the necessary attributes of a court of justice. It has no other function except that of adjudicating on a dispute. It is no doubt true that by reason of the nature of the dispute that they have to adjudicate, the law gives them wider powers than are possessed by ordinary courts of law, but powers of such a nature do not affect the question that they are exercising judicial power... that circumstance does not make them anything else but tribunals exercising judicial power of the state, though in a degree different from the ordinary courts and to an extent which is also different from that

enjoyed by an ordinary court of law.[1]

On the basis of the holding in *Bharat Bank's* case, a Full Bench of the Gujarat High Court held that the labour courts, industrial tribunals and national tribunals fall within the meaning of the word 'court' in s 10 of the Contempt of Courts Act 1971.[2]

PRESIDING OFFICER

Sub-section (2) lays down that the tribunal shall consist of one person only who is to be appointed by the government and designated as 'presiding officer' of the tribunal.

QUALIFICATIONS OF THE PRESIDING OFFICER

Sub-section (3) prescribes qualifications for the appointment of presiding officers of industrial tribunals and lays down that a person shall not be qualified for appointment as the presiding officer of a tribunal unless:

(a) he is, or has been, a judge of a High Court; or

(aa) he has, for a period of not less than three years, been a district judge or an additional district judge; or.

(b) *he is or has been a Deputy Chief Labour Commissioner (Central) or Joint Commissioner of the State Labour Department, having a degree in law and at least seven years' experience in the labour department including three years of experience as Conciliation Officer; or*

(c) *he is an officer of Indian Legal Service in Grade III with three years' experience in the grade.*

Note: *Items (b) and (c) have been inserted in the year 2010, as indicated in the main section.*

Section 7A(3) indicates that it is a person that can be appointed as a tribunal not an office.[3]Section 7C prescribes further qualifications for such appointment, ie, (i) the person appointed must be an 'independent person', and (ii) he must not have attained the age of 65 years. Thus, if a person appointed as presiding officer of an industrial tribunal does not satisfy the requirements of s 7A(3) and s 7C, his appointment shall be invalid and he shall have no jurisdiction for the purposes of the Act. For cl 2(aa) of the Central Act, the State of Haryana substituted its own cl 2(aa), which reads: "(aa) *he is qualified for appointment as, is or has been a district judge or an additional district judge or*." Pursuant to this clause, the State Government appointed certain practising lawyers as presiding officers of the industrial tribunals and the labour courts who had completed seven years practice as advocates. However, a district judge can be appointed by the State Government in consultation with the High Court. A practising advocate can only be appointed as a district judge if he has been 'for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment'. Thus, a lawyer, even if he has completed seven years of practice at the bar, is not eligible for appointment as a district judge or additional district judge unless he is 'recommended by the High Court for appointment'. In other words, the requirement of seven years' practice at the bar and the recommendation by the High Court for the appointment are cumulative *sine qua non* for appointment to the post of a district judge. In this view of law, a Full Bench of the Punjab and Haryana High Court in *Tul-Par Machine*, quashed the appointment of the presiding officers of the industrial tribunals and the labour courts because their appointment had not been recommended by the High Court. However, the court accepted the contention of the state that merely because the appointments of the presiding officers of the tribunals and the labour courts had been quashed, this would not *ipso facto* vitiate the awards rendered by them. The court, therefore, held that the offices of the presiding officers of the tribunals and the labour courts did lawfully exist and even if the appointments of the incumbents thereto had been set aside, the awards delivered by them under the colour of office would not be rendered inoperative on the basis of the *de facto* doctrine.[4]

ASSESSORS

Sub-section (4) authorises the 'appropriate government', if it so thinks, to appoint two persons as assessors to advise the tribunal in the proceedings before it. The assessors are usually appointed in cases involving technical or scientific details. Rule 25 of the Industrial Disputes (Central) Rules 1957 prescribes that where assessors are appointed to advise a tribunal or national tribunal under sub-s (4) of s 7A or sub-s (4) of s 7B or under sub-s (5) of s 11, the labour court, tribunal or national tribunal, as the case may be, shall in relation to proceedings before it, obtain the advice of such assessors but such advice shall not be binding on it. In *National Iron and Steel Co*, the Supreme Court observed that 'for the determination of technical matters, it is always desirable to have the assistance of persons who are familiar with the subject. No doubt, the ultimate decision would rest with the tribunal but since the decision has to be based on proper material, it should not have

denied to itself the opportunity of obtaining the appropriate material.[5]

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74 Sections 7, 7A, 7B and 7C subs by Act 36 of 1956, s 4 for original s 7 (wef 10-3-1957).

75 Ins by Act 46 of 1982, s 4 (wef 21-8-1984).

76 Ins by Act 36 of 1964, s 4 (wef 19-12- 1964).

77 The word 'or' omitted by Act 46 of 1982, s 4 (wef 21-8-1984).

78 Ins by Act 24 of 2010, s 5 (wef 15-9-2010 *vide* S.O. 2278 (E), dated 15-9-2010). Earlier, cl (b) omitted by Act 46 of 1982, s 4 (wef 21-8-1984).

79 *Hotel Kanishka v Delhi Administration* 1995 Lab IC 2381, 2386 (Del), per Anil Dev Singh J.

80 *LIC of India v All India Insurance Employees Assn* 1989 Lab IC 1493 (Bom), per Sujata Manohar J.

81 *Paulose v State of Kerala* (1993) 2 LLJ 491 (Ker) : ILR 1993 (1) Ker 563 per Mathew J.

82 Cf, *Minerva Mills Ltd v Workers* (1954) 1 LLJ 119 [LNIND 1953 SC 82], 122 (SC), per Mahajan J.

83 *JB Mangharam & Co v KB Kher* AIR 1956 MB 183 (DB), per Dixit J.

84 *G Claridge & Co Ltd v IT* AIR 1951 Bom 100 [LNIND 1951 BOM 11], per Shah J.

85 *Maharaja Shri Umaid Mills Ltd v IT* AIR 1954 Raj 274 [LNIND 1954 RAJ 114], per Wanchoo CJ.

86 *Minerva Mills Ltd v Workers* (1954) 1 LLJ 119 [LNIND 1953 SC 82], 123 (SC) : AIR 1953 SC 505 [LNIND 1953 SC 172]: [1954] 1 SCR 465 [LNIND 1953 SC 172], per Mahajan J.

87 *Blue Star Engineering Co (Bom) Pvt Ltd v LC* 1975 Lab IC 1171 (Del) (DB).

88 *Fedders Lloyd Corpn Pvt Ltd v Lieutenant Governor, Delhi* 1970 Lab IC 421 [LNIND 1969 DEL 112], 423-24 (Del) (DB).

89 *Shellac Industries Ltd v Workmen* (1967) 1 LLJ 492, 495 (Cal) (DB), per Dutt J.

90 *G Claridge & Co Ltd v IT* AIR 1951 Born 100, per Shah J.

91 *State of Kerala v B Renjith Kumar* AIR 2009 SC (supp) 465, per LS Panta J.

92 *PSS Bommanna Chettiar Sons v LC* 1973 Lab IC 882, 883 (Mad), per Ramaprasada Rao J.

93 *Coromandal Fertilisers Ltd v State of AP* (1988) 2 LLJ 390, 391 (AP), per K Ramaswamy J.

94 *JK Iron & Steel Co Ltd v Iron & Steel Mazdoor Union* (1956) 1 LLJ 227 [LNIND 1955 SC 119] (SC), per Bose J.

95 *Indian Mining Assn v Koyla Mazdoor Panchayat* 4 FJR 239 (LAT).

96 *Bharat Bank Ltd v Employees* (1950) I LLJ 921 (SC) : AIR 1950 SC 188 [LNIND 1950 SC 4]: [1950] 1 SCR459, per Mukherjea J.

97 Ibid, per Kania CJI.

98 Ibid, pp 922-23, per Fazal Ali J.

1 Ibid, p 932, per Mahajan J.

2 *Shaikh M Hussainbhai v Chandrabhanu Cinema* 1986 Lab IC 1749 (Guj) (FB).

3 *Mgmt of Punjab National Bank Ltd v LC* 1969 Lab IC 1574, 1579 (J&K), per IN Bhat J.

4 *Tul-Par Machine & Tool Co v Joginder Pal* 1983 Lab IC 1615, 1626 (P&H) (FB), per Sandhawalia CJ.

5 *National Iron and Steel Co, Ltd v Workmen* (1962) 2 LLJ 752 [LNIND 1962 SC 271], 757 (SC) : AIR 1963 SC 325 [LNIND 1962 SC 271]: [1963] 3 SCR 660 [LNIND 1962 SC 271], per Mudholkar J.

End of Document

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER II Authorities under the Act

[6][S. 7B. National Tribunals.—

(1) The Central Government may, by notification in the Official Gazette, constitute one or more national industrial tribunals for the adjudication of industrial disputes which, in the opinion of the Central Government, involve questions of national importance or are of such a nature that industrial establishments situated in more than one State are likely to be interested in, or affected by, such disputes.

(2) A National Tribunal shall consist of one person only to be appointed by the Central Government.

(3) A person shall not be qualified for appointment as the presiding officer of a National Tribunal [7][unless he is, or has been, a Judge of a High Courts'.]

(4) The Central Government may, if it so thinks fit, appoint two persons as assessors to advise the National Tribunal in the proceeding before it.]

CONSTITUTION OF NATIONAL TRIBUNAL

The power to constitute national tribunals is only with the Central Government under s 7B. A national tribunal can he constituted only for the adjudication of the 'industrial disputes' involving questions of national importance or the 'industrial disputes' in which industrial establishments situated in more than one state are likely to be interested or are likely to be affected by. The reference to a national tribunal can be made only by the Central Government whether it is or is not the appropriate government.[8] Sub-section (6) of s 10 provides that when a reference of an industrial dispute under sub-s (lA) of s 10 is made to a national tribunal, it is the national tribunal alone which will have jurisdiction to adjudicate upon the dispute and any industrial tribunal or the labour court before whom the same dispute may be pending for adjudication, shall cease to have jurisdiction to proceed further with the adjudication of the dispute.[9]Sub-section 7 of s 10 further provides that when a reference of an 'industrial dispute' is made to the national tribunal by the Central Government,' whether it is the 'appropriate government', or not, then notwithstanding anything contained in the Act, any reference in ss 10, 17, 19, 33 A, 33B and 36A to the appropriate government, in relation to that dispute, shall be construed as a reference to the Central Government.[10] In *Life Insurance Corpn of India* (supra) a single judge of the Bombay High Court held that in describing the nature of the dispute which may be referred to a national tribunal, the Act does not provide that if a dispute is likely to affect industries in more than one state, the dispute may be referred to the national tribunal. But this is a matter of discretion which the Central Government has to exercise in deciding whether or not to constitute a national tribunal. The phrase 'the Central Government may constitute' in s 7B and the phrase 'the Central Government may refer' in s 10(1) indicate that the Central Government has a discretionary power to constitute a national tribunal in disputes, which in its opinion, are of the kind referred to in these sections and if it is of the view that such disputes should be decided by a national tribunal. the Central Government, therefore, is not bound to constitute a national tribunal for adjudication of such disputes. This view is debatable.

PRESIDING OFFICER

Sub-section 2 lays down that the national tribunal shall consist of one person only who is to be appointed by the Central

Government and designated as its presiding officer.

QUALIFICATIONS OF THE PRESIDING OFFICER

This provision lays down that a person shall not be qualified for appointment as a presiding officer of the national tribunal unless he is, or has been a judge of a High Court. The selection in case of national tribunal is more restricted. A national tribunal can only be presided over by a person who is or has been a judge of a High Court. Section 7C also prescribes further qualifications that the incumbent of the office of the presiding officer of a national tribunal should be an 'independent person' and also should not have attained the age of 65 years.[11]

ASSESSORS

Sub-section (4) authorises the Central Government, if it so thinks fit to appoint two persons as assessors to advise the national tribunal in the proceedings before it. The assessors are usually appointed in cases involving technical or scientific details. Rule 25 of the Industrial Disputes (Central) Rules 1957 prescribes that where assessors are appointed to advise a National Tribunal under sub-s 4 of s 7B or under sub-s 5 of s 11, the national tribunal shall in relation to proceedings before it, obtain the advice of such assessors but such advice shall not be binding on it.

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6 Sections 7, 7A, 7B and 7C subs by Act 36 of 1956, s 4, for original s 7 (wef 10-3-1957).

7 Subs by Act 46 of 1982, s 5 (wef 21-8- 1984).

8 See, notes and comments under s 10(1A), post.

9 Ibid, s 10(6) post.

10 Ibid, s 10(7) post.

11 See, notes and comments under s 7C.

End of Document

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER II Authorities under the Act

[12][S. 7C. Disqualifications for the Presiding Officers of Labour Courts, Tribunals and National Tribunals.—

No person shall be appointed to, or continue in, the office of the Presiding Officer of a Labour Court, Tribunal or National Tribunal, if-

(a) he is not an independent person; or

(b) he has attained the age of sixty-five years.]

INDEPENDENT PERSON

The opening part of s 7C read with cl (a) prohibits the appointment of a person to, or continuance in, the office of the presiding officer of a labour court, tribunal or national tribunal if he is not an 'independent person'. According to cl (i) of s 2, a person shall be deemed to be an 'independent' person for the purposes of appointment as the chairman or other member of a board of conciliation, court of inquiry or tribunal, if he is unconnected with the 'industrial dispute' referred to such board, court, or tribunal or with any industry directly affected by such dispute. However, cl (a) of s 7C does not refer to the appointment as chairman or the other members of a board or court of inquiry. Nor does it refer to an 'industrial dispute' or any 'industry affected' by such dispute. On the other hand, it refers to the appointment of a person to the office of 'a presiding officer of a labour court, tribunal or national tribunal'. From a juxtaposition of these two provisions, the definition of the expression 'independent' in cl (i) of s 2 does not appear to be adequate for the purposes of s 7C. According to cl (i) of s 2, if a particular 'industrial dispute' has been referred to a conciliation board, or the court of inquiry, or a tribunal, a person who is connected with that dispute or with any industry directly affected by that dispute shall not be deemed to be an 'independent person' for the purpose of his appointment as a chairman or other member of such bodies. It is understandable that if a labour court, tribunal or national tribunal is specifically constituted for adjudication of a particular industrial dispute by construing the word 'tribunal' used in cl (i) of s 2 to mean 'a labour court, tribunal or national tribunal', a person connected with such 'industrial dispute' or 'any industry directly affected by such dispute' can be deemed not to be an 'independent person'. Hence, his appointment as the presiding officer of such 'tribunal' can be deemed to be prohibited, furthermore, even if such a dispute is referred for adjudication to a body presided over by such a person, he shall be prohibited from continuing in the office of the presiding officer.

But in practice, the labour courts, tribunals or national tribunals, are rarely constituted for adjudication of only one dispute. A large number of industrial disputes are referred to such bodies. At the time of the appointment of an incumbent, he would not know as to what disputes are pending before the tribunal or what disputes are likely to be referred to. If, after his appointment as presiding officer of a 'tribunal', the incumbent comes to know that he is connected with a particular industrial dispute or with any industry directly affected by such dispute or such dispute is referred to the tribunal after his appointment, he will not be an 'independent' person *qua* such dispute alone. However, this will not vitiate his appointment as the presiding officer of the tribunal. The government has the power to transfer such a dispute from that tribunal to another tribunal under s 33B. From the language of s 7C it appears that lack of 'independence' in a person not only disqualifies him from being appointed to the office of the presiding officer of a labour court, tribunal or national tribunal, but it also disqualifies him from continuing in such office. The expression 'independent person' used in s 7C therefore,

appears to be much wider in scope than 'independent person' defined in cl (i) of s 2. However, for the purposes of s 7C, an 'independent person' having not been defined in the Act, it is not clear as to when a person can be treated to be not an 'independent' person which will disqualify him from being appointed to the office of the presiding officer of a labour court or industrial tribunal or national tribunal or to continue in such office. The appointment of retired High Courts judges or retired district judges for short terms makes them dependent upon the Government for their extension. This practice debases the freedom of the industrial adjudication hence it requires serious consideration by the Parliament to make such adjudicators really 'independent' persons.

AGE OF THE PRESIDING OFFICER

The second disqualification is with respect to the age of presiding officer. A person cannot be appointed to or continue in the office of the presiding officer of a labour court, tribunal or national tribunal after he has attained the age of sixty-five years. Some states have, however, extended this age limit as, for example, Punjab which extended the age limit up to 67 years.[13]The insertion of age disqualification in s 7C, only prescribes the age of retirement. Section 7A (3) (a) provides for the appointment of a High Court judge (sitting or retired) as presiding officer of an industrial tribunal. Age is clearly not a qualification under this sub-clause as the age for retirement for a judge of a High Court is 62 years. Likewise, cl (aa) provides for the appointment of a district judge or an additional district judge, sitting or retired, as presiding officer of a tribunal. Accordingly, a retired district judge or additional district judge who is aged over 62 will be eligible for appointment under this sub-clause. Thus, the age of a person does not enter into his qualifications under sub-cll (a), (aa) and (b) of s 7A (3). Further, the insertion of the age qualification in s 7C of the Act, is more consistent with the intention of the legislature to add a new provision prescribing the age of retirement for the presiding officer.[14] Hence, the qualification on the basis of age cannot be imported into s 7A (3) of the Act by drawing an inference from the provisions of s 7C of the Act. Where an additional district judge, belonging to the Haryana Superior Judicial Service was transferred and posted as presiding officer, industrial tribunal-cum-labour court, claimed that he should be allowed to continue as presiding Officer till he completes 67 years as provided under s 7C of the ID Act (as amended by the Government of Punjab), the Supreme Court repelled the contention and held that, in the absence of termination of lien from the cadre of Haryana Superior Judicial Service, he continued to be governed by the r 19 of Punjab Superior Judicial Service Rules (as applicable to the State of Haryana) in terms of which, the age of superannuation was 60 years, and not 67 years under the amended s 7C of the ID Act.[15]

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12 Sections 7, 7A, 7B and 7C subs by Act 36 of 1956, s 4, for original s 7 (wef 10-3-1957).

13 *Vide*, Punjab Act 8 of 1957, s 3 (wef 3-6-1957).

14 Cf, *Atlas Cycle Industries Ltd v Workmen* (1962) 1 LLJ 250 [LNIND 1962 SC 61], 256 (SC), per Venkatarama Ayyar J.

15 *BS Sharma v State of Haryana* (2001) 1 LLN 858 (SC).

End of Document

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER II Authorities under the Act

[16][S. 8. Filling of Vacancies.—

If, for any reason a vacancy (other than a temporary absence) occurs in the office of the presiding officer of a Labour Court, Tribunal or National Tribunal or in the office of the chairman or any other member of a Board or court, then, in the case of a National Tribunal, the Central Government and in any other case, the appropriate government, shall appoint another person in accordance with the provisions of this Act to fill the vacancy, and the proceeding may be continued before the labour court, tribunal, national tribunal, board or court, as the case may be, from the stage at which the vacancy is filled].

LEGISLATION

Section 10 of the repealed Trade Dispute Act 1929 made a similar provision. Section 8 of the Industrial Disputes Act 1947 as originally enacted, made provision for 'filling of vacancies', which was subsequently substituted by s 4 of the Industrial Disputes (Amendment & Miscellaneous Provisions) Act 1951 (Act 40 of 1951). That provision was again substituted by the present section by virtue of s 5 of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act 1956 (Act 36 of 1956).

FILLING OF VACANCIES

When for any reason, a vacancy occurs in the office of the presiding officer of a labour court, tribunal or national tribunal or in the office of the chairman or any other member of the board or court; the Central Government in case of the national tribunal and in any other case, the 'appropriate government', shall appoint another person to fill in the vacancy so caused. The vacancy can be filled in by taking into consideration the provisions of this Act. In other words, the incumbent appointed to fill in the vacancy must satisfy the requirements of s 7A or s 7B, as the case may be, and also s 7C in any case. The appointment then shall be governed by the provision of s 9. Normally, a vacancy in the office of the presiding officer of the bodies enumerated in this section would occur when the presiding officer dies, retires, resigns or otherwise becomes disqualified under s 7C. It may also happen that a person appointed as the presiding officer under s 7, s 7A or s 7B may have been appointed under a misapprehension of his qualifications. If, in such a case, it is found that he, in fact, did not possess the requisite qualifications, his appointment would be void *ab initio*.[17] The office of the presiding officer would, therefore, be treated as vacant *ab initio*. Further, if a person was disqualified under s 7C, his appointment will also be void *ab initio*. But if a person becomes disqualified under s 7C, after his valid appointment, his continuance in the office from the time of his becoming so disqualified, becomes void. The words 'for any reason' have been advisedly used by the legislature with a view to take in all sorts of contingencies under which a vacancy may occur in the office of the presiding officers of the adjudicatory bodies mentioned in the section. It is however, only when a vacancy occurs that the government can proceed under s 8. But otherwise, after reference having been made, the appropriate government has no longer power to interfere with its proceedings except to the extent of exercising such powers as have been expressly granted to it.[18]For instance, the government has power to transfer a dispute from one tribunal to another under s 33B and s

8 does not control s 33B of the Act.[19] The power under s 33B of the Act, however, can be exercised only for sufficient reasons.[20]

Before the amendment of s 8 by the amending Act of 1956, it was not clear whether the expression 'vacancy' used therein referred to a permanent vacancy or a temporary one as well. On the construction of the unamended section in *United Commercial Bank*, speaking for a majority, Kania CJI discussed the question as to when a vacancy could be said to have arisen and when it could not be said to have arisen due to temporary absence of a member of the tribunal. In this case, one of the members of the Industrial Tribunal was appointed as a whole-time member of another tribunal and it was not known how long he would continue to do the duties in the boundary tribunal. In these circumstances, the absence of a member from the industrial tribunal, was held not to be a temporary vacancy. It was, therefore, held that a vacancy within the meaning of s 8 had arisen. This view has been given legislative recognition in amended s 8 by the Amending Act of 1956. A temporary absence of the presiding officer, chairman or any other member of any of the bodies mentioned in the section, does not give rise to a 'vacancy' in his office within the meaning of s 8 of the Act. Hence, there is no question of any appointment being made in his place to fill in the vacancy. After the vacancy has been filled, the new incumbent becomes the presiding officer of the body to which he is appointed and the proceedings may be continued from the stage at which they were left. In other words, it will not be necessary to start the proceedings from the beginning before that person.[21] In *Fedders Lloyd*, the facts were: the appropriate government made an order purporting to be under s 8 appointing a person as the presiding officer of the labour court, Delhi while the permanent incumbent proceeded on leave for a few weeks. The appointment was quashed by the Delhi High Court holding that the order could not be regarded as under s 8, because the absence of the permanent presiding officer was obviously a temporary absence. The court observed:

> The reason for insertion of the words 'other than a temporary absence' after the word 'vacancy' in section 8 ...was to clarify that a vacancy must be a permanent one and is not caused by the temporary absence of the presiding officer ... For, when a vacancy is filled under section 8 of the Act, proceeding is continued from the stage at which the vacancy is filled. The intention obviously is to make a permanent arrangement necessitated by the occurrence of a permanent vacancy. [22]

The appointment could not even be sustained under s 7 as there could not be two presiding officers of the same labour court. Section 7 contemplates Constitution of the labour court which in the circumstances of the case was not permissible. Though the appointment of the temporary incumbent was annulled, the High Court in a subsequent decision *viz, Blue Star Engg*, held that a reference made to the labour court while it was presided over by a temporary incumbent was not invalid because the annulment of the appointment of the temporary incumbent as the presiding officer in the temporary absence of the permanent incumbent did not affect the validity of the order of reference.[23] Though, s 8 speaks of the appointment of a person to fill in the vacancy occurred in the office of the presiding officer of a labour court, tribunal or national tribunal etc, it does not say that such appointment is to be made by a Gazette Notification. But r 5 of the Industrial Disputes (Central) Rules 1957 requires that the names of the persons constituting such bodies shall be notified in the Official Gazette. In view of the fact that r 5 of the Industrial Disputes (Bihar) Rules 1961 refer to the appointment of persons to preside over the 'Board, Court or Tribunal'... and omitted the words 'Labour Court', the Patna High Court held that while filling in the vacancy of the presiding officer of a labour court under s 8, it was not necessary to make the appointment of such presiding

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16 Subs by Act 36 of 1956, s 5, for s 8 (wef 10-3-1957).

17 *Haryana Co-op Transport Ltd v State of Punjab* (1970) 1 LLJ 611 (P&H) (DB), per Shamsher Bahadur J.

18 *Harendranath Bose v Second IT* (1958) 2 LLJ 198 [LNIND 1957 CAL 193] (Cal), per Sinha J.

19 *Sur Enamel & Stamping Works Pvt Ltd v State of WB* 1968 Lab IC 257, 258 (Cal), per BN Banerjee J.

20 *Associated Electrical Industries (India) Pvt Ltd v Workmen* (1961) 2 LLJ 122 [LNIND 1960 SC 59] (SC), per Gajendragadkar J.

21 *United Commercial Bank Ltd v Workmen* (1951) 1 LLJ 621 [LNIND 1951 SC 26] (SC) : AIR 1951 SC 230 [LNIND 1951 SC 26]: [1951] 2 SCR 380 [LNIND 1951 SC 26], per Kania CJI.

22 *Fedders Lloyd Corpn Pvt Ltd v Lt Governor, Delhi* 1970 Lab IC 421 [LNIND 1969 DEL 112],423-24 (Del) (DB).

23 *Blue Star Engineering Co (Bom) Pvt Ltd v LC* 1975 Lab IC 1171 (Del) (DB).

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER II Authorities under the Act

[24][S. 9. Finality of orders constituting Boards, etc.—

(1) No order of officer by a Gazette Notification.[25] the appropriate government or of the Central Government appointing any person as the chairman or any other member of a board or court or as the presiding officer of a labour court, tribunal or national tribunal shall be called in question in any manner; and no act or proceeding before any board or court shall be called in question in any manner on the ground merely of the existence of any vacancy in, or defect in the Constitution of, such board or court.

(2) No settlement arrived at in the course of a conciliation proceeding shall be invalid by reason only of the fact that such settlement was arrived at after the expiry of the period referred to in sub-section (6) of section 12 or sub-section (5) of section 13, as the case may be.

(3) Where the report of any settlement arrived at in the course of conciliation proceeding before a board is signed by the chairman and all the other members of the board, no such settlement shall be invalid by reason only of the casual or unforeseen absence of any of the members (including the chairman) of the board during any stage of the proceeding.]

LEGISLATION

An analogous provision was contained in s 8 of the repealed Trade Disputes Act 1929. The Industrial Disputes Act 1947 (as originally enacted) contained s 9 in a simpler form making provision for the finality of orders constituting the boards. On the construction of the unamended s 9, in *United Commercial Bank*(supra), Kania CJI held that the award of the All-India Industrial Tribunal (Bank Disputes) was void on the ground of defect in the Constitution of the tribunal. Consequently, an amendment was brought about by the Industrial Disputes (Amendment and Miscellaneous Provisions) Act 1956, by virtue of s 5 of which, the present s 9 was substituted for the old one. It may be noticed that the first part of the section refers to the appointment of any person as the chairman or any other member of board or court or as the presiding officer of a labour court, tribunal or national tribunal. The second part deals with a board or court which means a 'board' as defined in s 2(c) and the court of inquiry as defined in s 2(f) of the Act.[26]

SUB-SECTION (1)

(i) Finality of Appointments and Proceedings

The jurisdiction of civil courts is barred by the use of the words 'in any manner' in this sub-section.[27]In other words, the orders of the 'appropriate government' appointing the officers mentioned in this sub-section cannot be questioned before civil courts for obtaining decrees invalidating such appointments, on the grounds of illegality or otherwise of such appointments. Further, any act or proceeding before any board or court has also been saved from being questioned in civil courts on the mere ground of (a) a vacancy, or (b) a defect in the Constitution of a board or court.

(ii) Jurisdiction of High Court under Article 226 of the Constitution

The bar of sub-s (1) of s 9 relates only to the jurisdiction of the civil courts, it is only the civil courts which would be

precluded from entertaining the disputes regarding the validity of the appointment and the proceedings of the presiding officers of the labour courts.[28] The power of the High Courts under Art. 226 of the Constitution to issue directions, orders or writs cannot be disputed where the tribunal is not duly constituted or is acting without jurisdiction,[29] and the powers of *certiorari* and *quo warranto* under plenary powers of Art. 226 of the Constitution give ample authority to the writ court to grant the necessary relief to an aggrieved party.[30]Neither the Parliament nor the State Legislature can take away the right conferred on the High Courts under Art. 226 of the Constitution. Such right can only be abridged by an amendment of the Constitution. Hence, the Industrial Disputes Act, even though it may be very widely worded, cannot take away the jurisdiction of the High Court under Art. 226 of the Constitution. It is, therefore, open to a High Court in its writ jurisdiction to consider the validity of the appointment of any person as the chairman or any other member of a board or the court or the presiding officer of a labour court, tribunal or national tribunal. The provision, therefore, cannot shut out an inquiry for the purposes of a writ of *quo warranto*, if there is a clear usurpation of the office.[31] Once it is determined that the tribunal has no jurisdiction, it can be prohibited by a writ of prohibition. A writ of *quo warranto*, can be issued if the qualifications prescribed for the appointment of presiding officers are not satisfied or any of the disqualifications prescribed by s 7C is found or comes into existence, ie, the officer crosses the age limit or no longer remains an 'independent person' within the meaning of s 2(i). The legislature cannot take away the powers of the High Court given to it by Art. 226 of the Constitution.[32]

FINALITY OF SETTLEMENTS

Sub-s (2) makes provision that a settlement arrived at after the period provided in ss 12(6) and 13(5), shall not be invalid. Thus, if conciliation proceedings are continued after the period of 14 days or less as may be fixed by the government before a conciliation officer, or proceedings before a board are continued beyond the period of two months or less as fixed by the government, any settlement arrived at as a result of such proceeding, has been saved by this provision and it shall be valid and binding in spite of the fact that such settlement was arrived at after the prescribed period.

CASUAL ABSENCE OF A MEMBER OF THE BOARD DOES NOT INVALIDATE A SETTLEMENT

Sub-section (3) makes provision that any settlement shall not be invalid only by reason of the casual or unforeseen absence of any member or the chairman of a board during any stage of the proceeding, where the report of any settlement is signed by the chairman and all the other members of the board.

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24 Subs by Act 36 of 1956, s 5, for s 9 (wef 10-3-1957).

25 *Sri Veena Chandra v Mgmt. of Vishwamitra Press* 1977 Lab IC 1490, 1496 (Pat) (DB), per LM Sharma J.

26 *Statesman Pvt Ltd v HR Deb* 1968 Lab IC 1525 (SC), per Hidayatullah CJI.

27 *Mewar Textile Mills Ltd v IT* AIR 1951 Raj 161 [LNIND 1951 RAJ 6], per Wanchoo CJ.

28 *Haryana Coop Transport Ltd v State of Punjab* (1970) 1 LLJ 611 (P&H) (DB), per Shamsher Bahadur J.

29 *Mewar Textile Mills Ltd v IT AIR* 1951 Raj 161, per Wanchoo CJ.

30 *Harayana Coop Transport Ltd v State of Punjab* (1970) 1 LLJ 611 (P&H) (DB), per Shamsher Bahadur J.

31 *Statesman Pvt Ltd v HR Deb* 1968 Lab IC 1525 (SC), per Hidayatullah CJI.

32 *Lila Vati Bai v State of Bombay* AIR 1957 SC 521 [LNIND 1957 SC 25], per Sinha J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

[1]CHAPTER IIA Notice of Change

S. 9A. Notice of Change.—

No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change,—

(a) without giving to the workmen likely to be affected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or

(b) within twenty-one days of giving such notice:

Provided that no notice shall be required for effecting any such change—

(a) where the change is effected in pursuance of any [2][settlement or award]; or

(b) where the workmen likely to be affected by the change are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Services Regulations, Civilians in Defence Services (Classification,. Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate government in the Official Gazette, apply.

LEGISLATION

There was no provision in the repealed Trade Disputes Act 1929 or in the Industrial Disputes Act of 1947, providing for 'notice of change'. As a result of persistent demand that 'notice of change' should be given, whenever it is proposed to make any change in the conditions of service of workmen, the new chapter, i.e., Chapter 2A consisting of ss 9A and 9B was inserted by s 6 of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act 1956, with effect from 10 March 1957. The effect of s 9A is that the employer shall not introduce any change in respect of matters specified in the Fourth Schedule, without giving to the workmen likely to be affected by such change, a notice of the nature of the change. It is further enjoined upon the employer not to effect the proposed change within twenty-one days of giving of the notice.

OBJECT AND SCOPE

The object of this section is to prevent a unilateral action on the part of the employer changing the conditions of service to the prejudice of the workmen.[3] The real purpose of enacting this provision is 'to afford an opportunity to the workmen to consider the effect of the proposed change and, if necessary, to present their point of view on the proposal' and such consultation would further serve to stimulate a feeling of common joint interest of the management and workmen in the industrial progress and increase productivity.[4] In other words, s 9A was enacted with a view to protect the interests of workmen who may be affected by a proposed change by the employer. This section is a mandatory provision.[5] Therefore, any change made in the conditions of service applicable to any workman in respect of any matters specified in the Sch 4, without complying with the requirements of this section shall be a nullity and void *ab initio* and as such inoperative in law.[6] As soon as the employer proposes a change in the conditions of service applicable to any workman, the provisions of

this section are attracted and the employer has to give the notice under this section to the workman.[7] The legislature has contemplated three stages in making provision for the notice of change under s 9A. The first stage is the proposal by the employer to effect a change; the second stage is the time when he gives a notice and the third stage when he effects the change on the expiry of 21 days from the date of the notice. The conditions of service do not stand changed, either when the proposal is made or the notice is given but they are affected only when the change is actually made, i.e., when the new conditions of service are actually introduced.[8] The employer is under no obligation to await a reference which could be made at the instance of the workers before implementing the proposals contained in the notice.[9]This section provides for procedure for alteration of conditions of service with respect to matters specified in the Fourth Schedule when there is no industrial dispute or conciliation proceedings pending. There is no provision in the Act prohibiting the management from altering the conditions of service after following the procedure prescribed thereunder. Once the management complies with the express provisions of the Act, it cannot be said to owe a public duty or statutory duty to await a reference by the workmen to challenge the proposals contained in the notice under s 9A of the Act.

NOTICE

(i) Change in Condition of Service

Section 9A requires an employer who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Sch 4, to give to the workmen likely to be affected by such change, a notice in the prescribed manner of the nature of the change proposed to be effected, before effecting such change. Rule 34 of the Industrial Disputes (Central) Rules 1957, prescribes the procedure for giving such a notice. The notice is to be given in form 'E'. The provisions of this section are mandatory and they are enacted for protecting the interests of the workmen likely to be affected by the proposed change,[10] and prohibit an employer from giving effect to any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule without giving to the workman likely to be affected, by such change, a notice in the prescribed manner of the nature of the change proposed to be effected. Further, the employer is enjoined not to effect the proposed change within 21 days of the notice.[11] For attracting the provisions of this section, firstly, there should be a change in the conditions of service and secondly, such change should be related only to the conditions of service enumerated in the Fourth Schedule.[12] For instance, where the services of some conductors were terminated being surplus as a result of rationalisation and standardisation effected by the corporation, such rationalisation fell under item 10 of the Sch 4 and it could not be given effect to without giving the notice required under s 9A of the Act. Mere withdrawal of a privilege will not amount to a change in service conditions until such privilege having been allowed to be enjoyed by the employees over a long stretch of time, as a matter of custom or usage and has, in effect, become an accepted condition of service.[13]

In *Calcutta Electricity Supply*, the employer-company had a scheme of giving medical benefits to its employees which was withdrawn after coming into operation of the Employees' State Insurance Act 1948 (ESI Act) on the ground that the medical benefits under the Act were more generous. The employees disputed this decision ofthe management on the ground of contravention of the provision of s 9A of the Act. The industrial tribunal held that the change effected by the management was in contravention of s 9A because it was not entitled to withdraw the medical benefits which were already in existence before the Act came into force. In appeal against the award of the tribunal, the Supreme Court held that the contention of the employer that the benefits available under the ESI Act were more beneficial was factually not correct. Apart from that, the court further held that there was nothing in the ESI Act or the regulations framed thereunder which enables the employer to withdraw the pre-existing benefits merely because the employees came to be covered under that Act.[14] In *SBI Staff Union*, under the regulation framed by the bank, a member of the award staff (clerical) was given the right to contest elections to the state assemblies and local bodies subject to certain conditions contained in a circular. Subsequently, the bank sought to withdraw this right which was contested by the staff union of the bank. The Andhra Pradesh High Court held that the withdrawal of this concession to contest the elections was not only infringement of provisions of s 9A but also was violative of the rules of natural justice.[15]

In *Coal India*, the facts were: The company has a number of establishments. In some establishments, they observe a five-days' week and in others, a six-days' week. Some workmen posted at the establishments observing five-days' week requested the management to post them at establishments observing six-days' week. After having been so posted, they claimed that the management had violated s 9A by effecting a change without notice, as required by that section. A single judge of the High Court held that there was no breach of s 9A, firstly because the workmen had not denied the averment of the management that security personnel are required to work six-days in a week for eight hours daily and, secondly, that the workmen had got transferred to those establishments on their own request.[16] This section relates to a change proposed in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule. It is doubtful whether this is attracted when the service itself has changed instead of there being a change proposed or brought about in the conditions of service to which the workman belongs. So long as the workman is in service, there may be no change in the conditions thereof in respect of any matter specified in the Fourth Schedule without the requisite formalities,

including notice to the workman being gone into. But where there is a cessation of the service itself and the workmen are absorbed differently, it does not appear that it would-also be a case covered under s 9A. For instance, in *Ordnance Parachute Factory*, the workmen working as tailors 'C' in the ordnance factory agreed to choose to work as labour '*B*' under the apprehension of retrenchment. A single judge of the Allahabad High Court held that though the workmen continued to be in the employment of the same employer but the employment was not the same. Therefore, the absorption of the workmen as labour '*B*' did not require notice as contemplated by s 9A. Furthermore, since the change was brought about with the volition of the workmen, it was not necessary to give the notice.[17] The opening words of this section indicate that the requirement of notice would apply, if an employer proposes to effect changes in conditions of service and not to a case where certain conditions of service become applicable to the employees by operation of law.[18] In other words, the change contemplated by this section is one which the employer has volition to make or not to make. Where an employer is compelled to give effect to any statutory rule or order which brings about change in the terms of employment, such change would not fall within the ambit of this section.[19]

A change which is not related to any of the conditions of service enumerated in the Fourth Schedule will not attract s 9A. For instance, in *Robert D'Souza*, it has been held that retrenchment is not covered under any item of the Fourth Schedule. Hence, it cannot be said to be a change in the conditions of service of a workman.[20] Likewise, in *Sur Iron and Steel*, a change of weekly off-days from Sunday to Saturday on account of some restrictions being imposed on the use of electricity by the State Government, was held to be outside the ambit of the Fourth Schedule. The Supreme Court observed that s 9A applies only to matters enumerated in the Fourth Schedule to the Act and there is no specific entry in that Schedule which would cover a condition of service relating to weekly off-days.[21] Though, the decision is not entirely based on this view, there is a clear indication in the judgment that the alteration did not attract the provisions of s 9A.[22] In *Tata Iron and Steel*, the weekly off-days were temporarily changed from Sunday to Wednesday in one colliery of the employer company and to Thursday in the other, on account of shortage of power supply. In view of the emergency of the situation, a notice as contemplated by s 9A was not possible. Despite this fact, the court held that the items 4, 5 and 8 of the Fourth Schedule, *viz*, 'hours of work and rest intervals'; 'leave with wages and holidays' and 'withdrawal of customary concession or privilege or change in usage', was wide enough to cover the weekly off-days, and thus s 9A was attracted.[23] The concept of 'weekly days of rest' as contemplated by s 28 of the Mines Act is altogether different from the items envisaged in the Fourth Schedule. Nor can a temporary change as an emergency measure fall within the ambit of the expression 'withdrawal of any customary concession or privilege' on any canons of statutory construction. The effect of this decision is that even for a temporary change in emergency circumstances, a notice under s 9A would be required, despite the fact that there may not be sufficient time for giving such notice in the circumstances of a given case. This will not only result in a great deal of hardship to the employers resulting in loss and exposing them to penal consequences under the Act, but will also encourage indiscipline and disharmony in industry.[24] The reasoning of the court on all the three points is unsound and lacks adequate perceptions of the statutory provisions and the principles of industrial jurisprudence.

In *Assam Match Co*, the court considered both the above cases. In this case, the question was whether the employer had contravened s 9A of the Act, when on the request of the majority of the workers, the holiday for Diwali was changed from a particular day to the next day. Referring to item No 5 of the Fourth Schedule, which deals with 'leave with wages and holidays', the court said, '*prima facie*, if a holiday has been fixed, the management may not have power to totally cancel the same or deprive the workman of such a holiday without confirming to the provisions of s 9A. But on the facts of the case, it held that the change in question could not be considered to be an alteration in the conditions of service. The court observed that if a large body of workmen required change of the day of the holiday on the ground that the festival is not being observed on the day originally fixed and the management changes the date, it could not be stated that there was an alteration in the conditions of service because the workmen were not at all deprived of the holiday for Diwali which, in fact, they got on the next day.[25]*Tata Iron and Steel Co's* case was explained as confined to its peculiar circumstances and the court avoided to go into the correctness of that decision probably because it was not canvassed. The court noticed the clear conflict in the earlier two dicta and instead of resolving the conflict and laying down what would be the correct approach, it restricted itself to deciding the matter before it on the special facts of that case, but subsequently, in a case relating to a public sector undertaking, ie, *ONGC*, the court adopted altogether different norms and process of reasoning, in holding that the change (in the working hours of the staff, from 6½ to 8 hours in the administrative office of the Natural Gas Commission at Baroda, did not attract the provisions of s 9A, because it was not a change of the nature contemplated by the Fourth Schedule of the Act.[26] It is not possible to reconcile the rationale of this decision with the ratio of *Tata Iron and Steel Co.* It is difficult to understand that if even the temporary change-a purely emergency measure as in Tata Iron and Steel Co fell within items 4, 5 and 8 of the Fourth Schedule, why, on the unequivocal language of the statute, the change in the working hours in Oil and Natural Gas Commission should not fall within the ambit of item 4? It is rather surprising that in the latter case, the court altogether omitted to refer to its earlier decision though the judgments in both the cases were delivered by the same judge. In *Hindustan Lever*, the Supreme Court held that the reorganisation of the business of the employer company from three into two departments will not fall within the perimeter of items 8, 10 and 11 of the Fourth Schedule of the Act, on the facts of the case, because the word 'affected' used in the expression 'workman likely to be affected by such change', in s 9A(a) would mean that the workers should be 'adversely affected' by such

change. Hence, unless the workers are adversely affected by the change in question, it will not fall within the mischief of s 9A. Since the workmen, in fact, were not adversely affected by the change brought about by the reorganisation in question, the provision of s 9A were not attracted. While reviewing its earlier decisions, the court contented itself with the following observation:

> A close scrutiny of various decisions would show that whether any particular practice or allowance or concession had become a condition of service would always depend upon the facts and circumstances of each case and no rule applicable to all cases could be culled out from these decisions. [27]

Little effort appears to have been made to reconcile the *ratio decidendi* of these cases. Particularly, the conflict in the ratio of *Tata Iron and Steel* on the one hand and the *Sur Iron and Steel* and *ONGC* on the other, has neither been clearly comprehended nor resolved. In *Tata Iron and Steel*, the change being of a temporary nature and an emergency measure had no adverse effect on the workmen while in *ONGC*, the change was clearly of adverse nature in changing the working hours from 6½ to 8 hours. Though, the court took the view that the change caused by the reorganisation would not attract the provisions of s 9A, it held that the non-payment of wages to the workmen for a particular period on their refusal to do the work according to the reorganised scheme, constituted an 'alteration of the conditions of service of the workers', hence notice of reorganisation under s 9A was required. It is rather strange that in one breath the court said that since the reorganisation did not adversely affect the workers, the notice was not required, while in the next, it said that the failure to give the notice of the scheme of reorganisation resulting in 'alteration of condition of service' invalidated the reorganisation. In taking this view, in this case, the court again appears to have been weighed by the consideration that the workmen will lose wages for the period for which they had refused to work, otherwise no logic, to justify these contradictory stands, is discernible. Even if the facts before the two tribunals were different, on consolidation of the appeals, the entire gamut of the facts was before the court. In the earlier part of the judgment, the court said that the change on account of reorganisation would not fall under items 8, 10 and 11 of the Fourth Schedule but in the later part, it has not indicated as to under what item it would fall. Presumably, it may be referable to item 1. But neither the construction of item 1, nor the ratio of *North Brook Jute Co* on which reliance seems to have been placed, would warrant this view. The picture of law emerging out of these decisions is completely blurred; therefore the law requires restatement. In *Indian Oil Corpn*, the employer company had withdrawn a compensatory allowance payable to its workmen on the line of such allowance previously introduced by the Central Government posted throughout Assam as it thought that the rule of the Central Government was not binding on it. This allowance was withdrawn unilaterally, without giving any notice to the workers. It was held that the compensatory allowance was undoubtedly an implied condition of service so as to attract the mandatory provisions of s 9A.[28] In *Food Corpn of India*, the court held that by cancelling the direct payment system and introducing the contractor, both the wages and mode of payment were altered within the meaning of item 1 of the Fourth Schedule. Hence, notice of change was required for introducing the change.[29] A single Judge of the Bombay High Court, after referring to the decisions of the Supreme Court in *Sur Iron* & *Steel*, *Tata Iron* & *Steel* and *Assam Match* cases, opined:

> These decisions do not lay down any consistent principle of law...proper conclusion to be arrived at would depend upon the facts of each case; and, therefore, a change which might bring in its wake the requirements of section 9A in one case, would not necessarily bring the same result in another situation.[30]

In this case, 22 November 1970 was the normal weekly off-day and 24 November 1970 was to be observed as *bandh* day. Considering the inadvisability of working the factory on the day of the proposed *bandh*, the employers decided to keep the factory closed on bandh day and, in its place, work on the normal weekly off, i.e., 22 November 1970. Accordingly, a notice was displayed on the notice board, which stated that 24 November would be treated as the weekly off-day in lieu of 22 November which would be treated as a working day. The short question for consideration was, whether the action of the company in displaying the notice on the notice board changing the weekly off-day was violative of the provisions of s 9A. The court held that it would be difficult on the facts of the case to bring the matter within the entry 4 or entry 8 of the Fourth Schedule. Working at the matter from any reasonable angle and considering an isolated change as an exception for one occasion and not a permanent one, the change was not considered to be such a change as would materially and adversely affected the workmen. Hence, the provisions of s 9A were not attracted. The Madras High Court held that the exclusion of a trade union, which has not acquired the status of a recognised union under the code of discipline, from the category of unions which could negotiate with the management, will not amount to a change in the conditions of service. Such exclusion would not come within the mischief of s 9A of the Act. Nor would it constitute withdrawal of any customary concession or privilege or change in usage within the meaning of item 8 of the Fourth Schedule.[31]

In *CI Kannan*, a single judge of the Madras High Court held that the object of this provision is that conditions of service in

force at the time when a workman entered service could not be changed to his prejudice without giving notice to him. The prohibition of s 9A is with regard to the change in the conditions of service applicable to any workman and it does not appear to be applicable to regulations relating to the conditions of service which were brought into force for the first time unless it could be shown that since the employees entered the service, the conditions of service have been changed by the regulations which were brought into force for the first time. Referring to item 9 in the Fourth Schedule, the High Court said that the introduction of the new rules of discipline would only mean introduction of certain rules of discipline which were not applicable to the employees on the date of their employment and would not relate to the rules that were framed for the first time.[32] Mere change in the channel of promotion does not tantamount to increase or reduction in the number of persons employed within the meaning of item 11 of the Fourth Schedule. Therefore, the provisions of s 9A are not attracted.[33] In *Hindustan Shipyard*, the employer granted concession to the workmen due to war time emergency to attend office half an hour late with the reservation of the right to change the office hours at any time. In these circumstances, it was held that the workmen having agreed to the reservation by the employer to alter the working hours, made the right to alter the working hours also a condition of service and, therefore, the action in accordance with the said right was not hit by the provisions of s 9A.[34] In *Shalimar Paints*, a single judge of the Calcutta High Court held that shifting the venue of business of the employer from one place to another does not constitute 'transfer' and as such will not constitute a change in the conditions of service within the meaning of s 9A, because the employer has an inherent right to change his place of business.[35] This view is not free from doubt. The change of place of business may not constitute transfer from one place of business to another but change of place of business will obviously constitute a change in the conditions of service of the workmen who were accustomed to work in the place of their original employment and would fall within the ambit of the expression 'change in usage' as used in item 8 of the Fourth Schedule.

In *Navbharat Hindi Daily*, the Bombay High Court held that the retrenchment of certain workmen as a result of installation of a mono composing machine for rationalising machinery fell within the ambit of item 10 of the Fourth Schedule. Hence, the retrenchment without notice as required by s 9A was vitiated. The Fourth Schedule makes it clear that notice under s 9A is required only in cases of proposed change in the conditions of service in respect of any matter specified in it. Item 10 of this schedule deals with rationalisation, standardisation or improvement of plant 'which is likely to lead to retrenchment of workmen'. The emphasis, in this item, is on its likely effect on employment and not on rationalisation, etc.[36] In *KEC International*, Rebello J, of the Bombay High Court held that Voluntary Retirement Scheme (VRS) proposed by the company results in reduction of posts and hence attracts item (ii) of Sch IV of the Act and therefore, notice under s 9A was mandatory. He cited *Tata Iron and Steel Co*,[37] *Amrit Banaspati Co*,[38] *Hindustan Lever*,[39] and a host of other decisions in support of his reasoning and conclusion.[40] With great respect, Rebello J, had misapplied the ratio of the said decisions to the facts of the case. VRS is a voluntary scheme offered by the management with workmen being left absolutely free to opt for it or not. That being the position, it is trite to say that VRS by itself amounts to a change in the conditions of service to the prejudice of the workmen. As a matter of fact, the learned judge admitted the said legal position. It is not as if that VRS should necessarily involve an increase in the workload of the residual workforce. For instance, where the operations themselves are scaled down due to product-market imperatives or where changes are brought about in technology, process or structure, there need not be any increase in the workload of the workmen and, further, it may even result in the reduction of workload in certain situations. The learned judge blissfully ignored the fact that VRS had become an accepted norm of reducing surplus manpower in view of the tyrannical provisions enshrined in Ch V-B and that, while offering VRS, the employer would be shelling down many times the compensation that would have been paid, had the workmen been retrenched under the provisions of the Act. Thus, VRS is nothing more than an expensive alternative to retrenchment with a difference.

In the case of retrenchment, the employer exercises his right to terminate the service of surplus staff, whereas in VRS, the workmen exercise their right either to opt for the scheme or not, at their sole discretion according as the scheme is attractive or not. The reasoning of Rebello J, is plagued by his failure to appreciate the essence of VRS in the light of the statutory prohibition imposed by the law. His observation, 'the question is whether on account of the VRS there is likely to be retrenchment on account of rationalisation, standardisation or improvement of plant or technique', 'makes no sense in view of his other observation in the same paragraph to the effect, 'as pointed out earlier, definition of retrenchment excludes voluntary retirement. Then, he proceeds to justify his rhetoric by another statement in the same paragraph. In the notice put up by petitioner...it is mentioned that there is need for the company to continuously upgrade the quality of its products. *Prima facie*, therefore, item (10) can be attracted.' Could it be said that 'improvement in the quality of products' is the same thing as 'improvement in plant or technique'? Assuming, without conceding, that they mean the same thing, should such a change in product quality—which implies an increase in the market share, greater stability and a competitive edge for the organisation-be branded as a change in the conditions of service to the prejudice of workmen or to their advantage? None of the decisions cited by the learned judge in his copious judgment, running into 61 paragraphs in 20 pages, lends support to his line of reasoning or the conclusion reached. However, while an appeal against the same decision was pending before a Division Bench, the parties arrived at consent terms signed by counsel on both sides. The Division Bench, while passing an order in terms of the agreement reached between the parties, set aside the order of the

single judge, not on merits, but on the basis of the said terms of consent. The Bench comprising Srikrishna and Nijjar JJ, observed:

> It is made clear that the contentions raised by the parties in their respective writ petitions are kept open to be urged before the industrial court and/or in any other proceedings. We also make it clear that neither the industrial court nor any single judge of this court is bound by any observations made in the order passed by the learned Single Judge which has been set aside by consent.[41]

The Division Bench obviously did not find it necessary to go into the merits of the order passed by Rebello J. Even so, from the above observations of the Division Bench, it is quite clear that the Bench discountenanced the reasoning and conclusions reached by the single judge. A single judge of the Andhra Pradesh High Court in *G Mamthaiah v APSEB* ,[42] held that the change in the conditions of service relating to 'classification by grades' as contemplated by item 7 of the Fourth Schedule would include classification into and creation of new categories of classes. For instance, where two or more grades were interposed between two categories of security guards, the court held that a change in the conditions of service particularly when new higher minimum educational qualification was prescribed even for initial appointment would constitute a change in conditions of service relating to 'classification by grades'. In *Food Corpn,* the Bombay High Court held that reduction in rate of overtime allowance cannot be done without complying with the requirements of a notice under s 9A.[43]In another case involving the same Corporation, the facts were: overtime allowance was payable to the employees of the Food Corporation of India as was payable to the employees of the Central Government. But after the Goa, Daman and Diu Shops and Establishments Act 1973 came into force, the overtime allowance became payable to the employees in terms of that Act which was much more than what was provided under the Central Government Rules. Subsequently, FCI was exempted from the application of the Act and it sought to recover the excess overtime allowance paid to the employees under the Act, This was resisted by the employees on the ground that notwithstanding the exemption, it was incumbent on the FCI, to comply with the requirements of s 9A. The Bombay High Court held that for bringing about the necessary change in the rate of overtime allowance in terms of the exemption, the requirements of s 9A had to be complied with by giving notice of change.[44]

A change in the working hours can only be effected by giving notice under s 9A. This section does not deal with the question whether the management has a right to change the hours of work but merely prescribes the manner of change of hours by giving the requisite notice of change. The provisions of this section would cover also a case where the management has a right to withdraw a concession unilaterally. Whether there was an agreement to alter the hours unilaterally or not has nothing to do with the mode of intimation prescribed by s 9A of the Act.[45] If a change has been affected by imposition, it may be sufficient that the concerned workmen think it prejudicial, whether it be truly so or otherwise. But, where the change has been affected by consent, as between certain workmen and the employer, upon an offer by the employer and acceptance of the terms by the concerned workmen, and the rest of the workmen in the industry are unaffected because the *status quo* prevails, the union of the workmen cannot step in and presume to dictate, by telling the workmen that the choice was erroneous and that they are ignorant of their true welfare. The requirement of a 'notice' to workmen would arise only if they are likely to be affected prejudicially. A change in the conditions of service contemplated by the section should be understood in that sense. It is not intended to cover a case where the proposal is, for instance, to enhance the pay scales or to better the other terms by a unilateral decision of the employer.[46]

Where the employer had put up a notice changing the weekly off from 23 August 1994 to 24 August 1994 on account of shortage of raw material, it was held that the said change, though in compliance with the requirements of s 52(1)(b) of Factories Act, still amounted to violation of s 9A of ID Act read with the provisions of Ch VB, and the employer was bound to pay compensation for the day. Further held that it was not possible for the employer to change the weekly off solely on the ground that there was no material available for work to be provided on a particular date.[47] The expression 'conditions of service' really implies the actual continuance of the relationship of employer and employee. It would not cover the case of wrongful discharge or termination of service.[48] A single judge of the Karnataka High Court held that since the age of retirement as such is not one of the matters included in the Fourth Schedule nor is it any general condition, it is not necessary to give notice as required by s 9A.[49] In *State Bank of India,* the bank issued a notification to the effect that any staff member seeking election to a public or local body should give an undertaking that he would not take undue advantage of his position in bank and that in case he gets elected, he should resign from the service of the bank, failing which he would be discharged from service. Treating this letter of request seeking permission to contest the election as letter of resignation, the Supreme Court held that the said notification was not violative of s 9A, and such participation in election could not be considered as a customary privilege connected with the conditions of work.[50] Withdrawal of duty relief granted to the office-bearers of trade union is not attracted by s 9A and the grant of such duty relief is not in the nature of a customary concession.[51]The Industrial Disputes Act does not recognise any right to work relief in the event of a workman being elected as an office-bearer of the union, and the withdrawal of the concession by the management is not attracted by s 9A.[52] Fixing the rates of foodstuffs and beverages supplied in the canteen is not a condition of service and,

consequently, the revision of the rates does not amount to a change in the condition of service.[53]

(ii) Prescribed Manner

Where the Central Government is the 'appropriate government', r 34 of the Industrial Disputes (Central) Rules 1957, which deals with the notice of change is the relevant rule, for effecting the change in the conditions of service of any workmen, under which the manner has been prescribed. The notice is to be in form E. In cases where the State Government is the 'appropriate government', the rules framed by such State Government would be relevant. The procedure prescribed for the notice of change, however, has to be followed in respect of matters specified in the Fourth Schedule only. In *Lokmat Newspapers*,[54] the Supreme Court held that any management, which seeks to introduce new working pattern for its existing work force by any future scheme of rationalisation, standardisation or improvement of plant or technique, which has a tendency to lead to future retrenchment of workmen, has to give prior notice of the proposed change. Thus, the notice under s 9A must precede the introduction of rationalisation concerned, and not follow it. In *Mukund Ltd*, a single judge of the Bombay High Court held that calling workers on Sunday amounts to a change in the conditions of service under s 9A read with s 52 of the Factories Act, and failure to give notice under the former section amounted to unfair labour practice, despite the fact that the workers were given compensatory holiday and were also paid extra amount for having worked on a weekly holiday.[55] This is not a proper way of reading the provisions of the Factories Act as well as the ID Act. Section 52(1)(a) of the Factories Act clearly permits the employer to engage a worker on the first day of the week, provided he is given compensatory holiday within three days before or after, etc. The only requirement imposed on the manager was to deliver a notice, one day before the weekly holiday or the substituted day whichever is earlier, at the office of the Inspector of Factories and display a notice in the factory. In the instant case, it is an admitted fact that the workers were being called depending upon exigencies and were being compensated more than what the law requires not only by giving a compensatory holiday but also by paying extra amount. Could it by any stretch of imagination be said that such working on a weekly holiday amounts to a change in conditions of service? Pandya J, misapplied the law to the case facts. The decision of the trial judge that the complaint of the union was without merit in view of the fact that such calling of workers on Sunday was based on exigencies and hence temporary in nature, was right and that of Pandya J, is not in consonance with the letter and spirit of law. A single judge of the Madras High Court held that, even after issuing a notice under s 9A, the management cannot alter the service conditions covered by an earlier settlement, which has expired, until it is altered or modified or replaced by another settlement or otherwise in accordance with law.[56]

The IAAI decision of Madras High Court

The case of *International Air Cargo Workers*, as decided by the Madras High Court (2002) is a standing illustration of the judicial misconceptions of grave magnitude apart from being a replica misinterpretation of the provisions and misapplication of law. It is, therefore, considered expedient to devote some space to analyse the case in the following paragraphs. The facts of the case, briefly, were: the IAAI, entered into a contract with *Mis* Airfreight Ltd, for the loading and unloading of cargo at the Madras Airport. On the expiry of the contract with the company, the loading and unloading operators working therein were directly employed by IAAI as casual workers on a day-to-day basis for a period of 9 months, ie, from November 1985 to July 1986. Thereafter, pursuant to a direction from the High Court, the said workers formed an Industrial Cooperative Society and continued to handle the work of IAAI on the basis of a contract. The workers of the society raised a dispute for regularisation of their services in IAAI. Sathasivam J, *as he then was*, speaking for (self and Jnanaprakasam J) held that, having engaged the workmen directly after the cancellation of the contract with the private company, the IAAI sought to replace the direct payment system and introduce the contractor, which amounted to alteration of the conditions of service, which was illegal without complying with s 9A, and hence the workers had become the workers of IAAI.[57]

In the first place, the observation that the change from casual to contract employment (through the Industrial Cooperative Society) called for a notice under s 9A, reflects the grave misconceptions of law entertained by the learned judge. It is an admitted fact that the second writ petition No 5164 of 1986 filed by the said workers for their absorption as loaders-cum-packers as permanent and regular employees in IAAL was dismissed by the same High Court. The High Court recorded the memorandum filed by counsel for IAAI to the effect that till such time IAAI has made its own regular arrangements, it would consider mitigating the hardship of ex-loaders and packers by accommodating them as far as possible on a contract basis through a cooperative society except by way of regular absorption in the services of IAAI, and accordingly dismissed the writ petition filed by the workmen. In the face of these facts, *to say that the management of IAAI failed to comply with notice under s 9A is too far-fetched and militates against settled law*. The learned judge failed to grasp the fact that it was not a mere agreement entered into by the management and union *suo motu*, but an arrangement made by the management to accommodate the workers in pursuance of the direction issued by the High Court. Once the workers formed into a cooperative society and entered into an agreement with the management to undertake packing and loading operations, it acquires the character of a contract for service and not of a contract of service. That being the position, why should a notice

of change be given under s 9A ? *In the light of the admitted fact that there is no employer-employee relationship between IAAI and the members of the Coop Society, could it still be argued that s 9A has application as between the parties?* Even in the erstwhile dispensation, ie, before forming into a cooperative society, the said workmen were only casual workers engaged on a day-today basis and were never on the permanent rolls of IAAI. It is equally amusing to hear a High Court judge holding that the said change falls in entry (1) of Sch IV of the ID Act, ie, 'wages, including the period and mode of payment.' (,).

It should be clearly understood that the above expression '*wages*' refers to the amount payable or paid, '*period*' refers to the interval between two successive payments, and '*mode*' refers to payment in coins or currency notes or kind. In order to understand the implications of the said entry of Sch IV, one has to necessarily refer to s 4,5 and 6 of the Payment of Wages Act 1936. Section 4, which deals with the 'fixation of wage periods, stipulates that no wage period shall exceed one month. Section 5, which deals with the 'time of payment of wages' stipulates that payment should be made on 7th or 10th day after the last day of the wage period, according to the number of persons employed. Section 6 deals with the 'mode of payment', and stipulates that wages should be paid in current coin or currency notes or in both. The learned judge proceeded to interpret the expression in item 1 of Sch IV in a perfunctory manner, without getting a hang of what it connotes and what its significance is. Even assuming for the sake of argument that the interpretation placed by the learned judge on item 1 of Sch IV, is correct, howsoever precarious it might be, still s 9A has no application in the light of the fact that the change, if at all, was made pursuant to the agreement reached between the parties and recorded and directed by the High Court. Viewed from any angle, s 9A had no application whatsoever to the present case, and the decision was apparently based on a misreading of law and wrong assumptions made by the court. It is not necessary to go into the other limb of his argument as to the applicability of Art. 14 of the Constitution. The Constitution of India does not prohibit contract labour or contract work. In this case, the workers themselves formed into a co-operative society and entered into a contract for service with IAAI, and there was nothing in such an arrangement which could be said to be repugnant to Art. 14. The third line of reasoning of the learned judge was based on 'supervision' and 'control'. The mere fact that the workers of immediate employer or the co-operative society have to work under the control of the principal employer does not transform them into the employees of the principal employer. Control test was discarded long ago as the exclusive determinant of master-servant relationship. In*O'Kelly*, the court of appeal laid down the following tests to determine the true nature of employment relationship:

(a) Is there a measure of control indicative of an employer-employee relationship?

(b) Is the person carrying out the work for and on behalf of the employer or in business on his (or her) own account?

(c) Is the person free to accept or refuse work at will?

(d) Is the person supplied with a uniform and equipment?

(e) Is the person subject to disciplinary or grievance procedure?

(f) Must the person take holidays when and as directed?

(g) Is the person paid regularly either weekly or monthly? And are wages or salary paid gross or net of tax?

(h) What has been agreed with the Inland Revenue?[58]

'Control' test was replaced by the 'economic reality' test as a comprehensive yardstick, which takes into its fold several related factors that have a bearing on employment relationship from a wider perspective. In *US v Silk* , a Bench of nine judges of the US Supreme Court applied the economic reality test, ie, the degree of control, opportunities of profit or loss, investment in facilities, permanency of relations and the degree of skill required, and held that the 'unloaders' engaged by the company were 'employees' for the purpose of the Social Security Act 1935.[59] In *Market Investigation Ltd*, it was held:

> ... it is fair to say that there was at one time a school of thought according to which the extent and degree of the control which B was entitled to exercise over *A* in the performance of the work would be a decisive factor. However, it has been apparent for long that an analysis of the extent and degree of such control is not itself decisive.[60]

In *Agra Electric Supply*, the Supreme Court held that the term 'employee' is quite different from 'self-employed' person. A self-employed person owes no loyalty to the employer other than to complete a specific job of work within the specified time limits in return for an agreed fee. He is his own master.[61] Even where a person is self-employed, it does not imply that he can produce whatever he feels like producing and that the contracting party is obliged to accept it without question. In *IAAI* case, notwithstanding the fact that the workers were carrying out the work as members of the cooperative society, they were still required to subject themselves to the rules and regulations framed by International Airports Authority of

India, in the light of the fact that airports are sensitive places and have of late become targets of terrorist attacks etc, with imminent danger to the plant, installations and personnel including passengers. Viewed from this standpoint, the mere fact that they were under the control and supervision of IAAI does not *per se* transform them into the employees of IAAI. As a matter of fact, the workers in the instant case were not even eligible to be regarded as the employees of an immediate employer (ie, contractor) in order to support their claim for absorption in the regular services of principal employer, in the light of the fact that they were members, and not the employees, of the cooperative society, which had entered into a contract with IAAI to render certain services in the airport. On this view of the matter, the 'control' and 'supervision' test propounded by the learned judge rests on a tenuous footing apart from being time-barred in its application. Subsequent to the publication of the 6th edition of this book (2004),[62] the IAAI challenged the completely flawed decision of Sathasivam J in Supreme Court by Special Leave under Art. 136. Castigating the tribunal, *in the first place*, for recording a wholly perverse finding on three points urged before it, and rejecting the gloss added by Sathasivam J while affirming the perverse findings of the tribunal, *in the second*, Raveendran J (for self and Panta), observed:

> On the contention urged, the following questions arise for our consideration in this case :
>
> (i) Whether the agreement between the contractor society and the IAAI in regard to cargo handling work was sham and nominal and consequently, the workers engaged as contract labour in regard to cargo handling work, were the direct employees of IAAI ?
>
> (ii) Whether the status of loaders-cum-packers engaged in cargo handling work was illegally changed from that of direct casual labour to contract labour in violation of section 9A of the ID Act, 1947?
>
> (iii) In the absence of a notification under section 10 of CLRA Act prohibiting the employment of contract labour in the process/operation of cargo handling work, whether the workmen employed as contract labour are entitled to claim absorption? ()
>
> What is significant is that, the Union did not plead that the contract labour agreement between the society and IAAI was sham and nominal. In fact, it could not do so, as the contract was not with a private contractor operating with a profit motive, but with a society of the very workers. Nor did the first respondent-Union allege that IAAI was exercising direct control and supervision over their work or that IAAI was directly paying their salary or that IAAI was directly taking disciplinary action against them. () ... Therefore, the question of violation of section 9-A of ID Act does not arise. () ... The offer of IAAI to enter into a contract with the society formed by the workers, for supply of contract labour was readily welcomed and accepted by the Workers' Union ... Virtually, the seal of approval by the Court was put on the same by recording the proposal and the acceptance of the workers the same. The writ petition of the workers was dismissed and attained finality. Thus, the contracts with the society were genuine, beneficial voluntary bilateral contracts and there was nothing sham or nominal about it. It should also be noticed that at no point of time, the workers or their Union pleaded that the agreement between IAAI and the society was sham or nominal. () ... Unfortunately, the Tribunal goes to the extent of referring to the memo filed by the IAAI before the High Court ... offering to give the cargo handling contract to the society formed by the workers of Airfreight, as a compromise or settlement which is *opposed to public policy, principles of natural justice and an unfair labour practice. It further describes it as a settlement which the workers were constrained to enter*. () ... The contracts between IAAI and the society make it crystal clear that a lump sum consideration was to be paid by the IAAI to the society and the society was responsible for payment to its members who were send as contract labour. ... *This is a finding based on absolutely no evidence and shockingly perverse and is liable to be rejected accordingly*. () ... In view of the above we answer the questions as follows:
>
> (i) The contract labour agreement between IAAI and the society was not sham, nominal or as a camouflage and the contract labour were not the direct employees of IAAI.
>
> (ii) There was no violation of section 9-A of the ID Act.
>
> (iii) In the absence of a notification under section 10 of CLRA Act prohibiting the employment of contract labour in the operation of cargo handling work, the workmen employed as contract labour are not entitled to claim absorption. ... In the light of our findings on the two questions the order of the Division Bench cannot be sustained and is liable to be set aside and the order of the learned Single Judge has to be restored.[63] (Paras 29 & 30).

In *Divisional Engineer, TMD*, a single judge of the Madras High Court held that a change in the working hours of daily-rated NMR employees from 8 hours per day for 6 days a week to 9 hours per day for 5 days a week, which deprived the workmen extra payment for one hour extra work per day, was bad as the change was made without issuing notice under s 9A, and that the workers would be entitled to extra payment for one hour every day.[64] The conditions of service for the change of which, a notice is to be given under s 9A read with Sch IV do not in terms include the fixation of a period of

service or date of retirement. Introduction of maximum period of service would not operate to the detriment of the employee, who was otherwise entitled to serve only for six months and was liable to be terminated by giving one month's notice, and hence no notice under s 9A is required.[65] A single judge of the Bombay High Court held that there is no provision in any law in force, which allowed amendment to the terms of settlement by issuing a notice under s 9A. The terms and conditions agreed to in a settlement continue to survive even after the expiry of the settlement, and in the absence of any amendment to the settlement or unless another settlement on revised terms was signed, no such facility which was already there could be withheld.[66] An order of transfer does not constitute reversion or demotion and hence does not attract the provisions of s 9A.[67] An isolated instance of changing the weekly off from Wednesday to Thursday, which was also a holiday, more so when there was no reduction in the number of paid holidays, does not amount to a change in the conditions of service warranting a notice of change under s 9A and, therefore, there was no unfair labour practice under item 9 of Sch 4 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 (MRTU & PULP Act 1971).[68]

In *Lakshmi Vilas Bank*, the facts disclosed that the bank was paying a special allowance to machine operators and punch operators of its data processing centre at the rate of Rs 152/- and Rs 87/- per month respectively. Consequent upon outsourcing the job, the bank withdrew payment of the said special allowance and transferred the operators to other departments. Adjudicating the dispute raised against the contravention of s 9A, the tribunal, without giving a finding as to whether s 9A was complied with or not, rejected the claim of the workmen and held that 'it was left to the will and pleasure of the bank'. Quashing the award and remanding the matter to the tribunal, Sathasivam J of the Madras High Court, as he then was, held that it was mandatory for the bank to give 21 days' notice to the workmen concerned, which duty it did not fulfill, and hence the discontinuance of special allowance was wrong; and that the award of the tribunal against the workmen, in the absence of a specific finding whether s 9A was complied with or not, was not sustainable.[69] In an undertaking where 'Good Friday' was a holiday for over 25 years, it had become the usage and privilege of workmen. Such a privilege cannot be withdrawn without following the mandatory provisions enshrined in s 9A, and mere posting the decision on the notice board is not a sufficient compliance of s 9A.[70] It is not enough to send the notice of change to the union. Such a communication cannot be treated as sufficient compliance of the provision. Section 9A makes it mandatory to serve the notice in the prescribed form on every workman who is likely to be affected by the proposed change.[71] In *Digvijay Cement*, the Gujarat High Court dismissed the writ petition filed by the union on the ground that the question whether the management had violated s 9A or not was a question of fact which should be decided in a regular adjudication proceeding in the remedy provided under the ID Act.[72] In *Richard Fritchley*, the facts disclosed that a few employees, having opted for the voluntary separation under a scheme announced by the management, later turned out and raised an industrial dispute alleging that it was not resignation but retrenchment and that the management had violated s 9A. Rejecting both the pleas, Ghulam Mohammad J of AP High Court held that notice under s 9A was not necessary as the scheme offered was voluntary, and there was no retrenchment in view of the fact that the employees willingly opted out after receiving lumpsum amount.[73]

In *Steel Plant Employees Union*, the facts were: the Steel Authority of India Ltd, issued a circular in 2001 announcing a scheme for leasing houses/flats to employees, ex-employees, their spouses and legal heirs. The employees union filed an application alleging violation of s 9A on the ground that while many workmen were waiting in the queue the impugned circular threw open the allotment of houses and flats to other including the employees of other public sector undertakings. Rejecting the contention, Sathasivam J of the Madras High Court, as he then was, held that there was no violation of s 9A and that the impugned circular was in order.[74] The discontinuance of mailing section and the consequent termination of the services of workmen does not attract the provisions of s 9A, and it is not in every case of retrenchment a notice under s 9A is required.[75] Rationalisation cannot be done without giving notice under s 9A to the workmen who are likely to be affected, in this case the closing down of packaging division, failing which the consequential termination would be illegal.[76] In *Orissa Mining Corporation*,[77] the facts were: the management revised pay scales and benefits upward with effect from April 1, 1998 and while doing so restructured the house rent allowance that was payable as a percentage of basic pay for employees located in different stations. The corporation further gave an option to the employees either to opt for the revised scales of pay or continue with the existing, ie, pre-revised pay scales in their entirety. The employees having exercised and enjoyed the benefits filed a complaint alleging violation of s 9A in so far as their house rent allowance was reduced. The management contended that the revision of pay scales was effected as a package deal and that no worker was prejudicially affected. Despite this, the tribunal passed an award holding that the reduction in house rent allowance was not justified as it was in violation of s 9A. Quashing the award passed by the tribunal, the Orissa High Court supportively cited the view expressed by another Division Bench of the Madras High Court in *Tamil Nadu Electricity Workers*, to the effect: "It appears to us to be very clear that s 9A was never designed to prevent the implementation of any change, which is not change imposed by the employer on the workmen, but which is based upon the consent of the workmen to the offer by the employer, upon the exercise of their judgment that the change was beneficial."[78]

In *Rashtriya Chemicals*, the company issued a notice proposing change in the service conditions, which was referred for

adjudication. The tribunal passed an order directing the employer to adduce evidence in support of the proposed change, which order was challenged by the company in a writ petition. The company contended that the union should be directed to adduce evidence, in the first instance, against the proposed change. Rejecting the contention, Chandrachud J of the Bombay High Court held that that it was the employer who had sought to alter the prevailing conditions of service which were the subject matter of industrial settlements. That was the import of the notice of change under s 9A and it was, therefore, for the employer to establish the legitimacy of the grounds underlying the notice of change. The learned judge further held that the Industrial Tribunal was not in error in rejecting the application filed by the employer that the union be directed to lead evidence first.[79] In *Food Corporation*, the facts disclosed that the corporation, having paid overtime wages as provided for in the West Bengal Shops and Establishments Act 1963, stopped the said payment to the workers on the ground that they failed to discharge their duty during the normal working hours of the week. Having lost before the tribunal and single judge of the High Court, the Corporation moved the Division Bench of Calcutta High Court. Speaking for the Court, Ashim K Banerjee J held that: (i) if the workers did not discharge their duties during the normal hours, the employer should take departmental action; and (ii) having earlier paid overtime wages at the prescribed rate under the 1963 Act, the employer could not suddenly withdraw the same without following s 9A.[80] Where, in the dispensary of a power generation plant, the facts disclosed that the dispensary never worked beyond six-and-half hours, the change in the hours of work to eight hours without complying with s 9A is illegal.[81] *Reduction* in the qualifying age of employees' children from 28 to 25 years for medical benefit and restricting the number of children to two to be entitled to such benefit do not attract the provisions of s 9A, as it was not shown by the workmen that grant of medical benefit was part of conditions of service. The petitioner-workmen should workout their remedy under the ID Act and that High Court cannot go into that question while exercising its writ jurisdiction.[82] In *Thai Airways*, a single judge of Delhi High Court held that s 9A was meant for protecting the service conditions of permanent workmen and not those of daily wagers or casual workers and, hence, the award of the tribunal holding that the termination of service of casual workers was in violation of s 9A was untenable and deserved to be set aside.[83] Customary puja allowance that was being paid to the employees for long has become a condition of service, and its stoppage without following the provisions of s 9A is invalid and void *ab initio*.[84]

(iii) Proviso to the Section

The *proviso* to s 9A dispenses with the requirement of notice in the following cases:

(1) where the change is effected pursuant to any 'settlement or award';[85] or

(2) where the workmen likely to be affected by the change are the persons to whom the following statutory rules apply:

(a) Fundamental and Supplementary Rules;

(b) Civil Services (Classification, Control and Appeal) Rules;

(c) Civil Services (Temporary Service) Rules;

(d) Revised Leave Rules;

(e) Civil Service Regulations;

(f) Civilians in Defence Services (Classification, Control and Appeal) Rules;

(g) Indian Railway Establishment Code;

(h) Any other rules or regulations that may be notified in this behalf by the appropriate government in the Official Gazette.

Apart from the rules enumerated in cl (b) of the *proviso*, the 'appropriate government' has also been given further power to include any other rules or regulations in this category by a notification in its Official Gazette.[86] In other words, notice is dispensed with only in the case of such persons as are governed by the rules which are specified therein and 'any other rules or regulations' that may be notified in this behalf by the appropriate government in the Official Gazette.[87] The *proviso* cannot be construed to mean that if an employee is governed by the rules other than those mentioned therein, the employer in such a case must give a notice of change before he complies with the statutory rule or order which has not been made or issued by him. It may, however, be a different matter if the employer himself is the statutory authority to make rules or issue orders relating to conditions of service. In such a situation, it may be possible to say that the employer has to comply with s 9A unless the case is brought within the exceptions contained in the *proviso*.[88] But the language of cl (b) indicates legislative intention to exclude the persons governed by service rules only for the limited purpose of s 9A and not in respect of other matters.[89] The NCL-II recommended that there should be no statutory obligation on the employer to give prior notice, in regard to item 11 of the Fourth Schedule for the purpose of increase in the workforce, as is the position

now.[90]

(iv) Notice of Change and Article 226

The Madras High Court held that, notwithstanding the availability of an alternative remedy under the ID Act for violation of the provisions of s 9A, a writ petition under Art. 226 would be maintainable in a case where the change in holidays resulted in a change in the customary practice.[91] A notice of change under s 9A is really an order which takes effect on completion of 21 days, and the legality or otherwise of a notice under s 9A issued by a government company in respect of a matter falling under item 4 of Sch IV, ie, 'hours of work and rest intervals', can be examined under Art. 226 of the Constitution. By reason of introducing the change, the management cannot enhance the working hours.[92] However, in *Singareni Collieries*, the Andhra Pradesh High Court held that the number of helpers provided to tradesmen would depend upon the exigencies of the situation and may or may not be a condition of service and that the impugned circular issued by the management reducing the number of helpers could not be termed as violative of s 9A on the alleged ground that it was an alteration of conditions of service, and that the workmen could pursue the alternative remedy under the ID Act for redressal of their grievances.[93] In *AP Foods*, the issue was whether the High Court has jurisdiction to entertain a writ petition under Art. 226 in respect of a dispute relating to bonus and issue directions to the company. The appellant-organisation was run by AP Nutrition Council and was owned and controlled by the Government of Andhra Pradesh with its principal object to provide nutritious foods to school and pre-school children, pregnant women and lactating mothers and such other categories of beneficiaries as the Government from time to time decide within the general framework of the Government social welfare programmes. It was claimed to be a non-profit motive establishment. It did not sell or distribute its product either in public or to outsiders except those selected by the Government of Andhra Pradesh under its programmes. In view of the nature of the activities, the Government issued an order to the effect that the Payment of Bonus Act 1965 would not be applicable to the appellant. However, the appellant was paid one month's salary as *ex-gratia* from 1985, which was withdrawn in the year 1993. The writ petition filed by 243 employees was allowed by single judge of the High Court, which was affirmed by a Division Bench. Relying on the principles laid down by SC in several cases including *Hindustan Steelworks*,[94] Pasayat J (for self and Chatterjee J) held that a bare reading of s 22 of the Payment of Bonus Act makes the position clear that, *where the dispute arises between an employer and employees with respect to the bonus payable under the Act or with respect to the application of the Act in public sector then such dispute shall be deemed to be an industrial dispute within the meaning of ID Act; that as disputed questions of fact were involved, and an alternative remedy was available under the ID Act, the High Court should not have entertained the writ petition, and should have directed the writ-petitioners to avail the statutory remedy.* The learned judge directed the government of Andhra Pradesh to refer the following questions for adjudication.

(1) Whether there was violation of Section 9-A of the Industrial Disputes Act, 1947 as claimed by the employees?

(2) Whether the withdrawal of the construction allowance amounted to the change in the conditions of service.

(3) Whether AP Foods was liable to pay Bonus.[95]

EFFECT OF SECTION 33 ON SECTION 9A

The language of ss 9A and 33 indicates that the legislature has envisaged existence of undisputed right in an employer to alter the conditions of service applicable to the workmen to their prejudice. Before its amendment, the original s 33 imposed a total ban and provided that, 'no employer shall during the pendency of...proceedings before a tribunal...alter to the prejudice of the workmen concerned in the dispute, conditions of service applicable to them'. The present s 33 clearly contemplates that the tribunal may grant express permission to an employer to alter conditions of service applicable to the workmen to their prejudice.[96] In other words, the right of the employer to effect change in the conditions of service of workmen is subject to the provisions contained in s 33 during the pendency of any proceedings before a conciliation officer, board, labour court, industrial tribunal or national tribunal. Section 33(1)(a) refers to permission relating to any matter connected with the dispute. No change can be brought about in the conditions of service of a workman to his prejudice during the pendency of any such dispute but from the language of s 33(2)(a) which permits the employer to alter the conditions of service in regard to 'any matter not connected with the dispute' without even applying for the approval of the tribunal and further from the language of s 9A, which contemplates that the employer has a right to serve a notice for change in conditions of service, it appears that the employer has a right to alter conditions of service applicable to his workmen. It is now well settled that lifting the ban of s 33 does not effectively bring about the alteration in terms of conditions of service of workmen as desired by an employer,[97] because even if the ban is lifted, the right of the workmen to raise an industrial dispute with regard to the alteration of conditions is not taken away. The question whether conditions of service can be altered or not will have to be ultimately decided by the industrial tribunal on reference under s 10. This would be the position even where a valid notice of change under s 9A as regards conditions of service was given by the employer.[98]

Hence, the conditions of service as existing, either settled by an award or settlement would continue to be binding both on the employer and workmen, until they are altered by a contract or settlement or an award made in a reference under s 10. The language of ss 9A and 33(1) which deals with the manner in which the employer who contemplates alteration of conditions may proceed, is plain and clear. These provisions are only procedural and do not create extra or new rights in favour of an employer. In deciding for the purposes of s 33, as to at what point of time, the employer 'alters' any conditions of service, it is necessary to ascertain the time when the change, of which notice under s 9A is given, is actually effected. If at the time, the change is effected, a proceeding is pending before a tribunal, s 33 is attracted and not otherwise. The point of time when the employer proposes to change the conditions of service and the point of time when the notice is given are equally irrelevant.[1]Section 31 (2) makes the contravention of s 9A punishable with fine which may extend to one hundred rupees. The NCL-II expressed the view that the notice of change, issued by an employer as per provisions of s 9A, should not operate as a stay under s 33 though such a decision of the management will be justiciable under s 33A.[2]

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1 Chapter 2A consisting of ss 9A and 9B, ins by Act 36 of 1956, s 6 (wef 10-3-1957).

2 Subs by Act 46 of 1982, s 6 (wef 21-8-1984).

3 *Tamilnadu Electricity Workers v Madras SEB* (1962) 2 LLJ 136 (Mad), per Veeraswami J.

4 *Tata Iron & Steel Co Ltd v Workmen* (1972) 2 LLJ 259 [LNIND 1972 SC 300] (SC), per Dua J.

5 *Navbharat Hindi Daily v Navbharat Shramik Sangha* (1984) Lab IC 445, 448 (Bom) (DB), per Patel J.

6 *Janta Co-operative Sugar Mills Ltd, Bhogpur v LC 1987 Lab IC* 1093 (P&H), per Tewatia J.

7 *Mgmt of Indian Oil Corpn Ltd v Workmen* (1975) 2 LLJ 319 [LNIND 1975 SC 229] (SC), per Murtaza Faisal Ali J.

8 *Northbrook Jute Co Ltd v Workmen* (1960) 1 LLJ 580 [LNIND 1960 SC 87] (SC), per Das Gupta J.

9 *Gordon Woodroffe Employees Union v State of Tamil Nadu* 1990 Lab IC NOC 148 (Mad) (DB).

10 *Navbharat Hindi Daily v Navbharat Shramik Sangha* 1984 Lab IC 445, 448 (Bom) (DB), per Patel J.

11 *CI Kannan v Employees State Insurance Corpn* 1968 Lab IC 945, 948 (Mad), per Kailasam J.

12 *Sewak Bus & Transport Co Pvt Ltd v Punjab State* 1973 Lab I C 218, 221 (P&H), per Tuli J.

13 *Gurudas Chatterjee v State Bank of India* (1983) 2 LLJ 200, 207 (Cal), per GN Roy J.

14 *Calcutta Elec Supply Corpn Ltd v CES Workers' Union* (1995) 1 LLJ 874, 876 (SC).

15 *State Bank of India Staff Union v SBI* 1992 Lab IC 2078, 2081 (AP) (DB), per Sardar Ali Khan J.

16 *Coal India Employees Union v Coal India Ltd* (1993) 1 LLJ 646 [LNIND 1992 CAL 98] (Cal), per Susanta Chatterjee J.

17 *GM, Ordnance Parachute Factory v PO, IT-cum-LC* 1987 Lab IC 365, 377 (All), per Agarwal J.

18 *All India ITDCE Union Unit v Hotel Ashok,* 1984 Lab IC NOC 107 (Kant), per Rama Jois J.

19 *Hemant K Gupta v Dist Coop Central Bank Ltd* 1982 Lab IC 1435, 1439 (MP) (DB), per GP Singh CJ.

20 *L Robert D'Souza v Executive Engineer, Southern Rly* (1982) 1 LLJ 330 [LNIND 1982 SC 47], 333-34 (SC), per Desai J.

21 *Workmen of Sur Iron and Steel Co Pvt Ltd v Mgmt* (1971) 1 LLJ 570, 573 (SC), per Bhargava J.

22 *Assam Match Co Ltd v Bijoy Lal Sen* (1973) 2 LLJ 149 [LNIND 1973 SC 170], 152 (SC), per Vaidialingam J.

23 *Tata Iron and Steel Co Ltd v Workmen* (1972) 2 LLJ 259 [LNIND 1972 SC 300] (SC) : AIR 1972 SC 1917 [LNIND 1972 SC 300]: (1972) 2 SCC 383 [LNIND 1972 SC 300], per Dua J.

24 *Samnuggur Jute Factory Co Ltd v Workmen* 1982 Lab IC 1334, 1335 (Cal) (DB), per Banerjee J.

25 *Assam Match Co Ltd v Bijoy Lal Sen* (1973) 2 LLJ 149 [LNIND 1973 SC 170] (SC) : AIR 1973 SC 2155 [LNIND 1973 SC 170]: (1974) 3 SCC 163 [LNIND 1973 SC 92] : 1973 Lab IC 1158, per Vaidialingam J.

26 *Oil and Natural Gas Commission v Workmen* (1973) 1 LLJ 18 [LNIND 1972 SC 470] (SC) : (1973) 3 SCC 535 [LNIND 1972 SC 470] : AIR 1973 SC 968 [LNIND 1972 SC 470], per Dua J.

27 *Hindustan Lever Ltd v Ram Mohan Ray* (1973) 1 LLJ 427 [LNIND 1973 SC 65] (SC) : (1973) 4 SCC 14 : AIR 1973 SC 1156 [LNIND 1973 SC 65], per Alagiriswami J.

28 *Mgmt of Indian Oil Corpn Ltd v Workmen* (1975) 2 LLJ 319 [LNIND 1975 SC 229] (SC), per Murtaza Fazal Ali J.

29 *Workmen of FCI v Food Corpn of India* (1985) 2 LLJ 4 [LNIND 1985 SC 71], 13 (SC), per Desai J.

30 *Mistry Lallubhoy and Co v Engg and Metal Workers' Union* 1979 Lab IC 196 (Bom), per SK Desai J.

31 *Neyveli Lignite Corpn Labour and Staff Union v Mgmt*, 1984 Lab IC 1865 (Mad) (DB), per Nainar Sundram J.

32 *CI Kannan v Employees State Insurance Corpn* 1968 Lab IC 945, 948 (Mad), per Kailasarn J.

33 *Life Insurance Corpn of India, v All India IE Assn* 1989 Lab IC 1493, 1500 (Bom), per Sujata Manohar J.

34 *Workmen of Hindustan Shipyard Pvt Ltd v IT* (1961) 2 LLJ 526 (AP) : 1961 ALT 873, per Jaganmohan Reddy J.

35 *Shalimar Paints v Third IT* (1971) 2 LLJ 58 [LNIND 1970 CAL 56] (Cal) : AIR 1971 Cal 90 [LNIND 1970 CAL 56], per TK Basu J.

36 *Navbharat Hindi Daily v Navbharat Shramik Sangha* 1984 Lab IC 445, 448 (Bom) (DB), per Patel J.

37 *Tata Iron and Steel Co Ltd v Workmen* (1972) LLN 581 (588) (SC).

38 *Amrit Banaspati Co Ltd, v S Taki Bilgarmi* (1971) 2 LLJ 317 [LNIND 1971 SC 376] (SC).

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40 *KEC International Ltd v Kamani Employees' Union* (1998) 2 LLN 707, 725 (Bom), per Rebello J.

41 *KEC International Ltd v Kamani Employees Union* (1998) 4 LLN 540 (Bom) (DB).

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43 *Transport and Dock Workers' Union v Food Corpn of India* 1986 Lab IC 1393 [LNIND 1985 BOM 281], 1399 (Bom) (DB), per Daud J.

44 *Food Corpn of India Employees Assn v FCI* (1991) 2 LLJ 562 [LNIND 1990 BOM 47] (Bom) (DB), per Kamat J.

45 *Workmen of Hindustan Shipyard Pvt Ltd v IT* (1961) 2 LLJ 526 (AP), per Jaganmohan Reddy J.

46 *Tamilnadu Electricity Workers' Federation v Madras SEB* (1964) 2 LLJ 392 [LNIND 1963 MAD 296] (Mad), per Ananranarayanan J.

47 *Hartex Tubes (Private) Ltd v Asst Commissioner of Labour* (1998) 1 LLN 466 (Bom), per Rebello J.

48 *Manu v Aspinwal & Co Ltd* (1963) 1 LLJ 212 (Ker), per Vaidialingam J.

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50 *GM, State Bank of India v SBI Staff Union* (1998) 3 LLN 5 (SC), per Sujata V Manohar J.

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53 *Voltas SPE Union v Voltas Switchgear Ltd* (2001) 1 LLN 1135 (Bom), per Daga J.

54 *Lokmat Newspapers (P) Ltd v Shankar Prasad* (1999) 3 LLN 538 (553) (SC), per Majmudar J.

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57 *International ACW Union v IAAI* (2001) 4 LLN 909 (Mad) (DB), per Sathasivam J.

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60 *Market Investigation Ltd v Minister of Social Security* [1968] 3 All ER 732.

61 *Agra Electric Supply Co Ltd v Alladin* (1969) 2 LLJ 540 [LNIND 1969 SC 261], 544 (SC), per Shelat J.

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69 *Lakshmi Vilas Bank Employees Union v LVB Ltd* (2002) 4 LLN 118 (Mad), per Sathasivam J.

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88 *Hemant Kumar Gupta v President, Distt CCB Ltd* 1982 Lab IC 1435, 1439 (MP) (DB), per GP Singh CJ.

89 *Zilla Parishad, Bhandra v Khushal 1986* Lab IC 117, 121 (Bom) (DB), per Mohta J.

90 Government of India (2002), *Report of NCL-II*, Chap 13, p 43, para 6.82.

91 *Voltas VE Union v Voltas Ltd* (1999) 4 LLN 1107 (Mad) (DB), per Sivasubramaniam J.

92 *Kerala E&AECLW Congress v District Labour Officer* (2001) 4 LLN 380 (Ker), per Gafoor J.

93 *Singareni Collieries Workers Union v Mgmt* (2002) 4 LLN 83 (AP) (DB), per Sinha CJ.

94 *Hindustan Steelworks Constn Corpn Ltd v Employees Union* 2005 (6) SCC 725 [LNIND 2005 SC 608].

95 *AP Foods v S Samuel* AIR 2006 SC 3622 [LNIND 2006 SC 461]: (2006) 5 SCC 469 [LNIND 2006 SC 461] : (2006) III LLJ 18SC, per Pasayat J.

96 *Haribhau Shinde v IT* 1970 Lab IC 664 [LNIND 1969 BOM 45] (Bom) (DB), per KK Desai J.

97 See, notes and comments under s 33.

98 *Haribhau Shinde v IT* 1970 Lab IC 664 [LNIND 1969 BOM 45] (Bom) (DB), per KK Desai J.

1 *Northbrook Jute Co Ltd v Workmen* (1960) 1 LLJ 580 [LNIND 1960 SC 87] (SC), per Das Gupta J.

2 Government of India (2002), *Report of NCL-II*, Chap 13, p 43, para 6.82.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IIA Notice of Change

[3][S. 9B. Power of Government to Exempt.—

Where the appropriate government is of opinion that the application of the provisions of section 9A to any class of industrial establishments or to any class of workmen employed in any industrial establishment affect the employers in relation thereto so prejudicially that such application may cause serious repercussion on the industry concerned and that public interest so requires, the appropriate government may, by notification in the Official Gazette, direct that the provisions of the said section shall not apply or shall apply, subject to such conditions as may be specified in the notification, to that class of industrial establishments or to that class of workmen employed in any industrial establishment.]

EXEMPTION OF INDUSTRIAL ESTABLISHMENTS FROM SECTION 9A

This section empowers the 'appropriate government' to exempt certain class of industrial establishments or certain class of workmen employed in any industrial establishments from the application of the provisions of s 9A. However, before the Government makes the direction exempting any class of industrial establishments or class of workmen employed in any 'industrial establishment', the following requirements must be complied with:

(1) The appropriate government should have formed the opinion that:

(i) the application of the provisions of section 9A to any class of industrial establishments or to any class of workmen employed in any industrial establishment affect the employers in relation thereto so prejudicially that such application may cause serious repercussions on the industry concerned, and

(ii) public interest requires that such industrial establishments or a class of workmen employed in any industrial establishment should be exempted from the application of section 9A.

(2) The direction of exemption and any conditions subject to which the direction of exemption is made should be made by a notification in the Official Gazette of the 'appropriate government'.

3 Ins by Act 36 of 1956, s 6 (wef 10-3-1957).

The Industrial Disputes Act, 1947 (Act 14 of 1947)

[1]CHAPTER IIB Grievance Redressal Machinery

S. 9C. Setting up of Grievance Redressal Machinery.—

(1) Every industrial establishment employing twenty or more workmen shall have one or more Grievance Redressal Committee for the resolution of disputes arising out of individual grievances.

(2) The Grievance Redressal Committee shall consist of equal number of members from the employer and the workmen.

(3) The chairperson of the Grievance Redressal Committee shall be selected from the employer and from among the workmen alternatively on rotation basis every year.

(4) The total number of members of the Grievance Redressal Committee shall not exceed more than six:

Provided that there shall be, as far as practicable, one woman member if the Grievance Redressal Committee has two members and in case the number of members are more than two, the number of women members may be increased proportionately.

(5) Notwithstanding anything contained in this section, the setting up of Grievance Redressal Committee shall not affect the right of the workman to raise industrial dispute on the same matter under the provisions of this Act.

(6) The Grievance Redressal Committee may complete its proceedings within thirty days on receipt of a written application by or on behalf of the aggrieved party.

(7) The workman who is aggrieved of the decision of the Grievance Redressal Committee may prefer an appeal to the employer against the decision of Grievance Redressal Committee and the employer shall, within one month from the date of receipt of such appeal, dispose off the same and send a copy of his decision to the workman concerned.

(8) Nothing contained in this section shall apply to the workmen for whom there is an established Grievance Redressal Mechanism in the establishment concerned.]

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1 Subs by Act 24 of 2010, s 6 (wef 15-9-2010 *vide* S.O. 2278 (E), dated 15-9-2010). Before substitution, Chap IIB (as inserted by Act 46 of 1982, s 7) stood as under:

"CHAPTER IIB

Reference of Certain individual disputes to grievance settlement authorities

S. 9C. Setting up of Grievance Settlement Authorities and reference of certain individual disputes to such authorities.—

(1) The employer in relation to every industrial establishment in which fifty or more workmen are employed or have been employed on any day in the preceding twelve months, shall provide for, in accordance with the rules made in that behalf under this Act, a Grievance Settlement Authority for the settlement of industrial disputes connected with an individual workman employed in the establishment.

(2) Where an industrial dispute connected with an individual workman arises in an establishment referred to in sub-section (1), a workman or any trade union of workmen of which such workman is a member, refer, in such manner as may be prescribed, such dispute to the Grievance Settlement Authority provided for by the employer under that sub-section for settlement.

(3) The Grievance Settlement Authority referred to in sub-section (1) shall follow such procedure and complete its proceedings within such period as may be prescribed.

(4) No reference shall be made under Chapter III with respect to any dispute referred to in this section unless such dispute has been referred to the Grievance Settlement Authority concerned and the decision of the Grievance Settlement Authority is not acceptable to any of the parties to the dispute."

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER III Reference of Disputes to Boards, Courts or Tribunals

S. 10. Reference of Disputes to Boards, Courts or Tribunals.—

(1) [1][Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time,] by order in writing—

(a) refer the dispute to a Board for promoting a settlement thereof; or

(b) refer any matter appearing to be connected with or relevant to the dispute to a court for inquiry; or

2[(c) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication; or

(d) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication:

Provided that where the dispute relates to any matter specified in the Third Schedule and is not likely to affect more than one hundred workmen, the appropriate Government may, if it so thinks fit, make the reference to a Labour Court under clause (c):]

[3][*Provided* further that] where the dispute relates to a public utility service and a notice under section 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced.

[4][*Provided* also that where the dispute in relation to which the Central Government is the appropriate Government, it shall be competent for that Government to refer the dispute to a Labour Court or an Industrial Tribunal, as the case may be, constituted by the State Government:]

5[(1A) Where the Central Government is of opinion that any industrial dispute exists or is apprehended and the dispute involves any question of national importance or is of such a nature that industrial establishments situated in more than one State are likely to be interested in, or affected by, such dispute and that the dispute should be adjudicated by a National Tribunal, then, the Central Government may, whether or not it is the appropriate Government in relation to that dispute, at any time, by order in writing, refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a National Tribunal for adjudication].

(2) Where the parties to an industrial dispute apply in the prescribed manner, whether jointly or separately, for a reference of the dispute to a Board, Court, [6][Labour Court, Tribunal or National Tribunal], the appropriate Government, if satisfied that the person applying represent the majority of each party, shall make the reference accordingly.

7[(2A) An order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this section shall specify the period within which such Labour Court, Tribunal or National Tribunal shall submit its award on such dispute to the appropriate Government:

Provided that where such industrial dispute is connected with an individual workman, no such period shall exceed three months:

Provided further that where the parties to an industrial dispute apply in the prescribed manner, whether jointly or separately, to the labour court, tribunal or national tribunal for extension of such period or for any other reason, and the presiding officer of such Labour Court, Tribunal or National tribunal considers it necessary or expedient to extend such period, he may for reasons to be recorded in writing, extend such period by such further period as he may think fit:

Provided also that in computing any period specified in this sub-section, the period, if any, for which the proceedings before the Labour Court, Tribunal or National Tribunal had been stayed by any injunction or order of a civil court shall be excluded:

Provided also that no proceedings before a Labour Court, Tribunal or National Tribunal shall lapse merely on the ground that any period specified under this sub-section had expired without such proceedings being completed.]

(3) Where an industrial dispute has been referred to a Board, [8][Labour Court, Tribunal or National Tribunal] under this section, the appropriate Government may by order prohibit the continuance of any strike or lockout in connection with such dispute which may be in existence on the date of the reference.

9[(4) Where in an order referring an industrial dispute to [10][a Labour Court, Tribunal or National Tribunal] under this section or in a subsequent order, the appropriate Government has specified the points of dispute for adjudication, [11][the Labour Court or the Tribunal or the National tribunal, as the case may be] shall confine its adjudication to those points and matter incidental thereto.

(5) Where a dispute concerning any establishment or establishments has been, or is to be, referred to a [12][Labour Court, Tribunal or National Tribunal] under this section and the appropriate Government is of opinion, whether on an application made to it in this behalf or otherwise, that the dispute is of such a nature that any other establishment, group or class of establishments of a similar nature is likely to be interested in, or affected by, such dispute, the appropriate Government may, at the time of making the reference or at any time thereafter but before the submission of the award, include in that reference such establishment, group or class of establishments, whether or not at the time of such inclusion any dispute exists or is apprehended in that establishment, group or class of establishments].

13[(6) Where any reference has been made under sub-section (1A) to a National Tribunal, then notwithstanding anything contained in this Act, no Labour Court or Tribunal shall have jurisdiction to adjudicate upon any matter which is under adjudication before the National Tribunal, and accordingly—

(a) if the matter under adjudication before the National Tribunal is pending in a proceeding before a Labour Court or Tribunal, the proceeding before the Labour Court or the Tribunal, as the case may be, in so far as it relates to such matter, shall be deemed to have been quashed on such reference to the National Tribunal; and

(b) it shall not be lawful for the appropriate Government to refer the matter under adjudication before the National Tribunal to any Labour Court or Tribunal for adjudication during the pendency of the proceeding in relation to such matter before the National Tribunal.]

[14][*Explanation*—In this sub-section, 'Labour Court' or 'Tribunal' includes any Court or tribunal or other authority constituted under any law relating to investigation and settlement of industrial disputes in force in any State].

(7) Where any industrial dispute, in relation to which the Central Government is not the appropriate Government, is referred to a National Tribunal, then notwithstanding anything contained in this Act, any reference in section 15, section 17, section 19, section 33A, section 33B and section 36A to the appropriate Government in relation to such dispute shall be construed as a reference to the Central Government but, save as aforesaid and as otherwise

expressly provided in this Act, any reference in any other provision of this Act to the appropriate Government in relation to that dispute shall mean a reference to the State Government.]

15[(8) No proceedings pending before a Labour Court, Tribunal or National Tribunal in relation to an industrial dispute shall lapse merely by reason of the death of any of the parties to the dispute being a workman, and such Labour Court, Tribunal or National Tribunal shall complete such proceedings and submit its award to the appropriate Government.]

ORDER OF REFERENCE

'Where Appropriate Government is of opinion'

Section 10(1) as originally enacted, opened with the words 'if any industrial dispute exists or is apprehended'. On the construction of those words in s 10, as it originally stood, the Madras High Court took the view that the decision of the Government referring an 'industrial dispute' was amenable to judicial review and that the reviewing court could look into even the questions whether an 'industrial dispute' factually existed or was apprehended.[16] The High Court pointed out that from the words 'if any industrial dispute exists or is apprehended', it was not clear as to who was to decide whether an industrial dispute is 'existing' or is 'apprehended'? and the difficulty was accentuated in the case of an 'apprehended' industrial dispute. The vagueness in penning the unamended s 10(1) was also noted by the Supreme Court in *United Commercial Bank*,[17] where Chandrasekhara Iyer J posed the question, 'whose apprehension is referred to in the Act; the government's or the parties' or the tribunal's or anyone else's? What is to happen if the apprehension does not crystallise into an actual dispute before the tribunal enters on its duties as regards the reference? Is the tribunal bound even then to take note of the mere apprehension and proceed to decide a dispute notwithstanding the fact that the parties say that there is no dispute between them?' Since, these questions did not fall for decision in the case, the court left them undecided with the laconic remark, 'these are interesting questions of wide import'. Section 10(1) was amended by the Industrial Disputes (Amendment) Ordinance 1951 and the words 'where the appropriate government is of opinion that the industrial dispute exists or is apprehended, it may at any time by an order in writing refer the dispute...', were substituted for the words: 'if any industrial dispute exists or is apprehended the appropriate government may, by order in writing, refer the dispute...' Thus, the vagueness pointed out in the *United Commercial Bank* was removed by the legislature. But shortly afterwards, a Constitution Bench of the Supreme Court presided over by Patanjali Sastri CJI including all the three judges of the Bench which decided *United Commercial Bank*, on the construction of unamended s 10(1), in *CP Sarathy*, stated the following propositions:

(i) the government should satisfy itself, on the facts and circumstances brought to its notice, in its subjective opinion that an 'industrial dispute' exists or is 'apprehended';

(ii) the factual existence of a dispute or its apprehension and the expediency of making reference are matters entirely for the government to decide;

(iii) the order making a reference is an administrative act and it is not a judicial or a quasi-judicial act; and

(iv) the order of reference passed by the government cannot be examined by the High Court in its jurisdiction under Article 226 of the Constitution to see if the government had material before it to support the conclusion that the dispute existed or was apprehended.[18]

Though these propositions were based on the unamended Act, which did not contain the words 'where the appropriate government is of opinion', the court implied the formation of 'subjective opinion' by the appropriate government, in the words 'if any industrial dispute exists or is apprehended'.[19] But in *Western India Match Co*, referring to the observations of Patanjali Sastri CJI in *CP Sarathy* case that the function of the appropriate government to make a reference under s 10(1) is an administrative function, speaking for the Supreme Court, Shelat J said:

> It was so held presumably because the government cannot go into the merits of the dispute, its function being only to refer such a dispute for adjudication so that the industrial relations between the employer and his employees may not continue to remain disturbed and the dispute may be resolved through a judicial process as speedily as possible.[20]

In *Rohtas Industries*. commenting on the observations in *CP Sarathy*, Hegde J held:

> This interpretation of section 10(1) is based on the language of that provision as well as the purpose for which the power in

> question was given and the effect of a reference. That decision cannot be considered as an authority for the proposition that whenever a provision of law confers certain power on an authority on its forming a certain opinion on the basis of certain facts, the courts are precluded from examining whether the relevant facts on the basis of which the opinion is formed had in fact existed. [21]

A subtle distinction was drawn that 'the existence of circumstances but not the opinion' was open to judicial scrutiny. In *Shambhu Nath Goyal*, referring to the language of s 10(1), the court pointed out that the power conferred on the government by this provision to refer the dispute can be exercised only when there is an existing or apprehended industrial dispute.[22] Implicit in the power of making reference is 'the existence of the satisfaction that what is referred to is an industrial dispute'.[23] In this case, after referring to earlier dicta, the court held that 'in making reference under s 10(1), the "appropriate government" is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any less administrative in character'. Thus, there is a considered body of judicial opinion that while exercising power to or of making a reference under s 10(1), the appropriate government performs an administrative act and not judicial or quasi-judicial act.[24] The satisfaction of the existence of an industrial dispute or the satisfaction that an industrial dispute is apprehended is 'a condition precedent to the order of reference'. An order of reference cannot be made mechanically without forming an opinion. For formation of the necessary opinion, the 'appropriate government' must also be satisfied that a person whose dispute is being referred for adjudication is a 'workman'. If the dispute is not between an employer and his workman, it is not an 'industrial dispute' and the Government can justifiably refuse to refer the dispute. From the material placed before it, the Government reaches an administrative decision whether there exists an existing or apprehended industrial dispute. In either event, it can exercise the power under this section.

The adequacy or the sufficiency of the material on which the opinion was formed, is beyond the pale of judicial scrutiny. If the action of the Government in making the reference is impugned by a party, it would be open to such a party to show that what was referred was not an industrial dispute and that the tribunal had no jurisdiction to make the award but if the dispute was an industrial dispute, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be competent for the court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters.[25] The Government is not required to serve a notice on the management before making a reference under s 10 of the dispute raised by the Employees Association relating to the categorisation of employees.[26] The nature of the process of formation of the 'opinion' may be stated in the inimitable words of Lord Denning in *Trinidad Cement.*

> True it is that the governor has to enquire and, no doubt, he did-in his administrative capacity, but he had not to conduct anything in the nature of judicial or quasi judicial inquiry.[27]

The order making reference under s 10(1) is an 'unspeaking' order which to use Lord Summer's famous phrase '*speaks only with the inscrutable face of a sphinx*'.[28]Therefore, the opinion of the government, under s 10(1) in referring the dispute, in this sense, is subjective and is not open to judicial scrutiny. In other words, the court cannot canvass the order of reference closely to see if there was any material before the government for coming to its conclusion as if it was judicial or a quasi-judicial determination but it will be open to a party seeking to impugn the award resulting from the order of reference to show that what was referred by the government was not an 'industrial dispute' at all within the meaning of the Act and the tribunal had no jurisdiction to make the award. No doubt, it is for the government to be satisfied about the existence or apprehension of the dispute. However, it would be open to the party impugning the reference that there was no material before the government, and it would be open to the tribunal to examine the question, but that does not mean that it can sit in appeal over the decision of the government and come to a conclusion that there was no material before the government. Furthermore, the question whether an industrial dispute existed on the date of the reference is a question of fact to be determined by the tribunal on the material placed before it.[29] When the 'appropriate government' makes a reference of an industrial dispute for adjudication, it does not decide any question of fact or law. The only condition which the exercise of that power should satisfy, is that there should be the existence or apprehension of an industrial dispute. When once the government is satisfied about this question, it acquires jurisdiction to refer the dispute for adjudication.[30] However, the condition precedent to the formation of such opinion, that there should be an existing or apprehended 'industrial dispute' is imperative and the recitals of the existence or apprehension of the industrial dispute cannot preclude the judicial review from going behind those recitals and in determining whether, in fact, there was any material before the 'appropriate government' and if there was, whether the government applied its mind in coming to the conclusion that an industrial dispute was in existence or was apprehended, and it was expedient to make the reference. Therefore, an order of reference is open to judicial review, if it is shown that the appropriate government had no material before it or it has not applied its mind to the material before it or has not taken into consideration certain vital facts which it ought to have taken into consideration.[31]

It is now well established that 'the discretion is neither unfettered nor arbitrary, for s 10(1) clearly provides that there must "exist" an "industrial dispute" as defined by the Act or such a dispute must be 'apprehended' before the government decides to refer it for adjudication'.[32] The law takes note of certain well-recognised principles regarding the exercise of discretionary power. There must be a real exercise of discretion ie, the authority must be exercised honestly and not for corrupt or ulterior purposes. In dealing with this problem, therefore, it is necessary to discern that the exercise of the discretionary power depends upon the honest formation of opinion that an industrial dispute is in existence or is apprehended and further that it will be expedient to make the reference after applying the mind to the relevant material before the government. The words 'where the appropriate government is of opinion' indicate that the opinion must be formed by the appropriate government and it is of course implicit that the opinion must be an honest one.[33]Furthermore, the appropriate government must act reasonably and not capriciously or arbitrarily nor according to whims or fancies. It will be an absurd exercise of discretion if, for example, the government forms the requisite opinion on account of pressure by any political party. Within these narrow limits, the opinion is not conclusive and, can be challenged in a court of law.[34] In English cases also, there are dicta to the effect that, if there were no grounds on which an authority could be satisfied, the court might infer that it had not applied its mind to the relevant facts or did not honestly hold the view expressed to be taken and that the court would interfere if there were no materials before the authority upon which it could be reasonably 'satisfied' that the order should be made.[35] In other words, the order of reference can be challenged by establishing bad faith or *mala fide* and corrupt motive as bad faith will destroy any action. However, bad faith or corrupt motive will be a matter to be established by the party alleging or propounding bad faith or corrupt motive by affirming and stating the facts. These facts are not only to be alleged but also have to be proved.[36]

The discretion of the government to make an order of reference is dependent on the satisfaction of these requirements and no jurisdiction outside the section which empowers making a reference can be exercised. In *Sindhu Resettlement Corpn,* in the first instance, the workman demanded reinstatement which the employer declined. Then he claimed retrenchment compensation, which too was declined in the circumstances of the case. The dispute was taken up by the union claiming retrenchment compensation for the workman on the ground that the employer had failed to take him back in its employment. The conciliation proceedings failed, subsequently on the basis of the failure report of the conciliation officer, the state of Gujarat referred the dispute relating to the reinstatement of the workman for adjudication to an industrial tribunal and the tribunal awarded reinstatement with full back wages. This award was challenged on three grounds, one of which was that the reference with respect to the reinstatement was not valid, because the dispute about reinstatement was not raised by the workman or the union with the management. This challenge was sustained by the Supreme Court with the observations thus:

> If no dispute at all was raised by the respondents with the management, any request sent by them to the government would only be a demand by them and not an industrial dispute between them and their employer. An industrial dispute, as defined, must be a dispute between employers and employers, employers and workmen and workmen and workmen. A mere demand to a government, without a dispute being raised by the workmen with their employer cannot become industrial dispute...The government had to come to an opinion that an industrial dispute did exist and that opinion could only be formed on the basis that there was a dispute between appellant and the respondents relating to reinstatement. [37]

This view is not correct on the facts or in law. Though the court noticed that 'it may be that conciliation officer reported to the government that an industrial dispute did exist relating to the reinstatement' of the workman and payment of back wages to him, it pointed out that no such dispute, in fact, was raised either by the workman or the Union with the employer before going to the conciliation. As already stated, the workman at the outset claimed reinstatement and that having been declined, he claimed the retrenchment compensation. From this claim for retrenchment compensation, the court has inferred that the claim regarding reinstatement was given up. But it has not given effect to the word 'difference' in the definition of 'industrial dispute', Even if subsequently, the workman and the union claimed retrenchment compensation, the 'difference' of opinion relating to reinstatement and back-wages continued to exist. Furthermore, the court also does not appear to have appreciated that the conciliation proceedings, are not adjudication proceedings but they are merely negotiations between the parties with the mediation of the conciliation officer for bringing about a settlement of an 'apprehended' or 'existing' industrial dispute. Therefore, it is open, for one party to raise a claim and the other party to reject it in the conciliation proceedings and this would be a 'difference' or 'dispute' *qua* that claim between the employer and the workmen. Even if such a dispute was not actually existing before going to the conciliation, it could well be 'apprehended' and would come into 'existence' as soon as the claim is rejected before the conciliation officer.[38] This is what exactly happened in this case. Before the conciliation officer, the dispute relating to reinstatement and back-wages did exist on which he made a failure report which was the foundation of the reference. It is not necessary that the dispute should have become an 'existing dispute' before the conciliation officer. The law requires that the 'industrial dispute' must exist or be apprehended on the date of the reference.[39] It could not, therefore, be said that the government based its opinion on material which was not relevant to the formation of opinion. The decision on this point requires reconsideration. From

the use of the words 'any industrial dispute exists or is apprehended', it is obvious that the existence or apprehension of an 'industrial dispute' is a condition precedent to the making of the reference.[40]

CP Sarathy (supra) provides an illustration of a reference of an apprehended dispute. In this case, at the relevant time, there was no actual existing dispute between a particular employer owning a cinema theatre and his workmen but the government made a reference of an industrial dispute existing in the cinema industry as a whole in the town of Madras including the cinema of the employer. The Supreme Court upheld the validity of the order of reference on the basis of the expression 'apprehended' used in this section. In *Pradip Lamp Works.* the court held that the reference of an industrial dispute to avert a threatened strike was an 'existing' or at any rate an 'apprehended' industrial dispute.[41] But in *ITC,* the order of reference was attacked on the ground that it was mechanically made by the government without application of mind inasmuch as the use of the composite phrase, 'exists or apprehended' in the order, demonstrated that there was no application of mind of the authorities concerned making the order of reference. It was pointed out that, on the facts of the case, either an 'industrial dispute' 'existed' or it could be 'apprehended' and it could not be both. The use of the words 'or is apprehended' in the order of reference was a mere surplusage and did not necessarily lead to the conclusion that the reference was made in a cavalier manner without any application of mind.[42]

A dispute comes into 'existence' as soon as it is raised by one party with the other and is rejected by the other and once having come into existence, it continues unless it is settled by means of a settlement, adjudication or arbitration.[43] The question whether an industrial dispute was raised or not is a question of fact. It must, therefore, be raised before the tribunal. It cannot be allowed to be raised for the first time before the High Court in its jurisdiction under Art. 226 or before the Supreme Court in appeal under Art. 133 or Art. 136 of the Constitution. However, no reference can be made by the 'appropriate government' unless at the time when it decides to make the reference, an 'industrial dispute' between the employer and his employees either existed or was apprehended and the reference it makes must be with regard to that and no other industrial dispute.[44] These requirements postulate the absence of a general discretion to go on a fishing expedition to find evidence. No doubt the formation of opinion is subjective, but the existence or apprehension of a dispute, of the nature of an industrial dispute which is a *sine qua non* for making an order of reference, must be demonstrable. If the order of reference is questioned on the ground that there was no material before the 'appropriate government' leading to the conclusion of the apprehension or existence of an industrial dispute, the order of reference might be amenable to interference in judicial review, despite its being an administrative order. Since the 'existence' or 'apprehension' of an 'industrial dispute', is a condition fundamental to the forming of opinion, it must be proved at least *prima facie*. In other words, at least it must be shown that the government formed an opinion that an 'industrial dispute' existed or was apprehended between the parties before a valid reference could be made.

Ordinarily, after an order or reference has been made, the writ court does not interfere and the question of the validity of the reference is left to the tribunal to decide. Nevertheless, if the court finds that the government has acted in clear contravention of the provisions of law or has taken its decision on extraneous or irrelevant considerations and no investigation into the disputed facts is involved, it can, in appropriate cases, entertain a writ petition against the order of reference. For instance, in *Jaipur Polyspin,* there was absolutely no material before the government on the basis of which it could have directly or indirectly made a reference with regard to bonus for the years 1982-83 to 1986-87 while the conciliation report unmistakably related to the claim for bonus for the year 1987-88.[45] In the absence of any dispute or difference between the parties regarding the claim for bonus for the year 1982-83 to 1986-87, a single judge of the Rajasthan High Court held that the appropriate government was not competent to make reference for the years other than 1987-88 but in what types of cases, the writ court will interfere would depend on the facts and circumstances in each case. In *Aulia Bidi Factory, Burhanpur v Industrial Tribunal* ,[46] the state government was made a respondent party in the writ petition filed against the award of the industrial tribunal but no reply was filed on behalf of the state and, therefore, there was no material whatsoever before the High Court to show as to what material, if any, the government had before it on the basis of which it formed its opinion that an industrial dispute existed between the parties. The High Court, therefore, held that the opinion being based on no material, the consequent reference was invalid in law. The impugned award of the tribunal, adjudicating upon that reference was, therefore, quashed. It is not sufficient to assert that the circumstances exist which give no clue as to what they are because the circumstances must be such as to lead to conclusions of certain definiteness. An order of reference made by a government, without applying its mind to the materials and facts before it, in the light of the law laid down by judicial pronouncements in this behalf, would be manifestly erroneous and without jurisdiction and, as such liable to be quashed.[47]

The power to make an order of reference under s 10(1) arises as soon as the necessary opinion is formed by the appropriate government as to the existence or apprehension of an industrial dispute. The opinion, therefore, is naturally to be formed before the order is made. Hence, if the opinion was formed and an order was made after that, it will be a valid exercise of the power. The mere fact that the formation of opinion was not recited in the order would not take away the power to make the order. The validity of the order, therefore, does not depend upon the recital of the formation of opinion or on giving the details of facts upon which opinion is formed in the notification of reference, but on the factual formation of the opinion on

the basis of the relevant material. If, by inadvertence or otherwise, the recital of the formation of opinion is not mentioned in the preamble to the order, the defect can be remedied by showing other evidence to the effect that the order was made after forming such opinion and that there was a valid exercise of the power. If, on the other hand, the order *ex facie* valid contains a recital that the condition precedent is satisfied, the court would presume that the necessary condition was fulfilled and the burden will be on him, who challenges the accuracy of the recital, to prove that it was incorrect.[48] Nor is it necessary that the government should disclose, either in its notification or in its counter-affidavit, details of facts on which it formed its opinion and came to the conclusion that it is expedient to make the reference.[49] The stage of dispute is not relevant consideration, but the consideration germane for making a reference is the dispute. It would not make any difference as to whether the dispute between the employer and the workmen was at the stage of workmen's suspension or they happened to be dismissed in pursuance of the domestic inquiry that were held in the intervening time.[50] An order of reference made by a notification not authenticated by a secretary, additional secretary, joint secretary, deputy secretary, under secretary or such other officer empowered by the President under Art. 77 or by the Governor under Art. 166 of the Constitution in that behalf, to authenticate the notifications issued under the Act, will not be a valid order.[51] In making the order of reference which is an administrative function, the appropriate government is, under s 10(1)(2), required to form its opinion after applying its mind to the material before it but the government is not required to give a hearing to the parties before making the reference as the tribunal has jurisdiction to decide the controversy even with respect to the validity of the reference after giving hearing to the parties.[52]Unless the order of reference discloses the illegality on its face, it is not reviewable. Unlike s 12(5) of the Act, it is not necessary to state reasons for making the reference in the order of reference.[53] Though, the rules of natural justice would apply even to administrative orders, it is not necessary that administrative orders, like the order of reference under s 10(1) should be speaking orders unless the statute specifically enjoins such a requirement.[54] Joint reference by the government of a dispute relating to termination or retrenchment of several employees working in different branches of the bank is valid.[55] In *Indian Tea Assn*, the Supreme Court summarised the law relating to the powers of government while making a reference of a dispute as follows:

> (1) The appropriate government would not be justified in making a reference under section 10 of the Act without satisfying itself on the facts and circumstances brought to its notice that an industrial dispute exists or apprehended and if such a reference is made, it is desirable wherever possible, for the government to indicate the nature of dispute in the order of reference.
>
> (2) The order of the appropriate government making a reference under section 10 of the Act is an administrative order and is not a judicial or quasi-judicial one, and the court, therefore, cannot canvass the order of reference closely to see if there was any material before the government to support its conclusion, as if it was a judicial or quasi-judicial order.
>
> (3) An order made by the appropriate government under section 10 of the Act being an administrative order, no *lis* is involved as such an order is made on the subjective satisfaction of the government.
>
> (4) If it appears from the reasons given that the appropriate government took into account any consideration irrelevant or foreign material, the court may in a given case, consider the case for a writ of *mandamus*.
>
> (5) It would, however, be open to a party to show that what was referred by the government was not an industrial dispute within the meaning of the Act. [56]

Following the decision rendered in *Indian Tea Assn*, a single Judge of Gujarat High Court held that the refusal by the Central Government to make a reference of the dispute after forming an opinion, on facts, to the effect that the person raising the industrial dispute was not a 'workman' and that there was no direct employer-employee relationship, the High Court held that such a refusal did not suffer from any infirmity.[57]

Refusal to make a Reference

In *Bombay Journalists*, Gajendragadkar J, held a *prima facie* examination of the merits is not foreign to the enquiry which the government is entitled to make in dealing with a dispute under s 10(1). The learned judge identified two circumstances in which it would be incompetent for the government to refuse to make a reference:

> (i) where the dispute raises questions of law; and
>
> (ii) where it involves disputed questions of fact, because both these circumstances fall within the province of the Tribunal.[58]

Where a particular matter is covered under a previous settlement or award which is in force, a subsequent reference of the matter for adjudication is incompetent. If, however, a demand made by the workmen earlier was withdrawn or was not pressed and hence is not covered by the previous settlement or award, the bar of ss 18 and 19 does not operate and the

subsequent reference and adjudication as to that demand is competent and valid.[59] A second reference of an almost identical matter already covered by an award unless properly terminated under s 19 of IDA is invalid.[60] The refusal by the government to refer a dispute relating to dismissal of a workman, on the sole ground of absence of *mala fides* on the part of employer, is bad in law, because the determination as to the presence or absence of *mala fides* is a judicial function and hence not within the competence of the government.[61] It is mandatory for the government to record and communicate the reasons to the parties concerned, where the dispute has gone through conciliation and a failure report has been submitted. If the government refuses to refer the dispute on extraneous grounds, irrelevant considerations or acts of *mala fide*, the party would be entitled to move the High Court for a writ of *mandamus*.[62] The existence of satisfaction, that what was referred was an industrial dispute, was implicit in the power to make a reference.[63] The discretion conferred on the government was neither unfettered nor arbitrary.[64] From the aforesaid discussion, the legal position can be summed up thus: The government has the power to validly refuse to make a reference, if any of the following four conditions are satisfied:

(i) The claim is patently frivolous or vexatious; or

(ii) It is clearly belated or, in other words, has become stale; or

(iii) The dispute, if referred for adjudication, is likely to impact the general relations between the employers and the employees in the region adversely; and

(iv) The matter is covered by a subsisting settlement or award.

In other words, the power to make a reference is administrative and/or discretionary and is absolute in so far as the government is under no obligation to justify its decision. However, this absolute power is not available while refusing to make a reference, in which case the government is under a statutory obligation to communicate the reasons to the parties. In *Union Bank of India*, the facts were: the government refused to make a reference of the dispute relating to the increase in the rate of interest by the bank for loans to employees. Kochar J held that the refusal was without jurisdiction and directed the government to refer the dispute.[65] Where the government refused to make a reference on the ground that "*the workman has not substantiated his arguments with documentary evidence; that he has not worked for more than 120 days in 12 consecutive months*", Kulashrestha J of Madhya Pradesh High Court, while quashing the order, observed that the order amounted to adjudication of the dispute and that the government could not have undertaken adjudication of the disputed facts.[66] The reason given by the government, that the employer was not an 'industry', amounted to adjudication of the dispute and the refusal to refer the dispute on that ground is invalid.[67] In *Rathinaswamy*, the Central Government refused to refer the dispute relating to the conferment of permanence on 'temporary messengers' on the ground that the matter was covered by a settlement entered into under s 18(1) between the State Bank of India and the majority union. Directing the government to make a reference of the dispute, the Madras High Court held that it was not proper for the government to decide such contentious issues, which could only be resolved by adjudication.[68] In *Amts Karmachari Sangh*, the government refused to make a reference on the ground that there was no employer-employee relationship between the parties. Quashing the impugned order of the Dy. Labour Commissioner (who represented the appropriate government), Upadhyay J of Gujarat High Court observed that the reasoning of the government stands in direct conflict with the provisions of s 2(k) and s 2A of the Industrial Disputes Act in so far as the question whether there existed employer-employee relationship and whether the workman was entitled to relief were matters to be decided by a labour court or industrial tribunal.[69]

In *Sarva Shramik Sangh*, the facts briefly were: The appellant union filed a writ petition in 1999 in the Bombay HC seeking the following reliefs: (i) a direction to the Central Government to hold an investigation under s 10 of CLRAA on an application made by it earlier (in 1998) and make an order abolishing the contract labour system in respect of workmen working in the canteen of the Marketing division of IOC; and (ii) a direction to IOC to absorb/regularize the services of said workers. The writ petition was dismissed for want of prosecution in November 2003. Thereafter, the union filed another writ petition in HC in 2004 contending that the contract between IOC and the canteen contractor was sham and bogus and seeking a direction to the Central Government to refer the dispute relating to the permanency of canteen workers. The HC issued a direction to the Central Government to consider and dispose of the request for reference with a further direction to maintain *status quo* in respect of the workmen concerned till the disposal of reference application. In pursuance of it, conciliation proceedings were held and the conciliation officer sent a failure report in September 2004. The Central Government by its order of 21 December 2004 refused to make a reference on the ground that "the workmen were not appointed by IOC, but were engaged by the contractor having a valid and legal contract". The union filed a writ petition against the said order, which was dismissed by the High Court on the following grounds: (a) that the union had earlier filed a writ petition for abolition of contract labour in the canteen of IOC, which was dismissed in 2003 for non-prosecution and attained finality; (b) that the union, once having sought the relief of abolition of contract labour, was estopped from seeking any other relief by contending that the contract was sham and not genuine; and (c) that the order of Central Government refusing to make a reference did not suffer from any infirmity or arbitrariness. One of the issues were

canvassed before SC was "*whether the decision of the Central Government refusing reference requires interference*." Raveendran, J (for self and Panta, J), cited several decisions of SC commencing from *CP Sarathy* and observed that the facts of present case were squarely covered by the decision in *Ram Avtar Sharma* (supra). The learned Judge finally held:

> ... it can safely be concluded that a writ of *mandamus* would be issued to the appropriate Government to reconsider the refusal to make a reference, where (i) the refusal is on irrelevant, irrational or extraneous grounds; (ii) the refusal is a result of the appropriate government examining the merits of the dispute and prejudging/adjudicating/determine the dispute; (iii) the refusal is *mala fide* or dishonest or actuated by malice; (iv) the refusal ignores the material available in the failure report of the Conciliation Officer and is not supported by any reason. ()...we allow this appeal and direct the Central Government to reconsider the matter in the light of the observations above and take an appropriate decision on the request for reference of the dispute to the Industrial adjudicator. As and when the state (*sic*) Government makes the reference, it is for the Industrial Tribunal to consider the dispute on merits, on the basis of materials placed before it, uninfluenced by the observations of the High Court or this Court. [70] ()

Withdrawal, Cancellation or Supersession of Reference

There will be withdrawal of a reference when the dispute which has been referred is taken out of the purview of the tribunal and there will be supersession of a previous reference when the second reference comprises matters or disputes totally unconnected with or different from the disputes originally referred.[71] In *DN Ganguli*, the Supreme Court held that the government has no power, either express or implied, to cancel or withdraw a reference after it has made the order of reference. An order cancelling, withdrawing or superseding a reference would, therefore, be incompetent and invalid and would be liable to be struck down being *ultra vires* the power of the 'appropriate government' under the Act.[72] The reviewing court cannot direct the 'appropriate government' to withdraw a reference simply because the government has discretion in the matter of making a reference and the parties have no legal right in the matter.[73] This is so because the appropriate government cannot be directed to exercise a power which it does not possess, ie the power to withdraw a reference.[74] The reason is that upon a tribunal ceasing to exist, it cannot proceed further with the pending adjudication. Further, unless a dispute is referred to it under s 10(1), the new tribunal constituted under s 7A, cannot proceed with the adjudication of the industrial dispute even though such a dispute was pending adjudication before the old tribunal.[75]However, the distinction between the tribunal and its presiding officer is to be borne in mind. If the tribunal itself lapses, the question of a fresh reference arises but where the tribunal constituted under s 7A continues and the term of the presiding officer expires, the vacancy so caused may be filled in under s 8. In such cases, it would not be necessary to make a fresh reference. There is no express power in the 'appropriate government' by its executive act, to abolish a tribunal after referring a dispute to it under s 10(1) till it makes an award. Nor does it possess jurisdiction to refer the same dispute to another tribunal by abolishing the tribunal before which such dispute was pending adjudication.[76]

In *Lipton*, the government, while making reference, omitted to include certain demands of the employees and all the demands of management. Subsequently, realising that the presiding officer had retired, the government made another reference substituting the name of another person in place of the first presiding officer. In this reference, the government incorporated the demands of the employees which had not been included in the first reference. This order of reference was challenged by the management by a writ petition. Meanwhile, the government made yet another reference including some of the demands of the employees and only three demands out of nine demands of the management. The management amended its writ petition by including the third reference as well. A single judge of the Bombay High Court (Nagpur Bench) held that the third order of reference was bad to the extent it dropped the six demands of the management out of the nine included in the first order of reference, but upheld the validity of the remaining reference. In connection with the word 'supersession' used in the second order of reference, the court observed that it was a mere misnomer because the third order of reference made explicit by adding some more demands though it did not use the expression 'supersession'. After the amendment of 1956, the government can withdraw an 'industrial dispute' pending before a tribunal or any other adjudicatory authority and transfer the same to another but from the language of that provision, it is clear that whenever the government decides to withdraw a reference from an adjudicatory authority, it has to transfer the same to another adjudicatory authority. It is not that the government can withdraw the reference from adjudication after once having made the reference.[77] In *Indian Rayon*, a single judge of Gujarat held that, while it is well settled that the appropriate government can vary and amend the terms of reference, it has no power to cancel the reference once made. The learned judge further observed that the petitioner-company at whose instance, the order of reference was passed was not given opportunity of hearing, and thus the order cancelling the earlier order of reference was illegal and bad in law both for want of express or implied jurisdiction and for being in violation of the principles of natural justice.[78]

Note: *For further discussion, see notes and comments under s 33B -captioned 'Power of the Government to withdraw and transfer certain proceedings'.*

Amendment or Correction of Reference

The question whether after making the order of reference, the 'appropriate government' could subsequently amend it, was considered by the Madras High Court in *South India Labour Relations Organisation*, and it was held that it is open to the government to make, under s 10, an independent reference concerning any matter not covered by the previous reference.[79]The consensus of judicial opinion, as can be discerned from the decisions of several High Courts, is that while the appropriate government acting under s 10, has the power to add to or amplify, a matter already referred for adjudication, it will have no power to supersede or cancel the old reference in such a way as to effect a withdrawal of the reference validly referred. There is no bar to the application of the rule of construction embodied in s 21 of the General Clauses Act 1897 insofar as it is consistent with the Act and is not likely to defeat its purpose. The logical conclusion, therefore, is that any amendment, addition or modification which the government can make subsequent to the order of reference cannot go to the length of superseding or withdrawing the original reference.[80] Though, the government has the power to rectify or correct the previous order of reference,[81] under the guise of amending or correcting the previous order of reference, the order of amendment or the corrigendum tantamounting to supersession of the previous order of reference cannot be validly made because such an order would be *ultra vires* the power of the government.[82] But there is no bar to amend a pending reference by a subsequent notification which is in the nature of addition to or amplification of the issue already referred to adjudication. This is so because amending a reference relating to a pending dispute by way of addition or amplification thereto is not inconsistent with any of the provisions of the Act and adoption of such a course would not defeat the purposes of the Act. The crux of the problem is as to whether the amendment which is sought to be made by a subsequent order of the State Government is merely an amplification of or is supplemental to or makes an addition to the matters already referred to for the decision of the industrial tribunal or the labour court concerned or whether it amounts to the revocation or cancellation or withdrawal or supersession of the reference already made or of any of the issues contained in the earlier reference.[83]

However, clerical errors can always be corrected and such correction does not amount either to withdrawal of, or cancellation of, the order of reference.[84] In other words, the appropriate government can amend a reference by way of addition or modification so long as the amendment does not have the effect of withdrawing or superseding the reference already made. Similarly, the government has the power to issue a second order of reference for correcting an obvious mistake or terminological error which has inadvertently crept in the first order of reference. In *Bombay Gumasta Union*, the order of reference contained a mistake, in that an officer of the government clubbed 13 respondents describing them as 'Kumar Group of Companies' though the conciliation proceedings related to each and everyone of the 13 respondents. This mistake was noticed by the tribunal and the government by a corrigendum for the words 'Kumar Group of Companies', the names of the 13 respondents were incorporated. A single judge of the Bombay High Court held that the government had simply corrected the mistake it had committed in the title to the reference. In these circumstances, it could not be said that the government had substituted new parties in the place of the old ones. The corrigendum, therefore, was only a correction and nothing more. The reference, therefore, was not incompetent. The cardinal principle in determining the question, whether the amendment amounts to a correction of clerical error or introduction of fresh material, is whether the relief claimed by the aggrieved party in the original notification can be granted in the proceedings which are to take place in pursuance of the amended notification.[85] If the same relief can be granted, the mistake may be considered as clerical which can be corrected by amendment. But if the same relief cannot be granted, then it means that the original notification has been cancelled or withdrawn and another notification has been issued in its place which the appropriate government is not competent to do.[86] The government has no authority to amend the reference for adjudication to implead the company as party to the dispute between the canteen contractor and its workman, when the Division Bench of the High Court had earlier ruled that impleading of the company was illegal and it stood deleted from the array of parties before the tribunal.[87] Under s 10, the government has the power to amend the existing reference pending before the labour court. It is also not necessary to issue notice to the employer and consider his objections before making reference on the second application.[88] The government has inherent powers to correct apparent errors in its reference, but that does not mean that the government has power to (review) recall its earlier order of reference.[89]

'Appropriate Government at any time may refer'

It is the appropriate government which has the power to make the reference. Hence, the reference of a dispute by a government which is not the appropriate government will not be valid but a reference may be made by any authority duly authorised by the appropriate government. In *Bharat Textile Mills*, the notification making the reference of an industrial dispute for adjudication was issued in the name of the President of India and was made and signed by the labour commissioner who had been vested with the powers exercisable under ss 10 and 12(5) in relation to the industrial disputes. The Punjab and Haryana High Court held that the notification was neither void nor without jurisdiction and was, therefore, not liable to be quashed and the award made on such reference was not without jurisdiction. The words 'at any time' preceded by the word 'may' in s 10(1), indicate the intention of the legislature that the government has discretion to refer a dispute at any time, if it is of the opinion that an industrial dispute is existing or is apprehended.[90] This gives rise to the following questions:

(i) whether the conciliation proceedings are a condition precedent in the making of the order of reference?

(ii) Whether during the pendency of the proceedings for 'permission' or 'approval' of the action of discharge or dismissal of a workman, before an authority under Section 33, a reference of the dispute relating to such discharge or dismissal can validly be made for adjudication?

(iii) whether once having refused to make a reference the appropriate government can subsequently make a reference of the same matter? and

(iv) whether there is any limitation in making the order of reference?

These questions have given rise to some judicial discussion and are, therefore, dealt in some detail hereunder:

(i) Conciliation Proceedings

In *Avon Services* (supra), Desai J held that s 12 casts duty upon the conciliation officer to hold conciliation proceedings in respect of the industrial dispute that exists or is apprehended. It is mandatory on the conciliation officer to hold the conciliation proceedings where the dispute relates to a public utility service and a strike notice has been served under s 22. The conciliation officer must try to promote a settlement between the parties. Either he succeeds in bringing the parties to a settlement or fails in his attempt. In either case, he must submit a report to the appropriate government. But the procedure for promoting settlement cannot come in the way of the appropriate government making reference even after such a report is received. In *WIMCO*, Shelat J observed:

> Ordinarily, the question of making a reference would arise after conciliation proceedings have been gone through and the conciliation officer has made a failure report. But the government need not wait until such a procedure has been completed. In an urgent case, it can 'at any time' ie even when such proceedings have not begun or are still pending, decide to refer the dispute for adjudication. The expression 'at any time' thus takes in such cases as where the government decides to make a reference without waiting for conciliation proceedings to begin or to be completed.[91]

There is nothing in s 10(1) to indicate that the 'appropriate government' has to wait for the conciliation officer's report under s 12(4). The second *proviso* to s 10(1) makes it obligatory on the 'appropriate government' to make a reference of an industrial dispute relating to a public utility service where a notice of strike or lock-out under s 22 has been given. The government is enjoined to made a reference irrespective of the fact that any other proceeding including conciliation proceedings under the Act have commenced. It is implicit in this *proviso* that even before the conciliation proceedings have started, the 'appropriate government' will have the power to make the reference of the dispute. The conciliation officer's report is, therefore, not a condition precedent for the government for exercising its power to make a reference under s 10(1) of the Act.[92]*A priori*, even if the conciliation proceedings are not held according to the statutory provisions on the basis of which the failure report is sent to the government, it will not affect the validity of the reference.[93] The provisions of s 10(1) are not controlled by the provisions of s 12(4) or 12(5) of the Act,[94]because when the appropriate government considers the question as to whether a reference should be made under s 12(5), it has to act under s 10(1) of the Act, and s 10(1) confers discretion on the 'appropriate government' either to refer the dispute, or not to refer it, for industrial adjudication, accordingly as it is of the opinion that it is expedient to do so or not. In other words, in dealing with an industrial dispute in respect of which, a failure report has been submitted under s 12(4), the appropriate government ultimately exercises its powers under s 10(1), subject to this, that s 12(5), impose an obligation on it to record reasons for not making the reference when the dispute has gone through conciliation and a failure report has been made under s 12(4).[95]It is not necessary that all the steps contemplated in the Act for settlement of an industrial dispute should be taken by the appropriate government one after the other. The different authorities which are constituted under the Act are set up with different ends in view and the appropriate government is invested with the discretion to choose one or the other of the authorities for the purpose of investigation and settlement of industrial disputes, upon its own appraisement of the situation.[1] Rules 10A and 10B of the Industrial Disputes (Central) Rules 1957 apply where reference is made on the report of the conciliation officer or on an application by the employer or the workman, but there is no bar to the government making a reference of the consequential matters arising as a result of the decision of the industrial tribunal or labour court one way or the other.[2] The government making an order of reference under s 10, is not confined to the dispute which was the subject-matter of conciliation proceedings, but is entitled to refer any 'existing' or 'apprehended' industrial dispute.[3]

(ii) Pending Application under Section 33

In *ITC*, the question before the High Court of Karnataka was whether the government was competent to refer the dispute relating to dismissal for adjudication under s 10, while an application filed under s 33(2)(b) for the approval of the said

dismissal was pending before the tribunal. Rama Jois J held that any decision under s 33 is not final and, therefore, cannot yield to a limited and semi-final remedy provided under s 33(2)(b) proceedings. Therefore, notwithstanding that a proceeding under s 33 is pending, a dispute validly can be referred to adjudication under s 10(1).[4] On the construction of the words 'the appropriate government...may at any time, by order in writing... refer the dispute...for adjudication', the final conclusion of the learned judge is quite correct. But the reasoning that the decision of the court under s 33(2)(b) will not be final and bar reference under s 10(1) is not correct. In *Navalbhai K Chanhan*, the Gujarat High Court held that an order of reference with respect to dismissal of a workman can validly be made for adjudication during the pendency of an application for approval under s 33(2)(b) of the Act. In a s 33(2)(b) case, dismissal or discharge takes place before the application is made. Approval of the order of dismissal or discharge merely ratifies the action while disapproval has the affect of obliterating the order. On the other hand, in ss 33(1) and 33(3) cases, the dismissal or discharge of a workman takes place only after the express permission in writing is given by the appropriate authority. Therefore, there is a contradistinction between the provisions of s 33(2)(b) on the one hand and ss 33(1)(b) and 33(3)(b) on the other. In the former case, the order of reference with respect to the dismissal or discharge of a workman can validly be made in view of the power of the government to make the order of reference at any time, irrespective of the fact that a petition for approval is pending before the appropriate authority because in such a case, the action of discharge or dismissal has already taken place. But in the latter case, the order of reference will be premature because the dismissal does not take place unless the appropriate authority has accorded express permission in writing.[5]

(iii) Previous Refusal

When there is an industrial dispute, the factual existence of which cannot really be in dispute, a determination afresh by the government of the question of expediency of referring such a dispute for adjudication under s 10(1) of the Act after having previously declined to make a reference, does not amount to a review of any question judicially determined previously. The consensus of judicial opinion is that a prior order by the government under s 12(5), refusing to refer for adjudication a particular dispute, cannot affect the jurisdiction of the government to exercise the statutory power conferred upon it by s 10(1) of the Act on any subsequent occasion.[6] This view has been affirmed in *Western India Match* (supra), in which the Supreme Court considered two questions *viz*,

(i) do the words 'at any time' in section 4K of the UP Industrial Disputes Act 1947 (which is in *pari materia* with section 10 of the Central Act) have any limitation or can the government refer a dispute for adjudication after the lapse of about six years, as in this case, after the accrual of cause of the dispute? and

(ii) in what circumstances, can 'the Government refer such a dispute for adjudication after it has once refused to do so?

Answering the first point, the court said:

> In fact when the government refuses to make a reference it does not exercise its power; on the other hand it refuses to exercise its power and it is only when it decides to refer that it exercises its power. Consequently, the power to refer cannot be said to have been exhausted when it has declined to make a reference at an earlier stage...the fact that it had earlier refused to exercise its power does not preclude it from exercising it at a later stage. In this view, the mere fact that there has been a lapse of time or that a party to dispute was, by the earlier refusal, led to believe that there would be no reference and acts upon such belief, does not affect the jurisdiction of the government to make the reference.

But the second question, *viz*, as to in what circumstances can the Government refer a dispute for adjudication after once having declined to refer it, was not separately answered by the court. The answer to this question is to be found in the answer to the first question itself, in the observation:

> In the light of the nature of the function of the government and the object for which the power is conferred on it, it would be difficult to hold that once the government has refused to refer, it cannot change its mind on a re-consideration of the matter either because new facts have come to light or because it had misunderstood the existing facts or for any other relevant consideration.[7]

On the facts of the case, the court found that the earlier decision of the government refusing to make the reference was based on the misapprehension of facts and said:

> If the government subsequently found that its earlier decision was based on such misapprehension and on facts brought to its notice, it reconsiders the matter and decides to make the reference it is difficult to say that it exercised the discretion conferred on it

> by section 4K in any inappropriate manner.

With respect to stale claims, the court said:

> There is no reason to think that the government would not consider the matter properly or allow itself to be stampeded into making references in cases of old or stale disputes or reviving such disputes on the pressure of unions.

In *Binny*, it was pointed out to the court that the government had already refused to refer the dispute on two occasions and there was no material on record to show as to what persuaded the government ultimately to do so but the court observed that the mere fact that previously the government had taken the view that no reference was called for, would not, entitle the court to conclude that there could be no cause for reference of the dispute subsequently, and from the earlier refusal, it did not follow that thereafter the government could not either change its mind or make an order of reference on fresh material before it, as s 10(1) empowers the appropriate government to make a reference 'at any time' whenever it is of opinion that any industrial dispute exists or is apprehended. However, for want of the relevant material before it, the court could not go into the question whether the government had any material before it justifying the reference. It was, therefore, observed that this point could only be canvassed either in a proceeding to which the government was a party or where the court was in possession of all the available material relating to the dispute and in the absence of the government from the array of the parties, it was not possible to come to any finding as to whether there was any such material or not.[8] Since this point was raised in appeal by special leave before the Supreme Court, the view of the court is quite justified.

In *Avon Services* (supra), the appeal was against the order and judgment of the High Court dismissing the writ petition of the appellant *inlimine*, in which the appropriate government was impleaded as a party. In this case, the appropriate government had declined to make reference of an industrial dispute relating to the termination of the services of two workmen but about nine months after the refusal, the government referred the dispute for adjudication to the industrial tribunal. This order of reference did not disclose any reasons for making the reference. The tribunal directed the reinstatement of the workmen with full *back* wages. The award of the tribunal was challenged before the High Court of Punjab and Haryana in a writ petition impleading *inter alia* the government of Haryana which was dismissed *in limine*. In appeal, against the order of the High Court, before the Supreme Court, it was contended that subsequent to the earlier refusal to refer the dispute, neither had any facts come to light nor was it discernible from the order of reference that the government had misunderstood the existing facts or there was any other relevant consideration. It was further submitted that the order of reference did not disclose any reasons justifying reconsideration of its earlier decision refusing to refer the dispute. It was also pointed out to the court that the government was before it as a party to the appeal and since it had not filed any affidavit controverting these averments, the order of reference was bad for non-compliance with the requirements as suggested by the court in *WIMCO*. Following that decision, the court rightly held that it was competent for the appropriate government to refer an industrial dispute for adjudication which it earlier declined to do. Speaking for the court, Desai J stated:

> Merely because the government rejects a request for a reference or declines to make a reference, it cannot be said that the industrial dispute has ceased to exist, nor could it be said to be a review of any judicial or quasi-judicial order or determination. The industrial dispute may nonetheless continue to remain in existence and if at a subsequent stage the appropriate government is satisfied that in the interest of industrial peace and for promoting industrial harmony it is desirable to make a reference, the appropriate government does not lack power to do so under section 10(1), nor is it precluded from making the reference on the only ground that on an earlier occasion it had declined to make the reference. The expression 'at any time' in section 10(1) will clearly negative the contention that once the government declines to make a reference the power to make a reference under section 10(1) in respect of the same dispute gets exhausted. Such a construction would denude a very vital power conferred on the government in the interest of industrial peace and harmony and it need not be whittled down by interpretative process...A refusal of the appropriate government to make a reference is not indicative of an exercise of power under section 10(1), the exercise of the power would be a positive act of making a reference. Therefore, when the government declines to make a reference the source of power is neither dried up nor exhausted. It only indicates that the government for the time being refused to exercise the power but that does not denude the power. The power to make the reference remains intact and can be exercised if the material and relevant considerations for exercise of power are available; they being the continued existence of the dispute and the wisdom of referring it, in the larger interest of industrial peace and harmony. Refusal to make the reference does not tantamount to saying that the dispute, if it at all existed, stands resolved. On the contrary, the refusal to make a reference, not compelling the parties to come to a talking table or before a quasi-judicial tribunal would further accentuate the feelings and a threat to direct action may become imminent and the government may as well reconsider the decision and make the reference. ... It is not absolutely necessary that there ought to be some fresh material before the government for reconsideration of its earlier decision. The government may reconsider its decision on account of some new facts brought to its notice or for any other relevant consideration and such other relevant

> consideration may include the threat to industrial peace by the continued existence of the industrial dispute without any attempt at resolving it and that a reference would at least bring the parties to the talking table.[9]

In one breath, the court recognised that the government may reconsider its decision on account of some 'new facts brought to its notice or for any other relevant consideration...such other relevant considerations may include the threat to industrial peace by the continued existence of the industrial dispute without any attempt at resolving it and that a reference would at least bring the parties to the talking table' and at the same time, it said that 'it was not absolutely necessary that there ought to be fresh material before the government for reconsideration of its earlier decision'. These observations are not only self-contradictory but are also irreconcilable with the ratio of *WIMCO*, which provides unequivocal guidelines for exercise of the government's discretion for reconsideration of the question of referring the dispute which it had earlier declined to refer. To say that, it is not absolutely necessary that there should be fresh material before the government for reconsideration of its earlier decision, would give sanction to arbitrariness on the part of the government resulting in absurd situations. For instance, even after the lapse of fifty years, from its refusal to refer a dispute for adjudication, without any further facts or relevant consideration, the government would be competent and justified to make a valid reference merely because the 'industrial dispute' may 'continue to remain in existence'. By this logic, the 'industrial disputes', which are not referred for adjudication, will continue to exist for centuries, nay eternally. In other words, the power of the government to refuse to refer a dispute will be rendered otiose because the dispute always will continue to exist in cases where the government refused to refer it. That is why in *WIMCO*, the court had indicated the facts and circumstances in which the government can justifiably reconsider the question of referring the dispute to adjudication which it had declined earlier.

The existence of facts and circumstances, indicated in *WIMCO*, must be discernible either from the order of reference or from the return filed by the government to the writ petition. It is, therefore, desirable that when the government decides to refer the same dispute for adjudication, subsequent to its refusal to make a reference, it must state reasons showing that new facts had come to light or there was misunderstanding as to the existence of facts or there was any other relevant consideration including the threat to peace in the order of reference. Alternatively, these reasons may be stated in the counter-affidavit in reply to the writ petition challenging the order of reference. In the absence of the statement of reasons actuating the government to reconsider the question of making the reference, the guidelines provided in *WIMCO* that 'there is no reason to think that the government would not consider the matter properly or allow itself to be stampeded into making a reference in cases of old or stale dispute or reviving such disputes on the pressure of unions', would be rendered to be a merely pious hope, because the order being 'the inscrutable face of a sphinx'[10] will not be open to judicial scrutiny and the government will always be able to 'disarm the court by taking refuge in silence'.[11] There may be various possibilities of the government being pressurised into making the reference subsequent to the previous refusal; for instance, the change of the officer responsible for making the reference, connection of the trade union with the ruling party at the relevant time, change of the government from one political party to another; *mala fides* and so on. Obviously, such considerations cannot be *bona fide* or for relevant or germane reasons warranting the departure from the previous decision. This is illustrated in the case of *Srikrishna Jute Mills.*[12] After having declined to make the reference of a dispute, the 'appropriate government' subsequently referred the same for adjudication on the representation of an MLA. In a writ petition, challenging the subsequent reference, though the Andhra Pradesh High Court correctly stated the ratio of the dicta of the Supreme Court in *WIMCO* and *Binny*, in its application to the facts of the case it went haywire. From the facts of the case, it was not discernible that any new facts had come to light or the government had misunderstood the existing fact or there was any other relevant consideration. Obviously, the reference was made because the MLA had brought political pressure on the government, who had made the indorsement on the application of the workman. The consideration, that the application of workman was sent along with a covering letter of the MLA, was clearly extraneous and irrelevant to the facts which the government could take into consideration in determining the expediency of referring the dispute for adjudication. Hence, the reference was liable to be quashed on *certiorari*.

Again in *Shanti Theatres*, a single judge of the Madras High Court quashed the reference made in similar circumstances. In this case, the reference relating to the dismissal of three workmen was declined by the appropriate government on three occasions between 1969 and 1978, before the reference was finally made for adjudication. This order of reference was challenged by the employer in a writ petition before the High Court on the grounds that there was no fresh material before the government nor the earlier orders were passed by it under any misapprehension. It was stated in the affidavit that the reference was politically motivated and based on extraneous grounds and as such was vitiated by *mala fides*. It was also urged that, in the course of ten years, the situation had changed and the employer had been under the impression that a quietus had been given once for all to the dispute. It was, therefore, submitted that the government should have considered the inequity in referring a stale claim for adjudication after the lapse of a decade. The court quashed the award on the ground that the order was bad as it had not given any reasons disclosing any fresh material or that the earlier orders were passed as a result of any misapprehension. The court also observed that there was no reason justifying the reference after the lapse of such a long time.[13]

The decision of Supreme Court in *Avon Services* is not only bad in law, as it advances abuse of power, but is also likely to bring industrial disharmony by reviving old and dead controversies. The absurdity of reviving a dead case was illustrated in *Mahabir Jute Mills*, where the Supreme Court itself noted that between the dismissal of 800 workmen which was the subject-matter of the dispute and the hearing of the appeal by special leave, nearly twenty years had elapsed and an embarrassing situation had arisen for the employer, as the workmen employed in place of dismissed workmen had already put in 20 years of service.[14] It is submitted that in view of the decision rendered in *WIMCO*, as against the perverse reasoning of Desai J in *Avon Services*, it is not necessary for the appropriate government to give a hearing to the parties before making a reference after previously having refused to do so on one or more occasions. It would be necessary for the government to state reasons in the order of reference in such a situation for the scrutiny of the judicial review to see that it has not been 'stampeded into making a reference in case of old or stale dispute or reviving such dispute on the pressure of unions or external forces'.

In *Sultan Singh*, the government had refused to make the reference on the ground that there was no existing dispute. The workmen again represented to the government to make the reference and the labour minister made a note on the representation directing the government to make a reference. Despite that, no reference was made and on further representation, the labour commissioner ordered that 'in view of the decisions already taken' it is not necessary to reconsider the earlier decision and, therefore, again declined to make the reference. The writ petition was dismissed by the Punjab & Haryana High Court. In appeal, the Supreme Court held that, from a conjoint reading of s 10(1) and s 12(5), the State Government has to form an opinion whether an industrial dispute exists or is apprehended and then to decide whether to refuse or make the reference. In case the government refuses to make a reference, s 12(5) requires it to record and communicate its reasons to the parties concerned. But in case the government makes a reference, there is no requirement to record or communicate the reasons, as the function of making reference is only administrative and not quasi-judicial. For forming its opinion, the appropriate government is entitled to go into the question whether an industrial dispute exists or is apprehended. It would be a subjective satisfaction on the basis of the material on record. In an administrative order, no *lis* is involved. Hence, there is no need to issue any notice to the employer to hear him before making or refusing to make a reference. There is no need for giving a hearing even if the government makes a reference after initial refusal and such reference does not cease to be an administrative order; and so is not incumbent upon the government to record the reasons. In the light of this legal position, the court rejected the view of the High Court. However, the apex court did not give any relief to the workmen in view of the decision of the government that no industrial dispute existed.[15] In *FCI*, a few workmen were dismissed from service immediately after appointment as they had procured the employment by means of fraud and collusion with some employees of the corporation. The government categorically refused to refer the matter to the tribunal on the ground that the dismissal in question was not retrenchment. However, after a lapse of six years, the government made a reference, without applying its mind to the facts of the case and without hearing the management. The Calcutta High Court held that the second reference was not in accordance with the law and was liable to be struck down because it did not indicate any application of mind, particularly in the absence of management being heard before the reference was made. The court observed:

> The trend of judicial pronouncements unmistakably point out that natural justice in the special circumstances as in the present one demands that the employer ought to have been heard before the actual reference is made and that having not been done the impugned reference on the said ground alone is liable to be struck down. That there was no application of mind on the part of the government is evident from the fact that when the earlier reference was refused on a definite ground, no reason is disclosed why after lapse of six years a reference was made. True, the government is not bound to disclose what materials, if at all were considered when the reference is made. But failure to give a chance of hearing or an opportunity to the management to submit their case before the decision to refer the dispute was made only shows lack of application of mind which must vitiate the reference.[16]

In view of the expanding dimensions of administrative law, it is desirable that the legislature engrafts the requirement of stating reasons in case where the appropriate government decides to refer an industrial dispute for adjudication after previously having declined to do so. It is also desirable that a period of limitation is prescribed for making the order of reference instead of leaving it to unlimited vagaries of the government to make the reference 'at any time' after forming its opinion as to the existence or apprehension of the 'industrial dispute'. This will have a salutary effect against the revival of stale and dead controversies. This is the least requirement of fair administration, in the interest of industrial peace and harmony.[17] After having declined to refer the dispute for adjudication, if the appropriate government subsequently chooses to make the reference, it has the power only to refer that dispute which was previously 'existing' or 'apprehended'. In *Sindhu Resettlement Corpn* (supra), it was categorically held that while purporting to make the reference of the industrial dispute, it cannot refer altogether a different dispute for adjudication.[18] In *Central Bank of India*, the facts briefly were: the Central Government had, after the initial refusal of the dispute raised by the general secretary of the union as long back as 1971 in respect of a facility which was withdrawn by the bank, the dispute remained unresolved for over 25 years; made a second reference of the same dispute. The tribunal held that the second reference was valid, which order was impugned by

the bank. While observing that an earlier rejection to make a reference did not denude the government of its power to make second reference later under s 10(1), Mukul Mudgal J of the Delhi High Court held that such second reference should be with notice to the affected party, the Bank in this case, and that, in the light of the fact that the reference was made without notice to the bank, it was without jurisdiction.[19] This is decision calls for some analysis. Answers to the following questions expose the grave misconceptions of Himalayan proportions that crept into the judicial process:

(i) *Why should the government give a hearing to the employer before making a reference, albeit after initial refusal?* (ii) *What is the nature of the function performed by the government while making a reference?* (iii) *At what stage could it be said that the rights of parties have been affected—is it at the time of making a reference or after the Tribunal passes an order?* In the face of several authorities to the contrary, to hold that the employer needs hearing merely because reference was refused in the first instance, is a judicial misconception. If the issuance of notice or giving a hearing to the employer has no application while making reference of an apprehended dispute suo motu under s 10 (1) or on the receipt of failure report [s 12(4) read with s 10(1)], the said requirements can have no application to a reference made after initial refusal either. For that matter, even the fact that the workmen have a right to move the High Court under Art. 226 is also irrelevant in determining the nature and scope of the power conferred under s 10. The power of government to make a reference is in no way limited by the right conferred on either party to move the High Court for a writ. The above decision of Mukul Mudgal J runs counter to the principles enunciated by the Supreme Court and is *wrong with no binding force and deserves to be rejected as being baseless and without any merit*. In striking contrast, in a similar set of facts in *Lokmat Newspapers*, DD Sinha J of Bombay High Court held that the making of a reference is an administrative function; that being so, it can, after refusing to make a reference, refer the same dispute at a subsequent stage on new facts brought to its notice, and that an order making reference being an administrative one, there was no need to issue notice or to hear the employer.[20] This decision was consistent with the spirit of s 10 and with the rulings of the Apex Court and is right, as against the misconceived decision of Mukul Mudgal J in *Central Bank* (supra).

(iv) Limitation

There is no period of limitation prescribed in the Act for making a reference under s 10(1). It is for the appropriate government to consider whether it is expedient or not to make the reference.[21] The words 'at any time' used in s 10(1) do not admit of any limitation in making an order of reference. The laws of limitation which might bar any civil court from giving a remedy in respect of lawful rights cannot be applied by an industrial tribunal.[22] However, the policy of industrial adjudication is that very stale claims should not be generally encouraged or allowed unless there is a satisfactory explanation for delay, as, apart from the obvious risk to industrial peace from the entertainment of claims after long lapse of time, it is necessary also to take into account the unsettling effect which it is likely to have on the employer's financial arrangement,[23] and to avoid dislocation of industry. In *Shalimar Works*, the Supreme Court pointed out that though there is no limitation prescribed in making a reference of disputes to industrial tribunal under s 10(1), even so it is only reasonable that disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed.[24] In *WIMCO* (supra), though the court observed that the reference of the dispute made nearly six years after the previous refusal to make the reference, was valid and justified. The court, however, observed, that the government would consider these questions properly and will not allow itself to be stampeded into making reference of old or stale disputes or revive such disputes on the pressure of unions but these observations are nothing more than lip-service of pious hope, because in practice references of inordinately delayed disputes have not been refused. A single judge of Delhi High Court has gone to the extent of holding that a reference made even 18 years after the cause of the dispute arose was justified for the flimsy reason that the employer had not properly decided the case of the workman.[25] On the other hand, another single judge of Bombay High Court in *R Ganeshan*, held that inordinate and unexplained delay is just and proper ground for refusing to make a reference.[26]

There is no hard and fast rule regarding the time for making the order of reference. As to what is the reasonable time within which the dispute should be referred after the failure of conciliation proceedings or whether a claim has become too stale or not, will depend upon the facts and circumstances of each case.[27] Likewise, whether the intervening period between the date of earlier refusal of the government to make a reference and its subsequent decision to reopen the dispute is short or long would also necessarily depend upon the facts and circumstances of each case.[28] Though it is desirable that there should be no unreasonable or inordinate delay in making a reference by the appropriate government, delay or laches cannot be made a ground for striking down the reference. In the matter of making a reference, the 'appropriate government' is the supreme authority and the tribunal would hardly enter that arena and encroach upon its functions. It is a matter concerning the administrative action of the government and the tribunal is not competent to go into the question of delay in making the reference after assuming jurisdiction over the matter. It is duty-bound to decide the question on merits and the ground of delay cannot be made a jurisdictional matter before the tribunal. The tribunal may, if it thinks fit, take such facts into account only in the matter of granting relief to the employee.[29] In *Ajaib Singh*, where the workman raised a dispute against his termination after a lapse of 7 years, the Supreme Court held that, as no plea of delay was taken by the management before the labour court, the workman could not show the circumstances preventing him from approaching the

court at an earlier stage and, had that plea been taken, the workman would have been able to show the circumstances or even to satisfy the court that such plea was not sustainable after the reference was made by the government.[30] In *KGID*, a single judge of Karnataka High Court held that delay by itself could be no ground to reject the reference. The rejection by the tribunal of the dispute regarding payment of bonus for the year 1980, on the ground that the reference was made after a lapse of 12 years from 1980 and that the dispute, since, had become stale, was not sustainable in law.[31] In *Mahavir Singh*, the Supreme Court observed that, a reference could be made after a delay of 9 years, and it cannot be denied merely on the ground of delay and that mere delay does not cease the dispute, but taking care at the time of granting relief to the concerned workman.[32] In *Nedungadi Bank*, the apex court held:

> Law does not prescribe any time-limit for the appropriate government to exercise its powers under section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after a lapse of about several years of the order dismissing the respondent from service. At the time reference was made, no industrial dispute existed or could be even said to have been apprehended. A dispute, which is stale could not be the subject-matter of reference under section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of the each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made. The only ground advanced by the respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances, they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising industrial dispute was *ex facie* bad and incompetent.[33]

In *Gurmail Singh*, where the labour court dismissed the reference on the ground that there was a delay of 8 years in raising the dispute, the Supreme Court condoned the delay and ordered that the workman would not be entitled to any back wages for the 8 year period, but would be entitled to 50 per cent of wages from the date of raising the dispute till the date of reinstatement.[34] However, in *Indian Iron & Steel*, the Supreme observed that the tribunal was right in not granting any relief to the workman as he preferred the claim almost after a period of 13 years without any reasonable or justifiable ground.[35] In *Balbir Singh*, where counsel for petitioner strongly relied on *Ajaib Singh* in favour of condoning the delay and granting relief to the workman, the Supreme Court, rejecting the said contention, observed:

> We have carefully considered the contentions raised by the learned counsel for the petitioner. We have also perused the aforementioned decision. We do not find that any general principle, as contended by the learned counsel for the petitioner, has been laid down in that decision. The decision was rendered in the facts and circumstances of the case, particularly, the fact that the plea of delay was not taken by the management in the proceeding before the tribunal. In the case on hand, the plea of delay was raised and was accepted by the tribunal. Therefore, the decision cited is of little help in the present case. Whether relief to the workman should be denied on the ground of delay or it should be appropriately moulded, is at the discretion of the tribunal depending upon the facts and circumstances of the case. No doubt the discretion is to be exercised judicially. The High Court, on consideration of the matter, held that there was no ground to interfere with the discretion exercised by the tribunal. We are not satisfied that the award of the tribunal declining relief to the petitioner, which was confirmed by the High Court, suffered from any serious illegality which warrants interference by this Court. Accordingly, the special leave petition is dismissed. [36]

A conspectus of the above decisions discloses the fact that the law relating to the delay in raising or reference of disputes is bereft of any principle, which can be easily comprehended by the lawyer and litigant. In some cases, the delay was condoned, while in others, not, even though there was no perceptible difference in the nature or extent of delay as between them. It is also observed that the High Courts have adopted highly divergent approaches in condoning the delay and in granting or refusing relief to workmen, even when the plea of delay was raised by the management before the trial court. It is also observed that there was no uniformity nor consistency in the decisions in respect of the number of years of delay. The fact that Limitation Act does not apply to industrial disputes does not imply that the workmen can raise or the government can refer disputes at their sweet will after inordinate delay and that such delay should be favourably treated by the courts. Such a view militates against the very concept of administration of justice and the principles of natural justice. For example, in *Ajaib Singh* a delay of 7 years was condoned on the ground that the employer had not taken the plea of delay before the labour court, whereas in *Nedungadi Bank*, the delay of 7 years in making reference was not. Interestingly, Saghir Ahmad J, was the Presiding Judge of both the benches that decided *Ajaib Singh* and *Nedungadi*, which are poles apart in so far as the line of reasoning advanced and the conclusions reached, regardless of the fact that the two cases are identical as to the extent of delay. *What message do these two decisions with an identical set of facts - one condoning the delay and other condemning it - convey to the lawyer, litigant and the general public?* The case of *Sapan Kumar Pandit*, is a classic example of '*gross abuse of judicial power*' on the part of the Apex Court. The facts of the case were: a workman,

whose services were terminated in 1975 along with a few others, raised a dispute in 1990, which was referred for adjudication in 1993 under s 4K of the UPIDA, in all, 18 years after termination. The High Court rightly struck down the reference as being stale. Justice Thomas (for self and Sethi J), observed:

> There are cases in which lapse of time had caused fading or even eclipse of the dispute. If nobody had kept the dispute alive during the long interval, it is reasonably possible to conclude in a particular case that the dispute ceased to exist after some time. But when the dispute remained alive though not galvanized by the workmen or the union on account of other justified reasons it does not cause the dispute to wane into total eclipse...The High Court has obviously gone wrong in axing down the order of reference made by the government for adjudication.[37]

The above decision exposes not only judicial laxity of the worst order touching upon questions of vital importance, but also a total absence of conviction on the part of the learned judge. The mere fact that the Act does not prescribe any limitation does not mean that disputes can be referred after a substantial lapse of time. What is meant by the observation: '*when the dispute remained alive though not galvanized by the workmen or the union on account of other justified reasons'*, when the facts disclose that the workman slept over for 15 years and failed to explain the inordinate delay? If 10 other workmen raised a dispute through the union immediately after termination (i.e., in the year 1976) and the appellant did not choose to raise a dispute either along with them or thereafter, that fact itself should give rise to the presumption that the appellant was not interested in invoking the machinery provided under the Act. At any rate, the decision given by the labour court in respect of the said ten workmen would not be applicable to him automatically in view of the fact that he was not a party to the dispute raised by them nor did he raise a dispute on his own. *It is not for the judge to explain, on behalf of the workman, the unexplained delay running into 15 years and argue his case, as if he was holding a brief for him*. The doctrine of '*total eclipse*' *vs* '*partial eclipse*' invented and imported by Thomas J, into the reasoning process is absolutely baseless and irrelevant. An analysis of the aforesaid decision raises the question: "*on what principle known to law did the learned judge condone the delay of 17 years in making the reference, out of which 15 years was directly attributable to the workman himself, more so, in the face of several rulings of the Supreme Court to the contrary?*" The kind of misplaced generosity displayed by Thomas J in *Sapan Kumar Pandit* is clearly uncalled for, apart from being wholly misplaced and perverse. The decision of the High Court was right, being consistent with several authorities, a few of which are cited in the following paragraph, and that of Thomas J, is clearly wrong.[38] In *Shivalinga*, the Supreme Court rejected the argument advanced by counsel, which was based on the ratio of *Sapan Kumar Pandit*, and held 'that the delay of more than 9 years on the part of the workman did not deserve to be condoned and such delay would render the claim stale.[39] Despite this ruling, a single judge of Delhi High Court condoned the unexplained delay of five years and set aside the order of tribunal refusing to grant relief to the workman on that count.[40] In *JC Biswas*, the Supreme Court upheld the dismissal of a development officer, who remained absent from station without permission for 61 days and who filed a writ petition against the management after an unexplained delay of 5 years.[41] In *Digambar Kalaskar*, where a dismissed workman slept over for 18 years spending his time in writing letters to the State and Central ministers, without raising a dispute as provided in the Act, it was held that his claim for a reference of the dispute under s 10(1) became stale and there was no justification to condone the delay, even though no limitation was prescribed under the Act.[42]

In *Surjit Singh*, the Punjab and Haryana High Court held that if plea of delay was not taken, the delay might be condoned. But, if a dispute had become stale, it should not be revived after a lapse of long period, if the plea regarding delay was taken.[43] Where the workman, whose services were terminated on account of an FIR filed against him in a criminal case in 1978, did not raise the dispute for 11 months after the said FIR was quashed in 1994, and again did not take any interest to challenge the award of labour court which went against him for 4 years after the passing of award, the writ petition is not maintainable because of the unexplained delay.[44] In a case where the labour court condoned the unexplained delay of 9 years in raising a dispute that was referred under s 10 and ordered reinstatement with 50 per cent back wages, and the employer reinstated him pending proceedings in the High Court, the Karnataka High Court held that no blood could be pumped into either by a labour court or by the High Court for a stale dead reference, and that the single judge committed a serious error in failing to notice the enormous delay in the light of binding judgments of the apex court, but held that, in the particular facts of the case, the workman would not be entitled to any back wages.[45] Where the workman raised a dispute after 12 years, a single judge of Madras High Court held that the relief of reinstatement cannot be denied on grounds of delay, but the labour court had to exercise discretion while granting the appropriate relief.[46] The denial of back wages by the tribunal on the ground that he would have been otherwise employed is not proper, and, in view of the unexplained delay in raising the dispute, the award of back wages from the date of demand notice would meet the ends of justice.[47]Where a daily-wager, having worked for 395 days raised a dispute against his termination after 8 years, the High Court quashed the order of labour court directing reinstatement with 25 per cent back wages and held that in view of the unexplained delay of 8 years, the workman was not entitled to any relief even if there was any violation of the provisions of the ID Act on the part of the employer.[48]

Where the labour court condoned a delay of more than six years in raising the dispute on the part of a conductor, who was

dismissed for misappropriation, and ordered reinstatement, the award was quashed and the punishment restored.[49] In a case, where a workman was dismissed, for remaining absent without authorisation coupled with non-reply to the charge-sheet and failure to present himself in the enquiry, the High Court taking notice of the above facts and also of the fact that there was an unexplained delay of 4 years in raising the dispute, modified the order of labour court from reinstatement with 80 per cent back wages to reinstatement without back wages.[50] In *KR Singh*, Ms Nishita Mhatre J of the Bombay High Court directed the labour court to condone a staggering delay of nearly 20 years on the part of workmen in filing an application under s 33C(2) of theID Act claiming over time wages.[51] In striking contrast, Kochar J of the same High Court, in an exactly identical case involving the same employer and the same issue, quashed the order of labour court granting relief under s 33C(2) on ground of delay of 15-20 years.[52] The decision of Ms Mhatre J calls for some analysis. The facts of the case unfold that the employees slept for a staggering 20 years and filed a petition thereafter claiming some money from the employer. The learned judge failed to apply her judicial mind while passing a perverse order of this kind. The law does not require the employer to maintain the records beyond a certain period, after which they can be consigned to bonfire legitimately. Can the learned judge cite an illustration to the effect that the jurisprudence of any country has degraded itself to such an abysmal level in which, where one party seeks to get a wrongful gain through the judicial process, the judge could afford the luxury of dealing with the claim in a casual and perfunctory manner and allow the mischief to pass muster? Could it be said that the decision reflects a sound judicial disposition? The labour court and Kochar J are right, and Ms Mhatre J, is absolutely wrong. *But why blame the judges of High Courts, when the position with the Supreme Court is even worse, with two benches presided over by the same learned judge with identical set of facts reached opposite conclusions in two cases*, as disclosed in *Ajaib Singh* and *Nedungadi*?

Notwithstanding a few cases such as *IISCO*,[53] which were decided rightly, the fact remains that misconceived and ultra-generous decisions, not at the cost of the court but at the cost of employers, far outnumber those decided rightly, particularly, in respect of stale claims and delayed references. It is hardly necessary to cite them all here. *The fact that the courts are fastening the liability to reinstate - not only reinstate but also pay back wages - to the employers, where the employers were not even guilty of contributory negligence or responsible in any manner in the workmen raising disputes belatedly, revolts against all canons of justice and fairplay. To say the least, most of these decisions are injudicious and, still worse, outrageous!* The consequences of the chaotic rulings of the Supreme Court, which are bereft any reason or logic, are far reaching for the industrial community, as can be seen from the fact that the judicial anarchy that took birth in the precincts of the Supreme Court, in respect of stale claims and delayed references, continues unabated with High Courts passing judgments condoning undue delays. For example, in *TNPDC*, it was held that a delay of 4 years in raising the dispute could be a factor only in deciding the quantum of back wages and not the dismissal itself.[54] Notional increments cannot be denied on the ground of delay on the part of the workman in approaching the court.[55] Yet another decision which displayed an over-generous approach is *Aska Coop Society*, in which the Orissa High Court travelled to the length of holding that the award of the tribunal could not be held to be invalid *merely because there was delay of 15 years* in raising the dispute by the workman.[56] In *Kishori Lal*, Sapre J of the MP High Court condoned a delay of 7 years on the part of the workman in raising the dispute, remanded the matter to the government to examine the reasons for delay before rejecting the reference.[57] In the midst of judicial chaos created by Thomas, Saghir Ahmed JJ, and other learned judges and nurtured by several High Courts, it is refreshing to come across a highly responsible and mature decision by Ms Gyan Sudha Misra J of Rajasthan High Court in *Satyanarain Sharma*. The facts of this case briefly were: the workman remained absent for 3 years and spent another 4 years before he sought a reference of the dispute relating to the termination of his service by Hindustan Copper Ltd. On a rejection of the reference by Central Government, the workman approached the High Court. Dismissing the petition, *the learned judge observed that though the law did not prescribe any time limit for the government to exercise its power to refer the dispute, the said power could not be exercised at any point of time in order to revive stale claims*. The learned judge further observed that the delay on the part of petitioner-workman showed that he was neither prompt nor diligent in pursuing his case.[58] It is submitted that the decision given by Ms Gyan Sudha Misra J is right and just, *whereas all other decisions rendered, to the contrary, by the Supreme Court and different High Courts are perverse and obnoxious and are unmistakably wrong*. Yet another decision, which deserves full compliments from every right-thinking citizen is that of BS Chauhan J of the same High Court in *Rajendra Singh Gehlot*, in which the learned judge upheld the rejection by the government to make a reference of the dispute raised after a lapse of 20 years,[59] as against the bankrupt decision given by Thomas J in *Sapan Kumar Pandit*. In *SM Nilajkar*, the facts briefly were: a number of workmen were engaged by the telecom department for digging, laying cables, erecting poles, etc, during 1985-87 and the services of these workmen were terminated in 1987 on completion of the work. The tribunal directed the telecom department to reinstate all the workmen with continuity of service and 50% back wages. A single judge of the Karnataka High Court, while holding that they were not project employees, took note of the fact that there was a delay of 7 to 9 years in raising the dispute and in view of this and other facts, modified the award to the extent of reinstatement with continuity of service and other consequential benefits, but without any back wages. The Division Bench allowed the appeal preferred by the employer and set aside the award of the tribunal and the order of judge. Quashing the order of Division Bench, Lahoti J (for self and Brijesh Kumar J) held:

> It is true, as held in *M/s Shalimar Works Ltd v Their Workmen* (supra),[60]that merely because the Industrial Disputes Act does not

provide for a limitation for raising the dispute it does not mean that the dispute can be raised at any time and without regard to the delay and reasons therefore ... A delay of 4 years in raising the dispute after even reemployment of the most of the old workmen was held to be fatal in M/s Shalimar Works ... In *Nedungadi Bank Ltd v KP Madhavankutty* (supra),[61] a delay of 7 years was held to be fatal and disentitled to workmen to any relief. In *Ratan Chandra Sammanta v Union of India* (supra),[62] it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself, lapse of time results in losing the remedy and the right as well ... we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief. ... Pursuant to the judgment in *Daily Rated Casual Employees Under P and T Department v Union of India* (supra),[63]the department was formulating a scheme to accommodate casual labourers and the appellants were justified in awaiting the outcome thereof. On 16-1-1990 they were refused to be accommodated in the scheme. On 28-12-1990 they initiated the proceedings under the Industrial Disputes Act followed by conciliation proceedings and then the dispute was referred to the Industrial Tribunal cum-Labour Court. We do not think that the appellants deserve to be non suited on the ground of delay. ... The fact remains that there was delay, though not a fatal one in initiating proceedings calculating the time between the date of termination and initiation of proceedings before the Industrial Tribunal-cum-Labour Court. The employee cannot be blamed for the delay. The learned single Judge has denied the relief of back wages while directing the appellants to be reinstated. That appears to be a just and reasonable order. Moreover, the judgment of the learned single Judge was not put in issue by the appellants by filing an appeal. ... For all the foregoing reasons we are of the opinion that the decision of the Division Bench deserves to be set aside and that of the learned Single Judge restored, except for the finding that the appellants were not project employees.[64] (Paras 17, 18 & 19).

In *Turi RD*, a delay of 10 years in raising a dispute by the workman whose service was terminated was condoned by a single judge of Gujarat High Court on the ground that the Limitation Act 1963 does not apply to the proceedings under the Industrial Disputes Act.[65] Where the workman filed a petition under s 10(1B)(c) [of West Bengal Amendment 1989] before a labour court, which did not have territorial jurisdiction resulting in delay and thereafter approaching the proper labour court, the Calcutta High Court held that the delay so caused was not so fatal as to non-suit the workman.[66] In the larger interests of legal certainty, this issue calls for a comprehensive approach on the part of the apex court coupled with laying down well-defined, intelligible guidelines.[67] In *Asst Engineer, CAD*, the facts disclosed that a quasi-permanent employee raised an industrial dispute after a lapse of 8 years after the termination of her service. The labour court ordered reinstatement together with 30% of back wages. The said award was upheld by both tiers of High Court despite plea of the appellant that the claim was a stale one apart from the fact that the irrigation department itself was closed on completion of the project. Quashing the orders of the courts below, Pasayat J (for self and Thakker J) observed that, the labour court should not have granted relief; and that the learned single judge and the Division Bench did not consider the issues in their proper perspective and arrived at abrupt conclusions without even indicating justifiable reasons.[68] Where the workman failed to file the appeal before the appellate authority notified by the employer and slept over the matter for five long years and raised an industrial dispute thereafter, the tribunal condoned the delay and adjudicated the reference in the course of which, it directed the reinstatement of the workman. Quashing the order of the tribunal, a single judge of the Karnataka High Court held that, the settled legal position is that delay itself deprives a person of his remedy available in law. In the absence of any fresh cause of action or any legislation, a person who has lost his remedy by lapse of time loses his right as well. The learned judge further observed that, if on account of the delay, the dispute has become stale or ceases to exist, the reference should be rejected.[69]

Delay in the Disposal of Cases and its Implications

In *Mgmt of MCD*, the facts disclosed a staggering delay of 33 years in disposing the case relating to the termination of service of a workman. On the question of the quantum of back wages, the Supreme Court held that the reason for not granting full back wages to the workman was, firstly, due to the fact that for no fault of the parties, the litigation took more than three decades and it would not be proper to saddle the corporation and its exchequer which was meant for public benefit with such a huge financial burden, and secondly, the workmen could not have remained totally unemployed for 33 years.[70] Where the labour court ordered reinstatement of a workman without back wages on ground of five years delay in raising the industrial dispute, a two judge Bench of Supreme Court comprising Majmudar and Sabharwal, JJ, noticed that the delay was due to the workman initially approaching the central Administrative Tribunal, for which neither he nor the employer could be said to be responsible, and held that the burden of back wages should be borne equally by both sides, and accordingly ordered payment of 50 percent of back wages from the date of termination to the date of reinstatement.[71]Now, if the workman pursued a wrong remedy resulting in delay, it is perfectly legitimate for the court to condone the delay, if covered by the period of limitation, if any, prescribed in the Act. However, if the workman has not taken proper legal advice and runs around different courts and tribunals in a chaotic manner, the employer should not be directed to pay for the delay caused in the process. This decision reminds of the observation of Lord Hewart:

It is necessary to remember that in litigation there are more parties than one, that it is wrong to gratify the plaintiff to the detriment

of the defendant and that, while sympathy is a most commendable quality, it never appears in a less attractive guise than when it is practised at the expense of somebody else.[72]

A single judge of the Bombay High Court admittedly following this decision, held in *Nanded CCCWRS*, that the workman should not be penalised for pursuing remedy before a wrong court, and hence, no fault could be found with the decision of labour court awarding full back wages.[73] The precedent set in the process requires reversal by a larger bench so as to enable it to remain consistent with the principles of equity, fairness and justice.

Form and Contents of the Order of Reference: 'By Order in Writing'

The only requirement of s 10(1) is that the order of reference should be in writing. No form is prescribed under the rules for making such order. It is sufficient if the existence of a dispute and the fact that the dispute is referred to the tribunal are clear from the order.[74] The government is left to its own devices while passing the order. An order of reference has to be signed in accordance with the provision of Arts. 77 and 166 of the Constitution. Similarly, any corrigendum or amendment to such an order is also to be signed according to the same provision.[75] The order of reference need not necessarily be signed by a Governor of the State where the State is the appropriate government or by the President of India, where the Central Government is the appropriate government. It is sufficient that the approval of the Governor or the President for referring the dispute was obtained and the order is actually signed by the authorised officer.[76] However, orders of reference hastily drawn or drawn in a casual manner often give rise to unnecessary dispute and thereby, prolong the life of industrial litigation which must always be avoided.[77] In order to avoid such glaring mistakes in references, it is necessary that before making the reference, the Government must bestow great care so as to obviate references which are baseless and do not represent the actual dispute between the parties.[78] It should, therefore, carefully formulate the points of dispute; they should be so worded as to avoid ambiguity or prejudice or advantage to one or the other party to the dispute.[79] In *Eagle Fashions*, the Delhi High Court held that the terms of reference should clearly spell out the real dispute between the parties and if that were not so, the order of reference would be liable to be interfered with in exercise of writ jurisdiction. When the factum of employment and termination itself were in dispute, the terms of reference could not have been so framed as to presume the employment and its termination and confining the reference merely to adjudication of illegality or unjustness thereof. Such an order of reference drawn up without application of mind would be vitiated.[80] It would be in the interests of justice if the terms of reference are spelt out with care, exactitude and with such detail as would obviate any controversy as to the scope of the reference. It is also in the interest of justice that all the disputes raised between the parties should be referred for adjudication at one instance and not in a truncated and piecemeal manner so that there can be a composite and single adjudication of all disputes between the parties.[81]

There is no statutory requirement of the Act or the Central Rules that an order of reference under s 10 must be notified in the Official Gazette, though as a matter of practice generally, such orders are made by the government by notification in their Official Gazettes. The want of publication of an order of reference, therefore, does not make the order of reference in any way invalid.[82] The government should make reference in writing indicating the parties to the dispute and the point of controversy. The parties might be indicated individually or collectively with reasonable clearness.[83] It is not necessary to specify in the order of reference, the reliefs to be given by the tribunal in adjudicating upon the industrial dispute.[84]Nor the government need to state its reasons for making a reference to the tribunal while making a reference under s 10(1) of the Act.[85] There is nothing in the Act to indicate that the government cannot make a reference indicating that a party to the dispute is a trade union.[86]Nor is there any bar in the Act to the government referring a dispute piecemeal, having regard to the exigencies of the situation.[87] Thus, where separate but not inconsistent demands are made against the management by two groups of workmen belonging to two different unions, the government can refer each demand separately for adjudication.[88] The order of reference can ask the tribunal to adjudicate upon a particular question first and then to decide the further questions if it should find in favour of the workers on the first question.[89] Where there are specific words that a particular person shall decide the matter in dispute contained in the annexure, it is sufficient to constitute a reference.[90] But a notification appointing a certain person as a tribunal and referring to him in general terms all the industrial disputes which may arise at any time in the future would be illegal. [91]

Similarly, a general notification referring the disputes which are apprehended in a certain industry without specifying the particular firms in which such disputes are apprehended, is incompetent.[1] Likewise, if an order of reference does not specify the names of the concerned workmen or the names of the employers with whom the dispute exists, the reference will be bad for vagueness.[2] The order of reference, however, would not be rendered bad in law, if the requisite satisfaction is not recorded in the order of reference itself Even if there is some such lacuna, the order does not become invalid *ab initio* and the defect can be made good by filing an affidavit later on to show that the condition precedent was satisfied[3] Nor an order of reference under s 10(1)(c) is incompetent merely because it is made in general terms and the disputes are not particularised in it[4] Furthermore, mere wording of the order of reference is not decisive in the matter of tenability of a reference.[5] In *Mangalam Publications*, a dispute raised by an individual workman, a retired section officer in this case,

claiming arrears on re-classification in terms of Bachawat award was referred for adjudication. Quashing the award, the Kerala High Court held that a claim for arrears would arise only if there was a re-classification as per the Bachawat award and whether the establishment was liable to be reclassified was not an individual grievance but a collective one; that such a dispute has to be at the instance of the union or a number of workmen to be referred for adjudication under s 10(1)(c) Act; and that no individual dispute could be raised.[6] Similarly, disputes between several establishments and their workers can be referred to an industrial tribunal by the government by a single notification.[7] Likewise, the absence of indication that the dispute was under s 2(k) or s 2A in the order of reference, will not go to show that it is not an industrial dispute within the meaning of either of the two provisions. Such absence of indication will not invalidate the order of reference since the law does not require the government to do so. If a question does arise as to whether the dispute is one as defined under s 2(k) or s 2A, it is for the adjudicating authority to ascertain the same from the material on record.[8] Whether the dispute referred to the industrial tribunal is an industrial dispute under s 2(k) or s 2A is of no consequence so far as the tribunal's power to adjudicate is concerned, and that formal defects in citation of reference will not oust the jurisdiction of the tribunal.[9]

Authorities to whom Reference can be Made

Section 10(1) vests the 'appropriate government' with discretion to choose one or the other of the authorities ie, under cl (a) a board, under cl (b) a court of inquiry, under cl (c) a labour court or under cl (d) an industrial tribunal, for the purpose of investigation and settlement of industrial disputes. The government may set up one authority or the other for the achievement of the desired ends depending upon its appraisement of the situation as it obtains in a particular industry or establishment. It is not necessary that all the steps enumerated in s 10(1) should be taken seriatim one after the other by the 'appropriate government'. Whether one or the other of the steps should be taken by the appropriate government, must depend upon the exigencies of the situation, eg, the imminence of industrial strike resulting in cessation of industrial production and breach of industrial peace endangering public tranquility and law and order. What steps would be taken by the 'appropriate government' in the matter of an industrial dispute must, therefore, be determined by the surrounding circumstances. No hard and fast rule can be laid down with respect to making reference to the one or the other of the authorities for the purpose of bringing about the desired end-the settlement of an 'industrial dispute' and promotion of industrial peace.[10]It is manifest that the powers of reference given to the 'appropriate government' under cll (a), (b), (c) and (d) of s 10(1) are in the alternative and not cumulative in character. In other words, the 'appropriate government' cannot, at one and the same time, refer an industrial dispute for adjudication to a labour court under s 10(1)(c) and refer any matter connected with it or relevant to the identical industrial dispute to a court of inquiry under s 10(1)(b) of the Act.[11] The different authorities constituted under the Act are set up with different ends in view and are invested with powers and duties necessary for the achievement of the purposes for which they are set up. The appropriate government is invested with discretion to choose one or the other of the authorities for the purpose of investigation and settlement of industrial disputes, whether the government sets up one authority or the other for the achievement of the desired ends depends on its appraisement of the situation as it obtains in a particular industry or establishment.[12]An authority mentioned in this section, can take cognizance of an industrial dispute only on a reference being made to it. There is no provision in the Act under which a party can directly refer a dispute to any such authority for investigation, settlement or adjudication. Hence, an employer or a workman cannot approach these authorities directly. Their jurisdiction can be invoked only in the manner provided under the Act.[13]

(i) Board

In terms of cl (a), the appropriate government can refer a dispute to a board for promoting a settlement thereof but it is only an industrial dispute that can be referred to a board and any matter appearing to be connected with, or relevant to, the dispute cannot be referred to the board under this provision. In *Niemla Textile* (supra), it was held that a reference to the board of conciliation is but a preliminary step for the settlement of the industrial dispute and the report made by it would furnish materials to the government to make up its mind whether to refer the dispute for adjudication to an industrial tribunal.

(ii) Court of Inquiry

The government may refer any matter appearing to be connected with, or relevant to, the dispute to a court of inquiry under cl (b) for the purpose of inquiring into such matter. From the language of this provision, it is obvious that the function of a court of inquiry is neither conciliatory nor adjudicatory, it is only investigatory. A report of the court of inquiry furnishes material to the appropriate government for finally determining whether the 'industrial dispute' should be referred by it for adjudication to an industrial tribunal.[14] It may be that a report of the court of inquiry discloses circumstances under which the 'appropriate government' considers that it is not necessary or expedient to refer the industrial dispute for adjudication to a labour court or industrial tribunal. It is open to the government to refer 'any matter connected with, or relevant to, an industrial dispute' to a court of inquiry even without referring the dispute for adjudication. A reference to a court of inquiry is not a subsidiary proceeding which is dependent upon the existence of a proceeding relating to the dispute before an

industrial tribunal.[15] For making a valid reference under this clause to a court of inquiry, the following conditions have to be satisfied:

(a) the appropriate government must be of the opinion that an industrial dispute exists or is apprehended;

(b) the matter referred to must be one appearing to be connected with or relevant to an industrial dispute; and

(c) the order of reference must be an order in writing.

Once these conditions are satisfied, there is no requirement of law that the government should give particulars in the notification of the industrial dispute which exists or is apprehended. Before the reference of an industrial dispute is made for adjudication to an industrial tribunal, the government may set up a court of inquiry for the purpose of inquiring into any matter appearing to be connected with or relevant to the dispute. The court of inquiry will inquire into those matters and submit a report of its findings to the appropriate government within six months from the commencement of the inquiry. That report will furnish materials to the appropriate government for finally determining whether the industrial dispute should be referred by it for adjudication to the tribunal. The court of inquiry may disclose the circumstances under which the appropriate government may consider that it is not necessary to refer the dispute for adjudication. In that event, the matter will end and the government may await further developments before referring the dispute for adjudication. If on the other hand, the materials embodied in the report disclose circumstances which make it necessary for the government to refer the dispute for adjudication to the tribunal, the appropriate government will refer the matter for adjudication to the industrial tribunal. But there is nothing in the language of the Act warranting that once an industrial dispute is referred to a tribunal, matters connected with the industrial disputes cannot be referred to a court of inquiry.[16] The government is not precluded from first constituting a court of inquiry and then referring to it matters connected with or relevant to an industrial dispute.

(iii) Labour Court

The government has the discretion to refer an 'industrial dispute' or any matter appearing to be connected with or relevant to the 'dispute' to a labour court under cl (c), if such dispute or matter relates to any matter specified in the second schedule to the Act.[17] The first *proviso* to s 10(1)(d) uses only the word 'affected' but s 10 (lA) and s 10(5) use the word 'interested' or 'affected'. There is a difference in the import of the words 'interested' or 'affected'. For instance, a union which sponsors the cause of an individual workman is 'interested' in the dispute, but the workmen who are the members of the union are not necessarily 'affected' by the dispute.[18] But, the expression 'likely to affect' in the first *proviso* to s 10 (l)(d) should be interpreted to have the same import and should be understood in the same way as the words 'workmen concerned in the dispute' in s 33 of the Act.[19] It is clear from the *proviso* to s 10(1)(d) that a reference to a labour court with respect to a matter which falls within the third schedule is permissible only when by the application of its mind, the appropriate government comes to the conclusion that the dispute is not likely to affect more than one hundred workmen and that it is, therefore, proper to make a reference to the labour court. The opinion so formed by the government must be displayed by the order of reference although in a proper case, the formation of that opinion could be demonstrated by independent evidence.[20] In *Blue Star*, the Patna High Court repelled the contention that the reference should have been made under s 10(2) and not under s 10(1)(c), and held that, though there was difference between the two provisions, once the reference was made under s 10(1)(c) or s 10(2), the procedure for adjudication would be the same; the parties would be required to put in their written statement, adduce evidence and so on, and that being the position, the distinction would be academic in nature, particularly so, where no case was made out that the parties were likely to suffer or would have suffered prejudice.[21]

(iv) Industrial Tribunal

The discretion of the appropriate government under s 10(1) is very wide to refer an industrial dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the second schedule or the third schedule, to a tribunal for adjudication.[22] An order which refers for adjudication any matter specified in the schedule, cannot be held to be vague or uncertain on the ground that it did not specify what was considered as 'dispute' and what were constituted as 'connected matters', when the schedule indicated with sufficient clarity what those matters were.[23] In *Kamani Employees' Union*, the State of Maharashtra referred certain disputes for adjudication to the industrial tribunal including one relating to production bonus. Subsequently, while the adjudication of that reference was pending, the government made another reference to the same tribunal for adjudication of the question whether the existing incentive scheme of production bonus should be replaced by a new incentive scheme. This order of reference referred to the earlier order of reference, also stating that the company made a representation to the State Government that the terms of reference already made should be supplemented so as to include the above question. It was further stated that the government is of the opinion that the matter on which further reference is asked for by the employer is 'connected with or relevant to the

said dispute' regarding the revision of production bonus which was already the subject-matter of the earlier reference. The Supreme Court held that the second order of reference was neither a withdrawal of the previous reference nor was it a case of supersession of that reference. On the other hand, the question regarding the nature of the modification to be effective to the production bonus scheme had to be considered by the tribunal, having due regard to the scheme as it existed as well as to the various suggestions that may be made by the parties. If the employer had relied on a newly evolved scheme, it was competent to the tribunal to consider how far that scheme could be adopted in this particular case and this aspect of the matter could have been considered by the tribunal, because it was 'connected with or relevant to the dispute' relating to production bonus. Hence, there was no interference in any manner with the power of the tribunal in adjudicating upon the demands relating to production bonus as the question referred for adjudication in the subsequent reference was really a matter 'connected with or relevant to the dispute' already pending adjudication.[24] Where the reference of an industrial dispute raised by workmen claiming upwards revision of wage-scales or dearness allowance is made for adjudication, a dispute arising out of the counter-claim made by the employer asking for downwards revision should also be referred as it would be 'connected with and relevant' to the dispute of the workmen for the purpose of proper adjudication.[25]

First Proviso

Normally, the matters specified in third schedule to the Act are referable to an industrial tribunal under s 10(1)(d) but the first *proviso* to sub-s (1) carves out an exception in cases where the disputes relate to any matter in the third schedule and are not likely to affect more than 100 workmen.[26] In such cases, the 'appropriate government' has been given the discretion to make a reference to a labour court under cl (c) of s 10(1). The requirements of this *proviso* are two, namely:

(i) that the dispute is not likely to affect more than 100 workmen; and

(ii) the 'appropriate government' thinks it fit to make the reference to a labour court.

The word 'affected' cannot be equated with the word 'interested.' For instance, 'the union which sponsors the cause of an individual workman is 'interested' in the dispute but the workmen who are members of the union are not necessarily 'affected' by the dispute'.[27] Therefore, it is not sufficient that more than 100 workmen are interested in the dispute but the dispute, in fact, should be likely to 'affect' more than 100 workmen. The question, whether the dispute is likely to affect more than 100 workmen or not is a question of fact. In *Rangavilas Motors*, the question raised was about the implication of the words 'if it so thinks fit'. The Supreme Court observed:

> It is not necessary that the order of reference should expressly state that it is because of the *proviso* that a reference is being made to the labour court and if the reference can be justified on the facts, there is nothing in the Act, which makes such a reference invalid.[28]

The purport of this view is that, in case the facts justify that the dispute is not likely to affect more than 100 persons, it implies that the government thought it fit to refer the matter to a labour court, even though there is no material on record to indicate that the Government had applied its mind to the applicability of the *proviso*. In other words, the requirement of 'thinking fit is implicit in the fact of making the reference'. This view is not sound, because it completely ignores the second requirement of thinking the dispute to be fit for reference to the labour court. Thus, even an erroneous reference to a labour court merely because more than 100 persons are likely to be affected would be a valid reference. Thus, the words 'if it so thinks fit' would be rendered redundant.

Second Proviso

This *proviso* vests the government with an overriding power of making a reference in case the dispute relates to a public utility service and a notice of strike or lock-out under s 22 has been given.[29] In such a case, making of reference is imperative. Further, the appropriate government can make reference even if the conciliation proceedings before a conciliation officer or any proceedings under s 33A or 33 C are pending in connection with such a dispute. However, this *proviso* contains two exceptions. The appropriate government may refuse to make the reference if it considers:

(i) that the notice of strike or lock-out, as the case may be, under section 22 is of frivolous or vexatious nature; or

(ii) that it would be inexpedient to make the reference.[30]

But in case, the government refuses to make the reference in view of these two reasons, it shall have to comply with the requirements of s 12(5) *viz*, to record its reasons for refusing to make the reference and communicate those reasons to the

concerned parties. The reasons of the Government in coming to the conclusion that the notice is of frivolous or of vexatious nature or it is inexpedient to make the reference before refusing to make the reference are amenable to judicial review,[31] but the appropriate government is the sole arbiter of the question whether the notice of strike or lockout under s 22 is frivolous or vexatious, or whether it is inexpedient to make a reference. These are not objective facts which can be determined by a court of law. If, therefore, the government comes to a conclusion and forms an opinion which is not vitiated by *mala fide* or based on irrelevant or extraneous considerations, then the decision of the government would not be amenable to judicial review.[32] This *proviso*, however, will not apply if the notice as required by s 22 has not been given or is illegal or does not comply with the requirements of sub-s (4) of s 22 of the Act. Even where the notice under s 22 is given, which comprises of many demands and each one of which constitutes a separate dispute, the government is not bound to make a reference of all the disputes and demands.[33]

Third Proviso

This proviso has been inserted by the amending Act 46 of 1982.[34] It empowers the Central Government to refer the industrial disputes, in relation to which it is the appropriate government, to a labour court or an industrial tribunal, as the case may be, constituted by the State Government. Now; it is not necessary that the Central Government, where it is the appropriate government, must refer the disputes only to the labour courts or industrial tribunals constituted by the Central Government.

Subject Matter of Dispute

Before a dispute can be referred under s 10(1), the first and the foremost requisite is that it should be an 'industrial dispute' as defined in s 2(k). Then, s 10 requires that the 'appropriate government' must form its opinion on the material before it that the 'industrial dispute' is 'existing' or is 'apprehended'. After forming the opinion, the government under s 12(5) has to be satisfied with respect to the expediency of making the reference. Then, only the government will make or refuse to make the reference. Some illustrative cases dealing with matters which are fit and which are not fit for reference are set out below.

(i) Matters Fit for Reference

A dispute regarding modification of the Standing Orders under the Industrial Employment (Standing Orders) Act 1946, would be an 'industrial dispute', as certified Standing Orders like all other Standing Orders define conditions of service and, therefore, any dispute concerning the propriety, fairness or reasonableness of the Standing Orders could be validly referred for adjudication.[35] Any action taken by an employer under the Standing Order giving rise to a dispute between the employer and the workmen on a matter concerning the 'employment' or 'non-employment' can be referred by the government.[36] Likewise, a dispute relating to an item covered by the certified Standing Orders of an establishment can be validly referred.[37]A dispute between the management and workmen regarding inclusion of the emoluments earned by workmen for festival holidays for the purposes of computing bonus under para 7(2) of the scheme under the Coal Mines Provident Fund and Bonus Scheme Act, would be an 'industrial dispute' which can be referred for adjudication under s 10 of the Act.[38]An industrial dispute between a cooperative society and its workmen can be validly referred for adjudication, notwithstanding the fact that there are provisions in the Cooperative Societies Act itself for settlement of disputes because the Industrial Disputes Act, being a special Act dealing with settlement of industrial disputes, general powers under the Cooperative Societies Act cannot govern them.[39] A dispute relating to the production bonus scheme which is in substance an incentive wage plan, is an industrial dispute and can be referred for adjudication.[40] A difference between management and certain workmen as to whether the latter are bound by a settlement arrived at a conciliation proceeding, is an industrial dispute which can be referred.[41] Similarly, an agreement between a person representing a minority of workers and management cannot put an end to a dispute, and such a dispute, therefore, can be referred for adjudication.[42] The government can refer for adjudication even a dispute as to whether the closure of particular establishment was real or a pretence of closure.[43] A question relating to permission under s 33, to dismiss a workman is different from the question whether the dismissal of that workman is justified or not. Therefore, even during the pendency of an appeal in the Supreme Court against an order under s 33, a dispute relating to the dismissal of a workman can be validly referred.[44] When the subject-matter of reference made to the labour court relates to a term of employment or to the conditions of employment of a person, the labour court has jurisdiction to examine whether the dispute arose out of any unfair labour practice by the employer, giving cause for the dispute.[45]

(ii) Matters not Fit for Reference

There are certain matters which cannot be referred for adjudication on account of certain statutory provisions, even if those matters are 'existing' or 'apprehended' industrial disputes. Disputes regarding matters covered by a settlement arrived at under s 12(3) cannot be referred to adjudication during the continuance of such settlement.[46] Matters covered by previous awards cannot be referred during the currency of such awards.[47] However, matters which are expressly stated to have been

not settled by a settlement arrived at between the parties can be referred to the tribunal for adjudication.[48] Non-implementation of an award does not, however, fall within the definition of an industrial dispute; therefore, it cannot be referred for adjudication.[49] A proceeding pending under s 36A is not a proceeding in respect of an industrial dispute within the meaning of s 33(1) or s 33(3). Therefore, a reference made by the appropriate government under s 36A is not a reference in respect of an industrial dispute within the meaning of s 10(1).[50]It is only a reference in regard to the interpretation of an award. Section 10 would not apply to a reference under s 36A. Any dispute relating to a closure which is admitted or found to be real will fall outside the purview of this Act and, therefore, cannot be validly referred by the government, hence disputes relating to a closed industry and those relating to post closure period cannot be referred, but disputes relating to pre-closure period,[51]or arising simultaneously with the closure can be referred.[52] Even the question whether closure was justified or not, cannot constitute reference of an industrial dispute.[53] There can be no valid reference with respect to the reinstatement of a workman who is not alive on the date of reference, as his claim for reinstatements must be deemed to have died with him.[54]

In *Indian Oil Corporation*, Biswas J of Gauhati High Court held that the reference of a dispute for regularisation of contract workers in the services of the principal employer would only frustrate the object of ameliorating the plight of the workmen. The only course for immediate relief was to issue notification under s 10 of the Contract Labour (Regulation and Abolition) Act 1970.[55] In striking contrast, in a case involving the same employer, ie, Indian Oil Corporation, and the same issue, ie, regularisation of contract labour, the learned single judge, Mukul Mudgal J of Delhi High Court held that a dispute could be raised under s 10(1) of the ID Act, even in the absence of a notification issued under s 10 of the Contract Labour Act. On this view of the matter, the learned judge directed the Central Government to make a reference of the dispute.[56]*What do these two diametrically opposite decisions of two High Courts involving the same issue and, still worse, the same employer convey to the general public and industrial community, except callousness, indifference and judicial anarchy?* Between the two, the decision given by Biswas J (for Division Bench) is right and that of Mukul Mudgal J is wholly misconceived and wrong. In *Electronics Corporation*, the facts were: the industrial tribunal, Maharashtra, passed an award rejecting the reference made to it on the ground that the respondent-union failed to establish the existence of employer-employee relationship between the company and some 30 of its members whose services were terminated. The tribunal accepted the contentions of the company to the effect: (i) that there was no contract of employment between the company and the 'retainers' claiming to be employees since they were independent persons with whom the company had entered into a contract for servicing of television sets sold by them to the customers; and (ii) that the industrial dispute referred was not maintainable as there could be no dispute between the company and the 'retainers'. On a consideration of the documents as well as oral evidence, the tribunal came to the conclusion that the 'Retainer's had individually entered into contracts with the company for service of repairing the Television sets sold by the company and that there was no master and servant relationship between the company and the 30 persons who claimed to be employees. The said award of tribunal was quashed by the High Court. Setting aside the order of the High Court and restoring the award of the tribunal, Pasayat J (for self and Panta J), observed:

> "It was fairly accepted and admitted that taking into consideration that retainership was more beneficial than the regular service employees, all the seven employees left the service of the company and accepted the retainership. It was also accepted that there were several retainers who were working in several places like Delhi, Calcutta, Lucknow. ... The retainers used to visit the company for collecting complaints, collecting components, for receiving payments and for repairing the called-back sets. Except for these reasons, they were not required to go to the company. ... The Tribunal also noted that the witness has admitted that the scheme was for retainership and there was no question of his asking for absorption as regular employees. Till 1989-90 they were getting more income than the regular employees and, therefore, had not sought for regularization. But since 1989-90 they found the regular employees were getting more salary than their income, and, therefore, they claimed regularization. ... the Tribunal was right in its view that no employer-employee relationship existed. Observations of the High Court to the contrary are clearly untenable because the findings and the reasons given by the Tribunal have not been discussed ..."[57]

In *Bongaigaon Refinery*, the Supreme Court held that the reference of the dispute raised by a person, whose joining report was refused by the company on being found that he secured employment by concealing certain material facts, stood vitiated in so far as he had not entered the employment of company. The Division Bench of High Court was not right in directing the government to make a reference, and the reference under s 10 was wholly unwarranted and uncalled for.[58] In *Sanat Kumar Dwivedi*, the Supreme Court held that where the workman accepted the order of reinstatement without back wages, a subsequent dispute raised by him for back wages is clearly not maintainable.[59] Where reference of a dispute relating to retrenchment was made, the labour court was bound to adjudicate the said dispute. It has no jurisdiction to dismiss the dispute on the ground that the appointment of the workman was not legal.[60] In *Oriental Fire*, a Constitution Bench of the Supreme Court held that the dispute as to the categorisation of workmen in different categories under a scheme framed by the management for rationalising and revising the pay-scales and other terms and conditions of services of its employees, is well within the jurisdiction of the tribunal to resolve the problem and that if a reference of the dispute was made under s 10, the tribunal cannot decline to adjudicate it on the ground that it had no jurisdiction to go into the

merits of the case.[61]The employees working in the statutory canteens run departmentally in Central Government offices hold civil posts and hence, the industrial tribunal has no jurisdiction to adjudicate the reference under s 10 of the Industrial Disputes Act.[62] Where the management suspended operations on two occasions and issued notice that the employees would not be entitled to wages for the period on the principle of 'no work, no pay' and the government referred the resultant dispute for adjudication, the High Court held that there was an industrial dispute and the government was justified in making the reference.[63]

In *International Airports Authority*, Raveendran J (for self and Panta J) held that where there is no abolition of contract labour under s 10 of the Contract Labour (Regulation and Abolition) Act 1970 (CLRA Act), but the contract labour contend that the contract between principal employer and contractor is sham and nominal, the remedy is purely under the ID Act. The industrial adjudicator can grant the relief sought if it finds that contract between principal employer and the contractor is sham, nominal and merely a camouflage to deny employment benefits to the employees and that there is in fact a direct employment, by applying tests like: who pays the salary; who has the power to remove/dismiss from service or initiate disciplinary action; who can tell the employees the way in which the work should be done, in short who has direction and control over the employees.[64] A dispute relating to the removal of a 'badli' worker on account of unauthorized absence cannot be the subject-matter of an industrial dispute, and such a dispute cannot be referred for adjudication. Being a 'badli' workman, he is not entitled to any protection under the Act and reference made to the labour court would be incompetent.[65] In *GM, ONGC*, briefly state, the facts were: The demand raised by the contractual workers union for regularization in the services of ONGC was resisted by ONGC both in conciliation and before the tribunal on the ground that there was no employer-employee relationship between the workers and the Corporation. The award passed by the tribunal directing regularization was challenged in a writ petition before a single judge, who quashed the award passed by the tribunal. The Division Bench reversed the findings of the single judge and restored the award passed by the tribunal, with the result the Corporation moved the Supreme Court. Justice HS Bedi (for self and Tarun Chatterjee J) took note *inter alia* of the following finding of facts recorded by the tribunal:

(1) That there existed a relationship of master and servant.

(2) That there was no contractor appointed by ONGC.

(3) That the ONGC used to supervise and allot works to individual workers.

(4) That the ONGC took disciplinary action and called for explanations from the workers.

(5) The workers were paid wages though they did not attend their duties due to Cachar Bandh and due to flood.

(6) The wages were paid direct to the workers by the ONGC and the acquaintance roll was prepared by the Management to make payment to the workmen.

While dismissing the appeal, the learned judge held:

> The pleadings in the present matter would show that the core issue before the Tribunal was with regard to the status of the employees as employees of the ONGC or of the contractor and that it was this issue simpliciter on which the parties went to trial. Mr Dave's argument with regard to the decision of the Tribunal being beyond the reference, is to our mind, and in the circumstances, hyper technical. In this background, we feel that the judgments cited by Mr Dave pertaining to regularization of contract labour are not applicable to the facts of the case.[66] ()

Judicial Review of the Order of Reference

Making of an order of reference under s 10(1) is undoubtedly an administrative function of the 'appropriate government' based upon its own opinion with respect to the existence or apprehension of an industrial dispute and its subjective satisfaction as to whether it would be expedient to make a reference or not. Though the earlier thinking was that such an order cannot be interfered with at all by the courts,[67] the recent trend of judicial thinking is that though in a very limited field, the order of reference is amenable to judicial review under certain circumstance[68] but the reference of an industrial dispute is not barred by the existence or availability ofanother remedy because raising an industrial dispute is a well recognised and legitimate mode of redress available to a workman which has achieved statutory recognition under the Industrial Disputes Act and this statute-recognised mode of redress cannot be denied to a workman, the reference cannot be amenable to judicial review on the ground of existence or availability of alternative remedy.[69] From the decided cases, no exhaustive or final criteria emerges as to on what grounds an administrative order is amenable to judicial review. Nor any such exhaustive or final criteria is possible in a growing branch of law like the administrative law. However, some broad

heads under which an order of reference may be reviewable are discussed below.

(i) The Referring Government not the 'Appropriate Government'

Section 10(1) opens with the words 'where the appropriate government is of opinion'. Hence, if the government making the reference is not the appropriate government within the meaning of s 2(a) of the Act, the reference will not be a valid reference. But in cases where certain disputed questions of fact are involved, the proper course would be to raise a preliminary objection before the tribunal. The correctness of the order of the tribunal on the preliminary question can then be challenged before the writ court.

(ii) Improper Opinion, no opinion and non-application of mind

The appropriate government has to form an opinion with respect to the 'existence' or 'apprehension' of an industrial dispute. Thus, the power to make an order of reference arises only when necessary opinion is formed by the appropriate government with respect to existence or apprehension of an industrial dispute.[70] With respect to the existence or apprehension of an industrial dispute, the government is the sole arbiter and its opinion is final. Likewise, the determination of the question whether it is expedient to make a reference or not, depends upon the discretion of the appropriate government. But in forming its opinion or in exercising its discretion as to whether a reference should be made or not if the government had no material before it or even if it had the material before it, it had not applied its mind to such material, or had based its opinion on certain irrelevant and extraneous considerations or left out of consideration, certain vital matters which it ought to have taken into consideration, the order of reference would be invalid and would be liable to be quashed. When the validity of order of reference is challenged, a reviewing court can make inquiry as to whether the point in dispute was taken into account or not, to quash the order on *certiorari* and to direct the government to re-consider the reference. In such a case, the opinion of the government would be based on non-consideration of relevant material and the point for adjudication that has been referred is not the point in dispute between the parties. If the dispute referred by the 'government is altogether different from the dispute between the parties, the reference will be reviewable.[71] However, a tribunal which is the creature of the statute has to take the reference as it is made to it and it cannot question the power or authority of the appropriate government in making the reference. Nor can it enter upon the consideration as to whether the pre-conditions empowering the State Government to make the reference existed or not, when the State Government is not a party to the proceedings before it.[72] The reference, is reviewable only by a High Court in its writ jurisdiction under Art. 226 of the Constitution. The opinion of the government may be assailable for the following reasons:

> In forming the 'opinion' that an industrial dispute existed or was apprehended, if the government had no material before it, the order of reference will be liable to be quashed[73] The formation of opinion cannot import an arbitrary or irrational state of affairs. In other words, the opinion must be grounded on 'materials which are of rational and probative value'.[74] An order of reference under section 10, though justiciable, cannot be held to be bad merely because there was no material before the government on which it could come to an affirmative conclusion.[75] If in making the order of reference, the government did not take into account some vital material which it ought to have considered, and upon taking it into consideration, the government could not have made the reference, the reference will be liable to be quashed.[76] If in forming the opinion, that the reference should be made, the 'appropriate government' took into account any extraneous or irrelevant consideration which had no rational connection with the question of making the reference, in the ultimate analysis, the case would be one of 'no opinion' at all and the order of reference would be beyond the scope of the power of the government under section 10(1) of the Act.[77] In such a case the order of reference will be bad even if the authority has acted *bona fide* and with the best of intention.[78]

Before forming the opinion, the appropriate government must have applied its mind to the questions whether there is an industrial dispute existing or apprehended and whether it will be expedient to refer the dispute on the basis of material before it. If the government has not at all applied its mind, it cannot be said to have formed its opinion on these questions.[79] If the order of reference is challenged on the ground that the government has not applied its mind to the material before it, the government will have to satisfy the writ court by filling an affidavit to show that it had material before it and that the reference was made after taking into consideration the material regarding the existence or apprehension of the dispute. The absence of such evidence may make the reference vulnerable on the ground of lack of material or non-application of mind, but the opinion must be of the authority itself. In other words, if the authority in forming the opinion has acted under the dictates of another body, the exercise of power to make the order of reference would be bad.[80] In *SAIL*, explaining the nature and scope of jurisdiction under s 10 of the Contract Labour (Regulation and Abolition) Act 1970 (CLRA Act 1970) and under s 10 of ID Act 1947, Sinha J (for self and Dalveer Singh J) held that for the purpose of exercising jurisdiction under s 10 of the CLRA Act, 1970 the appropriate government is required to apply its mind. Its order may be an administrative one but the same would not be beyond the pale of judicial review. It must, therefore, apply its mind before making a reference on the basis of the materials placed before it by the workmen and/or management, as the case may be while doing so, it may be inappropriate for the same authority on the basis of the materials that a notification under s

10(1)(d) of ID Act of 1947 be issued, although it stands judicially determined that the workmen were employed by the contractor. The State exercises administrative power both in relation to abolition of contract labour in terms of s 10 of the CLRA Act of 1970 as also in relation to making a reference for industrial adjudication to a labour court or a tribunal under s 10(1)(d) of ID Act of 1947. While issuing a notification under the CLRA Act of 1970 the state would have to proceed on the basis that the principal employer had appointed contractors and such appointments are valid in law, but while referring a dispute for industrial adjudication, validity of appointment of the contractor would itself be an issue as the state must *prima facie* satisfy itself that there exists a dispute as to whether the workmen are in fact not employed by the contractor but by the management.[81]

In another case involving *SAIL*, the facts were: the union made a representation to Labour Commissioner in 1987 with a request to admit in conciliation the dispute about the regularization of services of its members who were working as contract labours with M/s Bardhan and Co under principal employers ie, the present appellants. The state of West Bengal issued notification on 15 July 1989 prohibiting employment of contract labours in the 4 stockyards. The aforesaid notification was kept in abeyance from time to time and ultimately was extended till March 1994. Some workers belonging to the Union filed a writ petition in the Calcutta High Court seeking absorption in view of the said notification. It was *inter alia* stated that they were working as contract labours. A single judge ordered that the writ petitioners were entitled to absorption and regularisation in SAIL from 15 July 1989, which was upheld by the Division Bench. Following the Constitution Bench decision in *SAIL*, the Supreme Court quashed the order of the Division Bench as well as the proceedings initiated on the reference made by the State Government, and further observed that the union was all along focusing on several aspects but never claimed that the contract was sham or bogus and that there could be no automatic absorption on the abolition of contract labour system.[82] In *Brijbhushan Yadav*, facts were: a few workmen engaged as security guards through contractor to work in BSNL, Ministry of Telecommunications, secured an award through the industrial tribunal, and lost before the High Court approached the Supreme Court. Setting aside the order of High Court and remitting the matter back to it, Sathasivam J (for self and Chatterjee J) observed:

> ... If it is established that after 30.10.1997, there was no valid contract between the security agency and the Department, the stand of the workmen that they were continued as security guards by the Telecom Department is to be accepted. As observed earlier, perusal of the order of the High Court does not show that any specific reference and discussion was made to the order/orders extending their contract with security agency up to 31.05.1999. (para 12) ... before this Court, respondents-Department have filed an application for permission to file additional documents as Annexures R-3 to R-8 in support of their stand that all the workmen were employed by the security agency and not by the Department. (para 13) ... we set aside the impugned order passed by the High Court in all these matters and remit the same to the High Court for fresh disposal after rendering a specific finding as to the subsistence/existence of agreement or contract with the security agency up to 31.05.1999 and pass appropriate orders. Both the Department as well as the workmen are permitted to place all the relevant material before the High Court in support of their respective claim and it is for the High Court to decide the issue on merits ...[83] (para 14).

In *Bharat Coking Coal*, the facts in brief were: a contractor was engaged in 1977 to construct a coal washery on a turnkey basis. After the completion of the project in 1979, the contractor terminated the service of all, but 39 skilled workers, after paying retrenchment compensation etc. The said 39 workers were retained to look after the maintenance work of washery after it was operationalized, and their services too were terminated after one year in January, 1981, resulting in a dispute raised by them demanding absorption in BCCL. The dispute was referred under s 10 for adjudication to an industrial tribunal, which directed absorption of the workmen in BCCL with continuity of service and consequential benefits. The BCCL did not challenge the award and implemented the terms. Thereafter, some five workers including the appellants in the present case filed a civil suit for declaration which was decreed by the civil court in their favour and upheld by the first and second appellate courts. Quashing the orders of the courts below directing reinstatement of the said workers, the Supreme Court held:

> ... the appropriate Government is empowered to make a reference under Section 10 of the Act only when “Industrial dispute exists” or “is apprehended between the parties”. (para 25). .. the services of the appellants and those at whose instance the reference was made were terminated long back prior to making of the reference. These workers were, therefore, not in the services of either Contractor or/and BCCL on the date of making the reference in question. Therefore, there was no industrial dispute that “existed” or “apprehended” in relation to appellants’ absorption in the services of the BCCL on the date of making the reference. (para 26) ... since the appellants’ services were discontinued or/and retrenched (whether rightly or wrongly) long back, the question of their absorption or regularization in the services of BCCL, as claimed by them, did not arise and nor this issue could have been gone into on its merits for the reason that it was not legally possible to give any direction to absorb/regularize the appellants so long as they were not in the employment. (para 27) ... absorption and regularization in the service can be claimed or/and granted only when the contract of employment subsists and is in force *inter se* employee and employer. (para 28). .. the only industrial dispute, which existed for being referred to the Industrial Tribunal for adjudication was in relation to termination of appellants’ employment and -

> whether it was legal or not? It is an admitted fact that it was not referred to the Tribunal and, therefore, it attained finality against the appellants. (para 29) ... the reference, even if made to examine the issue of absorption of the appellants in the services of BCCL, the same was misconceived. (para 30) ... the reference made to examine the issue of appellants' absorption *qua* the BCCL was incapable of being referred to on the said question and in any event, it was incapable of being answered in favour of the appellants. (para 33) ... having regard to the peculiar facts of this case and the reasons, which we have set out herein below, we are inclined to hold that the appellants are entitled to claim the retrenchment compensation from the Contractor/BCCL.[84] (para 36)

(iii) Mala fides

In any enactment which creates powers, there is a condition implied that the powers shall be used *bona fide* for the purpose for which they are conferred.[85] *A priori*, a reference made to any of the authorities under this section will be *mala fide* and colourable exercise of power if it is made for achieving an alien purpose, *viz*, a purpose not mentioned in the statute. Though *mala fides* of personal ill-will is not to be held established except on clear proof, it is not necessary that it should be established only by direct evidence or that it must be discernible from the impugned order. Bad faith can be deduced as a reasonable and inescapable inference from the proved facts.[86] In the classic words of Warrington LJ:

> No public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be that of the body, but proved to be committed in bad faith or from corrupt motives, would certainly be held inoperative.[87]

An action suffers from legal *mala fide* when its ostensible purpose is different from the real one.[88] However, such bad faith will be a matter to be established by a party propounding bad faith or *mala fide*. He should affirm the set of acts and it would not be sufficient merely to allege the facts but they will have to be proved.[89] Inference of *mala fide* cannot be drawn from the mere fact that the government was acting with promptitude and without any delay.[90] In *British India Corpn*, the Supreme Court remanded the case to the Punjab High Court as inspite of an allegation of *mala fides* on the part of the government, it had dismissed the petition *in limine* basing its decision on a mere comparison of the relevant items in the previous order of reference with the impugned order of reference. Bhagwati J observed that when there was an allegation of *mala fides* on the part of the government, the High Court should have issued notice to the respondent and after according a hearing to the parties, it should have recorded its decision on consideration of all the circumstances of the case which would have been brought to its notice. The learned judge emphasised that the High Court was not justified in dismissing the petition *in limine* as it was tantamount to preventing the parties from presenting their respective cases.[91] In *DN Ganguli*, while dealing with a case of cancellation of a notification of reference, the Supreme Court reiterated the same view and held that if validity of cancellation of notification making an order of reference was challenged on the ground of *mala fides*, it might be relevant and material to inquire into the motive of the government. Thus, if the court finds that the government was actuated by *mala fide* motives in making an order of reference, the reference would be invalid.[92]

(iv) No Industrial Dispute

The dispute with respect to the existence or apprehension of which the appropriate government is to form its opinion must be an industrial dispute as defined in s 2(k). If it could be shown that what was referred was not an industrial dispute at all, the jurisdiction of the authority to deal with the dispute can be questioned even though the factual existence of the dispute may not be the subject of a party's challenge.[93] However, the determination of the question whether a particular dispute is an industrial dispute or not may depend upon the determination of various facts. Hence, a preliminary objection has to be taken before the authority to whom the reference is made that what is referred is not an industrial dispute at all. The correctness of the decision of the authority on this question will be amenable to judicial review[94] but if what was referred to adjudication was *prima facie* not an 'industrial dispute' at all, satisfying the fundamental requirements of s 2(k), the order of reference will be invalid and incompetent *ab initio*.[95] In *National Engineering Industries*, the Supreme Court held that if there is no industrial dispute in existence or apprehended, the appropriate government lacks power to make any reference.[96] Where the government made a reference of a dispute relating to the termination of a workman on receipt of the failure report of the conciliation officer under s 12(4), it could not be said that the reference made was incompetent on the ground that there was no dispute in existence or apprehended as on the date of reference.[97]

(v) Improper Subject Matter of Dispute

A reference to a board can only be made of a matter of any dispute for promoting a settlement, and reference to a court of inquiry can be made of any matter appearing to be connected with or relevant to the dispute. But the reference to the adjudicatory authorities, *viz*, the labour courts and industrial tribunals has to be made for the matters specified in the second or the third schedule or any matters appearing to be connected therewith or relevant thereto. If a reference of a matter covered by the third schedule is made to a labour court, unless it falls within the purview of the first *proviso*, such

reference would be invalid. If the matter that is referred is not connected with or relevant to an 'industrial dispute', the reference of such matter would again be invalid. Where the government made a reference in terms: 'whether the workmen... are entitled to wages for the lockout period from...', and the management in a writ petition contended that the reference was bad in law, as there was no lockout at all, the Supreme Court upheld the order of High Court quashing the reference on the ground that it did not reflect the real dispute between the parties. The Supreme Court held that it is open to the High Court to examine whether the government had taken note of the relevant considerations while making a reference of a dispute, and the finding of the High Court in this regard cannot be disputed. The proper course is to direct the government to take steps to make the reference to the concerned authority after taking all the relevant material on record.[1] Where the management declared a lockout as a consequence of go-slow tactics resorted to by workers, and the government made a reference in terms 'whether the workmen shown in annexure A are entitled to wages with effect from 1 December 2000 onwards...', a single judge of Delhi High Court quashed the reference, and held that the reference should be made of the entire dispute, as the entitlement of workmen to wages was directly dependent on whether lockout was legal or justified.[2] In *India Cements*, the Madras High Court held that, whereas the dispute related to 'non-absorption', the reference made by the government in terms of 'termination of service', was a mistake not of substance but of form, and hence it would not affect the validity of notification referring the industrial dispute for adjudication.[3]

(vi) The Activity not 'Industry'

The adjective 'industrial' in the definition of 'industrial dispute' relates to the dispute in an industry as defined in s 2(j) of the Act.[4] In other words, besides the requirement of s 2(k), unless the dispute is related to an 'industry' as defined in s 2(j), it will not be an 'industrial dispute'. Therefore, if the reference is made of a dispute which relates to any activity which is not 'industry', it will not be a valid reference.[5] The reference of an industrial dispute which arises after the establishment becomes dead on account of closure, shall therefore, be invalid as the provisions of the Act will apply only to an existing or live industry.[6] A reference is not necessarily bad because at the time when it was made, the industry no longer existed. The power of the state to make a reference is to be determined with reference not to the date on which it is made but with reference to the date on which the right, which is the subject matter of the dispute, arises, and the machinery provided under the Act would be available for working out the right which accrued prior to the dissolution of the business. The dispute should be in a live industry and not in a dead or closed industry as the definition of industrial dispute presupposes continued existence of 'industry, and a closed or dead establishment would not fall within the definition of 'industry'. The provisions of this Act, therefore, will not apply to such an industry, because the entire scheme of the Act assumes that there is in existence an 'industry'. In other words, where, the business has been closed and it is either admitted or found that the closure is real and genuine, any dispute arising with reference thereto would fall outside the purview of the Act and that will be, *a priori* so, if a dispute arises—if one such could be convinced—after the closure of the business between the quondam employer and employees.[7]

There is thus a clear distinction between the two classes of cases, namely, (i) those in which the cause of action arose at the time when the business had been closed; and (ii) those in which the cause of action arose at the time when the business was being still carried on. There can be no 'industrial dispute' in respect of the first category of cases, because the real subject-matter of the dispute had ceased to exist when the dispute arose. But in regard to the second category, where the dispute actually arises before the closure of the business, it does not cease to be an 'industrial dispute' merely because subsequently the industry is closed. There is no provision of law according to which the closure of industry extinguishes the industrial dispute which had arisen before such closure.[8] In *UP Electric Supply*, the Supreme Court discountenanced the proposition that, as soon as a particular industry ceases to function, any adjudication in respect of a dispute which had occurred prior thereto becomes abortive and observed that 'if the dispute is one which relates to the past working of the industry and in particular where the claim of the workmen is for benefits which according to their view had accrued to them in the past, it can hardly be said that the adjudication is without any purpose'. If the workmen ask for better service conditions like the revision of wage scales, dearness allowance, medical and other facilities, gratuity etc, it would be useless for the tribunal to complete the adjudication and award how the service conditions etc ought to be bettered or revised, where the industry is *non est.* Where however the dispute, is over a claim to benefits by way of bonus for work done in the past, it would be the duty of the tribunal to complete the adjudication and make its award. If the tribunal finds that because of the services rendered by the workers in the past, an industry reaped profits a portion whereof should go to the workmen, it should not lie in the mouth of the employers to say that inasmuch as they have ceased to carry on the business their obligation to pay for the service rendered in the past should be wiped out.[9]

(vii) Reference Contrary to Law

The order of reference should be made to the authorities in accordance with the provisions of s 10(1). If the order is contrary to these provisions in the matter of selecting the appropriate authority, the order shall be invalid.[10] Likewise, where an order of reference covering some items of industrial disputes is pending adjudication a further order of reference covering the same subject-matter would be invalid.[11] Besides, where the reference is inconsistent with statutory provisions,

it would be invalid.[12] For instance, in *Indian Rubber*, the provisions of the Industrial Disputes Act were suspended in respect of the relief undertaking by a notification under the West Bengal Relief Undertakings (Special Provisions) Act 1972. A reference of an industrial dispute between the undertaking and its workmen to an industrial tribunal by the State of West Bengal was held to be without jurisdiction being contrary to law.[13] In *Corpn of the City of Mangalore*, the Karnataka High Court held that in a reference under s 10A, the age of superannuation fixed by the rules under the Madras District Municipalities Act cannot be modified by an adjudicator or arbitrator because such a reference would not be valid in law.[14] Likewise, reference of a dispute the subject matter of which is covered by the provisions of the Contract Labour (Regulation and Abolition) Act 1970 will not be valid and proper. Though the recent judicial trend is to permit all industrial disputes to be referred to adjudication, the reviewing court cannot be blind to the real issues involved in the case.[15] Similarly, a dispute with respect to payment of gratuity which is covered by the Payment of Gratuity Act 1972 being a self-contained Code, cannot be validly referred or be adjudicated upon by the adjudicatory authorities under the Act.[16] A reference which is violative of the Constitutional provisions such as Art. 14 will be invalid in law. But the situation will be different where an order of reference is quashed by the High Court as invalid. A second reference of the same dispute after curing the defect will not be barred, as at the time of such reference there was no existing dispute pending before the tribunal in the eye of law.[17] In *Tarang Theatre*, a reference made under the provisions of the UP Industrial Disputes Act 1947 by the State Government, was rejected by the labour court on the ground that the unionwhich had taken up the matter of the workmen, could not espouse the cause of the workman, without going into the merits of the case. Subsequently, the State Government made a reference of the dispute under s 10 of the Central Industrial Disputes Act. A single judge of the Allahabad High Court held that the subsequent reference was not contrary to law as it was not repugnant to s 12 of the UP Act. The maintainability and validity of the reference have to be viewed with reference to the circumstances existing at the time when the reference was made.[18] A single judge of the Madras High Court held that if the government refers a dispute relating to one establishment and its workmen, whereas it had already rejected precisely the same dispute between another establishment and its workmen, will not be discriminatory.[19] This view is not the correct view of the law. The reference in such a situation will not only be discriminatory but may also be *mala fide*. If on the date of making the reference there was no jurisdictional defect or any other bar operating to prevent reference being regarded as valid reference, the validity of the reference will not be open to challenge.[20] The order of reference will not be invalid merely because of some inadvertent statement in it. For instance, where the order of reference mentioned that the dispute related to the dismissal of four workmen while only three were dismissed, the entire dispute was not vitiated. The validity of the reference relating to the dismissal of three workmen was upheld.[21]

(viii) Disputes Covered by a Settlement or a Previous Award

Reference of an industrial dispute, the subject-matter of which is covered by a settlement as defined in s 2(p) of the Act, would be invalid during the period of operation of such a settlement.[22] The reason is simple. The jurisdiction to conciliate, arbitrate or adjudicate is there only when there is an industrial dispute. Adjudication under s 10, arbitration under s 10A and conciliation under s 12 are the remedies available under the Act for resolving an industrial dispute. When once a dispute is resolved by a settlement in the course of conciliation or otherwise, no dispute remains to be resolved by arbitration or adjudication.[23]The law is well settled that if there is a binding settlement which has not been terminated in accordance with the procedure laid down in the Act, no industrial dispute can be raised with regard to the items which form the subject-matter of the settlement. Such matters cannot be the subject-matter of conciliation proceedings under s 12 or of reference under s 10 of the Act.[24] But the reference of the points of dispute which are not covered by the settlement or which were not visualised at the time of the settlement cannot be prevented.[25] Likewise, if a settlement is not in accordance with the requirements of the provisions of the Act or the rules, it will not be a settlement in the eye of law and it will not bar reference of the points purported to have been settled under it.[26] In *Motor Industries*, the Karnataka High Court held that if after the termination of service of the workmen, a settlement was arrived at between the union of the workmen and the management which was accepted by the workmen, there could be no industrial dispute for the government to refer for adjudication. If, in spite of such settlement, the government were to make an order referring the settled dispute for adjudication, once again it would be a clear case of acting without authority of law and such an action could not but be described as capricious and arbitrary exercise of power or abuse of the power on the part of the government.[27] The question whether the settlement is in accordance with the statute and the rules, is a question of law which could be raised even during the course of argument without taking any plea even if it is not raised in the pleadings.[28] A settlement can be arrived at either in the course of conciliation proceedings or outside the conciliation proceedings. A settlement arrived at in the course of conciliation proceedings shall be binding on all parties to the industrial dispute and all heirs, successors or assignees of the employer and all persons who were employed on the date of the dispute and all persons who subsequently become employed in the establishment under s 18(3) of the Act. But a settlement arrived at otherwise in the course of conciliation proceedings will bind only parties to the settlement. It will not bind the workmen who were not a party to the settlement.

In *ICI*, the management entered into a settlement with one of the unions. Subsequently, an industrial dispute relating to the same demands was referred to an industrial tribunal for adjudication at the instance of the other union. A single judge of

the Bombay High Court held that the reference was validly made despite the settlement. The court observed that a settlement entered into between the management and the union outside the conciliation proceedings will bind only the workmen who were members of that union in terms of s 18(1), and not the other workmen and they would not be bound by such settlement. A reference of an industrial dispute relating to the matters covered by such settlement would not be barred. The tribunal, therefore, can validly adjudicate upon such a reference. The jurisdiction of the tribunal would be of the widest amplitude. The tribunal may, in its adjudication adopt the terms of the settlement and impose the same on the workmen raising the dispute if satisfied that the terms of the settlement are reasonable and the imposition of the terms of the settlement upon the entire body of workmen in the industrial establishment would be a fair and just resolution of the dispute. The fact that a majority of the workmen is a party to the settlement would be a material and relevant factor to be considered by the tribunal in this connection. Which terms of the settlement are fair and need be extended to the entire body of workmen and which need not be, are matters within the discretion of the tribunal. The tribunal may even incorporate in the award the beneficial terms of such settlement without imposing the obligatory or restrictive covenants contained therein. It would further be open to the tribunal notwithstanding the settlement to grant reliefs which might be higher than the reliefs obtainable under the settlement. In such a case, such relief would be available even to the persons covered by the settlement because the award will be binding on all workmen by virtue of s 18(3). The principle of 'all or none' has no relevance in industrial adjudication. Therefore, the contention that the settlement being an integral whole should be applied to all workmen, including those who were not parties to the settlement, either as a whole or not at all, is not sustainable. But only such matters as have been settled by the settlement cannot form the subject-matter of conciliation or reference.[29] In *Spencer*, the relevant clause in the settlement provided that the dismissal of the workman 'will stand but the company will have no objection to dispute in this respect being referred for adjudication to a tribunal by the government'. The High Court negatived the contention of the employer that since the question as to the dismissal was finally decided by the settlement, the reference was not competent and the tribunal had no jurisdiction to entertain the same. The court pointed out that the clear intention of the parties that the employer was not willing to withdraw the order of dismissal, but whether such order was valid or not would finally be decided by the tribunal and, therefore, the settlement did not affect the right of the parties to continue prosecuting the reference of the dispute regarding the dismissal of the workman.[30] But if a settlement is not a settlement as defined in s 2(p), it will not bar reference of the dispute for adjudication. Mere acquiescence in such a settlement or its acceptance by workers would not make them a party to the settlement.[31] However, the question whether the settlement had, in fact, been terminated or was subsisting is a question of fact and will require determination by the adjudicating authority.[32] Likewise, a matter covered by an award of an arbitrator, labour court, tribunal or national tribunal cannot be validly referred for adjudication during the period of operation of such award.[33]

In *ANZ Grindlays Bank*, the facts were: A long-term settlement was entered into between the Bank and AIGB Employees Association, which was the majority union, admittedly under s 18(1). The minority union, ie, AIGB Employees Federation refused to sign the settlement. Nevertheless, the management offered to extend the benefits of the said bi-partite settlement to employees, who were not members of the Association, subject to the condition that they accept the terms of settlement in writing. The Federation (i.e., the minority union) objected to the said clause. The Government referred the dispute raised by the Federation for adjudication in December 1998 in terms: "*Whether the terms of bipartite settlement dated 18-8-1996, between the management of ANZ Grindlays Bank Limited, and All Indian Grindlays Bank Employees Association which bound withholding of benefits of settlement to workmen who are not members of All India Grindlays Bank Employees Association until the individual gives acceptance of the settlement in the given format is legal and justified? If not, what relief are the workmen entitled to?*" The writ petition filed by the bank challenging the said reference was dismissed at both the tiers of the High Court. Quashing the orders of the High Court, a Bench comprising Sema and Mathur, JJ, observed that a plain reading of the reference made by the Government did not show that it did not refer any dispute or apprehended dispute between the bank and the federation; and that it did not refer any demand or claim made by the Federation or alleged refusal thereof by the bank; that in such circumstances, it was not possible for the Court to hold that, on account of the settlement dated 18 August 1996 arrived at between the bank and the association, any dispute or apprehended dispute had come into existence between the bank and the federation; the mere action of the bank in asking for written acceptance of the terms of the settlement from the non-members of the association could not be said to have given rise to any kind of dispute between the bank and the federation; and, therefore, the reference made by the government for adjudication was wholly redundant and uncalled for.[34]

It is submitted that this case was rightly decided by the Supreme Court. The dispute raised by the employees federation was, in the first place, frivolous and vexatious, nay, there was indeed no factum of a dispute. While making the reference, the Government had acted in haste without applying its mind to the facts. This is yet another instance [a few others including *Sindhu Resettlement Corporation* (supra), have been discussed elsewhere in this section], which discloses the casual style in which higher bureaucracy in the government proceed to conduct official business in a callous and desolate manner without applying its mind to the facts and circumstances of the case and, still worse, in gross violation of the very law, which the bureaucrats are expected to enforce. *Otherwise, how can one explain the irresponsible and reckless reference of the so-called 'dispute', where no industrial dispute of the kind contemplated in s 2(k) had ever existed!* Then

comes the turn of the High Court. With great respect, both the learned single judge and the Division Bench handled the case in a cavalier fashion and passed mediocre orders without first recording a finding on the question "*was there any dispute at all, as defined in s 2(k) of the Act, which required resolution through adjudication*", in the light of the facts that (i) the bank signed a valid settlement with the majority union, (ii) that it was willing to extend the benefit to all the employees of the bank, who were not members of the majority union, subject to their accepting the terms of settlement, in writing; and (iii) that the federation, which is a minority union had itself not raised any demands on the bank, except objecting to the requirement of written acceptance of the terms of settlement. The Supreme Court rightly quashed the reference made by the government was bad, while at the same time setting aside the orders passed by the learned single judge and the Division Bench of the High Court.

(ix) Reference to Arbitration

In *Karnal LK Sanghatan*, the State Government had referred an industrial dispute which was already pending arbitration before an arbitrator under s 10A. Quashing the reference, the Supreme Court observed that s 10 and s 10A are the alternative remedies to settle an industrial dispute. Therefore, an industrial dispute can either be referred to an industrial tribunal for adjudication under s 10 or parties can enter into arbitration agreement and refer it to an arbitrator under s 10 A. But once the parties have chosen their remedy under s 10A, the government cannot validly refer that dispute for adjudication under s 10.[35]

(x) Notice

The function of the government under s 10(1) in making the order of reference is an administrative and not a judicial or quasi-judicial one, for determination of the rights of any parties. Hence the failure of the 'appropriate government' to give notice of the order of reference to the parties does not vitiate the exercise of the statutory power of the government vested in it under s 10(1) of the Act. Since the order of reference is to be made upon subjective satisfaction of the government, there is no question of any hearing being given to the parties. Hence, an order of reference without giving notice to the parties concerned would not be violative of the rules of natural justice.[36] The failure of the government to give notice to either of the parties would not sustain a charge of *mala fides* on that ground alone.[37]

(xi) Promissory Estoppel

An interesting point arose before the Calcutta High Court in *Kesoram Industries*, the employer had declared lock-out on account of illegal activities of the workmen. In the course of conciliation proceedings, the labour commissioner made certain suggestions in favour of the workmen, except that the lockout would be treated on 'no work, no pay' basis. Consequently, the State Government represented to the management that if it accepted the labour commissioner's suggestions and lifted the lock-out, the State Government would take no further steps under the Act. Accordingly, the management accepted the suggestions and lifted the lock-out. But the workmen did not accept the labour commissioner's terms and resorted to strike. Consequently, the government referred the dispute under s 10 as to whether the workmen were entitled to wages for the period of lock-out and strike. The management challenged the validity of the reference on the ground that the reference was barred by promissory estoppel. A single judge of the High Court held that the reference was not barred by the assurance of the government.[38]

Parties to Dispute

Although a reference may be in general terms, it must cover all the members of the known class of workers. Where it is worded in such a manner that it cannot be predicated of any particular workman of that class that he is a party to the proceedings, the reference will be defective.[39] Where a notification states that a dispute relating to retrenchment, etc, of workmen (specific cases to be cited by employees) is referred to the tribunal, a person, who claims to be a worker and insists that his case should be decided by the tribunal, cannot take up the contention that the reference is not valid under s 10 because it has not specified the names of workmen. That being so, the tribunal is also entitled to decide that he is not a workman and refuse to pass any order when he approaches it. [40] For instance, where there was a dispute in a factory which had been leased out by a company to a lessee, it was the lessee who was in the management of the factory and not the lessor company. Thus, the lessor company would not be a proper party in the reference of the dispute for adjudication. Even though the notice of reference is served on the lessor company, it could not be made a party to the proceedings before the tribuna1.[41]There is nothing in the Act to indicate that the government cannot make a reference indicating that a party to the dispute is a trade union. The government should make a reference in writing indicating the parties to a dispute and the point of controversy. The parties might be indicated individually or collectively with reasonable clearness.[42] In *Hotel Imperial*, the Supreme Court observed that where the dispute is of general nature relating to the terms of employment or conditions of labour as a body, it is not necessary to mention in the order of reference the names of the particular workmen who might have been responsible for the dispute. Thus, where the workers of an employer are collectively made parties to an industrial dispute, all those in the service of the employer on the date of reference under s 10(1) are parties to the

dispute. But the court specifically stated that where the dispute refers to the dismissal, etc, of particular workmen as represented by the union, then it may be desirable to mention the names of those workmen in the order of reference.[43] The government may even make one common order of reference with respect to a number of employers or establishments, if there is a functional integrality among them or, if necessary, for the sake of uniformity.[44]

Constitutional Validity of Section 10(1)

Having regard to the provisions of the Act, it is clear that s 10 is not discriminatory in its ambit. The discretion given to the 'appropriate government' under s 10(1) is not an unfettered or uncontrolled discretion nor an unguided one, because the criteria for the exercise of such discretion are to be found within the terms of the Act itself. The provisions of s 10 are not unconstitutional, as there is no infringement of the fundamental rights under Arts. 14 and 19(1)(f) and (g) of the Constitution.[45] Likewise, the refusal of the government to refer a dispute for adjudication would not amount to infringement of Art. 14 of the Constitution merely because the government had in an earlier case referred the case of a similar employee for adjudication. If in law, the government is justified in refusing a reference, the applicability of Art. 14 does not arise at all.[46]

Provisions of Co-Operative Societies Acts

The question, whether the relevant provisions of the Co-operative Societies Acts bar a reference under s 10 of the Industrial Disputes Act, has vexed the courts and given rise to conflict of judicial dicta. The question involves the construction of the words 'touching the business of a society' in corresponding state statutes. A single judge of the Calcutta High Court in *Co-operative Milk Societies*, on the construction of the words 'touching the business of a co-operative society' in s 86 of the Bengal Co-operative Society Act, held that an industrial dispute between a co-operative society and its workmen does not relate to the actual business of the co-operative society, even if the dispute consequently, remotely or ultimately touches or affects the business of the co-operative society, Thus, such dispute shall not fall within the ambit of the expression 'any dispute touching the business of a co-operative society'. Therefore, a dispute regarding disciplinary action taken by a co-operative society against a paid servant of the society was expressly excluded from the purview of the Registrar's jurisdiction under s 86.[47] But this view was dissented from, by a Division Bench of that High Court in *Co-operative Industrial Home*, in which it was observed that the consensus of the judicial opinion was against the very wide proposition laid down by the single judge in *Co-operative Milk Societies'*case. The Bench held that the dispute between society and employee regarding the dismissal of an employee was a dispute 'touching the business of the society' and it also related to its affairs. It was further observed that the Bengal Co-operative Societies Act 1940 excluded the application of the Industrial Disputes Act.[48] In *Rashtriya Khadan*, a Full Bench of MP High Court held that the employees of the co-operative societies engaged in industrial activities are to be governed by the Industrial Disputes Act and not by s 55 of the MP Co-operative Societies Act 1969.[49] The Madras High Court in *South Arcot CMT Society*, took the view that the definition of industrial dispute'as given in this Act does not include 'any controversy regarding terms concerning an association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in approximate relation of an employer and employee'. The court also expressed doubt whether the Industrial Disputes Act itself applied to such disputes when there was the Madras Co-operative Societies Act 1932, which provided a machinery for the settlement of adjudication of disputes under s 51.[50]

In *Kasturbanagar*, a single judge of that High Court, however, took the view that the scope of s 51 of the Madras Co-operative Societies Act was limited and it related only to the disputes 'touching the business of a registered society' and arising between the society and its servants. Therefore, a claim for retrenchment compensation under s 25F of the Industrial Disputes Act by a workman retrenched by the society, though a dispute between the society and its servant, was not a dispute 'touching the business of the registered society'. Hence, the industrial disputes such as relating to retrenchment compensation or gratuity etc are not contemplated by the provisions of the Co-operative Societies Act and such disputes are covered by the Industrial Disputes Act which provides a special machinery to decide them.[51]The single judge distinguished the decision of the Division Bench which rested on the fact that the employees there were shareholders and were not 'workmen' as defined in the Industrial Disputes Act. Subsequently, another Division Bench of that High Court in *Salem CM Society*, has affirmed the view of the single judge in *Kasturbanagar CHC Society* and dissented from the view of the Division Bench in *South Arcot CMT Society* in view of certain provisions of the Act having not been noticed by the bench in that case.[52] The Bombay High Court in *Majoor Sahkari Bank*, held that the Industrial Disputes Act applies to the industrial disputes arising between a co-operative society as employer and their workmen as its employees. Therefore, a reference under s 10(1) would not be barred by the provisions of the Bombay Co-operative Societies Act.[53]Likewise, the Kerala High Court, on the construction of the words 'touches the business of a co-operative society' in s 60(1) of the Travancore Cochin Co-operative Societies Act 1951 held that this provision did not preclude a reference under s 10 of the Industrial Disputes Act. It was further held that s 10 of the Industrial Disputes Act was designed to deal

with controversies which by their very nature were outside the purview of ordinary litigation like the one contemplated under s 60(1) of the Travancore-Cochin Co-operative Societies Act.[54] In *Malabar CCB*, that High Court observed:

> Cooperative societies are creatures of statute, controlled by their Constitution, and concerned with their contracts. Industrial disputes stem, not from the subtle refinements of contractual obligations but from the rougher jurisprudence of social justice and readjustment. The uplands of industrial tribunals are out of bounds to the Registrar of Co-operative Societies. ... even if the workmen of cooperative societies are its shareholders, that would not preclude a reference of an industrial dispute under the Industrial Disputes Act between a co-operative society and its workmen because a co-operative society is not a mere aggregate of its members but it has a legal personality, separate and distinct from that of its shareholders.[55]

Dealing with the provisions of s 96 of the Gujarat Co-operative Societies Act, the Gujarat High Court in *Gujarat State CLM Bank*, took the view that this provision related to its ordinary meaning, *viz*, adjudication of rights and obligations under the ordinary law and not the adjudication of industrial disputes' which have acquired a special meaning and significance under the industrial law. The industrial law seeks to provide an extraordinary process of adjudication which has been designed to deal with controversies, which by their very nature are outside the scope and purview of ordinary litigation. Further, an 'industrial dispute' connotes an entirely different concept from disputes arising under the Cooperative Societies Act between the parties mentioned in s 96 of the Act, and the authority functioning under the Co-operative Societies Act, cannot have the power and jurisdiction to decide differences or claims or demands that arise under the industrial law.[56] A similar view has been taken by the Rajasthan High Court in *Kendriya SS Sangh*, wherein it was held that the provisions of s 61 of the Rajasthan Co-operative Societies Act would not necessarily exclude the applicability of the Industrial Disputes Act to a dispute between a co-operative society and its workmen.[57] Likewise, the Orissa High Court in *Bhanjanagar CU Bank*, held that a dispute regarding disciplinary action taken by a Co-operative Bank. not being within the jurisdiction of the registrar of co-operative societies, could be validly adjudicated by an industrial tribunal.[58] In *Co-op Central Bank*, the Supreme Court subscribed to the general proposition that the jurisdiction of the industrial tribunals under the Industrial Disputes Act will only be barred if the dispute in question can be completely decided by the registrar under s 61 of the Andhra Pradesh Co-operative Societies Act 1964 and in the circumstances of the case held that the 'industrial dispute' in question referred to the tribunal could not possibly be referred for decision to the registrar under s 61 of that Act, as it related to alteration of a number of conditions of service of the workmen which relief could only be granted by an industrial tribunal dealing with an 'industrial dispute' and could not fall within the powers of the registrar dealing with the dispute under s 61 of the Act.[59]

In *Allahabad District Cooperative*, the court observed that the dispute relating to conditions of service of the workmen employed by the society cannot be held to be a dispute touching the business of the society within the meaning of s 70 of the UP Co-operative Societies Act 1966.[60] The dispute in respect of betterment and upliftment of service conditions of managers employed in village agricultural cooperative credit societies does not come within the purview of the Constitution, management or the business of a co-operative society and, therefore, s 75 of the Rajasthan Co-operative Societies Act, is not a bar for raising an industrial dispute.[61]The reference of a dispute to a labour court under this Act is not barred by the provisions of ss 55(2) and 64 of the Madhya Pradesh Co-operative Societies Act 1961.[62] A Full Bench of the Punjab and Haryana High Court in *Sonepat Co-op. Sugar Mills*, struck down the provisions of s 128 of the Haryana Co-operative Societies Act 1984 in so far as they excluded the jurisdiction of the industrial tribunals and labour courts to decide the disputes relating to a member and a co-operative society being invalid, arbitrary and *ultra vires* Art. 14 of the Constitution.[63] In *Bhopal CCB*, a single judge of Madhya Pradesh High Court held that the dismissed employees of cooperative societies registered under the Madhya Pradesh Co-operative Societies Act 1960, could take recourse to the remedy provided under s 55 of that Act, and not under s 10 of the Industrial Disputes Act. A reference under s 10 of the ID Act was, therefore, incompetent and the award passed in pursuance thereof was a nullity.[64] In *Sagarmal*, the Supreme Court took the same view and held that the provisions of the Industrial Disputes Act did not apply to the employees of co-operative bank.[65]Section 102 of Haryana Cooperative Societies Act 1984, which provides that a dispute between the employee and the society has to be decided by an arbitrator, does not exclude the jurisdiction of the labour court to adjudicate the dispute on a reference made under s 10(1) of the ID Act.[66] In *Bijapur CMPS Union*, the issue before Supreme Court was about the date from which the ouster of jurisdiction of labour courts and tribunals in service disputes between a cooperative society and its employees takes place. The Karnataka Cooperative Societies Act 1959 was amended by Act 19 of 1976, by which service disputes between a cooperative society and its employees was to be referred to the Registrar for adjudication, and there was no specific provision therein to the extent of ousting the jurisdiction of labour courts and industrial tribunals, with the result that the Registrar of Cooperative Societies provided an alternative remedy in addition to the machinery provided under the ID Act. However, the said Amendment of 1976 was neither reserved for, nor received, the assent of President. In the meantime, the said Act was further amended by Act 2 of 2000 specifically excluding the jurisdiction of labour courts and industrial tribunals coupled with a '*non obstante*' clause. Specifically, two questions fell for the consideration of the court.

(1) Whether the jurisdiction of Labour Court under the ID Act, was barred by section 70 of the KCS Act with reference to co-operative societies and if so, from when;

(2) Even if Labour Court had jurisdiction, whether the appellant was entitled to file an application under Section 10(4A) of ID Act in respect of a cause of action which occurred in 1978.

After an analysis of legislative history, Raveendran J (for self and Mathur J) answered question (1) by summarizing the legal position with precision in the following words:

(a) Even though clause (d) was added in section 70(2) with effect from 20.1.1976, section 70(1) did not exclude or take away the jurisdiction of the Labour Courts and Industrial Tribunals under the Industrial Dispute Act to decide an industrial dispute between a Society and its employees. Consequently, even after insertion of clause (d) in section 70(2) with effect from 20.1.1976, the Labour Courts and Industrial Tribunals under the Industrial Dispute Act, continued to have jurisdiction to decide disputes between societies and their employees.

(b) The jurisdiction of Labour Courts and Industrial Tribunals to decide the disputes between co-operative societies and their employees was taken away only when sub-section (1) and sub-section (2)(d) of section 70 were amended by Act 2 of 2000 and the amendment received the assent of the President on 18.3.2000 and was brought into effect on 20.6.2000;

(c) The jurisdiction to decide any dispute of the nature mentioned in section 70(2)(d) of the KCS Act, if it answered the definition of industrial dispute, vested thus :

(i) exclusively with Labour Courts and Industrial Tribunals till 20.1.1976;

(ii) concurrently with Labour Courts/Industrial Tribunals under ID Act and with Registrar under section 70 of the KCS Act between 20.1.1976 and 20.6.2000; and

(iii) exclusively with the Registrar under section 70 of the KCS Act with effect from 20.6.2000.[67] ()

Having stated the legal position thus, the learned judge proceeded to deal with question (2) above, ie, *whether the appellant-workman was entitled to file an application under s 10(4A) in respect of a cause of action that arose in 1978*. This part of the decision has been discussed at the appropriate place in this section as it directly falls under the Karnataka amendment. In *North East Karnataka RTC*, the facts briefly were: a driver of the corporation was dismissed after conducting an enquiry on the ground that while overtaking another bus of the corporation, he hit the hind part of that bus with the result the other bus lost control and hit a tree resulting in the death of 4 passengers and injuries to many others. The labour court ordered reinstatement on the ground that there was no evidence to show that the said driver had not taken reasonable care in driving the bus. The High Court too upheld the award of the labour court. Allowing the appeal and remitting the matter to the labour court, Kapadia J (for self and Pasayat J) observed that the facts show that the offending bus collided with the hind portion of the other bus and the impact of the offending bus was so great that the other bus went and dashed into a tree resulting in injuries to 56 passengers and death of 4 lives. The learned judge directed the labour court to decide, whether in the circumstances of the case, the doctrine of res ipsa loquitur would be applicable or not.[68]

Shops and Establishments Act

A Full Bench of the Madras High Court in *Safire Theatre*, held that s 2A read with s 10 of the Industrial Disputes Act does not fully bar the remedy under s 41 of the Tamil Nadu Shops and Establishments Act 1947. If a decision is rendered under s 41 (2) of the Tamil Nadu Act before the Government had made a reference under s 10 of the Industrial Disputes Act, the decision would be final between the parties. However, before the conclusion of the inquiry under s 41 of the Tamil Nadu Act, if the Government makes a reference under s 10 of the Industrial Disputes Act, the pending proceedings under s 41 of the Tamil Nadu Act could not be continued. Both the remedies are available to a workman but in the alternative.[69] In *Bata India*, a single judge of the Kerala High Court held that the remedy under s 18(2) of the Kerala Shops and Commercial Establishments Act 1960, does not exclude the remedy of a reference under s 10(1) of the Industrial Disputes Act 1947.[70] In *Nirchiliya*, the Supreme Court observed:

> Once remedy could be worked out in either of the forums when the proceeding before the labour court was not continued, in the absence of any specific bar under either the Madras Shops and Establishments Act 1947 or the Industrial Disputes Act against the alternative forum being moved, the jurisdiction of the authority under the Madras Act would not be barred.[71]

The Madras High Court in *TN Chandra*, held that a workman entitled to the benefits of chapter VA of the Industrial Disputes Act, can have such right adjudicated upon even in proceedings under s 41 of the Tamil Nadu Shops and Establishments Act 1947. However, the employee has to satisfy the authority with respect to its entitlement to the benefits of that chapter by establishing that he is a 'workman' and the establishment in which he is employed is an 'industry' within the meaning of Industrial Disputes Act. He has also to establish that he has been in continuous service of the employer for not less than one year as required by s 25B of the Act.[72]

Section 34A of the Banking Companies Act 1949 (Act 10 of 1949)[73]

The only result of s 34A of the Banking Companies Act 1949 is that, in regard to two items,*viz*, secret reserves and provisions, the reasonable quantum which' would be available for taking into account by the adjudicator would be estimated and determined by an expert body which is a governmental authority or practically a department of government, *viz*, the Reserve Bank of India, which is entrusted by law with the duty of maintaining the credit structure of the country. Hence, s 34A of the Banking Companies Act, does not come in the way of effective adjudication by an industrial tribunal. The disputes between the parties in relation either to wages, bonus or other amenities or perquisites which involve financial obligations on the part of the employer remain even after the enactment of s 34A of the Banking Companies Act, with the adjudicator and he alone can determine the rights of the parties subject to the provisions of the industrial law or other relevant legislation, and the relief which he could award to the employees remains the same. The adjudicator alone determines the capacity of the industry to pay or bear the enhanced cost.[74]

Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 (Act 1 of 1972)

In *Daji M Surve*, the Bombay High Court held that the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 bars a reference of the industrial dispute with respect to a matter which the adjudicatory authorities under that Act are seized.[75] In *Cipla*, the Supreme Court held that the industrial court and labour court constituted under MRTU and PULP Act would not have jurisdiction to entertain disputes on behalf of contract workers and the right forum would be the labour court/industrial tribunal constituted under the Industrial Disputes Act, and that such disputes could only be adjudicated upon in a reference made under s 10 of the ID Act.[76] This view was reaffirmed in *Vividh Kamgar Sabha.*[77]

Civil Suits

Section 9 of the Code of Civil Procedure,1908 provides:

> **S. 9.Courts to try all civil suits unless barred.—**The courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
>
> *Explanation I.*—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.
>
> *Explanation II.*—For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in *Explanation* I or whether or not such office is attached to a particular place.

The principles relating to the jurisdiction of ordinary civil courts with respect to matters which are entrusted to special tribunals constituted by the legislature have been summed up in *Mulla's Code of Civil Procedure*, as follows:

(i) Where the statute re-enacts a right existing at common law and provides a special form of remedy therefor, the jurisdiction of the civil court to deal with the matter is not excluded unless the statute says so expressly or by necessary implication.

(ii) So also where the statute creates a new right but provides no special remedy therefor, it can be enforced in the ordinary civil courts.

(iii) However, where a statute creates a new right not existing at common law and specifies a particular mode in which it is to be enforced, that bars by implication, the jurisdiction of civil courts.

(iv) Even when the jurisdiction of civil courts is excluded, they would have jurisdiction to examine into cases where the provisions of the statute have not been complied with or where the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure, or of natural justice.[78]

These principles are based on the celebrated dictum of Willies J in *Wolverhampton*, wherein the learned judge stated the law thus:

> There are three classes of cases in which a liability may be established and founded upon a statute. One is, where there was liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there unless the statute contained words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there the party can only proceed by action at common law. But there is a third class, *viz*, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it...The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class.[79]

With respect to Indian statutes creating special liability and providing for procedures and remedies, this statement of law was adopted by the Privy Counci1.[80] The question of the exclusion of jurisdiction of the civil courts by special statutes has also been the subject-matter of a number of decisions of the Supreme Court.[81] In *Pabbojan Tea*, dealing with the question of fixation of minimum-wages, the Supreme Court observed:

> The exclusion of the jurisdiction of the civil courts is not to be readily inferred, but such exclusion must either be explicitly expressed or dearly implied and even if jurisdiction was excluded, the civil courts would still have jurisdiction to examine into cases where the provisions of the Act had not been complied with, or the statutory tribunal had not acted in conformity with the fundamental principles of judicial procedure.[82]

On an analysis of the provisions of the Act, the court held that the civil court has jurisdiction to entertain suits for declaration that the orders of the authority under the Minimum Wages Act were illegal and void and without jurisdiction and for further declaration that the employees (sub-normal workers) were not entitled to fullminimum wages without performing a day's task or without working the prescribed number of hours. Industrial legislation is enacted with the object of ensuring industrial peace and harmony and preventing the exploitation of labour. The object and purpose of the Industrial Disputes Act is settlement and investigation of industrial disputes with a view to minimise industrial strife and to promote industrial peace and harmony and have the industrial disputes decided by special forums, provided in the Act, as expeditiously as possible. The whole idea underlying the Industrial Disputes Act 'has been to provide a speedy, inexpensive and effective forum for resolution of disputes arising between workmen and their employers. The idea has been to ensure that the workmen do not get caught in the labyrinth of civil courts with their layers upon layers of appeals and revisions and the elaborate procedural laws, which the workmen can ill afford. The procedures followed by civil courts, it was thought, would not facilitate a prompt and effective disposal of these disputes. As against this, the courts and tribunals created by the Industrial Disputes Act are not shackled by these procedural laws nor is their award subject to any appeals or revisions. Because of their informality, the workmen and their representatives can themselves prosecute or defend their cases. These forums are empowered to grant such relief as they think just and appropriate. They can even substitute the punishment in many cases. They can make and remake the contracts, settlements, wage structures and what not. Their awards are no doubt amenable to jurisdiction of the High Court under Art. 226 as also to the jurisdiction of this court under Art. 32, but they are extraordinary remedies subject to several self-imposed constraints. It is, therefore, always in the interest of the workmen that disputes concerning them are adjudicated in the forums created by the Act and not in a civil court. That is the entire policy underlying the vast array of enactments concerning workmen. This legislative policy and intendment should necessarily weigh with the courts in interpreting these enactments and the disputes arising under them'.[83]

The Act does not contain any provision expressly barring the jurisdiction of the civil courts to entertain disputes which may fall within the ambit of an 'industrial dispute' or within the provisions of chapters 5A or 5B of the Act. These chapters specifically confer certain special rights on the workmen which are not available to them in common law or under any other statute. Furthermore, it is now well established that an adjudicatory authority under the industrial law is not bound by the contract between an industrial employer and his workmen. It has the discretion to modify or extend an existing agreement or make a new one between the parties.[84]Though there is nothing in the Act vesting such jurisdiction in the adjudicatory authorities, it has been conferred on them by the dicta of the Supreme Court. In exercise of this jurisdiction, the industrial tribunals can award re-instatement of a dismissed employee, reframe wage-structure, award various

allowances, fringe benefits, bonus and gratuity etc. In such cases, civil courts will have no jurisdiction to grant a decree for enforcing such rights or to grant injunction to prevent the breach of any such right. However, in cases where the 'industrial dispute' is for the purpose of enforcing any right, obligation or liability under general law or the common law and not a right, obligation or liability created by the industrial adjudication, or under the Act, then the alternative forums are there, giving an election to the suitor to choose his remedy either by moving the machinery under the Act or approach the civil courts. There has been a considerable divergence of opinion in the dicta of various High Courts on the question of the ouster of jurisdiction of civil courts with respect to industrial disputes.[85] In *PremierAutomobiles*, the Supreme Court found that the disputes in the case involved adjudication of rights/obligations by the Industrial Disputes Act. However, in view of the confusion created by the conflicting dicta of various High Courts, the court considered several decisions of the English and Indian courts on the subject and enunciated the following four principles in para 23 of its opinion:

> (1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil court.
>
> (2) If the dispute is an industrial dispute arising out of a right or liability under the general or common taw and not under the Act, the jurisdiction of the civil court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy. ... There will hardly be a dispute which will be an 'industrial dispute' within the meaning of section 2(k) of the Act and yet will be one arising out of a right or liability under the general or common law only and not under the Act.
>
> (3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.
>
> (4) If the right which is sought to be enforced is a right created under the Act such as chapter 5A then the remedy for its enforcement is either section 33C or the raising of an industrial dispute, as the case may be.[86]

The learned judge pointed out that a contingency might arise in regard to the dismissal of an unsponsored workman which would be an 'industrial dispute' in view of s 2A and as such civil courts would hardly have an occasion to deal with cases falling under this principle. In this connection, the court clearly pointed out that it is plain that the suitor cannot have both the remedies and he is to choose one or the other. In *TI Aron*, termination of the service of the employee was declared to be a nullity in the eyes of law by a civil court in a suit filed under s 9 of the Code of Civil Procedure as it was in flagrant violation of the statutory provisions. The suit was held to be maintainable under principle no 2 stated above. Sabhahit J of the Karnataka High Court pointed out that if the suit was for reinstatement, it could be instituted only under the provisions of the Industrial Disputes Act, as such, it would have fallen within principle No 3 and not principle no 2 as in *Premier Automobiles*. The learned Judge went on to observe:

> Thus, considering in this perspective, it is obvious that the impugned order of termination of the Karnataka State Road Transport Corporation, which was earlier known as 'TheMysore State Road Transport Corporation', which is a statutory Corporation, is susceptible to attack as having been in flagrant violation of the provisions made in the statute and as such, the termination or discharge is a nullity in the eye of law. Such a suit arises out of the general law of the land and is maintainable in a civil court. Such a dispute may also be brought up under the Industrial Disputes Act. (para 19)...Thus, considered as a whole, I am satisfied that the dispute that arises on the facts of the present case is of such a nature as can be taken cognizance of under section 9 of the CPC. There is no implied bar of jurisdiction in view of the provisions of the Industrial Disputes Act as the relief claimed is not one that arises exclusively out of the provisions of the Industrial Disputes Act but is of a general nature arising out of the general law, the cognizance of which can be taken under section 9 of the CPC.[87] (para 26).

The distinction drawn by Sabhahit J, between general law and special law is artificial, unwarranted and is out of context. The further distinction drawn by the learned judge between a statutory corporation and a non-statutory corporation is equally irrelevant, for the purpose of determining the question relating to the jurisdiction of civil courts, so long as it is admitted that the employee is a 'workman' and what was sought to be adjudicated is an 'industrial dispute' within the meaning of ss 2(s) and 2(k), respectively, of the ID Act. In the face of a binding ruling given in *Premier Automobiles*, which clearly laid down that the jurisdiction of civil courts stands ousted by implication, to hold that the dispute could be taken cognisance of under s 9 of Code of Civil Procedure, is misconceived and wrong. In *Bharat Petroleum*, the Bombay High Court held that the obligations of workmen or trade union contemplated by s 22 are obligations in realm, enforceable by the society at large. The obligation not to go on strike is prescribed under a special statute, namely, Industrial Disputes Act. The only manner in which the statute contemplates their enforcement is by way of penalties prescribed in s 26, ie, imprisonment and/or fine. A civil suit to restrain the employees from going on a strike, irrespective of whether the proposed strike is legal or illegal under a special statute, cannot be brought in a civil court.[88] However, in *IOC*, the Delhi High Court granted an interim injunction under O 39, r 3 of the CPC against the employees from staging the proposed

strike, in view of the fact that the conciliation officer issued notices to the parties and that the demands were under active consideration, and a strike would cause irreparable loss and injury not only to the employer but also to the public at large.[89]

A cursory glance of the Act would show that the only rights and obligations it creates are under chs VA and VB.[90] The claims of workmen for reinstatement, wage-rise, dearness allowance and other fringe benefits etc though recognised by industrial adjudication, are not created by the Act. Such claims, being *de hors*, the contract would however, be beyond the jurisdiction of the civil courts. Hence, by necessary implication, the jurisdiction of the civil courts is barred to give such reliefs. It is, therefore, suggested that principle no 3 should be slightly amended to read: 'If the industrial dispute relates to the enforcement of a right or an obligation created under the Act or by industrial adjudication, then the only remedy available to the suitor is to get an adjudication under the Act'. In *Jitendra Nath Biswas*, the Supreme Court held that the relief of reinstatement and back wages is available under the Industrial Disputes Act and cannot be granted by civil court, and, therefore the jurisdiction of civil court is excluded.[91] A Full Bench of the Punjab and Haryana High Court in *Sukhi Ram*, on the application of principle no 2 held that the civil court has jurisdiction to entertain the question whether the termination of the service of a workman is void, illegal, *ultra vires* and against the principles of natural justice. [92] From the facts stated in the judgement it is not clear whether the consequential relief sought by the plaintiff was for damages or for reinstatement and back wages. It may be pointed out that the civil court undoubtedly, will have the jurisdiction to give former relief but to award the latter relief would be beyond its jurisdiction as such relief could only be awarded by an industrial tribunal or labour court.

A single judge of the Orissa High Court in the *Orissa RTC*, held that the dispute about the legality of retrenchment of a workmen being an 'industrial dispute', the remedy for which has been specifically provided in the Act, is not cognisable by the civil court.[93] Likewise, a single judge of the Kerala High Court held that a dispute relating to the question, as to whether the transfer of a workman is *mala fid* e by way of victimisation and unfair labour practice, cannot be of a civil nature because law does not recognise any limitations on the powers of employers to transfer their employees on the ground of *mala fide* or unfair labour practice. However, there is express provision in s 25T read with item 7 of the fifth schedule to the Industrial Disputes Act regarding the *mala fide* transfer of a workman from one place to another. The proper forum for challenging the transfer on the ground of *mala fide*, victimisation and unfair labour practice is, therefore, under the Industrial Disputes Act and not the civil court.[94] This decision was followed by a single judge of the Kerala High Court in *Mookan, Major*.[95] In *VA Damodaran*, though in form the prayer in the suit was for declaring the age of the plaintiff and that he was entitled to continue in service till a certain date and for granting a permanent injunction restraining the defendants in any way interfering with the plaintiffs service by way of retirement, in effect, the plaintiff had agitated that the action of the defendant in retiring him from service was invalid as it was in contravention of the Standing Orders which fixed the superannuation age at 58 years. Thus, the relief of declaration that was claimed was not only regarding declaration of the age bur it was regarding contravention of the Standing Orders also. A single judge of the Madras High Court held that the civil court could not legitimately have jurisdiction to entertain and decide the suit because the relief claimed through the suit was in substance regarding the legality of superannuation under the Standing Orders.[1]

A number of mixed questions of law and fact have to be decided before the issue of jurisdiction can be properly disposed of In order to determine the question whether the suit is triable by the civil court or the industrial tribunal, therefore, the following questions have to be determined: (i) whether it is an industrial dispute; (ii) whether it is for the enforcement of a right under the Industrial Disputes Act or a right or obligation under the general or common law. The Calcutta High Court held that a suit to declare suspension of an industrial Worker as void and illegal is not barred by the provisions of the Industrial Disputes Act particularly when the matter of suspension has not acquired the character of an industrial dispute.[2]Likewise, a suit by a workman for damages for wrongful dismissal before the insertion of s 2A, could not be ousted by the Industrial Disputes Act.[3]The question whether a dispute is an 'industrial dispute' or not is a jurisdictional issue upon the determination of which will depend the jurisdiction of the tribunals under the Act under principle no 1 as enumerated in *Premier Automobiles*. Hence, it is open to an aggrieved party to approach the civil court for deciding this question. Alternatively, the aggrieved party may take the preliminary objection before the tribunal that the dispute in question is not an 'industrial dispute'. If the dispute is held not to be an 'industrial dispute', either by the civil court or the tribunal, then the industrial tribunal will have no jurisdiction to adjudicate upon the dispute and it is only the civil court that can decide it. In *Rajasthan SRTC*, a three-judge Bench of the Supreme Court noticed the controversy arising out of principle no 2 and particularly the qualifying statement in para 24 of the judgment in *Premier Automobiles* case (supra). According to principle no 2, 'if the dispute is an 'industrial' dispute arising out of a right or liability under the general or common law and not under the Industrial Disputes Act, the jurisdiction of the civil court is alternative and it is left to the person concerned either to approach the civil court or to have recourse to the machinery provided by the Industrial Disputes Act.' After analysing the earlier dicta of the court and the various High Courts, Jeevan Reddy J, reiterated the law on the subject as follows:

(1) Where the dispute arises from general law of contract, ie, where reliefs are claimed on the basis of the general law of contract, a suit filed in civil court cannot be said to be not maintainable, even though such a dispute may also constitute an 'industrial dispute' within the meaning of section 2(k) or section 2A of the Industrial Disputes Act 1947.

(2) Where, however, the dispute involves recognition, observance or enforcement of any of the rights or obligations created by the Industrial Disputes Act, the only remedy is to approach the forums created by the said Act.

(3) Similarly, where the dispute involves the recognition, observance or enforcement of rights and obligations created by enactments like Industrial Employment (Standing Orders) Act 1946—which can be called 'sister enactments' to Industrial DisputesAct—and which do not provide a forum for resolution of such disputes, the only remedy shall be to approach the forums created by the Industrial Disputes Act provided they constitute industrial disputes within the meaning of section 2(k) and section 2A of Industrial Disputes Act or where such enactment says that such dispute shall be either treated as an industrial dispute or says that it shall be adjudicated by any of the forums created by the Industrial Disputes Act. Otherwise, recourse to civil court is open.

(4) It is not correct to say that the remedies provided by the Industrial Disputes Act are not equally effective for the reason that access to the forum depends upon a reference being made by the appropriate government. The power to make a reference conferred upon the government is to be exercised to effectuate the object of the enactment and hence not unguided. The rule is to make a reference unless, of course, the dispute raised is a totally frivolous one *ex facie*. The power conferred is the power to refer and not the power to decide, though it may be that the government is entitled to examine whether the dispute is *ex facie* frivolous, not meriting an adjudication.

(5) Consistent with policy of law aforesaid, we commend to the Parliament and the state legislatures to make a provision enabling a workman to approach the labour court/industrial tribunal directly ie, without the requirement of a reference by the government in case of industrial disputes covered by section 2A, Industrial Disputes Act. This would go a long way in removing the misgivings with respect to the effectiveness of the remedies provided by the Industrial Disputes Act.

(6) The certified Standing Orders framed under and in accordance with the Industrial Employment (Standing Orders) Act 1946 are statutorily imposed conditions of service and are binding both upon the employers and employees, though they do not amount to 'Statutory Provisions'. Any violation of these Standing Orders entitles an employee to appropriate relief either before the forums created by the Industrial Disputes Act or the civil court where recourse to civil court is open according to the principles indicated herein.

(7) The policy of law emerging from Industrial Disputes Act and its sister enactments is to provide an alternative dispute resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and unencumbered by the plethora of procedural laws and appeals upon appeals and revisions applicable to civil courts. Indeed, the powers of the courts and tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute.[4]

The principles enunciated by Jeevan Reddy J in the *Rajasthan SRTC* and, in particular, principle (6), suffer from a host of inconsistencies. In the first place, what is meant by the observation: *otherwise, recourse to civil court is open' as enunciated in (3) above?* Is there a single right or obligation created by the Industrial Employment (Standing Orders) Act 1946, in respect of which, civil courts can exercise jurisdiction either concurrently with, or to the exclusion of, labour courts and industrial tribunals created by the ID Act? This way principle (3) breaks open a narrow channel for numerous litigations. A look at entry 1 of Sch II to the ID Act, ie, '*the propriety or legality of an order passed by an employer under the Standing Orders*' reveals the fact that every action taken under Model Standing Orders or Certified Standing Orders falls within the jurisdiction of labour courts and industrial tribunals. Again, entry 6 of Sch III and IV refers to '*shift working otherwise than in accordance with Standing Orders*', in respect of which an employer is required to give a notice of change under s 9A of the Act, falls within the jurisdiction of industrial tribunals. *Secondly*, at a very general level, *can the Apex Court single out at least one aspect of standing orders, which is incapable of being comprehended by the definition of 'industrial dispute' in s. 2(k) in respect of which, a special remedy has not been provided under IDA?* The expressions - *employment, non-employment, terms of employment and conditions of labour* - appearing in the definition clause are so comprehensive and of such amplitude that they take into their fold every conceivable aspect of employment relationship from cradle to grave. A glance at Schs II, III & IV reveals the fact that whether it is a right or obligation created under IDA or its sister enactments like the IESOA, or even those created under several other pieces of labour legislations such as PBA, FA, EPFA, PGA—has been brought within the jurisdiction of Labour Courts and Industrial Tribunals. That being the legal position, where is the question of seeking alternative remedy in civil courts? *And lastly*, the further observation made in principle (6) above, ie, '*Any violation of these Standing Orders entitles an employee to appropriate relief either before the fora created by the Industrial Disputes Act or the civil court where recourse to civil court is open according to the principles indicated herein*' is even worse, as it is capable of throwing the lawyer and the

litigant alike into total confusion, given the fact that taking recourse to a civil court is not the same thing as seeking the special remedy provided under the ID Act. Once the civil court is allowed to entertain a suit, the rigidity of Code of Civil Procedure enters into the litigation process. A collateral consequence of such an interpretation is that the proceeding acquires the character of civil adjudication, with the further implication that the civil court reaches the limit of its power the moment it enforces the contract made by the parties, and *cannot travel one inch beyond*. On the contrary, the very concept of industrial adjudication rests on the proposition that the adjudicator can extend an existing agreement or make a new one or create new obligations or modify the old ones. *Viewed in this perspective, where does the jurisdiction of civil courts stand? RSRTC* made the legal position murkier, quite contrary to its ostensible purpose of clarifying and explaining the ratio of *Premier Automobiles.* This decision is replete with equivocal and inconsistent observations made by the learned judge, which reflect more his confusion than clarity as to the relative turf of ID Act and civil courts, more so, in the face of an authoritative decision in *Premier Automobiles. What was the provocation for the learned judge to indulge in a creative exercise of this kind in a vital matter which was so conclusively decided and was in force for two decades!?* If a judge of any court at any level is faced with the dilemma of choosing between *Premier Automobiles* and *RSRTC*, he should invariably choose the former and reject the latter without a second look as being perverse and misconceived.[5] In *Apollo Tyres*, a workman filed a civil suit seeking several reliefs including (i) a declaration that he was a workman, (ii) that his transfer to West Bengal was illegal; (iii) restraining the management from compelling him to accept the promotion; (iv) restraining the management from interfering with his legitimate right to perform his duties as a general secretary of the trade union; and (v) granting the cost of suit. The trial court allowed the objection on jurisdiction of the civil court filed by the management and dismissed the suit filed by the workman. The appellate authority reversed the decree of the trial court and ruled that it had jurisdiction to try the suit. In the Civil Miscellaneous Appeal by the company, the High Court confirmed the order of the first appellate authority. Setting aside the orders passed by the High Court and the first appellate authority, a Bench comprising Katju and Dattu JJ held:

> On the facts of the case, we are clearly of the view that the suit filed by the plaintiff was barred by section 14(b) of the Specific Relief Act, 1963 which states that a contract of personal service cannot be enforced in a civil suit. In our opinion, if the plaintiff had any grievance and if he is a workman as defined in the Industrial Disputes Act, 1947, he should have raised an industrial dispute and sought relief under the Industrial Disputes Act, 1947 before the Labour Court or Industrial Tribunal. There are many powers which the Labour Court of Industrial Tribunal enjoy which the Civil Court does not enjoy eg the power to enforce contracts of personal service, to create contracts, to change contracts etc. These things can only be done by the Labour Court or Industrial Tribunal but cannot be done by a civil Court. A contract for personal service includes all matters relating to the service of the employee eg confirmation, suspension, transfer, termination etc. (para 12)…In our opinion, the reliefs claimed by the plaintiff were clearly seeking enforcement of a contract of personal service and the civil Court has no jurisdiction to grant such reliefs as held by this Court in the case of *Pearlite Lioners (P) Ltd v Manorama Sirsi*.[6] The High Court and the first appellate Court were clearly in error in holding that the civil Court had jurisdiction in the matter and the trial Court was right in holding that the civil Court had no jurisdiction and rightly dismissed the suit filed by the plaintiff. (para 13) … Accordingly, this appeal is allowed, the impugned judgment of the High Court and the first appellate Court are set aside and that of the trial Court is restored.[7] (para 14)

It goes to the credit of the learned judges, Markandey Katju and HL Dattu JJ that they placed the legal position relating to a right / duty / obligation created under the industrial law and the remedy provided thereunder in the correct perspective. This decision exposes the half-tones that surfaced in *Rajasthan SRTC*, which has been analysed at some length in the preceding paragraph. There is practically no right relating to a '*workman*' employed in an '*industry*', which is not capable of being grasped by the definition of '*industrial dispute*' in s 2(k) of the ID Act. The said definition is so exhaustive and inclusive that it indeed is impossible to envisage a right created even by common law in respect of an industrial workman, for the enforcement of which the Industrial Disputes Act is silent thereby driving a workman to seek remedy in a civil court. It is once again submitted that *Apollo Tyres* was rightly decided in contradistinction to *Rajasthan STRC*, which was decided in a casual and callous manner.

In *Nizam Sugars*, the delinquent employee filed a suit for declaration that the domestic inquiry conducted by the employer was void and, for permanent injunctionrestraining the employer from proceeding thereafter. The employer sought time for filing the counter and in the meanwhile terminated the services of the delinquent. In this fact situation, a single judge of the Andhra Pradesh High Court held that the suit was not maintainable in law because the employee sought to enforce his right created under the Industrial Disputes Act and his remedy was only under that Act.[8] The civil court, *prima facie*, has no jurisdiction to decide the validity or otherwise of the order of termination and while deciding the issue whether the plaintiff has a *prima facie* case or not, the trial court could also consider whether it lacks or not, the inherent jurisdiction to try the suit. The dismissal of the employee during the pendency of the suit affect the jurisdiction of the civil court to try the suit covered by s 2A of the Act which provides a forum for settlement of individual dispute covered by s 2A particularly when the court should be satisfied that a strong *prima facie* case has been made out by the plaintiff, including the question of maintainability of the suit. The dismissal of a suit by the civil court on the ground that it had no jurisdiction as the matter

was in the realm of industrial adjudication, will not bar adjudication by an adjudicatory authority under the Industrial Disputes Act.[9] Likewise, a dispute relating to transfer of employees on the *mala fide* ground of victimisation and punishment would constitute an industrial dispute, therefore, a civil suit challenging such transfer is not maintainable.[10] In *Road Transport Undertakings*, the facts were: a few workers indulged in violent demonstration and the employer filed a suit for the issue of a perpetual injunction which was contested by the workman on the ground that the civil court had no jurisdiction to entertain and decide the suit for grant of an injunction because the alleged acts of the Workers amounted to unfair 'labour practice' within the meaning of s 2(ra) of the Act, and that, therefore, it was only an industrial tribunal which was entitled to take cognizance of such matters. It was further contended that the civil court was debarred from taking cognizance in respect of unfair 'labour practice' ever though it is an offence since s 34 of the Act bars cognizance by the court. A single judge of the Delhi High Court held that s 34 was in respect of taking cognizance by the criminal court and did not debar a civil court from taking cognizance of a matter of civil nature.[11] In *Chandrakant Nikam*, Pattanaik J, speaking for another three-judge Bench, observed:

> It may be borne in mind that the Industrial Disputes Act was enacted by the Parliament to provide speedy, inexpensive and effective forum for resolution of disputes arising between workmen and the employers, the underlying idea being to ensure that the workmen do not get caught in the labyrinth of civil courts which the workmen can ill-afford, as has been stated by this Court in *Rajasthan State Road Transport Corporation* case (supra). It cannot be disputed that the procedure followed by civil courts is too lengthy and consequently, is not an efficacious forum for resolving industrial disputes speedily. The power of industrial courts also is wide and such fora are empowered togrant adequate relief as they think just and appropriate. It is in the interest of the workmen that their disputes, including the dispute of illegal termination, are adjudicated upon by an industrial forum...In the aforesaid premises and having regard to the relief sought for in the suits filed in the civil court, we have no manner of hesitation to come to the conclusion that in such cases the jurisdiction of the civil court must be held to have been impliedly barred and the appropriate forum for resolution of such dispute is the forum constituted under the Industrial Disputes Act...[12]

While holding that the jurisdiction of civil courts stood barred by implication, Pattanaik J did not dilate upon the other part of the decision rendered in *Rajasthan SRTC* to the effect that the jurisdiction of civil courts was not barred in respect of rights and obligations created under the Industrial Employment (Standing Orders) Act 1946. There is an urgent need to review and restate the legal position by expressly barring the jurisdiction of civil courts as laid down in *Premier Automobiles*. In *Golden Hills Estates*, a single judge of the Madras High Court held that a civil suit for declaration that termination of the services of a workman was null and void and that he continued in service was not maintainable.[13] In a case where the civil court recorded a finding that it has jurisdiction to try a case of dismissal of a workman, on the ground that the right of the workman did not arise solely under the industrial law but also under the general law, a single Judge of Karnataka High Court held that, leaving the correctness of the said finding aside, once the workman had elected to seek remedy by filing a civil suit and lost the case in the civil court, he was bound by the finding that the domestic enquiry held as well as the dismissal were valid, he would not thereafter be permitted to agitate the same issue by raising an industrial dispute under the ID Act. The fact that a competent court, on his election of the remedy, decided the issue operates as *res judicata*, and the labour court cannot retry the same issue.[14] A dismissed workman of Punjab Roadways, who, having filed a civil suit and lost, raised an industrial dispute, the Punjab and Haryana High Court held that he was debarred from agitating the dispute after he had failed in civil court on the principle of *res judicata*.[15] The NCL-II categorically recommended that the jurisdiction of civil courts should be expressly ousted in respect of all matters for which provision is contained in the relevant labour laws.[16] In *BS Bharti*, the facts briefly were: The respondent-workman was engaged as a fitter on a daily basis from 1971 to April 1973, whereafter he was treated as a probationer for an initial period of six months at the end of which, his probation was extended by another three months. On his services not being found satisfactory, his probation was terminated on 24 January 1974. The government refused to refer the dispute for adjudication. The appellant thereafter filed a suit in the civil court, which decreed the suit of the appellant. Aggrieved by the decree, the company filed a regular first appeal before the High Court, which following the judgment in *RSRTC*, allowed the appeal and set aside the judgment passed by the trial court. Upholding the order of High Court, Hegde J (for self, Sinha and Mathur JJ) observed:

> In cases where the application for reference under the provisions of the Industrial Disputes Act has been rejected by the appropriate authority, the aggrieved party should pursue the same by way of a writ petition and if possible get the dispute referred under the Industrial Disputes Act. If he fails to do so even after such attempt or fails to make such an attempt, the directions issued in para 37 of the above judgment in the case of *Rajasthan State Road Transport Corporation* (supra) does not apply…. In the said view of the matter, we find no reason to interfere with the judgment of the High Court.[17]

In *Kehar Singh*, HK Sema J (for self and AR Lakshmanan J) dealt with the question of the jurisdiction of civil courts. The following observations are self-explanatory:

> In view of the order that we propose to pass, it may not be necessary to recite all facts leading to the filing of the present appeal. The respondent herein was working as Conductor in the Haryana Roadways, Sirsa Depot. He was dismissed from service. ... Aggrieved by the order of dismissal, he preferred an appeal before the Additional Transport Commissioner which was dismissed on 29-6-1995. Aggrieved thereby, the respondent filed civil suit ... seeking a decree of declaration ... The trial Court framed as many as 7 issues. One of the important issue framed was issue No. 6, whether the Civil Court has got jurisdiction to try the present suit. We are dismay (*sic*) to note that no finding has been recorded on this issue by the Trial Court. The Trial Court, however, proceeded to examine the case on merits, without determining the jurisdiction of the court. It is now well established principle of law that a decree without the jurisdiction is a nullity. Unfortunately, all the Courts below including the High Court has failed to notice this important question of law. (para 4) ... We repeatedly made query from the learned counsel for the respondent as to whether the finding has been recorded by the Trial Court regarding the jurisdiction of the Civil Court. We received no answer. (para 5) ... In a recent judgment of this Court in the case of *Rajasthan State Road Transport Corpn v Zakir Hussain* [18] in which my brother Dr Justice AR Lakshmanan was party, this Court after considering the various Judgments including the judgment referred above, has come to the conclusion that the Civil Court has no jurisdiction to entertain such suit. (para 9) ... In the view that this Court has been taking consistently, the Civil Court has no jurisdiction to entertain such suit and any decree passed by the Civil Court without jurisdiction, is a nullity. The High Court has failed to notice the position of law enunciated by this Court in catena of decisions.[19] (refer para 10)

Once the original decree itself has been held to be without jurisdiction and hit by the doctrine of *coram non judice*, there would be no question of upholding the same merely on the ground that the objection to the jurisdiction was not taken at the initial, first Appellate or second Appellate stage. It must, therefore, be held that the civil court in this case had no jurisdiction to deal with the suit and resultantly the judgments of the Trial Court, First Appellate Court and the Second Appellate Court are liable to be set aside for that reason alone and the appeal is liable to be allowed. In view of this verdict of ours, we have deliberately not chosen to go into the other contentions raised on merits.[20] In a case involving a conductor, the civil court entertained the suit and decreed it, despite the employer raising an objection to the effect that the civil court had no jurisdiction. The appellate court too proceeded blindfold and dismissed the appeal filed by the management. What is worse, the High Court of Rajasthan, in second appeal, treaded the same path as the District Judge and dismissed the appeal. *Is it possible that the learned judges at all the three levels of Trial Court, District Court and High Court were operating from a position of abject ignorance of the rudimentary legal principles? Assuming that they are, as reflected in their decisions, should they not apply their mind to the averments of the management in its objection and come to a reasoned conclusion? If this is not a callous, indifferent and reckless manner of handling a case, on the part of the judges at all the three levels, what else could it be?* A bus conductor is very much a workman within the meaning of s 2(s) of the ID Act. The Corporation itself is an 'industry' within the meaning of s 2(j). And finally, the dispute relating to dismissal falls within the subject matter 'non-employment' within the meaning of 'industrial dispute' under s 2(k). Once these three parameters are satisfied, the dispute becomes an industrial dispute, which can only be adjudicated in the remedy and manner provided in the ID Act. *Could it be said that the learned judges could not grasp these elementary aspects, which even a student of labour law in a graduate school could very well grasp?* Quashing the irresponsible decisions handed down right from the Trial Court up to the High Court, Lodha J (for self and Raveendran J) observed:

> The case of the respondent as set up in the plaint, therefore, is that in the absence of departmental enquiry as contemplated in Standing Orders, the order of dismissal is bad in law. It is true that respondent pleaded that he has been dismissed from service without affording any opportunity of defence and hearing and in breach of principles of natural justice but the said ... plea has to be understood in the backdrop of his pleading that the dismissal order has been passed contrary to Standing Orders without holding any departmental enquiry. The legal position that Standing Orders have no statutory force and are not in the nature of delegated/subordinate legislation is clearly stated by this Court in *Krishna Kant*.[21] In that case (*Krishna Kant*), this Court while summarizing the legal principles in paragraph 35(6) stated that the certified Standing Orders framed under and in accordance with the Industrial Employment (Standing Orders) Act, 1946 are statutorily imposed conditions of service and are binding both upon the employers and employees, though they do not amount to 'statutory provisions' and any violation of these Standing Orders entitles an employee to appropriate relief either before the forum created by the Industrial Disputes Act or the civil court where recourse to civil court is open according to the principles indicated therein. In *Bal Mukund Bairwa* (2) (2009 AIR SCW 2566), in para 37 of the report, the position has been explained that if the infringement of the Standing Orders is alleged, the civil court's jurisdiction may be held to be barred but if the suit is based on the violation of principles of common law or constitutional provisions or on other grounds, the civil court's jurisdiction may not be held to be barred. In our opinion, nature of right sought to be enforced is decisive in determining whether the jurisdiction of civil court is excluded or not. In the instant case, the respondent who hardly served for three months, has asserted his right that the departmental enquiry as contemplated under the Standing Orders, ought to have been held before issuing the order of dismissal and in absence thereof such order was liable to be quashed. Such right, if available, could have been enforced by the respondent only by raising an industrial dispute and not in the civil suit. In the

circumstances, it has to be held that civil court had no jurisdiction to entertain and try the suit filed by the respondent.[22]

The above case was rightly decided, but the reliance placed by the learned judge on *Krishna Kant*, with all the horrors that beset the reasoning process therein, is certainly misconceived for the reason that the said decision is a poor representative of sound judicial thought on the question of '*implied ouster*' of the jurisdiction of civil courts in the realm of industrial disputes.

SUB-SECTION (1)(A): DISPUTES INVOLVING QUESTIONS OF NATIONAL IMPORTANCE OR DISPUTES RELATING TO ESTABLISHMENTS SITUATED IN MORE THAN ONE STATE

Sub-section (1A) empowers the Central Government to refer an 'industrial dispute' or any matter appearing to be connected with or relevant to that dispute in the second or Third Schedule to a national tribunal for adjudication irrespective of the fact whether or not it is the 'appropriate government' in relation to that dispute. Under this sub-section, the Central Government is to form its opinion merely on the question as to whether an industrial dispute exists or is apprehended. However, before the Central Government can make a reference under this sub-section, it must have formed its opinion that:

(1) there is a dispute which satisfies the requirement of an industrial dispute as defined in section 2(k).

(i) such industrial dispute exists or is at least apprehended at the time of making the reference;

(ii) such dispute

(a) involves any question of national importance; or

(b) is of such a nature that industrial establishments situated in more than one state are likely to be interested in, or affected by such dispute, and that

(2) the dispute should be adjudicated upon by a national tribunal.

The opinion of the Central Government that these conditions exist is a pre-condition to the making of a reference to the national tribunal.[23] If any of these conditions does not exist, the reference to the National Tribunal will not be justified. Subject to these limitations and also the further requirement of acting *bona fide*, the discretion of the government in making the order of reference is unreviewable. For making reference with respect to inter-state industrial establishments, the discretion of the government has been made very wide. The legislature has used the words 'industrial establishments situated in more than one state are likely to be interested in or affected by, such dispute'. For exercise of power under this sub-section, therefore it is not necessary that the inter-state establishments should be 'affected', but it is sufficient even if they are 'likely to be interested' in the dispute proposed to be referred to the National Tribunal. The words 'interested' or 'affected' cannot be equated. There is a difference in the import of the words 'interested' and 'affected'. For instance, the union which sponsors the cause of an individual workman is 'interested' in the dispute but the workmen who are the members of the union are not necessarily 'affected' by the dispute.[24]Section 10(6) divests a labour court or an industrial tribunal of the jurisdiction to adjudicate upon any matter pending adjudication before it after the Central Government has made a reference of that matter to the National Tribunal under this sub-section. The words 'at any time' used in sub-s (1A) read with sub-s (6) indicate that a reference by the Central Government to National Tribunal can be made even after the matter has been referred to a labour court or an industrial tribunal under s 10(1) by the 'appropriate government'. It is now well-settled that the appropriate government has no power to cancel or supersede a reference made by it under s 10(1) of the Act. However, it is obvious that the reference made by the appropriate government under s 10(1) can be superseded by a reference made by the Central Government in exercise of its power under sub-s (1A) to a national tribunal.

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1 Subs by Act 18 of 1952, s 3, for "If any industrial dispute exists or is apprehended, the appropriate Government may" (wef 4-3-1952).

2 Subs by Act 36 of 1956, s 7, for cl (c) (wef 10-3-1957).

3 Subs by Act 36 of 1956, s 7, for 'Provided that' (wef 10-3-1957).

4 Ins by Act 46 of 1982, s 8 (wef 21-8-1984).

5 Ins by Act 36 of 1956, s 7 (wef 10-3-1957).

6 Subs by Act 36 of 1956, s 7, for 'or tribunal' (wef 10-3-1957).

7 Ins by Act 46 of 1982, s 8 (wef 21-8-1984).

8 Subs by Act 36 of 1956, s 7, for 'or tribunal' (wef 10-3-1957).

9 Ins by Act 18 of 1952, s 3 (wef 4-3-1952).

10 Subs by Act 36 of 1956, s 7, for 'a tribunal' (wef 10-3-1957).

11 Subs by Act 36 of 1956, s 7, for 'the tribunal' (wef 10-3- 1957).

12 Subs by Act 36 of 1956, s 7, for 'tribunal' (wef 10-3-1957).

13 Sub-sections (6) and (7) ins by Act 36 of 1956, s 7 (wef 10-3-1957).

14 *Explanation* ins by Act 36 of 1964, s 5 (wef 19-12-1964).

15 Ins by Act 46 of 1982, s 8 (wef 21-8-1984).

16 *TD Ramayya Pantulu, IT v Kutty & Rao (E) Ltd* (1949) 1 LLJ 13 (Mad) (DB), per Horwill J.

17 *United Commercial Bank Ltd v UPBE Union* (1952) 2 LLJ 577 [LNIND 1952 SC 47] (SC), per Chandrasekhara Iyer J.

18 *State of Madras v CP Sarathy* (1953) 1 LLJ 174 [LNIND 1952 SC 84] (SC) : AIR 1953 SC 53 [LNIND 1952 SC 84]: [1953] 4 SCR 334 [LNIND 1952 SC 84], per Patanjali Sastri CJI.

19 *Newspapers Ltd v IT* (1957) 2 LLJ 1 [LNIND 1957 SC 28], 8 (SC), per Kapur J.

20 *Western India Match Co v WIMCO Workers' Union* (1970) 2 LLJ 256 [LNIND 1970 SC 4], 262 (SC) : (1970) 1 SCC 225 [LNIND 1970 SC 4] : AIR 1970 SC 1205 [LNIND 1970 SC 4], per Shelat J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER III Reference of Disputes to Boards, Courts or Tribunals

[10][S. 10A. Voluntary Reference of Disputes to Arbitration.—

(1) Where any industrial dispute exists or is apprehended and the employer and the workmen agree to refer the dispute to arbitration, they may, at any time before the dispute has been referred under section 10 to a Labour Court or Tribunal or National Tribunal, by a written agreement, refer the dispute to arbitration and the reference shall be to such person or persons (including the presiding officer of a Labour Court or Tribunal or National Tribunal) as an arbitrator or arbitrators as may be specified in the arbitration agreement.

11[(1A) Where an arbitration agreement provides for a reference of the dispute to an even number of arbitrators, the agreement shall provide for the appointment of another person as umpire who shall enter upon the reference, if the arbitrators are equally divided in their opinion, and the award of the umpire shall prevail and shall be deemed to be the arbitration award for the purposes of this Act.]

(2) An arbitration agreement referred to in sub-section (1) shall be in such form and shall be signed by the parties thereto in such manner as may be prescribed.

(3) A copy of the arbitration agreement shall be forwarded to the appropriate government and the conciliation officer and the appropriate government shall, within [12][one month] from the date of the receipt of such copy, publish the same in the Official Gazette.

13[(3A) Where an industrial dispute has been referred to arbitration and the appropriate government is satisfied that the persons making the reference represent the majority of each party, the appropriate government may, within the time referred to in sub-section (3), issue a notification in such manner as may be prescribed; and when any such notification is issued, the employers and workmen who are not parties to the arbitration agreement, but are concerned in the dispute, shall be given an opportunity of presenting their case before the arbitrator or arbitrators.]

(4) The arbitrator or arbitrators shall investigate the dispute and submit to the appropriate government the arbitration award signed by the arbitrator or all the arbitrators, as the case may be.

14[(4A) Where an industrial dispute has been referred to arbitration and a notification has been issued under sub-section (3A), the appropriate government may, by order, prohibit the continuance of any strike or lockout in connection with such dispute which may be in existence on the date of the reference.]

(5) Nothing in the Arbitration Act 1940 (10 of 1940)[15] shall apply to arbitrations under this section.]

LEGISLATION

This section was inserted by s 8 of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act 1956 and it was enacted with the object of enabling employers and employees to voluntarily refer their disputes to arbitration themselves by a written agreement and for the enforcement of agreements between them, reached otherwise than in the course of conciliation proceedings.[16] The provisions of the various sub-sections of s 10A and s 17 project a time bound programme from the stage of reference to the culmination of the award. Strict adherence to these provisions is a condition precedent for passing a valid award.[17]

SUB-SECTION (1)

(i) Reference to Arbitrator

The requirements of sub-s (1) are:

(a) there should be an existing or apprehended industrial dispute;

(b) the reference to arbitration should be by a written agreement;

(c) the reference should be made before the dispute has been referred under section 10 to a labour court, an industrial tribunal or national tribunal; and

(d) the names of the person or persons to act as arbitrator or arbitrators must be specified in the arbitration agreement. Such persons may be presiding officers of labour courts, tribunals or national tribunals.

The section is not very clearly worded, but the essential features of its scheme are not in doubt.[18]The first requirement of this section is that there must be an 'industrial dispute' which is in existence or is apprehended. The words 'where any industrial dispute exists or is apprehended' postulate that what is in existence or is apprehended must be an 'industrial dispute' within the meaning of s 2(k) of the Act. If the dispute which is existing or apprehended is not an 'industrial dispute' at all, the reference will not be competent.[19] In *Sindhu-Hochtief*, a single judge of the Bombay High Court held that the dispute as to what should happen to the undistributed bonus will not fall within the definition of 'industrial dispute' as defined in s 2(k) inasmuch as it would not be a dispute or difference connected with the employment or non-employment or the terms of employment or with the conditions of labour. Hence, even the consent of the parties to the reference of such dispute to arbitration under s 10A could not validate the reference.[20] An agreement, to refer an 'industrial dispute' to an arbitrator under this section, is not a 'settlement' of the dispute as postulated by s 2(p) of the Act, because the dispute subsists after such an agreement and does not come to an end.[21] The scope of the words 'at any time' has been limited by the words that immediately follow, *viz*, 'before the dispute has been referred under s 10 to a labour court, tribunal or national tribunal'. It follows that after an industrial dispute has been referred to an arbitrator under s 10A, it cannot be validly referred to a labour court, tribunal or national tribunal for adjudication.[22]

The reference of a dispute to arbitration under s 10A can, however, be made even if the conciliation proceedings before a conciliation officer are pending or a reference regarding that dispute under s 10(1)(a) or (b) has already been made to a board or a court of inquiry. The wording of this sub-section enables and confers the powers on parties to enter into an arbitration agreement. However, such agreement must be in the prescribed form and must specify the name of the arbitrator or arbitrators and a copy of the arbitration agreement should be forwarded to the 'appropriate government', on receipt of which the 'appropriate government' is required to publish the same in the Official Gazette. It means that all parties interested in the dispute should have notice of reference of the dispute to arbitration and such of them might present their viewpoint to the arbitrator, as choose to do *so*. The procedure to be followed under s 10A is directory and the government is required to adopt, if it wants to make the award of the arbitrator binding on the parties or persons who have not joined the reference to arbitration. However, sub-s (4) requires that the award has to be submitted to the 'appropriate government'. It is after the parties have named the arbitrator and entered into a written agreement in that behalf that the 'appropriate government' steps in to assist the further proceedings before the named arbitrator.[23] An arbitration agreement which affects the interest of large number of employees could never be a private agreement outside the scope of s 10A, and the non-publication of the arbitration agreement under s 10A(3) would be fatal to the arbitration award.[24]

The arbitrator or arbitrators may be private persons or even the presiding officer of labour courts, tribunals or national tribunals. However, when an industrial dispute is referred to an arbitrator, his jurisdiction to arbitrate on the dispute will be under s 10A and not under s 10 and his award will not be governed by the provisions of the Act relating to the awards of the labour courts or tribunals but will be governed only by the provisions relating to the awards of the industrial arbitrators. However this section will have no application to an arbitration agreement which is not in compliance with the requirements of sub-ss (2) and (3) thereof.[25] On a reference to more than one arbitrator, when there is no provision for an award made by less than all being valid, each one of them must act personally in performance of the duties of his office, as if he were the sole arbitrator, for, as the office is joint, if one refuses or omits to act, the others can make no valid award. Such a provision is, implied, unless a contrary intention is expressed, whenever the arbitration agreement requires that there shall be three arbitrators (as distinguished from merely permitting the appointment of three arbitrators) the award of any two is then binding.[26] For the making of an award it is enough that the arbitrators act together and finally make up their mind and express their decision in writing. This writing must be authenticated by their signatures. The award thus made and signed is complete and final so far as the arbitrators are concerned. The giving of a written notice to either party is not essential to the making of an award.[27]

(ii) Procedure before the Arbitrator

Section 11 lays down that an arbitrator shall follow such procedure as he may think fit. The Madhya Pradesh High Court appears to have misread s 11 in *KP Singh*,[28] where it observed that s 11 of the Act prescribes the procedure to be followed by a conciliation officer, the board, the court or the tribunal; but leaves the arbitrator to follow his own procedure. The observation is not in accordance with the clear language of sub-s (1). From this observation, the court further deduced that 'that is certainly in consonance with the principles of arbitration...' This observation is not correct as an arbitrator has to follow the same procedure a board, court, labour court, tribunal or national tribunal has to follow. In other words, the arbitrator has to evolve his own procedure in accordance, however, with the rules of natural justice. The law has been correctly stated by another Division Bench of the same High Court in *Aftab-e-Jadid*, where speaking for the court, CP Sen J said:

> Subject to any limitations contained in the arbitration agreement and to any statutory direction as to the manner in which he has to discharge his duties, an arbitrator may conduct any proceedings in any manner he thinks fit so long as he acts in accordance with the principles of natural justice, equity and good conscience. Though the Arbitrator is not bound by the procedure laid down either in the Civil Procedure Code or by the strict rules of evidence but this does not mean that his procedure might be opposed to natural justice or he must disregard the rules of evidence which are founded on fundamental principles of justice and public policy. An arbitrator is also not bound to reduce the evidence in writing unless the terms of agreement so required.[29]

On the reference having been made to the arbitrator, he has all the powers, the terms of reference, to which both sides are partly, conferred.[30] Before the arbitrator acquires jurisdiction to arbitrate on the industrial dispute referred to it, it is imperative that the mandatory requirements of s 10A must be complied with.

SUB-SECTION (1A): UMPIRE

From a cursory glance of sub-s (1) and sub-s (1A), it would appear that the parties can appoint an even number of arbitrators. Previously there was no provision to resolve the matter if the arbitrators were equally divided in opinion. In such a situation, the parties had to make a reference to an arbitrator over again or to move the government for making a reference under s 10. This difficulty has now been removed by the legislature by the insertion of sub-s (1A), which makes an imperative provision for the appointment of an umpire in case an even number of arbitrators is appointed by the parties. Where in the course of such arbitration, the arbitrators are equally divided in their opinion, the award of the umpire shall prevail and shall be deemed to be the arbitration award for the purposes of this Act.

SUB-SECTION (2): ARBITRATION AGREEMENT—'*AS MAY BE PRESCRIBED*'

Sub-section (1) requires the arbitration agreement to be in writing and sub-s (2) requires such agreement in the prescribed form and to be signed by the parties thereto in the prescribed manner. Part 2 of the Industrial Disputes (Central) Rules 1957 deals with arbitration agreements. Rule 7 prescribes that an arbitration agreement shall be in Form C and also lays down the procedure for its delivery to the authorities mentioned therein and also the requirement of the consent in writing by the arbitrator or arbitrators. The Orissa High Court held that it is not necessary that the arbitration agreement must be in form 'C' and it is sufficient if the requirements of that Rule and form are substantially complied with by the arbitration agreement. Similarly, state governments have prescribed their own corresponding Rules.[31]

SUB-SECTION (3): PUBLICATION OF THE ARBITRATION AGREEMENT

The first part of this provision requires the parties to forward a copy of the arbitration agreement to the appropriate government and the conciliation officer and the second part further requires the appropriate government to publish the agreement in the Official Gazette within 'one month' from the date of the receipt of such copy. In both the cases, the legislature has used the imperative word 'shall'. On the question of the requirement of forwarding the copy of the arbitration agreement to the appropriate government and the conciliation officer, there is complete unanimity of judicial opinion that the requirement is mandatory and its non-compliance will render any arbitration proceedings and award invalid.[32] However, with respect to the second requirement, *viz*, the publication of the agreement in the Official Gazette within one month from the date of its receipt, there was wide divergence among different High Courts, some holding the provision as mandatory, while others stating that it was merely directory. The cobwebs of confusion were finally cleared by the conclusive pronouncement of the Supreme Court in *Karnal LK Sangahtan*, in which it was held that the arbitration agreement must be published before the arbitrator considers the merits of the dispute and non-compliance of this requirement would be fatal to the arbitral award. In other words, publication of the arbitration agreement in the Official Gazette is a mandatory condition, non-compliance of which would invalidate the arbitral proceedings and the award while the requirement of publication within a period of one month from the date of the receipt of the agreement by the

government is merely directory. According to this holding, the award may be published at any time 'before the arbitrator considers the merits of the case.[33]

SUB-SECTION (3A): EMPLOYERS AND WORKMEN WHO ARE NOT PARTIES

This sub-section is introduced by the Industrial Disputes (Amendment) Act 1964, and it provides that even though the government is satisfied that the persons making the reference represents the majority of each party, it may still, within a period of one month, issue a notification with a view to give an opportunity to those employers and workmen who are not parties to the arbitration agreement but are concerned in the dispute, to present their case before the arbitrator or the arbitrators. If the requirements of this section are not complied with, the government will not be able to issue a notification under s 10A(4A) prohibiting the continuance of any strike or lockout which may be in existence on the date of the reference in connection with the dispute under reference. The Madras High Court held that the requirements of this provision are, therefore, mandatory and an award made by the arbitrator where the requirements of this provision have not been complied with, will be rendered invalid.[34] However, a single judge of the Delhi High Court in *DCM Clerks*, has taken the view that the provisions of this sub-section are not mandatory but they are directory.[35]

SUB-SECTION (4)

(i) Award of Arbitrator

This sub-section empowers the arbitrator to investigate and adjudicate upon the 'industrial dispute' referred to him under the arbitration agreement and then to submit the award signed by him. Such award is also to be published, like any other award under the Act, by the appropriate government within a period of thirty days from the date of its receipt, in accordance with the provisions of s 17 and it is final after being published under s 17(2). An award of the arbitrator which is not published as required by s 17 (1) of the Act, will be incapable of being enforced as postulated by s 17 A and as such will have no force of law. Section 17A makes an award enforceable on the expiry of thirty days from the date of its publication under s 17. Section 18(2) makes an arbitration award, which has become enforceable, binding on the parties to the agreement who referred the dispute to arbitration. Section 18(3) makes the arbitration award, in case where a notification has been issued under sub-s (3A) of s 10A, which has become enforceable, binding not only on all parties to the dispute but also on all other parties summoned to appear in the proceedings, the heirs, successors or assigns of the employer and all present and future workmen. Under s 19(3), the arbitral award remains in operation for a period of one year from the date on which it becomes enforceable subject to the powers of the 'appropriate government' to reduce or extend the period of its operation. According to s 19(6), such award further continues to be binding on the parties even after the expiry of the period of its operation under s 19(3) until a period of two months have lapsed from the date on which either of the parties intimates its intention to the other to terminate the award. By fiction of s 20, proceedings before an arbitrator under s 10A are deemed to have commenced on the date of the reference for arbitration and concluded on the date when the award becomes enforceable. Section 21 makes provision for keeping certain matters confidential by the arbitrator. Section 29 makes the breach of any terms of an award, a penal offence. Section 30 provides for penalty in cases of unlawful disclosure of information required to be kept confidential. Section 33C makes provision for recovery of money or computation of any benefit capable of being computed in terms of money, due under an award from the employer.

(ii) Jurisdiction of the Arbitrator

The arbitrator 'functioning within the framework of such agreement of the parties under s 10A of the Act, does not have the status of a statutory arbitrator, though there may be similarities between the two; nor could it be said of him, that he is a court even if some trappings of a court are present, as he lacks the fundamental, inherent judicial power vested by the state in a court. His jurisdiction, based on specific agreement of parties to abide by his decision, is consensual in nature. Reference of an industrial dispute to an arbitrator under s 10A is more or less an *ad hoc* arrangement to serve a particular purpose as desired by the parties. It may differ from private arbitration simpliciter inasmuch as the reference in terms of the agreement is made by the government by due publication in the Official Gazette, and the award given by him also is to be published in the Official Gazette. In a sense proceedings before him are quasi-judicial in character. Once the award is rendered he becomes *functus officio* and it will not be competent thereafter for him to consider, or do anything further in relation to the dispute referred to him for adjudication pursuant to the specific agreement in that behalf.[36] If the arbitrator finds that what is referred to him is not an industrial dispute at all, he has no jurisdiction to proceed further with the arbitration proceedings. Sub-section (4) requires the arbitrator or arbitrators to 'investigate the dispute'. This provision, unlike sub-s (4) of s 10, does not talk of the adjudication of any matters 'incidental to' the dispute. Nor sub-s (1) like sub-s (1)(d) of s 10, talks of the reference of 'any matter appearing to be connected with or relevant to the dispute'. The arbitrator, therefore, has to strictly adjudicate upon the dispute as specifically referred to him by the agreement of the parties and it cannot go into any other matters whether connected with or relevant or incidental to the dispute. Though the provisions of Arbitration Act 1940 do not apply to the proceedings before an industrial arbitrator, the general principles regarding the validity of such arbitrator's award would apply. For instance, where the award can be held to be vitiated on

account of the misconduct on the part of the arbitrator or where he exceeds jurisdiction, or does not hear the parties or fails to determine an important question referred to them to be answered, the award will be amenable to judicial review under Art 226 of the Constitution. However, the award of the arbitrator cannot be called in question as a defective award on any procedural ground or that a particular criterion has not been kept in view by the arbitrator. This is so, because the arbitrator has been invested with authority to settle the dispute between the parties on joint agreement between them, so he is well expected to do substantial justice between the parties in giving his award.[37]

The award of an arbitrator under this section is of quasi-judicial character. The question whether such an award should state reasons for its decision, has given rise to conflicting judicial dicta. The Punjab High Court preferred the view that 'the law does not intend to confer on the arbitrator under the Act, uncontrolled and absolute power to make the award completely bare of reasons so as to render it incapable of judicial scrutiny. It was further observed that 'as an arbitrator had to decide a proposal and an opposition, in other words, to determine, a *lis*, the decision which he had to give could not be devoid of any reference to the mode or manner by which the opinion was formed'.[38] The Madhya Pradesh High Court,[39] has categorically stated that there is an applied statutory obligation on the arbitrator to give reasons in support of the conclusions of fact and law reached by him in the award. Though he is not required to write a lengthy judgment, like a court, he must briefly indicate the working of his mind, ie, the process of reasoning which led him to decide the dispute referred to him. Hence, his failure to state reasons, which is obligatory, would constitute an error of law apparent on the face of the record. In other words, an award not based on any reasons is liable to be quashed. On the other hand, the Patna High Court held that the desirability for giving the grounds on which a decision is based does not *ipso facto* lead to the conclusion that such grounds must be given in the quasi-judicial decision of an arbitrator, where there is no specific provision in the law itself to that effect. It was further observed that the court or tribunal to which the reference was made would be bound to give reasons for its findings in accordance with the provisions of law. If, however, the parties voluntarily choose a private person, it cannot necessarily follow that such a person also would be bound to give reasons for the decision arrived at by him.[40] A single judge of the Delhi High Court, also held that the award of an industrial arbitrator will not be invalid merely because he has not given the reasons for his decision because there is no provision in the Act, mandatory or directory, that an arbitrator must give reasons for his award.[41]The view of the Patna and the Delhi High Courts does not appear to be correct. No doubt there is no provision in the Act which requires a labour court, tribunal or national tribunal to state reasons for its award. All that s 16(2) requires a labour court, tribunal or national tribunal, is that their awards 'shall be in writing and shall be signed by its presiding officer'. Similarly, sub-s (4) of s 10A requires that the award of an industrial arbitrator shall be signed by him. Thus, in either case there is no requirement of stating reasons. However, in both cases, the requirement of stating reasons is implied in order to enable the scrutiny of the judicial review of such awards. It is now well-settled that the award of an industrial arbitrator is amenable to judicial review. In *Rohtas Industries*, the Supreme Court observed:

> Suffice it is to say, an award under section 10A is not only not invulnerable but more sensitively susceptible to the writ lancet being a quasi-statutory body's decision. The absence of reasons in support of the award will shut-out the judicial scrutiny by making it an inscrutable face of sphinx. [42]

Industrial arbitration is based altogether on different principles and norms and the scope of arbitration is also not like civil arbitration. The analogy of civil arbitration adopted by the Delhi High Court is, therefore, not apposite. The view of the Punjab and the Madhya Pradesh High Courts is correct law. A single judge of the Madras High Court, took the view that a person appointed to arbitrate upon an 'industrial dispute' in the course of conciliation proceedings under s 12(3) will not acquire the status of an arbitrator under s 10A. He will merely be a private arbitrator. Since such an arbitrator will not be governed by the provisions of s 10A, the exclusion of the Arbitration Act under sub-s (5) will not apply to such an arbitrator.[43]In this case, the court had recorded that it was common ground between the parties that the impugned decision was not an award following an arbitration under s 10A of the Industrial Disputes Act.

SUB-SECTION (4A): PROHIBITION OF CONTINUANCE OF STRIKES AND LOCKOUTS

This provision corresponds to sub-s (3) of s 10 of the Act. It empowers the government to prohibit the continuance of a strike or lockout, in connection with an industrial dispute, which may be in existence on the date such dispute is referred to arbitration. The only pre-condition to the exercise of this power is that a notification under sub-s (3A) should have been issued. The power is, however, discretionary with the government whether or not to prohibit the continuance of a strike or lockout in the circumstances of each case.[44]

SUB-SECTION (5): EXCLUSION OF THE ARBITRATION ACT

This provision specifically excludes the application of the provisions of the Arbitration Act 1940 (Act 10 of 1940)[45]to the award of an arbitrator under s 10A. The effect of this is that the jurisdiction of the civil courts and the application of other

provisions of civil law to the award of industrial arbitrator under s 10A has been barred. In other words, the scheme of this Act does not contemplate a private arbitration outside the Act as a method of resolving an industrial dispute merely because the parties say that the matter will be left for informal arbitration, the agreement cannot be stated to refer the dispute to an arbitration, outside the preview of s 10A.[46] In *Hindustan National Glass*, the Calcutta High Court held that an application under s 30 of the Arbitration Act challenging the award of an arbitrator under s 10A is not maintainable. The award of an industrial arbitrator is not amenable to any provisions of civil law but it is subject to the provisions of the Industrial Disputes Act only. Section 17 requires the publication of the award of the arbitrator like the award of any other adjudicatory authority. After such award is published, it is to be dealt with under the same provisions of the Act as the awards of other adjudicatory authorities,*viz*, a labour court, a tribunal or a national tribunal.[47]

JUDICIAL REVIEW

In *Dental Technicians*, Lord Goddard CJ stated, 'There is no instance of which I know in the books, where certiorari or prohibition has gone to any arbitrator, except a statutory arbitrator, and a statutory arbitrator is a person to whom, by a statute, the parties must resort'. [48] This dictum gave rise to a conflict of judicial opinion on the question 'whether an arbitrator functioning under s 10A was a statutory arbitrator and whether his decision would be binding on the parties'. The Kerala High Court held that such an arbitrator is not a statutory arbitrator, because s 10A leaves the choice of arbitration and arbitrator to the will of the parties.[49] The same view was taken by the Madras High Court.[50] On the other hand, the High Courts of Bombay,[51] and Patna,[52] held that the arbitrator contemplated by s 10A has all the attributes of a statutory arbitrator. However, in *Engineering Mazdoor Sabha*, as an obiter, the Supreme Court observed:

> Article 226 under which a writ of certiorari can be issued in an appropriate case is, in a sense wider than Article 136, because the power conferred on the High Court to issue certain writs is not conditioned or limited by the requirement that the said writs can be issued only against the orders of courts or tribunals. Under Article 226(1), an appropriate writ can be issued to any person or authority, including in appropriate cases any government, within the territories prescribed. Therefore, even if the arbitrator appointed under section 10A is not a tribunal under Article 136, in a proper case, a writ may lie against his award under Article 226.[53]

Now, these obiter observations have been accepted as correct law by the Supreme Court in *Rohtas*, where Krishna Iyer J observed:

> It is legitimate to regard such an arbitrator now as part of the methodology of the sovereign's dispensation of justice, thus falling within the rainbow of statutory tribunals amenable to judicial review...Suffice it to say, an award under section 10A is not only not invulnerable but more sensitively susceptible to the writ lancet being a quasi statutory body's decision. [54]

If, therefore, an arbitrator records findings based on no legal evidence and the findings are either his *ipse dixit* or based on conjectures and surmises or his findings suffer from additional infirmity of non-application of mind, the award will be quashable being perverse.[55] For a complete understanding of judicial trends, which disclose not only the progressive evolution and consolidation of the law relating to the scope of 'judicial review' of the awards of arbitrators appointed under s 10A, but also of the approbation and reprobation resorted by the later judges of Supreme Court, it is necessary to examine the decisions commencing from *Air Corporation*, in some detail. In that case, the facts were that the corporation and its employees entered into an agreement whereby the parties agreed under s 10A of IDA to submit their disputes to a committee of arbitration consisting of two representatives each of the corporation and the union with an independent chairman of the status of a High Court judge to be appointed by the government. The agreement provided that a unanimous agreement of the arbitrators would be binding on the parties, but failing such unanimity the decision of the chairman was to be deemed to an award made by a single and sole arbitrator. The government of Bombay appointed Mr Vyas, a retired judge of Bombay High Court as the chairman. During his absence from Bombay, the representatives of the corporation and the union in the committee of arbitrators arrived at a 'unanimous agreement' on all demands except one, which was left to be decided by him; and by a letter addressed to him, the representatives asked him to sign the agreement and declare the award in terms of it. On his return to Bombay, he declined to do so till he had studied the agreement and understood its full implications, more so as he conjectured that the union representatives had brought pressure upon the representatives of the corporation. Thereafter, he and his wife went on an inaugural flight by a 'Boeing' to USA at the invitation of the corporation and accepted substantial hospitality from the corporation. Thereafter, he came to the conclusion that the agreement was vague and proceeded to give 'directions' subject to which the agreement was to be implemented. The union filed a writ petition under Arts. 226 and 227 to set aside the chairman's directions on the ground that he had no jurisdiction to give them, and on the ground that he had disqualified himself as an arbitrator. The High Court rejected the preliminary objection, ie, that there was no jurisdiction to entertain the petition under Art. 227, since the arbitration was that of a private tribunal. Chandrachud J (as he then was), on a consideration of the provisions of ID Act, held that the arbitration

contemplated by s 10A had all the essential attributes of statutory arbitration under s 10 of the Act, and assuming that the word 'tribunals' in Art. 227 meant statutory and not private tribunals, an arbitration functioning under s 10A was a statutory tribunal. On this view of the matter, he held that the arbitrator under s 10A was subject to the superintendence of the High Court.[56] He distinguished the English Law as expounded in *Dental Technicians*, wherein Lord Goddard CJ observed:

> I have never heard of *certiorari* or prohibition going to an arbitrator...It would be an enormous departure from the law relating to prerogative writs if we were to apply these remedies to an ordinary arbitrator... [57]

Citing the above decision, Chandrachud J of Bombay High Court (as he then was), observed (supra):

> Now, in the first place, it must be remembered that in England, the issue of prerogative writs is largely conditioned by historical reasons. Secondly, the arbitrators against whom the writ was sought in the English case were a purely private body to whom reference was made in pursuance of a clause in the indenture of apprenticeship...The observations contained in the judgment of Lord Goddard, CJ, that a statutory arbitrator is a person to whom by statute the parties must resort cannot be read to mean that in no other case could a tribunal be deemed to be a statutory tribunal. The only question which arose for decision in that case was whether a writ of certiorari or prohibition could lie against what was admittedly a private body of arbitrators and in repelling the argument that it could, the learned Law Lord has mainly relied upon English practice.

In his commentary on the above decision, Seervai observes:

> The misconduct of the chairman was so grave that it is not surprising that the court should have arrived at the result it did and quashed the chairman's direction. It is submitted, however, that the decision that the chairman acting under section 10A, Industrial disputes Act, was a tribunal within the meaning of Article 227, was contrary to the decisions in *Bharat Bank Ltd...* and in *Durga Shankar Mehta*,[58]...and it is submitted further that this part of the judgment must be treated as overruled by the Supreme Court in *Engineering Mazdoor Sabha v Hind Cycles* ,[59]... Does a writ of *certiorari* lie to quash the award of an arbitrator appointed under section 10A, Industrial Disputes Act, that is, an arbitration award as it is called in the Act? The question is not free from difficulty, for the arbitrator under that section derives his authority to act from the consent of parties in the first instance, nor is there any legal obligation on the parties to resort to a private arbitrator. Consequently, a court in India may feel that the decision in the *Dental Technicians'* case covers an arbitration award. However, the judgments in that case show that the application for a writ of *certiorari* was there designed as a short-cut to the normal procedure under the English Arbitration Act 1950, by which parties can get an award set aside, or an arbitrator restrained from proceeding with an arbitration. The Indian Arbitration Act 1940, confers similar rights to challenge an award or to restrain an arbitrator from proceeding further. Therefore, persons resorting to private arbitration in England or in India do not bind themselves to accept an award, if it should be fraudulent or in excess of the arbitrator's jurisdiction. And yet, if certiorari does not lie in India, such acceptance must be the result of the combined effect of section 10A(5) and section 17, Industrial Disputes Act, the first of which excludes the application of the Indian Arbitration Act, 1940; and the second of which provides that an award published under that section is not to be called in question by any court in any manner whatsoever... a court would be justified in holding that though arbitration under section 10A of the Industrial Disputes Act is not compulsory, and though the arbitrator derives his authority in the first instance from the consent of parties, section 10A(4) of the Act imposes a legal obligation, and confers a legal authority, on the arbitrator to decide questions affecting the rights of subjects and having the duty to act judicially. The award is to be sent not to the parties but to the appropriate government, which is under an obligation to publish it within thirty days. This view of section 10A(4) is justified by its plain language and harmonises with the whole scheme of the Act which largely assimilates an arbitration award to the award of a court or tribunal constituted under the Act so far as the making, publication and the finality attaching to the award are concerned, as also in the consequences which flow from a failure to carry out the award. It also harmonises with the object for which the Act was enacted, namely, that the settlement of industrial disputes is not a matter, which concerns the parties alone, but is also a matter, which concerns the State and the public. The above considerations show that the writ of *certiorari* issued in the *Air Corporation* case, was rightly issued.[60]

In *Rajinder Kumar Kindra*,[61] the facts were that the dispute relating to the dismissal of a salesman was referred to an arbitrator under s 10A. The arbitrator held that the findings of the inquiry officer were based on no legal evidence and therefore perverse. The management did not ask for an opportunity before the arbitrator to lead evidence afresh before him to substantiate the charges. The arbitrator, having recorded his findings, did not pass an award of reinstatement. In the meantime, he was elevated as a judge of the Delhi High Court. As there was no formal order from him, a second reference was made to a retired additional district and sessions judge, Delhi, as an arbitrator, who found that the dismissal of the workman was based on proved charges, that the inquiry proceedings were not vitiated by violation of the principles of

natural justice etc, and passed an award stating that the workman was not entitled to relief. The workman filed a writ petition in the Delhi High Court, which dismissed the matter *in limine* observing that the matter depends upon assessment of evidence and the court cannot reappraise the same under Art. 226 of the Constitution. The workman appealed to the Supreme Court by special leave. Desai J, having made a solemn declaration to the effect that the court was not re-appreciating the evidence, exactly did that by minutely dissecting, as it were, the enquiry proceedings and other documents to arrive at the conclusion that the enquiry was vitiated. Some of his observations are reproduced below:

> (1) Let it be made absolutely clear...that the only misconduct imputed to the appellant was that he was negligent in keeping the cheque book...There is not a little of evidence in support of the allegation of misappropriation or embezzlement of funds or manipulation of accounts by the appellant...there is absolutely not an iota of evidence which could indicate that the appellant issued any cheques himself or that he aided or abetted someone to issue the bogus cheques (para 9).
>
> (2) Someone so minded to forge the cheque and to withdraw money from some one's account may use anybody's cheque book. In such a situation, the owner of the cheque book unless he had participated in the conspiracy in any manner for facilitating withdrawal of the amount cannot be attributed any misconduct for keeping his cheque book unattended or not in safe custody. Therefore, first limb of charge no 3 can be rejected as per se untenable without anything more (para 10).
>
> (3) Mr Jain contended that once Mr Kakkar came to the conclusion that the appellant was given full opportunity to participate in the domestic enquiry, neither High Court under Art 226 nor this Court under Article 136 can sit in appeal over the findings of the enquiry officer and reappraise the evidence. We have not at all attempted to reappreciate the evidence though in exercise of the jurisdiction conferred by section 11A of the Industrial Disputes Act 1947 both arbitrator and this Court can reappraise the evidence led in the domestic enquiry and satisfy itself whether the evidence led by the employer established misconduct against the workman.
>
> (4) This court in *Workmen of M/s Firestone...*,[62] held that since the introduction of section 11A ...the industrial tribunal is now equipped with the powers to reappraise the evidence in the domestic enquiry and satisfy itself whether the said evidence relied upon by the employer establishes the misconduct alleged against the workman. It is equally well settled that the arbitrator appointed under section 10A is comprehended in section 11A.
>
> (5) This court in *Gujarat Steel Tubes...*,[63] held that an arbitrator appointed under section 10A is comprehended in section 11A and the arbitral reference apart from section 11A is plenary in scope. Therefore, it would be within the jurisdiction both of the arbitrator as well as this Court to reappreciate evidence though it is not necessary to do so in this case.
>
> (6) It is thus well-settled that where the findings of misconduct are based on no legal evidence and the conclusion is one to which no reasonable man would come, the arbitrator appointed under section 10A or this court in appeal under Article 136 can reject such findings as perverse. Holding that the findings are perverse do not constitute reappraisal of evidence, though we would have been perfectly justified in exercise of powers conferred by section 11A to do so. (para 16)

The above decision of Desai J furnishes a classic example of the extent to which judges over-reach themselves in blatant violation of the principles enunciated by the Supreme Court to the contrary. In this connection, it is pertinent to recall the observations of Mahajan J to the effect that the Supreme Court would not constitute itself into a mere 'court of error' and substitute its decision for the determination of a tribuna1.[64] In a subsequent case, the learned judge, as Chief Justice of India, reiterated:

> ...the Constitution having trusted the wisdom and good sense of the Judges of this Court in this matter, that itself is a sufficient safeguard and guarantee that the power will only be used to advance the cause of justice, and that its exercise will be governed by well established principles which govern the exercise of overriding Constitutional power.[65]

Where to place the likes of Desai J, in the legal history of India, which was characterised by an uncompromising approach of eminent judges like Justice Mahajan and others towards maintaining high standards of judicial disposition? However, an arbitrator under this section is not a tribunal' within the meaning of Art. 136 of the Constitution. Likewise, it is not a 'tribunal' within the meaning of Art. 227 of the Constitution.[66] The Madhya Pradesh High Court in *MG Panse v SK Sanyal* , has expressed the view that after the decision of the Supreme Court in *Rohtas Industries*, the earlier decision in *Engineering Mazdoor Sabha* to the effect that an arbitrator functioning under s 10A is not a 'tribunal' within the meaning of Art. 136 of the Constitution, does not now hold the field.[67] The Mysore,[68] the Madhya Pradesh[69] and the Orissa[70] High Courts have taken the view that an arbitration award made under sub-s (4) based on an arbitration agreement which does not comply with the requirements of sub-s (3) will be invalid and unenforceable. However, a Full Bench of the Madras[71] High Court held that the arbitration agreement which does not comply with the requirement of sub-s (3) will not be invalid.

Hence, the award made on the basis of such agreement will be valid. In taking this view, the Full Bench relied on the above Bench decisions of the three High Courts. However, none of those decisions, supports the view of the Full Bench. Apart from relying on these decisions, the Full Bench has not given any reasons of its own. The view of the Full Bench of the Madras High Court is incorrect.

However, all these High Courts appear to have got confused, perhaps in their overenthusiasm, on the question of jurisdiction under Art. 226. An arbitration agreement which does not comply with the requirements of various sub-sections of s 10A cannot be deemed to be an agreement under that section. Sub-section (5) excludes the application of Arbitration Act 1940 only to 'arbitration under this section'. It is obvious that where the mandatory requirements of this section have not been complied with, such agreement cannot be 'under this section'. Where an agreement is not under this section, the application of the Arbitration Act 1940 is not barred. Therefore, arbitration agreement between the parties which does not comply with the requirements of sub-s (3) will not be under s 10 A and shall be governed by the provisions of the Arbitration Act. Hence, a petition under Art. 226 challenging the validity of such arbitration agreement or of an award made under sub-s (4) based on such an agreement, will not be maintainable. The general principles of the validity of an arbitrator's award apply to the award passed by an arbitrator under this section. The award is vitiated if the arbitrator is guilty of misconduct or exceeds his jurisdiction or does not hear the parties or fails to determine an important question referred to him to be answered. However, the award cannot be challenged on any procedural grounds or on the ground that the arbitrator has not kept in view many particular criterion.[72] In *CITU*, a single judge of MP High Court held that an arbitrator functioning under s 10A is a statutory tribunal, and the question as to the jurisdiction of the High Court to interfere with the award of an arbitrator is no longer *res integra*.[73] In *NS Giri*, the facts were: the arbitrator under s 10A passed an award enhancing the age of superannuation of the employees of Mangalore Corporation to 58 years as against the age of 55 years prescribed under the regulations framed under the Karnataka Municipal Corporation Act 1976. The main question was whether the award so made could be given effect to, if it were inconsistent with the statutory provisions governing the service conditions of the employees. The Supreme Court, relying on *Marina Hotel*,[74] and *Hindustan Times*,[75] held that an award passed under the ID Act should not be inconsistent with the law laid down by the legislature and, if it were so, it was illegal and could not be enforced. On this view of the matter, the Court upheld the order of the High Court quashing the award of the arbitrator.[76] Where the arbitrator proceeded illegally and decided the dispute on evidence which is not admissible, a ground for interference has been made out.[77]

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10 Ins by Act 36 of 1956, s 8 (wef 10-3-1957).

11 Ins by Act 36 of 1964, s 6 (wef 19-12-1964).

12 Subs by Act 36 of 1964, s 6, for "fourteen days" (wef 19-12-1964).

13 Subs by Act 36 of 1964, s 6 (wef 19-12-1964).

14 Ins by Act 36 of 1964, s 6 (wef 19-12-1964).

15 Repealed by the Arbitration and Conciliation Act 1996 (26 of 1996).

16 Gazette of India Extraordinary, dated 21 September 1955, Pt 2, s 2, p 411.

17 *Andhra Pradesh Country TCM Federationn v Commr of Labour* 1985 Lab IC NOC 3 (AP), per Rama Rao J.

18 *Engineering Mazdoor Sabha v Hind Cycles Ltd* (1962) 2 LLJ 760 [LNIND 1962 SC 337], 796 (SC), per Gajendragadkar J.

19 Cf, *Sindhu Resettlement Corpn Ltd v IT* (1968) 1 LLJ 834 [LNIND 1967 SC 268] (SC), per Bhargava J.

20 *Sindhu-Hochtief (India) Pvt Ltd v Pratap Dialdas* (1968) 2 LLJ 515 (Bom), per Tulzapurkar J.

21 *Rasbehary Mohanty v PO, LC* (1974) 2 LLJ 222, 226 (Ori) (DB), per RN Misra J.

22 *North Orissa Workers Union v State of Orissa* (1971) 2 LLJ 199 (Ori) (DB), per Patra J.

23 *Engineering Mazdoor Sabha v Hind Cycles Ltd* (1962) 2 LLJ 760 [LNIND 1962 SC 337] (SC), per Gajendragadkar J.

24 *KM Sangh v GM, Western Coal Fields Ltd* (1998) 2 LLN 604 (MP), per Kulshrestha J.

25 *Ved Prakash v Ram Narain Goyal* 1976 Lab IC 1375, 1377 (Del), per Yogeshwar Dayal J.

26 *Russell on Arbitration*, 1928, 20th ed, p 234.

27 *Janardhanprasad v Chandrashekhar* AIR 1951 Nag 198 (DB).

28 *KP Singh v Gokhale* (1970) 1 LLJ 125, 128 (MP) (DB) : ILR [1972] MP 1016 : 1969 JLJ 449, per Tare J.

29 *Aftab-e-Jadid v Bhopal SP Sangh* 1985 Lab IC 164 [LNIND 1984 MP 29] (MP) (DB), per CP Sen J.

30 *Gujarat Steel Tubes Ltd v Gujarat Steel Tubes Mazdoor Sabha* (1980) 1 LLJ 137 [LNIND 1979 SC 464] (SC), per Krishna Iyer J.

31 *North Orissa Workers' Union v State of Orissa* (1971) 2 LLJ 199 (Ori) (DB), per Patra J.

32 *Moorco (I) Ltd v Govt Tamil Nadu* 1993 Lab IC 1663, 1664 (Mad) (DB), per Nainar Sundaram Acg CJ.

33 *Karnal Leather Karamchari Sangahtan v Liberty Footwear Co* 1989 SCR (3) 1065, per Shetty J.

34 *Madras Machine Tools Mfrs v Spl Deputy Commr of Labour* 1980 Lab IC 329 [LNIND 1979 MAD 89], 332 (Mad) (DB), per Mohan J.

35 *DCM Clerks Assn v Mgmt* CW No 1355 of 1981 (Delhi), per HL Anand J.

36 *Kerala SRTC v A Kunjukrishna Pillai* 1976 Lab IC 541, 543 (Ker), per K Bhaskaran J.

37 *Mgmt of National Projects Construction Corpn Ltd v Workmen* (1976) 1 LLJ 86 [LNIND 1975 SC 395] (SC), per Alagiriswami J.

38 *Rohtak Delhi Transport Pvt Ltd v Risal Singh* (1964) 1 LLJ 89, 96 (Punj) (DB).

39 *MG Panse v SK Sanyal* 1980 Lab IC 524, 526-27 (MP) (DB), per GP Singh CJ.

40 *Rohtas Industries Ltd v Workmen* (1968) 1 LLJ 710, 715-16 (Pat) (DB) : AIR 1967 Pat 224, per Dutta J.

41 *Mgmt. of Daily Aljamiat v Gopi Nath Aman* 1971 Lab IC 1353 (Del), per Avadh Behari Rohatgi J.

42 *Rohtas Industries Ltd v Rohtas Industries Staff Union* (1976) 1 LLJ 274 [LNIND 1975 SC 523] (SC) : AIR 1976 SC 425 [LNIND 1975 SC 523]: (1976) 2 SCC 82 [LNIND 1975 SC 523], per Krishna Iyer J.

43 *Estates Staff Union of South India v Commr of Labour* (1970) 1 LLJ 94 (Mad), per Ramakrishnan J.

44 For detailed discussion, see, notes and comments under sub-s (3) of s 10.

45 Repealed by the Arbitration and Conciliation Act 1996 (26 of 1996).

46 *Spl Officer, TUCS Ltd, v S Laganathan* (1986) 2 LLJ 225 [LNIND 1986 MAD 40], 229 (Mad), (DB), per Nainar Sundaram J.

47 *Hindustan NG & IM Union v SN Singh* (1982) 1 LLJ 168 (Cal) (DB), per Chittatosh Mookherjee J.

48 *Regina v Disputes Committee of Dental Technicians* [1953] 1 All ER 327.

49 *ATKM Employees'Assn v Musaliar Industries Pvt Ltd* (1961) 1 LLJ 81 (Ker), per Velu Pillai J.

50 *Anglo-American Direct Tea Trading Co Ltd v Workmen* (1963) 2 LLJ 752 [LNIND 1963 MAD 259] (Mad), per Srinivasan J.

51 *Air Corpns Employees' Union v DV Vyas* (1962) 1 LLJ 31 [LNIND 1961 BOM 46] (Bom) (DB) : AIR 1962 Bom 274 [LNIND 1961 BOM 46]: 1962 (64) BOMLR 1 : ILR 1962 Bom 292 [LNIND 1961 BOM 46], per Chandrachud J.

52 *Rohtas Industries Staff Union v State of Bihar* (1962) 2 LLJ 420 (Pat) (DB), per Ramaswami CJ.

53 *Engineering Mazdoor Sabha v Hind Cycles Ltd* (1962) 2 LLJ 760 [LNIND 1962 SC 337] (SC) : AIR 1963 SC 874 [LNIND 1962 SC 337]: 1963 (6) FLR 103, per Gajendragadkar J.

54 *Rohtas Industries v Workmen* (1976) 1 LLJ 274 [LNIND 1975 SC 523], 279 (SC) : AIR 1976 SC 425 [LNIND 1975 SC 523]: (1976) 2 SCC 82 [LNIND 1975 SC 523], per Krishna Iyer J.

55 *Rajinder Kumar Kindra v Delhi Administration* (1984) 2 LLJ 51 7 (SC), per Desai J.

56 *Air Corpn Employees' Union v DV Vyas* (1962) 1 LLJ 31 [LNIND 1961 BOM 46] (Bom) : AIR 1962 Bom 274 [LNIND 1961 BOM 46]: ILR 1962 Bom 292 [LNIND 1961 BOM 46], per Chandrachud J.

57 *Regina v Disputes Committee of Dental Technicals* (1953) 1 ALL ER 327.

58 *Durga Shankar Mehta v Thakur Raghuraj Singh* AIR 1954 SC 520 [LNIND 1954 SC 97], per Mukherjea J.

59 *Engg Mazdoor Sabha v Hind Cycles Ltd* (1962) 2 LLJ 760 [LNIND 1962 SC 337] (SC), per Gajendragadkar J.

60 HM Seervai, *Constitutional Law of India*, 1993, Vol 2, 4th ed, pp 1694-96.

61 *Rajinder Kumar Kindra v Delhi Administration* (1984) 2 LLJ 517 [LNIND 1984 SC 267] (SC), per Desai J.

62 *Workmen of Firestone TRCI Ltd v Mgmt* 1973 I LLJ 278 (SC) : AIR 1973 SC 1227 [LNIND 1973 SC 430]: (1973) 1 SCC 813 [LNIND 1973 SC 430], per Vaidialingam J.

63 *Gujarat Steel Tubes Ltd v GST Mazdoor Sabha* (1980) 1 LLJ 137 [LNIND 1979 SC 464] (SC), per Iyer J.

64 *Bharat Bank Ltd v Workmen* (1950) 1 LLJ 921 [LNIND 1950 SC 4], 935-36 (SC), per Mahajan J.

65 *Dhakeswari Cotton Mills Ltd v Commissioner of Income-tax* AIR 1955 SC 65 [LNIND 1954 SC 149], 69, per Mahajan CJI.

66 *Engineering Mazdoor Sabha v Hind Cycles Ltd* (1962) 2 LLJ 760 [LNIND 1962 SC 337] (SC) : AIR 1963 SC 874 [LNIND 1962 SC 337]: 1963 (6) FLR 103, per Gajendragadkar J.

67 1980 Lab IC 524,526 (MP) (DB), per GP Singh CJ.

68 *Workmen of Madras Woodlands Hotel v KS Rao* 42 FJR 223, 226 (Mys) (DB), per Chandrasekhar J.

69 *KP Singh v SK Gokhale* (1970) 1 LLJ 125, 128 (MP) (DB), per Tare J.

70 *Rasbehary Mohanty v LC* (1974) 2 LLJ 222, 226 (Ori) (DB), per RN Misra J.

71 *Ramakrishna Kulwantrai Steels Pvt Ltd v Workmen* (1977) 1 LLJ 382 [LNIND 1976 MAD 317], 384 (Mad) (FB), per Ramaswami J.

72 *National Projects Construction Corp Ltd v Workmen* 1970 Lab IC 907, 913 (Pat) (DB), per Misra CJ.

73 *Centre of Indian Trade Unions v State of MP* (2002) 2 LLN 256 (MP), per Mishra J.

74 *Manna Hotel v Workmen* (1961) 21 LLJ 431 (SC).

75 *Hindustan Times Ltd v Workmen* (1963) 1 LLJ 108 [LNIND 1962 SC 431] (SC) : AIR 1963 SC 1332 [LNIND 1962 SC 451]: [1964] 1 SCR 234 [LNIND 1962 SC 451].

76 *NS Giri v Corporation of City of Mangalore* (1999) 3 LLN 388 (SC), per Lahoti J.

77 *Eastern Coalfields Ltd v SK Mukhopadhyaya, Arbitrator* (2003) 3 LLJ 1082 (Jhar .)(DB)

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

SUB-SECTION (2): 'REFERENCE BY APPLICATION OF PARTIES

Section 10(2) makes it obligatory for the government to make reference of an industrial dispute if the parties to that dispute apply in the prescribed form. The parties to an 'industrial dispute' may make a joint application or they may make separate applications. In any case the government must be approached by the parties by means of an application in the prescribed manner to refer a particular dispute. It is not material whether they approach by a joint application or by separate applications as long as the subject matter of the dispute is the same. The government has to satisfy itself that the persons applying represent the majority of each party. It is only when these two conditions are satisfied that the appropriate government would be bound to refer the dispute.

In *Poona Labour Union*, a joint application was made by the workmen and the employer to the Deputy Commissioner of Labour, Maharashtra under s 10(2) for referring the dispute for adjudication. The deputy commissioner wanted to make an on the spot inquiry in respect of the aforesaid dispute and asked the union to produce their membership register along with the counterfoils of receipts on a particular day. However, the union wrote back to the deputy commissioner that if there be any doubt about the representative character of the union, the only course would be to hold a secret ballot. In other words, the union wanted their membership register to be accepted as correct for determining the majority of the workmen of the union or in the alternative, the secret ballot to be conducted to ascertain the wishes of the majority of the workmen for the purposes of making the reference. As this request of the union was not acceded to by the deputy commissioner of labour, the union filed a writ petition in the High Court for a writ of mandamus on the ground that it was mandatory for the State Government to refer the dispute to adjudication as soon as the parties applied jointly or separately in the manner prescribed under s 10(2). The court found that though the first condition was satisfied, *viz*, that the application in the prescribed form had been made but the second condition namely, that the union represented the majority of the workmen was not satisfied. In view of the fact that the Act does not require any rules to be made with respect to the manner in which the appropriate government has to hold an inquiry to satisfy itself that the parties making an application under s 10(2) represent the majority of each part, it is open to the State Government to hold such an inquiry in any manner which is in consonance with principles of natural justice. Therefore, the government was justified to hold an inquiry under r 28A of the Bombay Industrial Relations Rules 1947 for the purpose of ascertaining the membership of the union.[25] Rule 3 of the Industrial Disputes (Central) Rules 1957 prescribes that the application shall be in form A and shall be accompanied by a statement setting forth:

(a) the parties to the dispute;

(b) the specific matters in dispute;

(c) the total number of workmen employed in an undertaking affected;

(d) an estimate of the number of workmen affected or likely to be affected by the dispute; and

(e) the efforts made by the parties themselves to adjust the dispute.

The rule also prescribes the mode of service of the application. However this rule applies only to a reference under s 10(2) and it does not apply to a reference under s 10(1) of the Act. The parties to an industrial dispute, desiring to have their differences settled by an industrial tribunal, cannot themselves apply to the tribunal, but must move the appropriate government to refer the matter to the tribunal. The government has the power to lay down the scope of the dispute requiring adjudication only in a reference under sub-s (1), but it cannot interfere with the scope, decided by the parties themselves by agreement, in a reference made under this provision. However, by agreeing to a joint application under s 10(2) of the Act, the employer is not estopped from raising a preliminary objection as to the maintainability of a reference, for instance on the ground that what is referred is not an 'industrial dispute' or that the concerned employee is not a 'workman', or that the undertaking is not an 'industry'. An

application in form 'A' does not have the effect of depriving a party of the right to raise all objections which the party would have if the reference is under ss 10(1) and 12(5) of the Act. The observation of Bishan Narain J to the effect that '*the employer is not estopped from raising a preliminary objection as to the maintainability of reference*' sounds paradoxical. If the employer has even an iota of doubt that what is sought to be referred is not an 'industrial dispute', why should he, in the first instance, be a party to the joint application requesting a reference of the dispute? The very fact that he signed the application along with the union in form 'A' should give rise to the irrebuttable presumption that the employer is of the opinion, and is fully convinced, that there was an industrial dispute which required adjudication and, hence, on the same presumption, he should not be permitted to retract from that position at a later stage. It is not as if the employer had signed the joint application under duress, undue influence or misrepresentation! This part of the decision is manifestly wrong and deserves to be rejected as being without any substance.[26]

Sub-section (2) does not explicitly lay down whether it is open to the parties to choose a particular labour court or an industrial tribunal out of several functioning in the state and approach the appropriate government for reference to that particular labour court or tribunal. However as the overall power is given to the government alone, it appears that it is the government's choice of a particular labour court or tribunal, that matters, and it is not open to the parties to select a particular labour court or tribunal and approach the government that the same be referred to that particular tribunal. The government may, however, accept the proposal of the parties.[27] Jurisdictional objections can always be raised by anyone of the parties, because jurisdiction of the tribunal entirely depends on existence or apprehension of an 'industrial dispute' as defined in the Act.[28] Furthermore, the jurisdiction of the tribunal emanates from the order of reference made by the 'appropriate government'. Hence, if the referring government is not the 'appropriate government', the tribunal will have no jurisdiction to adjudicate on such a reference. In such cases, the general principle of law is that neither consent nor waiver can be a substitute for jurisdiction and cure the initial want of jurisdiction. The basis of jurisdiction can always be looked into by the tribunal irrespective of the agreement of the parties to make a joint request for reference.[29] In the case of associations or unions, the requirement of majority on both the sides arises but if the dispute is only between an employer and his employees, the requirement of majority with respect to that employer would not arise. Upon an application being made by the parties to refer the dispute and the government being satisfied with respect to the fact that the persons applying to it represent the majority, it is bound to refer the dispute under this sub-section. However, this provision does not entitle anyone of the parties to an 'industrial dispute', to compel the appropriate government to make a reference,[30] because in such a case the reference will not be under s 10(2), it will be only under s 10(1), in which case there is no need of an application, much less in form 'A'. Though the requirement of making an application in the prescribed form, *viz*, in form A is mandatory for a valid reference under s 10(2) of the Act,[31] a reference under s 10(1) would not be vitiated merely on the ground that an application by one of the parties in form 'A' was not made.[32]

SUB-SECTION (2)(A): SPECIFYING THE PERIOD OF ADJUDICATION

Period of Adjudication

This sub-section has been inserted by the Amending Act 46 of 1982. It requires the appropriate government to specify the period in the order of reference of an industrial dispute, to a labour court, tribunal or national tribunal, within which it should submit its award on the dispute to the appropriate government. From the language of this provision, it is evident that no uniform period has been fixed by the legislature for adjudication of all sorts of disputes. It has, advisedly, been left to the discretion of the appropriate government to specify the period of adjudication, taking into account the nature and incidence of each particular dispute. In other words, the appropriate government has the discretion to fix the period of adjudication in each case. The procedure for submitting the award has been prescribed in sub-rr (10) and (11) of r 10B of the Industrial Disputes (Central) Rules 1957. No doubt this provision, subject to the discretion of the adjudicator, will ensure time bound adjudication. However, these tribunals have their own physical limitations and constraints of time. Apart from making the adjudication time-bound, it is necessary for the government to consider increasing the number of these tribunals, commensurate with the workload on them. Otherwise, the pious hopes raised by this provision will end in disappointment. The Industrial Disputes Act is a piece of social welfare and beneficial legislation aimed at amelioration of hardships of the working class by providing the machinery for resolving their grievances by settlement and failing that, by compulsory adjudication expeditiously. The purpose will be frustrated if the adjudication gets enmeshed in litigative marshes. In *HD Singh*, the court deprecated the tendency of employers to stifle the efforts of the workmen in their legitimate claims seeking benefits under the industrial law by tiring them out in adjudication proceedings raising technical and hyper-technical pleas and dragging industrial adjudication for years together on such pleas. The court counselled the employers to meet the case of the employees squarely on merits and get them adjudicated quickly for ensuring industrial peace and contended labour and exhorted the labour to reciprocate to prevent industrial unrest.[33]

In a public interest litigation, the Delhi High Court directed the Central Government to constitute, for the time being, one more industrial tribunal and two more labour courts for the Union Territory of Delhi to deal with large number of arrears and pending references with further recommendation that the government should look into this aspect in greater depth and it may itself feel impelled to constitute even larger number of labour courts and industrial tribunals consistent with the actual requirements and

needs.[34] In this case, the court noticed the startling number of applications and references pending before the labour courts and the industrial tribunals which were escalating with terrific speed. In view of such a heavy work load, making the adjudication of references time-bound is a contradiction in terms and nothing more than an eyewash. Similar situations may not be denied in the other states of the country as well. It is, therefore, imperative to increase the number of adjudicatory tribunals commensurate with the work load.

***First Proviso*: Disputes of Individual Workmen**

This proviso carves out an exception to sub-s (2A). Here the legislature itself has fixed the maximum uniform period of three months with respect to industrial disputes connected with individual workmen. It takes away the discretion of the appropriate government to fix the period of adjudication in the order of reference. The maximum period of adjudication with respect to disputes referred to adjudication under s 2A will be three months by virtue of this proviso. Likewise, the maximum period of adjudication of the disputes which are connected with individual workmen though not comprehended in s 2A, have partaken the character of industrial dispute under s 2(k) on being espoused by workmen or unions, is also three months. Apart from the disputes relating to discharge, dismissal, retrenchment or otherwise termination of the service of an individual workman as comprehended in s 2A, this proviso also takes the disputes connected with individual workmen relating to their service such as suspension, leave and transfer etc; when espoused by trade unions or substantial number of fellow workmen.

***Second Proviso*: Extension of the Period**

This proviso further gives discretion to an adjudicator to extend the period fixed by the appropriate government or by the first proviso, for such further period as he may think fit in two circumstances, *viz*, (1) when the parties to the dispute whether jointly or separately apply in the form prescribed by the relevant rules under the Act for extension of such period; or (2) for any other reason. Even in the absence of any application by the parties for extension of time, an adjudicator has been given *suo motu* power to extend the time for 'any other reason'. However, the adjudicator is required to record his reason for such extension in writing. This makes the order of the adjudicator reviewable. In other words, the High Court in its writ jurisdiction under Arts. 226 and 227 of the Constitution can scrutinise the legality and validity of the order on the grounds of justifiability of the reasons recorded by the adjudicator. If the extension of period is for extraneous, irrelevant or non-germane reasons, the order extending the period will be subject to quashing on *certiorari*.

***Third Proviso*: Exclusion of the Period of Injunctions**

In reckoning the period of adjudication under this sub-section, if the proceedings before an adjudicator have been stayed by an injunction or an order of a civil court, the period of operation of the stay shall not be taken into account. For instance, if the period of adjudication specified in the order of reference is one year and the proceedings before the adjudicator are injuncted by a civil court or a writ court by a stay order after three months for adjudication and the injunction of the stay continues to operate for a period of three years, before the matter comes back to the tribunal, the period of three years during which the injunction or stay remained operative, will not be taken into account and the computation of the period specified in the order of reference will be as if only three months had expired.

***Fourth Proviso*: Abatement of Proceedings**

This proviso makes it clear that any proceedings pending before an adjudicatory authority, shall not abate merely on the ground that the period specified in the order of reference under this sub-section has expired. From this it would appear that the requirements of a definite period is not mandatory but it is merely directory.[35] This proviso must be read with the second proviso which vests the discretion in the adjudicator to extend the period of adjudication. This proviso makes it clear that in cases where the period specified in the order of reference expires before the order of extension is made by the tribunal either on application of the parties or *suo motu*, the proceedings will not abate. From the language of this proviso it further appears that even if the order of the adjudicator extending the period for adjudication is quashed by a writ court, still the proceedings will not abate. It will be open to the adjudicator to sustain the extension on valid reasons or to extend the further period on valid and justifiable reasons. The second and the fourth provisos put together takes much of the wind out of the sail of the main section, if not make it entirely illusory. The requirements of the main section appear merely to be directory, not mandatory particularly so when no penalty has been provided for its non-compliance or breaches.[36]

SUB-SECTION (3): PROHIBITION TO CONTINUANCE OF STRIKES AND LOCKOUTS

Prohibition to continuance after making the Order of Reference

The Act prohibits the commencement and continuance of strikes and lockouts in certain circumstances for achieving its object, *viz*, the investigation and settlement of 'industrial disputes' in a peaceful atmosphere. Section 10(3) and s 10A(4A) empowers

the appropriate government to prohibit the continuance of strikes. The pre-conditions to the exercise of the power under this sub-section are:

(i) an 'industrial' dispute should have been referred to a board, labour court, tribunal or national tribunal under section 10 or arbitrator under section l0A ; and,

(ii) on the date of the reference there should be a strike or lockout in existence in connection with such dispute.

When these two conditions are existing, the appropriate government has the power to prohibit by order the continuance of such strike or lockout. The words 'the appropriate government may by order', indicate that unless the appropriate government makes the prohibitory order, the strike or lockout will not be automatically prohibited. The power, therefore, has to be exercised by the government in its discretion. The effect of this sub-section is that even though a strike or lockout when commenced was legal, it would become illegal if continued after the prohibitory order under s 10(3) has been made. In a case where there is a number of demands, if the government refers all the demands to a tribunal for adjudication, it derives its powers to prohibit a strike or a lockout which was resorted to in connection with the points of dispute referred for adjudication.[37] The words 'which may be in existence on the date of reference' refer to 'any strike or lock-out' and not to 'such dispute'. However, the Delhi High Court in *Edward Keventers*, took the view that if out of the number of demands only some are referred for adjudication, the continuance of the strike can be prohibited only regarding the disputes which have been referred for adjudication, the prohibition of the continuance of the strike with respect to the matters which have not been referred to adjudication is not warranted by sub-s (3) of s 10 of the Act. From the language of the statute, *viz*, sub-s (3), it is obvious that the question of the existence of an industrial dispute is irrelevant to the exercise of power under this sub-section. What is material is the existence of a strike or a lockout. The court has correctly noticed that the words 'such dispute' in the sub-section 'indicate an industrial dispute mentioned in the earlier part, namely, an industrial dispute referred to a board, labour court, tribunal or national tribunal under this section'. However, the premises that 'in order to invoke sub-s (3) of s 10, it would also have to be shown that such a dispute was in existence on the date of reference' and that for exercising the power in sub-s (3), it is necessary that 'the industrial dispute had been referred to the authority concerned under the section and the dispute was such as was in existence on the date of reference', are not warranted by the language or the grammar of the statute.[38] The use of the words in the judgment 'that the dispute was such as was in existence on the date of reference' indicates that the High Court has substituted the word 'as' for the word 'which' after the words 'such dispute'. The word 'which' occurring in the phrase 'which may be in existence on the date of reference' does not refer to the words 'such dispute', but it refers to the words 'any strike or lockout'. In other words, the power of the government is to prohibit the continuance of 'any strike or lockout...which may be in existence on the date of the reference'. If the purpose of the legislature was to connect 'such dispute' with the words 'may be in existence' on the date of reference, then the qualifying words should have been 'as' instead of the word 'which'. Grammatically the word 'which' connects the words, 'may be in existence on the date of reference' with the words 'any strike or lockout and not with the words, 'such dispute'. A priori, the further conclusion of the High Court that '*likewise the sub-section would not apply if some disputes were in existence on the date of reference but the same has not been referred to a board, labour court, tribunal or national tribunal*' is also not correct as it is not warranted by the plain language of the statute. According to Maxwell:

> A statute is to be expounded according to its obvious meaning. In other words, unless the language is ambiguous in its literal sense or leads to any absurdity, repugnancy or inconsistency with the other provisions of the statute, the ordinary and natural sense of the words cannot be departed from as the words of the statute in such cases, best declares the intention of the statute.[39]

It is well-settled that the meaning which words ought to be understood to bear is not to be ascertained by any process akin to speculation and the primary duty of a court is to find the natural meaning of the words used in the context in which they occur...to give a literal meaning to the language used by Parliament unless the language is ambiguous or, its literal sense gives rise to an anomaly or, results in something which would defeat the purpose of the Act.[40] In this case the language of the statute is quite clear and unambiguous and the ordinary and normal meanings do not lead to any absurdity or repugnancy or inconsistency with any provisions of the Act. On the other hand, the construction put on the words of the section by the High Court in using the word 'as' for the word 'which' after the words 'such dispute' leads to an absurdity.[41] Strike, as contemplated under s 10(3), is to be treated as whole, it cannot be said that there are separate and concurrent strikes relating to each one of the demands raised by the workmen. The result of this holding is that if some demands out of the total number of demands are referred under s 10(1), the 'appropriate government' will be empowered only to prohibit the strike with respect to those demands which have been referred and it will not be empowered to prohibit the strike for the demands which have not been referred. If that be so, the purpose of sub-s (3) would be defeated by including in the charter of demands some frivolous or unreferable demands which the government will not refer and it would become impossible to prohibit the continuance of a strike with respect to such frivolous or unreferable demands consequently rendering the provisions of sub-s (3) otiose. The holding of the High Court is also repugnant to the provisions of s 23, which prohibits the commencement of strikes or lockouts during the pendency of the proceedings and the ban on commencement of strike is complete. It will be, therefore, illogical that

though a strike during the pendency of adjudicatory proceedings of an 'industrial dispute', cannot be commenced whether it relates to the matters under reference or un-referred matters, but with respect to the matters which have not been referred, it can be continued according to the interpretation of sub-s (3) by the High Court. This will further be repugnant to the object of the Act itself which seeks to investigate and settle industrial disputes in peaceful and harmonious atmosphere by securing industrial peace. If the strike commenced before the reference can be continued on the ground that some of the demands have not been referred, the object and purpose of s 10(3) to achieve a peaceful atmosphere during adjudicatory or arbitral proceedings will be frustrated. This decision, therefore, does not propound correct law. In appeal, the Supreme Court reproduced the text of s 10(3), instead of construing the language of the statute, it had nevertheless gone on a tangent observing: 'this stands to reason and justice and a demand which is suppressed by a prohibitory order and is not allowed to be ventilated for adjudication before a tribunal will explode into industrial unrest and run contrary to the policy of industrial jurisprudence'.[42] The court took the illustration of a situation where out of 20 demands in a charter of demands, the appropriate government referred only one demand for adjudication and posed the question to itself as to how can this result in the anomalous situation of the workmen being deprived of their basic right to go on strike be supportive of those 19 demands'? In posing this question the court appears to have lost sight of the clear language of the statute which prohibits only the 'continuance' of any strike in connection with the dispute which has been referred. It does not prescribe the right of the workmen to go on strike subsequently in connection with the disputes which were not referred.

On a true construction of s 10(3), the position of law is that when there is a strike in connection with a number of demands some of which have been referred to adjudication to an adjudicatory authority, the government has the right to prohibit the continuance of the strike by invoking that provision. When the strike was commenced, it was in connection with the demands in dispute. After the reference of some of the demands for adjudication, the strike does not cease to be in connection with the referred disputes. This gives the right to the government to prohibit continuance of the strike. However, after the prohibition of the continuance of the strike in existence at the time of the reference, the workmen may commence a fresh strike in connection with the demands which have not been referred to adjudication, after complying with the requirements of s s 22 and 23 of the ID Act. The Patna High Court held that where the strike or lockout is not in connection with any dispute referred for adjudication, but is itself the subject-matter of a dispute, it would not attract the provisions of s 10(3), and it would not justify an order of prohibition under the said sub-section.[43] The words 'in continuation of any strike or lockout in connection with such dispute which may be in existence on the date of the reference', have to be read with reference to the facts of each particular case. The words 'in connection with' mean 'concerning' such dispute or 'relating to' such dispute. It also means 'with reference to' such dispute. These words seem to be significantly wide. The connection of the dispute and the strike or lockout may be direct or indirect or even remote. Whether the order of prohibition of the continuance of any strike or lockout relates to the dispute or has reference to the dispute, directly or indirectly, are questions which have to be decided on the facts and circumstances of each case.[44] In order that the strike or lockout may be 'in connection with' a dispute, it is necessary that the strike or lockout should be something different from the dispute itself. Therefore, an order prohibiting a strike or lockout can only be made where such strike or lockout is in connection with a dispute, which should be, in order that the strike or lockout might be in its connection, something different from the strike or lockout itself. On this construction of s 10(3), the Rajasthan High Court[45] has taken the view that a strike or lockout which is the subject-matter of the dispute itself, cannot be termed to be a strike or lockout in connection with such dispute. Hence, a strike or lockout, which is itself in dispute, would not justify an order under s 10(3) for its prohibition.

In other words, unless the government makes the order there is no statutory bar on the continuance of strike or lockout. The Kerala High Court was of the view that the power exercised under s 10(3) is a quasi-judicial power and an order thereunder could not be passed without giving a reasonable opportunity to all those who would be affected by the order to state and establish their case.[46] As against this, the High Courts of Delhi,[47] Andhra Pradesh,[48] Karnataka,[49] and Bombay,[50] held that it was not necessary for the government to issue a show cause notice to the parties before passing an order prohibiting the strike and lockouts under this provision. The latter view lays down the correct law, whereas the Kerala High Court is clearly wrong. In *Birla Tyres*, the appropriate government invoked s 10(3) and issued an order prohibiting the strike, which was followed by a letter from the Labour Commissioner to the union to refrain from strike and threatening legal action under r 20 of Trade Union Rules in the event of failure on the part of the union. Quashing the order of the government and the communication of the Labour Commissioner, Mahapatra J (for self and Gopala Gowda J) held that no reference of an industrial dispute was made under s 10, and that in the absence of a reference, the order prohibiting strike was illegal and could not be sustained.[51] Where the branch of a company was closed, the prosecution launched by the government, on the ground that the company had declared a lockout in contravention of the order passed under s 10(3), was illegal and liable to be quashed in view of the fact that the labour court in its award did not record a finding to the effect that it was a case of lockout.[52]

Constitutional Validity of sub-section (3)

The discretion of the government under sub-s (3) is not un-channelled or arbitrary because it provides for the exercise of the discretion for attaining the objects of the Act which are the settlement of industrial disputes, the promotion of industrial peace, maintenance of production and benefit to the community in general. It cannot be assumed that the 'appropriate government'

will abuse its power even though the power is wide and is to be exercised in its discretion. In view of the objects of the Act, the discretion vested in the 'appropriate government' cannot be said to be unfettered and uncontrolled because to make the exercise of the powers justiciable will defeat the very purpose of it. While giving the power to the 'appropriate government' to prohibit the continuance of the strikes and lock-outs, the legislature could not have foreseen every contingency or situation that would arise and to specifically enumerate such contingencies in the Act itself. Though the statute cannot be struck down, the abuse of power, whenever occurs, would be liable to be struck down.[53]

SUB-SECTION (4): JURISDICTION OF ADJUDICATORY AUTHORITIES

This sub-section delineates the perimeter of the jurisdiction of the adjudicatory authorities under the Act, *viz*, the labour court, the industrial tribunal or the national tribunal to adjudicate. These authorities, *hereinafter* will be compendiously referred to as 'the tribunal'. The word 'jurisdiction' means authority to decide,[54]or the 'legal authority of a court to do certain things'. In the context of the Industrial Disputes Act, the word 'jurisdiction' may be used in three senses *viz*:

(i) the jurisdiction by Constitution of the tribunal or the qualifications of the presiding officer;

(ii) local jurisdiction of the tribunal; or

(iii) the jurisdiction with respect to the subject-matter of the dispute. In this sense of the word 'jurisdiction', the tribunal may have power to entertain a dispute, though in another sense, it may be said that it has exceeded its power in granting a relief which it was not authorised to grant.[55]

An industrial tribunal is the statutory creation, *viz*, the Industrial Disputes Act. Hence its jurisdiction is confined by the Act, and it follows that the tribunal will have no jurisdiction, to adjudicate upon any dispute or *lis* to which the Act does not apply. The jurisdiction of the tribunal has further been limited by the provisions of s 10(4) to confine its adjudication to 'the points specified in the order of reference and matters incidental thereto'. In *United Commercial Bank*, Kania CJI observed:

> Nor can consent give a court jurisdiction if a condition which goes to the root of the jurisdiction has not been performed or fulfilled. No appearance or consent can give a jurisdiction to a court of limited jurisdiction which it does not possess...The absence of a condition necessary to find the jurisdiction to make the award or give a decision deprives the award or decision of any conclusive effect. The distinction clearly is between the jurisdiction to decide matter and the ambit of the matters to be heard by a tribunal having jurisdiction to deal with the same. ... When however the question is of jurisdiction of the tribunal to make the award...no question of acquiescence or consent can affect the decision.[56]

The mere fact that an objection was not taken before the tribunal, would not give it jurisdiction if it had no inherent jurisdiction.

Constitution of the Tribunal

If the tribunal is not properly constituted or the presiding officer does not possess the requisite qualifications under ss 7, 7A or 7B or suffers from any of the disqualifications enumerated in s 7C, he will have no jurisdiction to proceed with the adjudication of an 'industrial dispute', even though such an 'industrial dispute' has been referred to him by the 'appropriate government' or the Central Government.

Local Jurisdiction

The jurisdiction of the tribunal emanates from the order of reference. A reference for adjudication to a labour court or industrial tribunal can be made by the 'appropriate government'. Therefore if, the subject-matter of the dispute does not lie within the local limits of the state government which makes the reference or the cause of action not arising within its territories, the reference will not be competent and the tribunal constituted by such a state government will not be competent to adjudicate upon such a reference.

Adjudicatory Jurisdiction

The jurisdiction of the tribunal to adjudicate upon an industrial dispute referred to it may be conveniently dealt with under the following heads:

(i) Industrial adjudication

(ii) Subject matter

Industrial Adjudication

(i) General Principles

Once a reference has been properly made to an adjudicatory authority, the dispute has to be resolved by it and adjudication cannot be avoided on the ground that the workman failed to pursue another remedy. The adjudicator cannot refuse to adjudicate upon the dispute and surrender its jurisdiction to some other authority. Though the appropriate government has jurisdiction to refer or not to refer a dispute for adjudication, the adjudicator to whom the dispute has been referred has no discretion to decide whether to adjudicate or not.[57]In the words of Mahajan J, 'the expression "adjudication" implies that the tribunal is to act as a judge of the dispute; in other words, it sits as a court of justice and does not occupy the chair of an administrator. It is pertinent to point out that the tribunal is not given any executive or administrative powers'.[58] However, the scope of adjudication by a tribunal under the Act, is much wider and also in view of the increasing complexity of modern life and the interdependence of the various sectors of a planned national economy, it is obviously in the interest of the public that labour disputes should be peacefully and quickly settled within the framework of the Act rather than resort to methods of direct action which are only too well calculated to disturb the public peace and order and diminish production in the country and the court should not be astute to discover formal defects and technical flaws to overthrow settlement.[59]

The task of an industrial adjudicator is indeed tedious. He has to reconcile the head-on dash between the fundamental rights guaranteed by the Constitution such as freedom of trade, freedom to practice any profession or to carry on any occupation and the Directive Principles enshrined in the Constitution which are fundamental in the governance of the country. In addition he has the delicate task of balancing the conflicting interests of employer, employee and the public on basic policies such as freedom and sanctity of contract, protection of business, right to work, making training available to employees, earning of livelihood for oneself and family, utilisation of one's skill and talent, continued productivity, betterment of one's status, avoidance of one's becoming a public charge, encouragement of competition and development of national and international trade and avoidance of monopoly, promotion of collective bargaining and elimination of indiscipline in industry and so on. The adjudication by the industrial adjudicators under the Act is only an alternative form of settlement of industrial disputes on a fair and just basis.[60] The Constitution has vested the powers of judicial review in the High Courts and invested the Supreme Court with power to sit in appeal over the awards of industrial tribunals, 'which are founded on somewhat hazy background of maintenance of industrial peace, which secures the prosperity of the industry and improvement of conditions of the workmen employed in the industry'.[61] Industrial adjudication has also necessarily to be aware of the current socio-economic thought around; it must recognise that in a modern welfare state, healthy industrial relations are matters of paramount importance and its essential function is to assist the state by helping in the solution of industrial disputes which constitute a distinct and persistent phenomenon of modern industrialised state.[62] In the language of Krishna Iyer J:

> Industrial jurisprudence does not brook nice nuances and torturesome technicalities to stand in the way of just solutions reached in a rough and ready manner…Grim and grimy life-situations have no time for the finer manners of elegant jurisprudence.[63]

The ultimate object of industrial adjudication is to help the growth and progress of national economy and it is with that ultimate object in view that industrial disputes are settled by industrial adjudication on principles of fair-play and justice.[64]The provisions of this Act confer wide powers and jurisdiction upon the adjudicatory authorities to make appropriate awards in determining industrial disputes brought before them. In the interest of social justice and with a view to securing peace and harmony between the employer and his workmen, industrial adjudication may impose new obligations or abolish the old ones or alter or modify the terms and conditions of employment, if it is thought fit and necessary to do so.[65] Speaking for the federal court, on the scope and powers of industrial adjudication in *Western India Automobile Assn,* Mahajan J observed:

> Adjudication does not, in our opinion, mean adjudication according to strict law of master and servant. The award of the tribunal may contain provisions for settlement of a dispute which no court could order if it was bound by ordinary law but the tribunal is not fettered in any way by these limitations.[66]

In other words in deciding industrial disputes, the jurisdiction of an industrial adjudicator is not confined to administration of justice strictly according to law.[67] but it can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. Therefore the tribunal, has not merely to interpret or give effect to the contractual obligations between the parties which it considers essential for keeping industrial peace,[68] but its jurisdiction is much wider and can be reasonably exercised with the object of keeping industrial peace and progress.[69] This holding in *Western India Automobile Assn* was reverberated by the Supreme Court in *Bharat Bank,* in which Mukherjee J observed:

> In settling the disputes between the employers and the workmen, the function of the tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement, It has not merely to interpret or give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace. [70]

In *Rohtas Industries*, SK Das J held:

> A court of law proceeds on the footing that no power exists in the courts to make contracts for people; and the parties must make their own contracts. The courts reach their limit of power when they enforce contracts which the parties have made. An industrial tribunal in not so fettered and may create new obligations or modify contracts in the interests of industrial peace, to protect legitimate trade union activities and to prevent unfair practice or victimisation.[71]

Now in *Premier Automobiles*, Untwalia J pointed out:

> ...the powers of the authorities deciding industrial disputes under the Act are very extensive-much wider than the powers of a civil court, while adjudicating a dispute which may be an industrial dispute. The labour courts and the tribunals to whom industrial disputes are referred by the appropriate government under section 10 can create new contracts, lay down new industrial policy for industrial peace, order reinstatement of dismissed workmen, which ordinarily a civil court could not do.[72]

These dicta of the federal court and the Supreme Court are based on the celebrated statement of law by Ludwig Teller to the following effect:

> ...industrial arbitration may involve the extension of an existing agreement, or the making of a new one, or in general the creation of new obligations or modifications of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements.[73]

This principle enunciating the scope of industrial adjudication has since been followed and adopted by the courts in the field of industrial adjudication in India.[74] The industrial adjudicators therefore, are to adjudicate upon the disputes between the employers and their workmen and in the course of such adjudication, they must determine the 'rights' and 'wrongs' of the claims made, and in doing so they are undoubtedly free to apply the principles of justice, equity and good conscience, without attaching undue importance to legal technicalities and keeping in view, the further principle that their jurisdiction is invoked, not for the enforcement of mere contractual obligations but for preventing labour practices regarded as unfair and for restoring industrial peace on the basis of collective bargaining.[75] It is for this reason that the industrial tribunals are armed with extraordinary powers and have been entrusted with duty of adjudicating disputes of a peculiar character. Therefore, the rights of an employer to hire labour, to dismiss the employees, to fix wages, dearness allowance, bonus and gratuity, to grant leave facilities, housing accommodation and other amenities have been controlled and regulated by well-recognised limits placed upon the contractual rights of the employers by the industrial adjudication. Therefore, industrial adjudication is always a matter of making adjustment between the two competing claims.[76] But, howsoever wide or flexible the scope of industrial adjudication and the power of the adjudicator may be, it cannot exercise arbitrary jurisdiction.[77] No doubt, an industrial adjudicator can substitute a new contract if it is essential for industrial peace, but 'it would be arrogating too much power if the tribunal were to make an award altering a statutory provision'.[78] Therefore the industrial adjudication has to proceed on the basis of certain broad guidelines. The powers of the tribunals are derived from the statutes, which lay down the rules of the game and the tribunal has to decide according to these rules. The powers conferred upon the tribunal have the sanction of law behind it and are not exercisable by reason of discretion vested in it.[79] The exercise of discretion itself means that something is to be done according to rules of reason and justice, not according to private opinion but according to law and not humour. It cannot be arbitrary, vague and fanciful but must be legal and regular.[80] The tribunal cannot also ignore altogether the existing obligations without any rhyme or reason.[81] In *New Maneckchowk*, Wanchoo J observed:

> There is no doubt, therefore, that it is open to an industrial court in an appropriate case to impose new obligations on the parties before it or modify contracts in the interests of industrial peace or give awards which may have the effect of extending existing agreement or making a new one. This, however, does not mean that an industrial court can do anything and everything when dealing with an industrial dispute. This power is conditioned by the subject-matter with which it is dealing and also by the existing industrial law and it would not be open to it while dealing with a particular matter before it to overlook the industrial law relating to that matter as laid down

by the legislature or by this court.[82]

In these matters, there are no absolutes and no formula can be evolved which would invariably give answer to different problems which may be posed in different cases on different facts. In the branch of law relating to industrial relations, in the words of Shah J 'the temptation to be crusaders instead of adjudicators must be firmly resisted'.[83] It cannot be too strongly stated and reinstated that every industrial dispute depends upon its own peculiar circumstances. In sailing across the sea of industrial adjudication, more ships of justice have gone down for failure to sense the treacherous reefs of generality than for any other reason. 'In order that industrial adjudication should be completely free from the tyranny of dogmas or the sub-conscious pressures of preconceived notions, it is of utmost importance that the temptation to lay down broad principles should be avoided'.[84] For, 'vague and indefinite directions instead of fostering harmony, are likely to open up vistas for future bickerings and disputes in their implementation'.[85] The approach of industrial adjudication, has to be necessarily pragmatic, and the tests which it applies and the considerations on which it relies would vary from case to case and would not admit of any rigid or inflexible formula. In attempting to solve industrial disputes, industrial adjudication is generally to be reluctant to lay down any hard and fast rules or adopt any test of general or universal application.[86] It should, therefore, refrain from enunciating any general principles or adopting any doctrinaire consideration,[87] and should avoid formulating and adopting abstract generalisations.[88] Das Gupta J observed:

> Nor can the tests and the principles that have been laid down be applied mechanically or by way of syllogism. A mechanical or syllogistic approach may appear to furnish the easiest way of solving a complicated problem, but the allurement of the easy way has to be resisted. For, while such ways are beset with risks of errors in all branches of law, they are even more unsafe and inexpedient in industrial law, where sensitive problems of human relations have to be solved in the mist of all the complexities of modern industrial organisation. That is why in applying the well-settled tests and principles on these problems, we have to bear in mind that while all tests that are possible of application should be applied, the value and importance to be attached to individual tests will vary according to the nature of the industrial activities and according to the nature of the disputes in which the problem has arisen, *viz*, whether it is in respect of lay-off, retrenchment, production bonus, profit bonus or something else.[89]

The tribunals, therefore, should not decide abstract question of law,[90] nor should they be unduly influenced by academic questions of law, but should make an attempt to deal with the merits of each case according to its facts and circumstances.[91] While adjudicating a dispute, the tribunal is not vested with the power to decide whether any statutory provision is intra virus or otherwise. The question whether there was a rationale or logic in making the provision is not to be examined by the tribunal, and cannot be done by It.[92] In *Delhi Cloth Mills*, speaking of the futility of precedent in the field of industrial adjudication, Shah J said thus:

> We consider it right to observe that in adjudication of industrial disputes settled legal principles have little play; the awards made by industrial tribunal are often the result of *ad hoc* determination of disputed questions, and each determination forms a precedent for determination of other disputes. An attempt to search for principle from the law built up on those precedents is a futile exercise. To the courts accustomed to apply settled principles to facts determined by the application of the judicial process, an essay into the unsurveyed expanses of the law of industrial relations with neither a compass nor a guide, but only the pillars of precedents is disheartening experience...and even generally in the settlement of disputes arising out of industrial relations, there are no fixed principles, on the application of which the problems arising before the Tribunal or the Courts may be determined and often precedents of cases determined *ad hoc* are utilised to build up claims or to resist them. It would, in the circumstances, be futile to attempt to reduce the grounds of the decisions given by the Industrial Tribunals, the Labour Appellate Tribunals and the High Courts to the dimensions of any recognised principle.[1]

An industrial tribunal is not a court of general or residuary jurisdiction but a tribunal with specific jurisdiction enumerated by the terms of the orders of reference. In other words, it is an *ad hoc* tribunal with *ad hoc* jurisdiction to determine specific industrial disputes.[2] It should not base its conclusions on some airy view of what it considers would be a good thing for workmen.[3] In other words, the tribunal has to confine itself to the pleadings and the issues arising therefrom and it is, therefore, not open to it to fly off at a tangent, with disregard to the pleadings and thus, reach any conclusion that it considers as just and proper.[4] It is 'desirable that industrial adjudication should deal with problems as and when they arise and confine its decision to the points which strictly arise on the pleadings between the parties'.[5] Therefore, the best course to adopt in dealing with an industrial dispute is to consider the facts of the case, the nature of the demand made by employees, the nature of the defence raised by the employer and decide the dispute without unduly enlarging the scope of the inquiry. Care must be taken not to evolve large principles which may affect the facts and circumstances which are not before the tribunal or which would tend to prejudice issues not directly raised in the case under adjudication.[6] If in the decision of the dispute, some working principles have to be evolved, that must be done.[7] Nevertheless, it may not be irrelevant to point out that in avoiding generalisations

(however commendable), the guidance afforded by the statute through its own dictionary cannot be ignored.[8] In *HD Singh*, the Supreme Court remorsefully deprecated the practice of the employers to stifle the efforts of the workmen in their legitimate claims seeking benefits under the industrial law by tiring them out in adjudication proceedings, raising technical and hyper-technical pleas and thus, dragging on litigation for years on such pleas. The court counselled the employers to meet the case of the, workmen squarely on merits and get them adjudicated quickly. It also advised the employers to achieve industrial peace by evolving a contented labour and the workmen should reciprocate to prevent industrial unrest. [9] The primary duty of the industrial tribunal is to establish peace in the industry between the employer and workmen but while settling an industrial dispute with a view to establishing industrial peace, it should not lose sight of the interest of the industry. Any settlement of a dispute ignoring the interest of the industry is likely to have far-reaching and detrimental effects on the workmen themselves.[10]

During the past half century, industrial adjudication in India, has served remarkably well. It is a striking testimony to the work, not only of those who framed the legislation, but also and to a greater degree, of the industrial tribunal, labour appellate tribunal, High Court and in particular, the Supreme Court whose duty it has been to interpret and apply it. Refusing to lay down general principles because it has always conceived its function to be the adjudication of issues properly before it for decision and confining its judgment to the facts and circumstances calling for its intervention in the dispute of the parties. The industrial adjudication has maintained a steady adherence to the determination of the law in its application to particular facts, avoiding political or equally vague or ill-defined standards, unaffected by considerations characterised as 'dynamic', yet contriving to a remarkable degree, to infuse common sense and practical considerations into its decisions. Some topics relating to tribunal jurisdiction which have not been dealt with elsewhere in the book are being dealt with under the following heads:

(a) Employer's Right of Management

On the right of an employer to organise and carry on his business in any manner he likes, the following words of Hidayatullah J in *Ghatge and Patil*, are noteworthy:

> A person must be considered free to so arrange his business that he avoids a regulatory law and its penal consequences which he has without the arrangement, no proper means of obeying. This, of course he can do only so long as he does not break that or any other law.[11]

In *Parry & Co*, Shelat J observed:

> It is well-established that it is within the managerial discretion of an employer to organise and arrange his business in the manner he considers best. So long as that is done *bona fide* it is not competent to the tribunal to question its propriety...it is for the employer to decide whether a particular policy in running his business will be profitable, economic or convenient and we know of no provision in the industrial law which confers any power on the tribunal to inquire into such a decision so long as it is not actuated by any consideration of victimisation or any such unfair labour practice.[12]

Acting *bona fide* means that the organisation or reorganisation should not be affected with the ulterior object of victimising his employees so as to get rid of their services which would not otherwise be permissible or possible. If an employer remaining within the four corners of law and acting *bona fide* organises or reorganises his business, an industrial adjudicator will have no jurisdiction to interfere with his policy. In *Hathisingh*, it was held that permitting the tribunal to exercise jurisdiction to inquire into the prudence of the employer or foresight displayed by him in organising or reorganising his business, will be fraught with danger or unreasonableness or unfairness to the employer. It may infringe the fundamental right of the employer to carry on his business.[13]

(b) Modifying Terms of Contract

As already pointed out, industrial arbitration may involve the extension of an existing agreement or the making of a new one or in general the creation of new obligations or modification of old ones.[14] In *Bombay Labour Union*, Wanchoo J held:

> It is too late in the day now to stress the absolute freedom of an employer to impose any condition which he likes on labour. It is always open to industrial adjudication to consider the conditions of employment of labour and to vary them if it is found necessary…unless the employer can justify an extraordinary condition by reason, which carry conviction.[15]

The terms and conditions of a contract between the employer and an employee can, however, be interfered with by a tribunal only when it is found necessary in the interest of social justice or exigencies of the situation. The tribunal cannot indiscriminately interfere with contracts.[16] In other words, the jurisdiction of the tribunal is hedged in by the requirements of

social justice. In *Orissa Cement*, the Supreme Court upheld the requirement of a condition in the contract requiring that a wireman should take the examination qualifying him to be a wireman.[17]

(c) Disputes covered by Standing Orders

The question whether an 'industrial dispute' can be raised in respect of the matters covered by the Industrial Employment (Standing Orders) Act 1946 arose in *Bangalore WCS Mills.*[18] Addressing the question, the court held that there was no warrant for holding that merely because the Standing Orders Act is self-contained statute, the jurisdiction of the industrial tribunal, to adjudicate upon the matters covered by the Standing Orders, has been abridged or taken away in any manner. It will always be open in a proper case for the union to raise an 'industrial dispute', and if such a dispute is referred by the government, concerned for adjudication, the industrial tribunal will have jurisdiction to adjudicate upon the same.

(d) Disputes relating to Service Conditions of Government Employees

In *State of Bihar*, it was held that the powers under Art 309 did not affect the jurisdiction of a properly constituted tribunal to adjudicate in relation to an industrial dispute between the government servants and the state, and the industrial tribunal was not precluded from adjudicating an industrial dispute which might have an impact either direct or indirect on the service conditions of persons serving in the union or the state.[19]

(e) Jurisdiction to give Relief

Under this Act, tribunals have full powers to adjudicate upon all matters in dispute between the employers and workmen and give adequate relief. For instance, where the dispute is with respect to the termination of service of a workman, the tribunal has the jurisdiction to award reinstatement and back-wages if the termination is found to be wrongful.[20] Industrial adjudication is not adjudication according to the strict law of master and servant but unlike commercial adjudication, it may involve extension of an existing agreement or making of a new one as long as it is within the scope of the reference.[21] Therefore, the tribunals have given the relief of reinstatement, bonus, gratuity, provident fund, wages, dearness allowance and various other allowances, amenities and facilities in the course of industrial adjudication of variegated industrial disputes. The industrial tribunals intended to adjudicate industrial disputes between the management and workmen, settle them, and pass effective awards in such a way that industrial peace between the employers and the employees may be maintained so that there can be more production to benefit all concerned. For the above purpose, the industrial tribunals, as far as practicable, should not be constrained by the formal rules of law and should avoid inability to arrive at an effective award to meet justice in a particular dispute.[22] But a tribunal cannot grant relief not claimed by workmen.[23] Likewise, it will have no jurisdiction to award relief in excess of the demand of workmen.[24] Nor can it grant relief with respect to disputes not referred to it because 'it cannot proceed to adjudicate disputes not referred'.[25] On the other hand, the tribunal cannot deprive the workmen of the benefits which they were entitled to, in making an award under the pre-existing arrangement and place them in a worse position than before the award particularly, when the employer did not want any change in their favour.[26]

Once a reference is made by the government under s 10(1)(c), it is the duty of the labour court to answer the reference and not to dismiss the same in default or for non-prosecution. If the workman has not produced any evidence or has not filed the claim statement, it is open to the labour court to decline the reference by passing an appropriate order.[27] A labour court cannot refuse adjudication of the dispute on the ground that the reference was defective and not happily worded.[28] It is not competent for the tribunal to arrive at a finding that the reference is not maintainable only because a settlement had been arrived at with another union, more so, when the said settlement was arrived at under s 18(1) and not s 18(3). In terms of s 18, the minority union is also entitled to raise a dispute.[29] In *KGID*, a single judge of Karnataka High Court held that, in a reference made by the government even if the points of dispute are very vague and suffer from ambiguity, it is the statutory duty of the tribunal to find out the exact dispute between the parties and adjudicate the same.[30] The tribunal has power to refuse reinstatement notwithstanding violation of s 25F and award only compensation.[31] Where, during the pendency of an adjudication proceeding relating to the transfer of 22 employees to various places, another employee was transferred by the management, he can approach the tribunal under the original reference.[32] The provisions of LIC of India (Staff) Regulations 1960 which provide for appeal and review of disciplinary actions taken against the employees of the corporation cannot be said to bar the jurisdiction of industrial tribunal from adjudicating the industrial dispute.[33]

(ii) Social Justice in Industrial Adjudication

According to Holmes J, social justice is 'an inarticulate major premise which is personal and individual to every court and every judge'. In *Muir Mills Ltd*, Bhagwati J speaking for the Supreme Court held that *the concept of social justice does not emanate from the fanciful notions of any particular adjudicator but must be founded on a more solid foundation.*[34] This view was reverberated by Vivian Bose J, in *JK Iron.*[35] In the same strain SK Das J observed that '...social justice does not mean that reason and fairness must always yield to the convenience of a party—convenience of the employee at the cost of employer as in this case—in an adjudication proceeding. Such one-sided or partial view is really next-of-kin to caprice or humor.[36]

Gajendragadkar J persistently emphasised that social and economic justice is the ultimate ideal of industrial adjudication,[37] and that social and economic justice has been given a place of pride in our Constitution.[38] In the words of Hidayatullah J, Social justice is not based on contractual relations and is not to be enforced on the principles of contract of service. It is something outside these principles, and is invoked to do justice without a contract to back it.[39] In *JK Cotton*, Gajendragadkar J observed:

> In our opinion, the argument that the considerations of social justice are irrelevant and untenable in dealing with industrial disputes, has to be rejected without any hesitation. The development of industrial law during the last decade and several decisions of this court in dealing with industrial matters have emphasised the relevance, validity and significance of the doctrine of social justice...Indeed, the concept of social justice has now become such an integral part of industrial law that it would be idle for any party to suggest that industrial adjudication can or should ignore the claims of social justice in dealing with industrial disputes. The concept of social justice is not narrow, or one-sided, or pedantic, and is not confined to industrial adjudication alone. Its sweep is comprehensive. It is founded on the basic idea of socio-economic equality and its aim is to assist the removal of socio-economic disparities and inequalities; nevertheless, in dealing with industrial matters, it does not adopt a doctrinaire approach and refuses to yield blindly to abstract notions, but adopts a realistic and pragmatic approach. It, therefore, endeavors to resolve the competing claims of employers and employees by finding solution which is just and fair to both parties with the object of establishing harmony between capital and labour, and good relationship. [40]

In *Ahmedabad Mfg*, Dua J said:

> This concept of social justice has a comprehensive sweep and it is neither pedantic nor one-sided but is founded on socio-economic equality. It demands a realistic and pragmatic approach for resolving the controversy between capital and labour by weighing it on an even scale with the consciousness that industrial operations in modern times have become complex and complicated and for the efficient and successful functioning of an industry various amenities for those working in it are deemed as essential for a peaceful and healthy atmosphere. [41]

Thus, though industrial adjudication cannot and should not ignore the claims of social justice—a concept based on socio-economic equality—it has to resolve the conflicting claims of employers and employees by finding not one sided but a fair and just solution.[42] In *Burmah Shell*, Hegde J observed:

> Social security for the weaker sections of our nation is of utmost importance: but then we cannot forget the limitations under which we are living. While we should not forget our social goals, our purpose may be defeated if we do not approach our problems in a pragmatic way. It is one thing to settle a dispute by agreement, which affects only the interests of the parties to the agreement; it is a quite different thing for this court to lay down a rule which will have a wider application. [43]

However, in *Indian Express*, Krishna Iyer J has rather emotively suggested a go-by to pragmatism in the following words:

> Industrial jurisprudence is not static, rigid or textually cold but dynamic burgeoning and warm with life. It answers in emphatic negative the biblical interrogation. 'What men is there of you whom if his son asks bread will give him a stone'? The Industrial Tribunals of India in areas unoccupied by precise block letter law, go by the Constitutional mandate of social justice in the claims of the 'little people'.[44]

Then, in *Basti Sugar Mills*, the same learned judge spoke in the same strain thus:

> Social justice is made of rugged stuff...Where social justice is the touchstone where industrial peace is the goal where the weak and the strong negotiate to reach workable formulae unruffled by the rigidities and formalisms of the law of contracts, it is impermissible to frown down the fair bonus agreement reached by the representatives of both camps and accepted by the employees in entirety...labour law is rough hewn and social justice sings a different tune. [45]

(iii) Jurisdiction on Remand

The jurisdiction of the tribunal on remand will depend on the order of remand. The High Court in writ proceedings or the Supreme Court in appeal under Art 136 of the Constitution may order a *de novo* adjudication of the reference or the remand may be for a limited purpose. This point is illustrated in '*Western India Vegetable Products*.[46]

(iv) Distinction in Jurisdiction under Section 10(4) and Section 33C(2)

There is an important distinction between a reference under s 10(4), and the proceedings under s 33C(2) of the Act. In a reference under s 10(4), the tribunal is required to confine its adjudication to the points in dispute and also matters incidental thereto. Therefore, while in a reference under s 10, the tribunal or the labour court may adjudicate upon matters connected with the dispute or associated with the dispute, in proceedings under s 33C(2), the jurisdiction of the labour court is confined to compute in terms of money, any benefit due to the workmen or the amount at which the benefit claimed by them should be computed. The legislature has not given to the labour court the Jurisdiction to adjudicate upon matters incidental to the claim made by the workmen for any money or benefit due to them under s 33C(2). Therefore, the labour court cannot go into incidental matters under s 33C(2). For instance, in s 33C(2) proceedings, the labour court cannot enlarge the scope of its inquiry and proceed to adjudicate on the question of closure, the question of enforceability of the terms of settlement, the question whether the transferor or the transferee of an undertaking is liable and also the question whether the claim of the workmen could be enforced against the transferee.[47]Where industrial disputes arise between the employees acting collectively and their employers in the manner prescribed by the Act, such disputes can be resolved only by adjudication on a reference under s 10 and cannot be brought within the purview of s 33G. Similarly, with regard to the fact that the policy of the legislature in enacting s 33C is to provide a speedy remedy to the individual workman to enforce or execute his existing rights, the case of existing rights of individual workman has to be dealt with under s 33C(2).[48]

(v) Res judicata

The doctrine of *res judicata* is codified in s 11 of the Code of Civil Procedure. It means that if by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as *res judicata* and bars the trial of an identical issue in subsequent proceedings between the same parties. This principle also comes into play when by such judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication. Explanation 4 to that section gives further recognition to the rule of constructive *res judicata*. In situations where the principle of direct *res judicata* would not apply, the rule of constructive *res judicata* may bar the subsequent proceedings. In other words, when any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue in the eye of law, and, therefore, is taken as decided. Section 11 generally comes into play in relation to civil suits. It is, however, not exhaustive. Apart from codified law, the principle of *res judicata* has been applied in various other kinds of proceedings and situations by courts in England and in India and other countries.[49] In *Nawab Hussain*, the Supreme Court dilated upon the doctrine of *res judicata* as under:

> The principle of *estoppel per rem judicatam* is a rule of evidence. As has been stated in *Marginson v Blackburn Borough Council* [1939] 2 KB 426, 437 it may be said to be "the broader rule of evidence which prohibits the reassertion of a cause of action". This doctrine is based on two theories: (i) The finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It, therefore, serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon. It is thus not permissible to obtain a second judgment for the same civil relief on the same cause of action, for otherwise the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. It is the cause of action which gives rise to an action, and that is why it is necessary for the courts to recognise that a cause of action which results in a judgment must lose its identity and vitality and merge in the judgment when pronounced. It cannot therefore survive the judgment, or give rise to another cause of action on the same facts. This is what is known as the general principle of *res judicata*.[50]

There is a diffused spectrum of judicial dicta dealing with various aspects of the application of the principle of *res judicata* to the orders and awards of the industrial adjudicators. Section 19(3) provides that an award of an industrial adjudicator remains operative for a period of one year from the date on which it becomes enforceable. Then, it can be terminated by any party bound by it by giving a notice as required by s 19(6). But unlike the decree or order of a civil court, the industrial award is not perpetual and conclusive as it is limited to the duration for which it remains effective and in force under s 19 of the Act.[51] It continues to be binding on the parties only as long as an award remains in operation. There is, thus, a statutory bar to the reference of an industrial dispute which is the subject-matter of an operative award. In such cases, the question of application of the principle of *res judicata* does not arise. But there is no provision in the Act indicating as to when and under what circumstances the subject-matter covered by an industrial award can be validly referred for adjudication again after the termination of such award; whether an award given on a matter in controversy between the parties after its termination in terms of s 19(6) after the expiry of the period of one year as postulated by s 19(3) would operate as *res judicata* to a subsequent reference of the same matter for adjudication or, whether the tribunal has no option when such a matter is again referred to it for adjudication but to proceed to try it *de novo*, traverse the ground again and come to a fresh decision.

In *Burn and Co*, dealing with these questions, the Supreme Court held that though s 11 of the Code of Civil Procedure is inapplicable to industrial adjudication, the principle underlying it as expressed in the maxim *interest reipublicae ut sit finis litium* - which is founded on sound public policy and is of universal application being a rule 'dictated by a wisdom which is for all time - is applicable to the decisions of industrial adjudicators for 'good reasons'. Venkatarama Aiyyer J observed that it 'would be contrary to the well recognised principles that a decision once rendered by competent authority on a matter in issue between the parties after a full inquiry should not be permitted to be re-agitated'. It was further pointed out that if 'an adjudication loses its force when it is repudiated under s 19(6) and the whole controversy is at large, then the result would be that far from reconciling themselves to the award and settling down to work it, either party will treat it as a mere stage in the prosecution of prolonged struggle, and far from bringing industrial peace, the awards would turn out to be but truces giving the parties breathing time before resuming hostile action with renewed vigour'. However, realising that it was dealing with a case of fixation of wage-structure which would not admit the application of the principle of *res judicata* in view of rise in cost of living with the passage of time and various other transitory factors, the court added that by regarding the awards of the industrial adjudicators to have long term operations and liable to be modified by change in the circumstances on which they were based, the objects of the Act would be served.[52] The ratio of this case is, generally the principle of *res judicata* will apply to the decisions of industrial adjudicators but the awards based on prevailing circumstances such as wage-structure and dearness allowance, etc, though normally treated to have long term operations would be liable to be modified by change in circumstances on which they were based. In subsequent decisions,[53] the court adopted this principle with respect to awards based on prevailing circumstances such as wage-structure and dearness allowance. In *Straw Board*, Goswami J observed that 'multiplicity of litigation and agitation and re-agitation of the same dispute at issue between the same employer and his employees will not be conducive to industrial peace which is the principle object of all labour legislations bearing on industrial adjudication'.[54] In *Sankar Prasad Banerjee*, the Calcutta High Court observed thus:

> ...the principle of *res judicata* would be normally applicable to industrial adjudications or awards as industrial settlements are intended, consistent with the policy of the Industrial Disputes Act 1947, to be operative for a fairly long period unless there is change of circumstances which may be the basis of the award. In cases where the award is based on prevailing circumstances like determination of wage structure and the like on existing price index, with the constant change of circumstances like spiraling of prices, the principle of *res judicata* would be inappropriate and inapplicable. Such principle would however be applicable when the award is not based on prevailing circumstances but on rights claimed long existing but found by the labour court as non-existent and there is no scope for any change of the rights or in the claim of the workmen on the employer by reason of change of circumstances. In this state of affairs there can be no dispute that in such cases, the principle of *res judicata* will have full application.[55]

In *Hindustan Lever*, Desai J observed that though this highly technical concept of civil justice may be kept in precise confined limits in the field of industrial arbitration which must as far as possible be kept free from such technicalities that thwart resolution of industrial disputes; it can safely be said that principle analogous to *res judicata* can be availed of to scuttle any attempt at raising industrial disputes repeatedly in defiance of operative settlements and awards.[56] In *Punjab Coop Bank*, the Court upheld the validity of the application of the principle of *res judicata* to an issue raised in subsequent proceedings under s 33C(2) which had already been decided by a competent labour court in that regard in earlier industrial dispute.[57] In *Bombay Gas*, a three judge Bench of the court has gone to the extent of even applying the principle of constructive *res judicata* where speaking for the Court Alagiriswami J observed:

> The doctrine of *res judicata* is a wholesome one which is applicable not merely to matters governed by the provisions of the Code of Civil Procedure but to all litigations. It proceeds on the principle that there should be no unnecessary litigation and whatever claims and defences are open to the parties should all be put forward at the same time, provided no confusion is likely to arise by so putting forward all such claims.[58]

In *Mumbai Kamgar Sabha*, the court entertained a doubt about the extension of the sophisticated doctrine of constructive *res judicata* to industrial law which is governed by special methodology of conciliation, adjudication and considerations of peaceful industrial relations, where collective bargaining and pragmatic justice claim precedence over formalised rules of decision based on individual contests, specific causes of action and findings on particular issues.[59] A single judge of the Calcutta High Court in *Deepak Puri* observed:

> In my view considering the purpose for which Industrial Disputes Act has been engrafted in the statute book and the socio economic conditions of the country it would be positive injustice if the doctrine of constructive *res judicata* is given a narrower meaning than is intended to subserve. The doctrine of constructive *res judicata* ought not and should not be restricted in its applicability.[60]

Whether a matter in dispute in a subsequent case had earlier been directly and substantially in issue, between the same parties and the same had been heard and finally decided by the tribunal, will be of pertinent consideration and will have to be determined before holding, in a particular case, that the principle of *res judicata* is attracted.[61] The earlier question at issue must be relevant and germane in determining the question of *res judicata* in the subsequent proceedings'.[62] The principle will be applicable only when there is an express adjudication on merits of the dispute and not otherwise.[63] Furthermore, in order a decision should operate as *res judicata*, it must have been directly and substantially in issue in the former proceeding.[64] In *Mathura Prasad*, the Supreme Court held that if, by an erroneous decision, the court assumes jurisdiction which it does not possess, its decision cannot operate as *res judicata* between the parties.[65] In *Rajendra Jha*, the Supreme Court rejected the plea of the workman that the labour court did not permit the employer to lead evidence by erroneous exercise of jurisdiction but the court held that the labour court had the jurisdiction to decide whether to allow the employer to lead evidence or not. It might have acted irregularly in the exercise of that jurisdiction but that is to be distinguished from the cases in which the court inherently lacks jurisdiction to entertain the proceeding or to pass a particular order. A priori, the plea of the workman was held to be barred by *res judicata*.[66]

In *Bharat Barrel*, the company decided to close down its factory on a particular date on account of non-availability of raw material and other compelling circumstances and informed the workmen accordingly that their services would stand terminated on account of the closure of the factory and they would be paid compensation in terms of the provisions of s 25FFF but subsequent to the notice of closure, the workmen created a grave law and order situation and consequently, the company decided to terminate the services of the workmen on a date prior to the date of closure. Then, the workmen raised an industrial dispute with respect to the *bona fide* and validity of the closure. In this reference while upholding the validity of the closure, the tribunal also found that all the Workers had been discharged by the company prior to the date of closure and held, 'since the termination of service of the Workers is not connected with the closure, the Workers would not be entitled to any compensation due to closure'. This award remained unchallenged and became final. Thereafter, at the instance of some of the Workers, another reference was made by the government. The employer raised an objection before the tribunal that the claim of the Workers was barred by the principle of *res judicata*. In appeal, the Supreme Court held that, having allowed the finding that the workmen had been validly discharged prior to the operation of the notice of closure to become final in the earlier disputes, it was not open to the workmen to reagitate the same question in the subsequent industrial dispute. Accordingly, the court held that the award of the tribunal in the subsequent reference was invalid.[67]

In *Punjab State Coop Bank*, an employee of the Punjab State Cooperative Bank was retrenched from service on payment of retrenchment compensation and one month's salary in lieu of notice. The workman challenged the validity by filing a writ petition which was dismissed on merits after hearing the parties. Then, the employee raised an industrial dispute which was referred to a labour court for adjudication which set aside the order of retrenchment and directed the reinstatement of the workmen with continuity of service. In a writ petition filed by the employer, the Punjab and Haryana High Court held that since the same question between the same parties had been adjudicated upon by the High Court, subsequent reference of the same dispute was barred by the principles of *res judicata*. Speaking for the court, Bahri J held that when different remedies were available and the workman chose to avail the remedy of the writ jurisdiction under Art. 226 of the Constitution and failed on merits, he was debarred from approaching the labour court again on the same cause of action and for the same relief.[68] If in the earlier proceedings, it was held that the relief was barred by limitation under the statute of limitation, it would not operate as *res judicata* to the same relief in a subsequent proceeding before an authority constituted by a different statute which does not provide for limitation. For instance, the holding of the labour court functioning under s 26 of the Bihar Shops and Establishments Act to the effect that the relief was barred by limitation was held not to operate as a bar in granting compensation by the labour court in reference under s 10 of the Industrial Disputes Act. The Patna High Court in*B Choudhury*, observed that for the purpose of attracting the principles of *res judicata*, the issues in the two proceedings must be common. Section 10 of the Industrial Disputes Act does not prescribe any time limit, whereas s 26 of the Bihar Shops and Establishments Act prescribes a period of limitation; hence, there can be no issue in the reference case as to whether the dispute is barred by limitation. In the absence of an issue in respect of limitation in the reference case, the findings recorded on the question of limitation in the proceedings under the Shops and Establishments Act, shall not operate as *res judicata* in the reference case.[69]

Some distinction of whatever shade or magnitude, may have to be borne in mind in application of the principle of *res judicata* in industrial adjudication in contradistinction to civil proceedings. Extremely technical considerations, usually invoked in civil proceedings, may not be allowed to outweigh substantial justice to the parties in an industrial adjudication. The real character of the controversy between the parties is the determining factor and in complex and manifold human relations between labour and capital giving rise to diverse kinds of ruptures of varying nuances, no cast-iron rule can be laid down. [70]Industrial disputes generally relate to claims of wage-structure including dearness allowance and bonus etc and other terms of employment or conditions of labour of workmen or termination of service whether under the contract, as a measure of retrenchment or by way of punishment for an act of misconduct. It cannot be said in all cases of industrial adjudication that a question which is once decided can never be reagitated. For instance, there are certain classes of cases like disputes regarding wage structure, service conditions etc which arise as circumstances change and new situations arise which may not be barred by the rule of *res judicata*.[71] The application of the principle of *res judicata* to adjudication of such disputes is discussed under the following

heads:

(a) Wage-structure

The labour appellate tribunal was of the view that an award of an industrial tribunal dealing with wage-fixation should be taken as binding on the parties, even after having been terminated under s 19(6), unless there was a change of circumstances. In other words, such an award should operate as *res judicata* to any further reference.[72] However, in *Burn & Co*, the labour appellate tribunal apparently resiled from this stand with the observation that it was 'a rule of prudence and not of law'. In this case, the industrial tribunal had given an award fixing the pay-scales for the clerical and subordinate staff of the company in June 1950. Exactly after one year of the publication of this award in July 1951, the workmen terminated this award in terms of s 19(6) declaring their intention not to be bound by it and shortly afterwards, raised an industrial dispute regarding their pay-scales which was referred for adjudication. The industrial tribunal took the view that the same question had been directly adjudicated upon by the earlier tribunal and since there was no change in the circumstances, the pay-scales as fixed by the earlier tribunal should not be disturbed. The labour appellate tribunal disagreed with this view and made certain alterations in the pay-scales. In appeal, the Supreme Court on principle, disagreed with the view of the labour appellate tribunal and agreed with the view of the industrial tribunal that in the absence of any change in the circumstances between the first award and the subsequent reference, the earlier award should not be disturbed. It is in this context that the court enunciated the general proposition of law that the principle of *res judicata* should apply to industrial adjudication. However, with respect to awards based on the prevailing circumstances, it held that, even though such awards should be regarded as having long-time operation, they were liable to be modified on change of circumstances on which they were based.[73]

In *IGN Rly*, dealing with an award of wage fixation while dissenting from the general rule in *Burn & Co* and emphasising that s 19(6) of the Act itself 'contemplates that the award cannot be binding after it is terminated', Wanchoo J suggested a cautious approach in applying the principle of *res judicata* to 'such matters as wages and dearness allowance'. The learned judge further held that, if the circumstances have changed, there is a good case for a change in the award, and on this view of the matter, he made come changes in the existing wage-structure in view of a noticeable rise in prices between the previous award and the subsequent reference.[74] In *Remington*, the court explained the principle enunciated in *Burn & Co* in the background of its peculiar circumstances relating to wage fixation.[75] However, in *Balmer Lawrie*, Gajendragadkar J observed that the adjudicator would not normally be justified in rejecting the claim of the workmen for revision of wage-scales, solely on the ground that enough time had not passed after the making of the earlier award or that material change in the relevant circumstances had not been proved. In other words, these factors were not considered as justification to bar the claim for revision of wage-scales. On the other hand, some other factors such as increase in the paying capacity of the employer, upward trend in the cost of living, other anomalies, mistakes or errors in the earlier award fixing the wage-structure, the rise in the wage-structure in comparable industries in the region, were considered as valid justification for wage-revision. The court, however, refrained from laying down any hard and fast rule in the matter and said that the question of revision of wage-structure must be examined on the merits in each case that is brought before the adjudicator for his adjudication. On the application of the principle of *res judicata*, the learned judge held:

> While dealing with the question about revision of wage-scales, it is necessary to remember that the technical considerations of *res judicata* should not be allowed to hamper the discretion of industrial adjudication…It is undoubtedly true that wage-scales are devised and wage-structures constructed as matters of long term policy, and so, industrial adjudication would naturally be reluctant to interfere with the wage- structures without justification or in light-hearted manner. When a wage-structure is framed, all relevant factors are taken into account and normally it should remain in operation for a fairly long period; but it would be unreasonable to introduce considerations of *res judicata* as such, because for various reasons which constitute the special characteristics of industrial adjudication the said technical considerations would be inadmissible...the principle of gradual advance towards the living wage, which industrial adjudication can never ignore, itself constitutes such a special feature of industrial adjudication that it renders the application of the technical rule of *res judicata* singularly inappropriate.[76]

The effect of these dicta is that when on the expiry of the time fixed by s 19(3), an award is terminated by a party under s 19(6), it is no longer binding on the parties and will not, therefore, bar subsequent reference for fresh wage fixation on which a fresh award is permissible on account of the changing nature of industrial problems and constant spiraling of prices.[77] Lastly, the application of the principle of *res judicata* is in so far as claim for revision of wages is concerned is inconsistent with the approach of the industrial adjudication from the minimum wage towards living wage. In other words, wage structure is in the process of metamorphosis, an evolution from the subsistence level to the living wage level and it cannot be checkmated by introducing the technical rules like *res judicata* in the adjudicatory process.[78]

(b) Dearness Allowance

By and large, the same principles as applicable to wage revision would apply to the adjudication of dearness allowance disputes

as well in connection with the application of the principle of *res judicata* but in *Remington Rand* (supra), Gajendragadkar J observed that considerations which are relevant in regard to the fixation of wage-structure by an award would not be relevant in respect of dearness allowance. In this case, a comprehensive settlement was arrived at in the year 1953 including dearness allowance. The relevant clause relating to the dearness allowance provided for variations in the payment of the dearness allowance with rise in the index of cost of living. Subsequently, in the year 1958 by another interim settlement, it was agreed that the adjustment in the dearness allowance to the rise in the cost of living index will be made by the management every month instead of every six months as was done till then. It was also agreed that the minimum dearness allowances in Delhi and Simla would be raised from Rs 58 to Rs 60 per month. This agreement became operative from July 1958, which *inter alia* provided that the parties would negotiate amongst themselves for a final settlement. In case no settlement was reached, it would be open to the union to approach the conciliation authorities. Since the parties could not come to a final settlement in respect of the dispute raised by the workmen, the dispute was referred for adjudication. The tribunal revised the scheme of the dearness allowance. In appeal, Gajendragadkar J rejected the contention of the employer in the light of the comfortable financial position of the company and the rise in the cost of living subsequent to the settlement, and held that the demand for the revision in the rates of dearness allowance was justified. In *Bengal Chemicals*, certain rates of dearness allowance were fixed by an industrial tribunal in the year 1957. This award was challenged in appeal, both by the employer as well as the workmen before the Supreme Court. The appeal of the employer was dismissed, as no interference with the award was permissible while the appeal of the workmen was dismissed as it was not pressed.[79] Subsequently, in November 1963, a dispute relating *inter alia* to dearness allowance was referred for adjudication. The tribunal rejected the contention of the company in view of the fact that the earlier award was affirmed by the Supreme Court. Thus, it accepted the union's contention that there should be an increase or decrease of dearness allowance by one rupee for every five points in the cost of living index. In appeal, it was contended on behalf of the workmen that there should have been a complete *de novo* examination of the claim for revision of the dearness allowance, without being influenced by the earlier award. Repelling the contention, the Supreme Court held that the tribunal was perfectly justified in proceeding on the basis of the earlier award for considering the nature of the revision of dearness allowance.[80]

(c) Bonus

The claim of bonus is for each year. The fact that the claim of the workmen for a particular year was the subject-matter of an earlier award will not bar the reference of a claim for bonus for a subsequent year but it is not impossible to visualise a situation where the tribunal awards certain quantum of bonus for a particular year and after the lapse of one year, the workmen terminate the award in terms of s 19(6) and then claim that the bonus awarded to them for that year was not adequate and seek to re-open the award by having a further reference made for adjudication. In such a case, the general principle of *Burn & Co* will apply with full force and the reference will be barred by the principle of *res judicata*. Even if some new points are raised to support the claim for higher quantum of bonus they too will be barred by the rule of constructive *res judicata* as these points could have been raised in the earlier adjudication.[81] The application of the principle of *res judicata* to bonus cases appears to have been misapprehended by a single judge of the Andhra Pradesh High Court in *Varahalakshmi Rice*, in which the facts disclosed that the workmen raised an industrial dispute for bonus for the year 1953-54, 1954-55 and 1955-56, but the government referred the dispute only for the year 1955-56. The tribunal rejected the said claim on the ground of delay as well as on merits. Subsequently, the government referred the claim of workmen for bonus for the years 1953-54 and 1954-55. The employer challenged this order of reference by a writ petition on the ground that the claim for payment of bonus for the years 1953-54 and 1954-55 was barred by the principle of *res judicata*. The High Court held that the matter of demand for bonus for the year 1955-56 having been concluded by the specific decision of the industrial tribunal, it was implicit in the finding that the claim for bonus for the years 1953-54 and 1954-55 was also untenable and that such a finding would operate as bar to the adjudication of the impugned reference. In taking this view, the learned judge has displayed unawareness even of the statutory provisions. According to s 10(4) of the Act, the jurisdiction of the tribunal is confined to the points of dispute specified in the order of reference and matters incidental thereto. The earlier reference had clearly specified the claim of the workmen for payment of bonus for the year 1955-56 and it had no reference to the claim for the years 1953-54 and 1954-55. Hence, the jurisdiction had to be confined only to the payment of bonus for the year 1955-56. By pleadings, the parties cannot enlarge the scope of the jurisdiction of the tribunal which emanates from the order of reference. The earlier tribunal was incompetent to decide the question of bonus for the years 1953-54 and 1954-55 as it had not been referred for adjudication. Hence, there was no decision by a competent court. The question of actual or constructive *res judicata* would therefore, not arise.[82] Dealing with a case of rehabilitation charge in *Trichinopoly Mills*, Gajendragadkar J observed that the principles of *res judicata* could not be strictly invoked in respect of such points though it was equally true that industrial tribunals would not be justified in changing the amounts of rehabilitation from year to year without sufficient cause.[83]

(d) Discharge or Dismissal affirmed in Adjudication on Reference

The action of termination of the services of a workmen by the employer either under the contract or by way of retrenchment or as measure of punishment by way of discharge or dismissal, may be affirmed or set aside by an industrial adjudicator in adjudication on a reference of an industrial dispute relating to such termination of the service. In terms of s 19(3), an award

remains in operation for a period of one year from the date on which it became enforceable. After the lapse of that period, either of the parties bound by the award may terminate the award by giving two months' notice to the other party under s 19(6). By virtue of s 19(5), the provisions of s 19(3) shall not apply to any award which 'by its nature, terms or their circumstances does not impose, after it has been given effect to, any continuing obligation on the parties bound by the award'. An award relating to termination of service of a workman after being given effect to does not impose any continuing obligation on the workman or the employer. The award, therefore, becomes final and shall not cease to be operative after lapse of one year. It cannot be terminated by a notice under s 19(6). That dispute cannot be referred to adjudication subsequently. A single judge of the AP High Court held that, if a workman approaches the civil court for the relief of reinstatement, it would not be open to him to invoke the jurisdiction of industrial adjudication once again by raising an industrial dispute seeking the relief of reinstatement with back wages, merely because the civil court did not grant the entire relief sought by him.[84]

(e) Decision under Section 33C(2)

It is now settled law that the jurisdiction of the labour court under s 33C(2) is not of adjudicatory nature. It is merely analogous to the jurisdiction of an executing court. Therefore, while purporting to decide the question as to the amount of money due or as to the amount at which the benefit claimed by the workman should be computed, the labour court cannot arrogate to itself the jurisdiction of adjudicatory authorities on a reference under s 10 of the Act. In exercise of its limited jurisdiction, no doubt, the labour court can make an incidental inquiry into the existence of the right of the workman to claim a benefit in terms of money, but it cannot entertain a claim which is based on the right which is the subject matter of an industrial dispute. Therefore, the decision of the labour court in its jurisdiction under s 33C(2) will not operate as *res judicata* in a subsequent reference under s 10. But a single judge of the Delhi High Court in *Shoba Puri*, held that even a finding of fact by the labour court while deciding a matter will not operate as *res judicata*.[85] This view is not correct. No doubt the jurisdiction of the labour court under s 33C(2) is not of adjudicatory nature, but in deciding certain questions of fact, it is the competent court. Therefore, it cannot be said that the findings of fact by the labour court in exercise of its jurisdiction under s 33C(2) will not operate as *res judicata* if the same questions of fact are raised in the course of adjudication proceedings before an adjudicatory authority on a reference under s 10.

(f) Other terms of employment and conditions of service

The question of application of the principle of *res judicata* to adjudication of disputes relating to other terms of employment and conditions of service in a subsequent reference, would be governed by the rule, as laid down by the Division Bench of Calcutta High Court in *Sankar Prasad Banerjee*.[86]

(g) Jurisdictional issues

In determining the question whether the principle of *res judicata* in a given case would apply, the heart of the matter will always be: what was the substantial question that came up for decision in the earlier proceeding? Sometimes, additional issues may have to be framed upon which the jurisdiction of the tribunal will depend for deciding the principal issue which has been referred for adjudication, ie, (i) whether the dispute in question is an '*industrial dispute*' or (ii) whether the establishment to which the dispute relates is an '*industry*' or (iii) the concerned employee is a '*workman*' or (iv) whether the government making the reference is the '*appropriate government*'?[87] In *Theosophical Society*, a single judge of the Madras High Court held that the question whether the activities of the industrial establishment is of an 'industry' is to be decided on the state of affairs obtaining on the date of the order of reference but not on the basis of the circumstances which prevailed at the time of the earlier decision of the High Court holding that the activities of the establishment were not of an industry. Therefore, the earlier decision cannot operate as *res judicata* to subsequent reference because during the period between the last decision and the order of reference the activities of the establishment might have undergone a change bringing it within the ambit of the definition of industry.[88] The principle of *res judicata* is governed by the doctrine of the competence of the court whose decision is put forward as a bar, which requires that the decision must be given by a competent court having jurisdiction to decide the point. An industrial tribunal is not a court of general jurisdiction to finally decide its own jurisdiction nor is it competent to decide the question of its jurisdiction in a manner so as to exclude the judicial review to examine its assumption of jurisdiction. In other words, an industrial tribunal will not be a 'competent court', when it assumes jurisdiction outside the Act under which it acts. In these premises, a prior decision of an industrial tribunal on the question whether a firm of solicitors was an 'industry' was held not to operate as *res judicata* in a subsequent adjudication of the question by another tribunal.[89] An industrial tribunal constituted under this Act possesses a limited jurisdiction and has not been invested with the powers of general administration to finally decide its own jurisdiction. If the tribunal, therefore, assumes jurisdiction, by an erroneous decision over a subject-matter, which is not an industrial dispute covered by the Act, in a fresh reference, it would be open to any of the parties to say that the previous decision was without jurisdiction. In such a case, the previous award would be of incompetent jurisdiction. For the purpose of deciding a question which relates to the special jurisdiction, if a tribunal finds it necessary to decide another matter, that matter does not become a matter of special jurisdiction and a decision on it would not bind the parties.

A tribunal of a limited jurisdiction may be invested with powers to deal with a subject-matter only if a certain state of facts exists or it may be entrusted with jurisdiction also to determine the existence of such facts. In the former case, if the tribunal

wrongly holds or assumes the existence of those facts on which its jurisdiction depends, then that decision or assumption is not final or conclusive. Hence, the industrial tribunals do not possess power to finally and conclusively decide whether or not a particular establishment is an 'industry'. The earlier decision of a tribunal on a jurisdiction at fact would not, therefore, shut out an inquiry by a reviewing court and if that court decides that the establishment is not an 'industry', the previous decision of the tribunal on such an issue will not be final between the parties. If the decision of a tribunal on a jurisdictional question were to operate as *res judicata*, it would mean that in every case where the tribunal assumes jurisdiction, where in fact it has none, over a subject-matter by an erroneous decision, that will bind the parties for all times to come. It is open, therefore, to a party in a subsequent proceeding to say that the previous decision of the tribunal, being a decision on collateral or jurisdictional fact by the tribunal of limited jurisdiction, is not conclusive.[90] Hence, a previous award of an industrial tribunal erroneously deciding a jurisdictional issue would not operate as *res judicata* barring a subsequent reference or the Constitutional remedy of judicial review.[91] For instance, the decision of a tribunal in a prior reference on a question as to whether an establishment to which the dispute relates falls within the definition of 'industry' cannot operate as *res judicata*.

Where an organisation consists of several units, the decision of a tribunal with respect to a particular unit that it falls within the definition of 'industry' or not would not operate as *res judicata* in a subsequent reference with respect to another unit.[92] A single judge of the Calcutta High Court in *Walford Transport*, held that the decision of a tribunal in an earlier decision on the jurisdictional fact as to whether the employee concerned fell within the definition of 'workman' would constitute *res judicata* in a subsequent reference.[93] In *Rajagopal Transport*, the Madras High Court held that the decision of an industrial tribunal on the merits of a dispute after holding that it has no jurisdiction, if affirmed by a writ court, will operate as *res judicata* to a subsequent reference.[94] This decision is not correct as it goes beyond the scope of writ jurisdiction while dealing with jurisdictional issues. Any decision of a tribunal beyond its jurisdiction is a nullity. It cannot either be affirmed by the reviewing court nor can it be within the jurisdiction of such court to deal itself with the adjudication of the dispute, which the tribunal itself had no jurisdiction to decide. The jurisdiction of the writ court is confined only to see whether the tribunal had jurisdiction. It cannot itself assume the role of an industrial adjudicator. In *Indodan Milk Products*, a single judge of Allahabad High Court held that if a dispute has been settled by settlement in the course of conciliation proceedings or otherwise, the industrial tribunal or the labour court will have no jurisdiction to adjudicate on the same because such a settlement is binding on the management as well as the union of which the workmen with respect to whose termination of service, the dispute relates.[1]

Subject-matter

An industrial tribunal is the creation of statute. Hence its jurisdiction is circumscribed by the Act. Its adjudication must, therefore, be confined to the perimeter of the provisions of the Act. It cannot dispense its own brand of industrial dispute. It may, of course look for guidance, to various sources, yet its award is legitimate only so long as it draws its sustenance from the order of reference. Section 10(4) lays down that the adjudication by the tribunal is to be confined only to:

(i) the points specified in the reference; and,

(ii) the matters incidental thereto.

(i) The Points Specified in the Order of Reference

The industrial tribunal is not a court of general and residuary jurisdiction, but is a tribunal with specific jurisdiction circumscribed by the terms of an order of reference.[2] The scheme of the Act is that a tribunal constituted under the Act has to determine the dispute referred to it. In other words, unlike an ordinary civil court, a tribunal has no general or inherent jurisdiction in any class of matters. It can have no power or authority whatever to deal with a dispute beyond that which can be derived from or traced to ss 7, 7A, 10H and 15 of the Act. Before the tribunal can acquire jurisdiction in any particular case, the 'industrial dispute' must be referred to it by the 'appropriate government' and its jurisdiction is limited to the dispute so referred.[3] For instance, in *Manabendra Choudhury*, a single judge of the Calcutta High Court held that after a workman resigns from his job during the pendency of the adjudication proceedings no dispute with respect to 'non-employment' of the workman was left before the tribunal. Therefore, the tribunal could not have embarked on a field of inquiry as to the factum of such resignation even for the purpose of computation of the benefits arising out of the decision on the main portion of the issue referred to it because the tribunal cannot travel beyond the ambit and scope of the issue specifically referred to it for adjudication. In the circumstances of the case, the court remanded the matter to the tribunal for answering the consequential part of the issue relating to the relief to which the petitioner would be entitled.[4] Where a dispute relating to payment of wages to certain Workers was not referred, such dispute cannot be validly entertained by the adjudicator and any award determining such dispute will be without jurisdiction.[5] The functions of a tribunal are quasi-judicial but it is not a civil court. It does not have the inherent power to decide any of the disputes raised by the parties in their pleadings beyond reference. Its jurisdiction is limited and restricted only to the issues referred to it by the appropriate government by an order of reference.[6]In other words, the tribunal has to function within the limits imposed upon it by the statute and has to act according to its provisions.[7] In

adjudicating upon an 'industrial dispute', the tribunal cannot allocate to itself powers which the legislature alone can confer or do, something which the legislature has not permitted to be done. The tribunal acquires jurisdiction to adjudicate upon an 'industrial dispute' only after it has been referred to it. In other words, without such a reference, the tribunal does not get any such jurisdiction to adjudicate upon any dispute.[8]

In adjudicating upon an industrial dispute, the tribunal must look at the order of reference itself as it is only the subject-matter of reference with which the tribunal can deal with.[9] The tribunal cannot go beyond the terms of reference.[10] Where in an order referring an industrial dispute to a tribunal under s 10(1) or in a subsequent order, the government had specified the points of dispute for adjudication, the tribunal shall confine the adjudication to those points and matters incidental thereto. It would, therefore, appear that while it is open to the 'appropriate government' to refer the dispute or any matter appearing to be connected therewith for adjudication, the tribunal must confine its adjudication to the points of dispute referred and the matters incidental thereto. The government may not always specify the points upon which a reference is made; it may make a reference generally. In most cases, the order of reference is so cryptic that it is impossible to cull out therefrom the various points about which the parties were at variance leading to trouble. In such cases, of course the tribunal can ascertain the points of dispute from the pleadings of the parties to find out the exact nature of the dispute and decide them. Section 10(4) permits the tribunal to decide only disputes or points referred to it and matters incidental thereto.[11] The points of dispute should, therefore, be carefully formulated and should be so worded as to avoid ambiguity or prejudice or advantage to one or the other party to the dispute.[12] The order of reference by which an industrial dispute is referred to the tribunal for adjudication gives jurisdiction to the tribunal to deal with the merits of dispute.[13] However, what are the merits of a dispute, would depend on the nature of the reference and the specific questions referred to adjudication.[14] The jurisdiction of the tribunal being limited to the matters referred to it by the government, it would have no right to travel outside the reference, and proceed to adjudicate the matters not referred to it.[15] The legal position is that mere wording of the reference is not decisive in the matter of tenability of reference. It may contain the defence or may not. If the points of difference are not discernible from the material before the court or tribunal, it has only one duty, and that is to decide the points on merits and not to be astute to discover formal defects in the wording of the reference. In other words, inelegant or clumsy wording of the order of reference will not justify short-circuiting the reference by ignoring the basic background of the dispute and subjecting the workman to unnecessary misery and hardship in moving the administrative machinery all over again after a long time.[16] However, the tribunal has to confine itself to the pleadings and the issues arising therefrom and it is not open to it to fly off at a tangent disregarding the pleadings and reach any conclusion that it deems just and proper.[17]

In *Delhi Cloth Mills*, the Supreme Court pointed out that the tribunal can look into the pleadings of the parties to find out the exact nature of the dispute, but it cannot allow the parties to go a stage further and contend that the foundation of the dispute mentioned in the order of reference was non-existent and that the true dispute was something else. In other words, once a reference is made to the tribunal, the parties cannot be permitted to make out an entirely new case than the one which was raised by it and which alone the appropriate government was persuaded to refer for adjudication. An industrial adjudicator dealing with a reference made to it has no general or inherent jurisdiction to cover all matters which a party might raise before it for the first time and its jurisdiction is limited only to the dispute referred to it. [18]. In *Uttar Pradesh SEB*, the facts were: a dispute relating to dismissal was raised by the contract Workers alleging that, the contractor not being a registered contractor, they should be treated as being directly employed by the State Electricity Board. The tribunal passed an award directing that all the Workers should be absorbed as regular staff of the State Electricity Board. Quashing the award, a single Judge of Allahabad High Court held that it was only the government, which had the powers to abolish contract labour, and not the tribunal.[19]

The High Courts of Madras,[20] Delhi,[21] Mysore,[22] Madhya Pradesh,[23] and Bombay,[24] held that the tribunal was not at liberty to enlarge the scope of the reference. Even if a reference is made on an incorrect assumption, it is not open to the tribunal to enlarge, by its own choice, the scope of the reference and widen the issues for decision and the field of inquiry. In *Indian Oxygen*, certain disputes were referred to adjudication on a joint application under s 10(2). The notification of reference stated that 'an industrial dispute exists or is apprehended between the management of Indian Oxygen Ltd, Jamshedpur and their workmen represented by Indoxco Labour Union, Jamshedpur regarding the matters specified in their joint applications dated 7 September 1963'. The notification thus made it clear that the disputes referred to the tribunal were disputes set out in the said agreement and statements and were between the management of the company's factory at Jamshedpur and their workmen represented by the Indoxco Labour Union. However, in view of the amendment of the Constitution of the union, the tribunal made its award applicable to all workmen employed in the various establishments of the company in the state of Bihar. In appeal, the Supreme Court held that the award made by the tribunal must necessarily be confined to the disputes referred to it, the parties to those disputes and the parties who had agreed to refer those disputes for adjudication.[25]

In *Jaipur Udyog*, it was held that, it was not open to the tribunal to enlarge the ambit of the dispute between the parties by reference to difference in the age of superannuation under two sets of Standing Orders relating to two different establishments owned by the same employer.[26] In *Firestone*, the court observed that the plea for reinstatement of the workmen was based on the alleged invalidity of the action taken by the management in dismissing these workmen. Therefore, the issue of unfair labour practice or discrimination by reason of subsequent reinstatement on permanent basis of some workmen was not a matter

referred to the tribunal for adjudication nor was it in any way connected with or incidental to the right of reinstatement. Hence, the plea of unfair labour practice or discrimination was altogether an independent question. Therefore, it held that the tribunal travelled outside the jurisdiction in recording a finding of unfair labour practice and discrimination.[27] In *Central Inland Water*, the Calcutta High Court held that the question whether the corporation was the 'successor' of the company was beyond the scope of reference and in the circumstances of the case, hence the determination of this question was beyond the jurisdiction of the tribunal.[28] However, there is nothing in s 10(4) or any other section of the Act specifying the duties of the tribunal and requiring it to adjudicate upon the points in the order of reference which have been given up by the workmen through their union without any allegation that they were unfairly given up because it is impossible for any tribunal to adjudicate upon any point of dispute without evidence on record and those who give up the dispute are hardly likely to produce any evidence.[29] In *EID Parry*, the Madras High Court held that an industrial tribunal is a 'court' within the meaning of the Interest Act 1978. Therefore, the tribunal has the jurisdiction to grant interest on bonus awarded to the workmen from the due date as the tribunal has wider powers than a civil court while adjudicating an industrial dispute. The fact that the Interest Act 1978 which came into force in the year 1981 is not applicable, is immaterial.[30] In *HPCL*, the Andhra Pradesh High Court held that a declaration by the tribunal, that casual Workers were entitled to wages on par with regular Workers, was illegal and was beyond the terms of reference. The Bench further observed that such a declaration could not also be said to be a decision on a matter incidental to the point referred to it by the government.[31] Where the dispute referred was 'whether the management of the Bank was justified in terminating the services of the employee, while engaging a fresh hand in his place was justified', the award of tribunal directing reinstatement with full back wages and attendant benefits to the workman was beyond the scope of reference, as the terms of reference did not contemplate relief of reinstatement to the workman.[32]

(ii) 'Matters Incidental Thereto'

The word 'incidental' means according to *Webster's New World Dictionary:* 'Happening or likely to happen as a result of or in connection with something more important; being an incident; casual, hence, secondary or minor, but usually associated'. Mitter J held:

> Something incidental to a dispute must, therefore, mean something happening as a result of or in connection with the dispute or associated with dispute. The dispute is a fundamental thing while something incidental thereto is an adjunct to it. Something incidental, therefore, cannot cut at the root of the main thing to which it is an adjunct.[33]

A point is incidental to another point when the former necessarily depends upon the other.[34] 'Incidental' implies a subordinate and subsidiary thing related to some other main or principal thing requiring casual attention while considering the main thing.[35] It is obvious, therefore, that the matters which require independent consideration or treatment and have their own importance, cannot be considered as 'incidental'. The words 'matters incidental thereto' should not be interpreted so as to give vague and indeterminate jurisdiction to the tribunal, especially over independent matters.[36] A matter which is independent in one context, may become subsidiary in another matter in a different context. It all depends on how and under what circumstances it arises. In other words, the question whether the adjudication of one matter is incidental to the adjudication of another matter depends on the facts of the case, the pleadings of the parties and the issues which properly arise for determination on the pleadings.[37] The words 'incidental thereto' in s 10(4) do not have the same meaning as the words 'appearing to be connected with or relevant to' occurring in cll (b), (c) and (d) of s 10(1). The matters covered by the latter expression must be specifically referred for adjudication, while the matters covered by the former expression need not be specifically referred as they can be adjudicated upon as a part of the main dispute. For instance, on an industrial dispute being referred to it, the tribunal has jurisdiction to determine whether on the facts placed before it, an 'industrial dispute' within the meaning of s 2(k) has really arisen, or the concerned persons are 'workmen' as defined in s 2(s) or a particular undertaking is an 'industry' within the meaning of s 2(j) or such industry is a live industry or a closed industry. Such questions can be validly examined and adjudicated upon by the tribunal as matters incidental to the points of dispute specified in the order of reference. These matters have not only to be determined as matters incidental to the dispute but have necessarily to be determined as collateral or jurisdictional issues, as the jurisdiction of the tribunal depends upon such determination, or adjudication.[38] Some of the matters held to be 'incidental' and 'non-incidental' have been discussed in the following paragraphs:

(a) Incidental Matters

In view of the words 'incidental thereto' appearing in s 10(4), interim relief of compensation pending application under s 33 can be granted by the tribunal, being 'incidental' to the main question without being itself referred in express terms.[39] The question of grant of interim pay and allowances is incidental and ancillary to the main relief of 'payment of wages and allowances, etc'. It is not necessary to specify the relief in the order of reference.[40] If for the purpose of deciding a bonus claim, it is necessary to determine whether the employer employed certain persons, the tribunal has the power and duty to determine the question. The question, therefore, whether the persons claiming bonus are workmen or not is an incidental question to the main dispute.[41] In a dispute in relation to a claim for gratuity and compensation for the past services rendered by workmen

referred for adjudication, it was held that the reference was not confined to the claim for gratuity for the past services only, but also included the fixation of a scheme of gratuity which could come into force at a future date, as such fixation of a scheme of gratuity is a matter incidental to the claim of the workmen for gratuity.[42] Where the question referred to an industrial tribunal was 'whether the existing rates of basic wages in a particular concern needed any revision', it was held that the reference authorised the tribunal to introduce 'time-scales of wages'.[43] In an order of reference, the industrial dispute was mentioned to be existing 'between Kirloskar Bros Ltd Kirloskarwadi and its Workmen', it was held that the order of reference included not only the workmen of the machine factory at Kirloskarwadi but also those employed in that company's press which was formerly at the place, but before the date of reference had been shifted to Pune. The name of the place was clearly descriptive and included the workmen working there and also at Pune. It was, therefore, held, that the tribunal should first have decided the pleas of the company that the press was a separate and independent business, as an incidental question.[44]

A provision in an award that certain persons shall not be deemed to be workmen was held to be incidental to the point of reference.[45] The determination of the cadre of each category of workmen regarding permanency of servants was not only a matter incidental to the point referred, ie, 'rules regarding permanency of servants' but was also absolutely necessary.[46] Fixation of scales of pay was held to be 'incidental' to fixation of grade, of pay.[47] The demand of the workmen included revision of overtime for workmen covered by issue no 1 and revision of the scheme of payment of overtime with directions for additional payment in respect of workmen covered by issue no 2. The references were actually made by the government in pursuance of an agreement. The *ad hoc* arrangement that was arrived at in order to overt the strike was a matter incidental to the reference which had to be made to the industrial tribunal in pursuance of that agreement. In deciding as to what should be the payment for over-time in future under the award, the tribunal had to consider whether it would be justified to continue the *ad hoc* payments and convert them into regular pay because of the claim of the workmen: it was held that there was no ground at all for enhancing the overtime rates over and above those payable prior to the agreement. The Supreme Court upheld that competency of the tribunal in holding that these *ad hoc* payments need not be made in future, as incidental matters to the issues under reference.[48] The question before the tribunal was regarding the adjustment of the workmen in the different grades which were recommended by the central wage board and the effect to that fixation was to be given retrospectively, Hence, it became necessary for the employer to raise the issue that if the workmen are to get the benefit of the new grades with retrospective effect, then whatever the overtime wages and the bonus they had already received shall not be increased according to the increase in the wages under the agreement. It was held that this matter was undoubtedly incidental to the increase of wages in accordance with the new grades in which the workmen were to be fixed Up.[49] The question of adjustment or otherwise payment of ad-interim bonus was held to be incidental to the dispute relating to the payment of bonus for a particular year.[50] The question whether the workmen concerned were the employees of the company or its contractor can be decided by the tribunal as incidental to the main question where the termination of the service was legal and valid.[51]

(b) Matters Non-incidental

In a dispute between the workmen and the management of Airlines Hotel, one of the demands of the workmen was 'inspection of the company's account books, bills and receipt-book, etc, to ascertain the correct amount collected by the management and due to the Workers'. The government referred all the demands but refused to refer this demand. The tribunal still gave direction to the employer 'to give access' to the Workers to the account books. Held that the direction was without jurisdiction as the government had in terms refused to refer the dispute regarding inspection of accounts. There could be no justification for the direction for what could not be done directly because of the refusal of the government, could not be done indirectly on the plea that it was incidental.[52] In *Express Beedi Factory*, the question referred to the tribunal was related to 'leave', 'wages', etc, which question could arise only in a going concern. The tribunal, however, found that the concern had closed down before it started the proceedings, and awarded compensation for closure under s 25FFF, a point not referred to it. It was held that the jurisdiction of the tribunal being confined to the matters referred to it by the government, it would have no right to travel beyond the reference and to proceed to adjudicate upon matters not referred to it. The fact that the tribunal proceeded at the invitation of the parties would make no difference to the competence of the tribunal to adjudicate upon the question.[53] Where the reference read as 'whether leave facilities should be increased, and if so, to what extent?', the industrial tribunal would have no jurisdiction to fix the quantum of festival holidays, as it would be beyond, the ambit of the reference, 'holidays', being entirely different from 'leave' facilities.[54]

The issues referred to the tribunal for adjudication related to the question of justification in the increase of workload. The tribunal granted an interim relief passing an interim award directing continuance of the increased workload on payment of higher wages. The question of wages, in the circumstances, was considered to be wholly independent and foreign to the question referred to the tribunal. It was held that such a matter could not be considered to be a matter incidental to the issues referred for adjudication within the meaning of s 10(4) of the Act.[55] The question referred to the tribunal was whether a workman should be reinstated. The tribunal found that he was not entitled to be reinstated but as a matter 'incidental' to the dispute, it awarded certain compensation to the workman. The labour appellate tribunal not only confirmed the decision of the industrial tribunal but also increased the quantum of compensation. In writ proceedings, the Calcutta High Court held that where a specific issue is referred, the tribunal must confine itself to that issue and it is not called upon to exercise general

jurisdiction and adjust disputes between the parties, it was further observed that compensation for wrongful dismissal or loss of service is a completely different thing; it does not arise because a man is reinstated, but because he is not reinstated. Furthermore, it was a complicated matter to be worked out on evidence which had not been led in this case, as no issue arose. The matter decided was neither 'incidental' nor related to the dispute.[56] In a reference, the question was as to what should be 'the service conditions of 59 female Workers'. Before the tribunal, the Workers claimed that the wages should be paid retrospectively. The tribunal rejected the demand for 'retrospective' wages. In writ proceedings against the award of the tribunal, the High Court observed that on proper construction the expression 'incidental matters' referred to prospective and not retrospective matters, unless the actual terms of reference either expressly or by compelling and necessary implication, gave jurisdiction to the tribunal to pass orders retrospectively.[57]

The claim of a company by way of damages on account of an illegal strike which was not referred in the order of reference for adjudication *inter alia* on the question whether the strike was illegal, could not be treated as 'incidental' to the main question. The labour appellate tribunal held that the scope of adjudication was entirely limited and determined by the reference and it was not open to any tribunal to travel outside the same and to decide the question on fanciful notions of social justice.[58] The question of retrenchment could not be adjudicated upon, being an incidental question to the main question whether the 'non-absorption' of certain workmen was justified.[59] One of the demands referred to a tribunal was for 'fixation of working hours'. After fixing the working hours, the tribunal went a step further and awarded that if the employees were asked to do overtime work, then the employer would have to pay overtime allowance at a particular rate. However, the question of payment of overtime work was not referred. In a writ petition against the award, it was held that the direction was beyond the scope of the reference in view of the language of s 10(4) of the Act.[60] The order of reference was, 'whether the demotion of a particular workman is justified? If not, is he entitled to the post of fitter-mate or any other relief in lieu thereof?' The labour court found that there was no demotion in fact but directed reinstatement of the concerned Worker as a fitter-mate holding that his transfer was actuated by malice on the part of the manager. It was held that the tribunal exceeded the scope of reference as the question considered by the labour court was not incidental to the alleged demotion.[61]

The changing of designations to fit-in with, particular type of work which the Workers have to perform, is a matter which cannot be said to be incidental to or to be logically dependent on the question of revision of wages.[62] The point of provident fund was not held to be incidental to the retrenchment compensation. The question whether any amount should be added to the provident fund account of a retrenched workmen is not incidental to the dispute relating to the validity of retrenchment and the compensation payable to the retrenched workman.[63] The question of amalgamation of dearness allowance cannot be considered to be incidental to, 'increase of wages', as it raises specific and distinct issues some of which might be of a far-reaching effect in the concerned region. Increase of wages is a very different matter, as such an increase would not necessarily comprise even incidentally the question of amalgamation of dearness allowance with basic wages. For considering such a question there must be a specific reference.[64] Where a dispute related to the demand of the workmen for abolition of the contract system in the sphere of chassis delivery work and absorption of the convoy leaders, drivers, as regular Workers and the terms of reference did not include the determination by the tribunal as to whether there was any retrenchment and if there was any retrenchment, whether proper retrenchment notice was given. Held, the questions relating to retrenchment were not incidental to the points in dispute referred for adjudication.[65] Where the order of reference itself stated the designation of the concerned workmen and the only question referred for adjudication was, whether the workman was entitled to higher grade and scale of pay, it was held that on the terms of reference the question of designating the workman did not arise and it could not also be said that it was a matter incidental to the point referred for adjudication.[66] Where the appropriate government referred certain specific disputes but did not refer the dispute as to the date or dates from which the workmen of a particular section became the employees of the company, it was held that the disputes relating to the date or dates of employment of such workmen could not be decided as matters incidental to the specific disputes referred for adjudication.[67] Where the claim for bonus payable to the operatives of the company was referred for adjudication, it was not open to the tribunal to widen the scope of the inquiry beyond the terms of reference by entertaining individual applications by the clerical staff of the company for bonus.[68] In a case where the demand for reinstatement was based on the alleged invalidity of the action taken by the management in dismissing the workmen, the issue of unfair labour practice or discrimination by reason of subsequent reinstatement on permanent basis of some of a workmen was not a matter referred to the tribunal for adjudication nor was it in any way connected with, or incidental to, the right of reinstatement, it was held that the tribunal travelled outside its jurisdiction in recording a finding of unfair labour practice without even framing an issue on the alleged unfair labour practice and discrimination, as unfair labour practice and discrimination was altogether a different question.[69]

(iii) Construction of the Order of Reference

The scope of reference is a matter of considerable importance. Although it is open to an adjudicator to follow his own procedure, he has to confine his adjudication to the points of dispute specified in the order of reference and to matters incidental thereto. Before embarking on adjudication, therefore, the adjudicator has to determine the scope of the order of reference. Hence, the question of the scope and construction of the order of reference becomes relevant. The construction of the order of reference will, in all probability, be easy or difficult, according to whether the document has been skillfully or

carelessly drawn. In *India Paper Pulp*, speaking for the federal court, Kania CJI said that not infrequently, the orders of reference are 'far from satisfactory and are not carefully drafted'.[70] In *Delhi Cloth Mills*, one of the issues raised before Supreme Court was: 'which of the two provisions - s 4K of the UP Industrial Disputes Act 1947 ('State Act') and s 10 of the Industrial Disputes Act 1947 ('Central Act') - applies in so far as it relates to the jurisdiction of the labour court in respect of adjudicating '*matters incidental to the reference*'. In the context of the fact that the subject 'labour' is enumerated in 'Concurrent List', it is considered to take a look at cl (2) of Art. 254 of the Constitution for a better understanding of the relative turfs of the Centre and States in such circumstances. The said clause runs thus:

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, *then the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State*:

> Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State. (Italics supplied).

Justice Mitter held that s 4K of UP Industrial Disputes Act 1947 does not talk of '*matters incidental to reference*'. Hence, the labour court had no jurisdiction to decide such matters by invoking provisions of s 10 of the Central Act. as the provisions of the State Act would prevail by virtue of Art 254 (2) of the Constitution.[71] Inaccuracy of language employed in the order of reference, however, does not always make any difference to the jurisdiction of the tribunal to proceed with the reference and adjudicate upon it,[72] as the tribunal can interpret and find out the real meaning of the order of reference as it stands.[73] In the language of Krishna Iyer J, industrial jurisprudence is an alloy of law and social justice and one cannot be too pedantic in construing the terms of a reference respecting a dispute for industrial adjudication.[74] The general principle, in construing the public orders made by public authorities in exercise of a statutory power is that they must be construed objectively with reference to the language used in the order itself, because such orders are meant to have public effect and are intended to affect the manner and conduct of those to whom they are addressed.[75] The tribunals must attempt to construe the order of reference not too technically or in a pedantic manner, but fairly and reasonably. Even if the phraseology of the order of reference is not elegant, the tribunals should take to the substance rather than to the form of the order of reference.[76] In other words, the tribunal not only has the power but a duty is cast on it to find out what was the real dispute which was referred to it and to decide it and not to throw it out on a mere technicality.[77] It would involve no hardship if the reference is also made in wider terms provided, of course, the dispute is one of the kinds described in s 2(k) and the parties between whom such dispute has actually arisen or is apprehended in the opinion of government, are indicated either individually or collectively with reasonable clearness.[78] In construing the terms of the order of reference and determining the scope and nature of the points referred, 'the order of reference itself has to be looked into'.[79] However, the words 'order of reference' do not mean 'order of reference only'. The scope of the order of reference gets crystallised from the statements of the respective cases of the parties.[80] In *Delhi Cloth Mills* (supra), Mitter J held:

> The tribunal must, in any event, look to the pleadings of the parties to find out the exact nature of the dispute, because in most cases the order of reference is so cryptic that it is impossible to cull out therefrom the various points about which the parties were at variance leading to the trouble.

It is, thus, clear that where the order of reference is vague or cryptic, the tribunal may look to the pleadings of the parties and other circumstances with a view to 'cull out therefrom the various points about which the parties are at variance' leading to the dispute and to determine the real nature of the dispute. It was, however, pointedly stated that 'the parties cannot be allowed to go a stage further and contend that the foundation of the dispute mentioned in the order of reference was non-existent and the true dispute was something else. Under s 10(4) of the Act, it is not competent to the tribunal to entertain such a question'. Therefore, the tribunal cannot allow the parties to challenge the very foundation of the dispute by means of the pleadings or evidence. Likewise, in *Pottery Mazdoor Panchayat*, the terms of reference showed that the point in dispute was not about '*the fact of closure of business*', but was confined to the narrow question '*whether the closure was proper and justified*'. That being so, it was held that the tribunal had no jurisdiction to go behind the fact of closure and inquire into the question whether the business in fact was closed down by the management; and that the tribunal was not at liberty to enlarge the scope of the reference.[81] Even if a reference is made on an incorrect assumption, it is not open to the tribunal while so holding, to enlarge, by its own choice, the scope of the reference and widen the issues for decision and the field of inquiry including evidence.[82]In *Jaipur Udyog*, the court struck down the award on the ground that the tribunal went beyond the scope of reference.[83]

However, in *Enfield India*, a single judge of the Madras High Court held that a dispute expressly stated in the order of reference to be 'between the workman...and the management' is to be construed as a dispute between the workman represented by the union and the management.[84] In this case, though the union had been representing the workman with respect to his non-

employment before the management and the conciliation officer, from the judgment it does not appear that the dispute was espoused by the union. Therefore, to say that the dispute was between the workmen of the employer company represented by the union and its management, is incorrect. It is well-settled that the government is bound by the report of the conciliation officer. In *Sitaram Shirodkar*, the case of the workman was that the employer had terminated his services while the case of the management was that the workman had abandoned the job by absenting from duty. However, the government made reference to the effect as to whether the action of the management in 'terminating the services' of the workman was 'legal and justified'. The Bombay High Court held that the reference proceeded only on the basis that 'there was termination of service' while completely leaving out the question of abandonment of job on the part of the workman. Thus, the only question left open for adjudication was as to whether the 'termination was legal and proper.' This disabled the tribunal from going into the question whether the workman had, in fact, abandoned his job. In this view of the matter, the court held that the reference was bad and could be quashed on *certiorari*.[85]

Adjudication of Individual Dispute: Karnataka Amendment

Section 10(4A) of the Industrial Disputes (Karnataka Amendment) Act 1987 states:

> Notwithstanding anything contained in section 9C and in this section, in the case of a dispute falling within the scope of section 2A, the individual workman concerned may, within six months from the date of communication to him of the order of discharge, dismissal, retrenchment or termination or the date of commencement of the Industrial Disputes (Karnataka Amendment) Act 1987, whichever is later, apply, in the prescribed manner, to the labour court for adjudication of the dispute and the labour court shall dispose off such application in the same manner, as a dispute referred under sub-section (1).[86]

An application under sub-section (4A) may be made even in respect of a dispute pending consideration of the government for reference, on the date of the commencement of the Industrial Disputes (Karnataka Amendment) Act 1987. This entitles an individual workman directly to approach the labour court for adjudication of a dispute falling under s 2A of the Act instead of approaching it through the appropriate government asking for a reference of the dispute and the labour court shall dispose of the same 'in the same manner as a dispute referred under sub-s (1)'. Therefore, the consideration of the application under s 10(4A) is post-reference stage and shall be in the manner as if a dispute has been referred for adjudication under s 10(1). However, in order to invoke the adjudicatory machinery of the labour court, the existence of an 'industrial dispute' on the date of invoking the jurisdiction under s 10(4A) is a basic requirement the absence of which will take away the jurisdiction of the labour court to proceed further with adjudication. Therefore, every application made before the labour court under this provision, should not be treated as relating to a dispute that existed on the date of the application. The labour court is required to examine and form an opinion as to whether the dispute before it for adjudication existed, which could be adjudicated by it. Each case should be decided on its own merits. The question whether a dispute exists or not should be decided by the labour court taking into account several aspects. In *Banavasi VS Sangh*, a single judge of Karnataka High Court held that the fact that the government had earlier refused to refer the dispute for adjudication will, by itself, not bar the workmen from filing an application under this sub-section because this right is *de hors* the provisions of s 10.[87] In *Bijapur Coop Milk Producers Society*, the issue before the Supreme Court was about the date from which the ouster of jurisdiction of labour courts and tribunals in service disputes between a cooperative society and its employees became effective. The Karnataka Cooperative Societies Act 1959 was amended by Act 19 of 1976, by which service disputes between a cooperative society and its employees was to be referred to the Registrar for adjudication, and there was no specific provision therein to the extent of ousting the jurisdiction of labour courts and industrial tribunals, with the result that the Registrar of Cooperative Societies provided an alternative remedy in addition to the machinery provided under the ID Act. However, the said Amendment of 1976 was neither reserved for, not received, the assent of President. In the meantime, the said Act was further amended by Act 2 of 2000 specifically excluding the jurisdiction of labour courts and industrial tribunals coupled with a '*non obstante*' clause. Specifically, two questions fell for the consideration of the Court.

(1) Whether the jurisdiction of Labour Court under the Industrial Disputes Act, was barred by section 70 of the Karnataka Cooperative Societies Act with reference to co-operative societies and if so, from when.

(2) Even if Labour Court had jurisdiction, whether the appellant was entitled to file an application under Section 10(4A) of Industrial Dispute Act in respect of a cause of action which occurred in 1978.

The decision of the Court on question (1) has been discussed in the preceding paragraphs. The learned Judge answered question (2), which directly falls under Section 10 of the Central Act as amended by Karnataka. With reference to this particular aspect, the facts of the case were: the appellant workman, whose service was terminated on 1-3-1980 approached the labour court under the amended s 10(4A). The labour court passed an award in 1996 holding that the workman had worked for more than 240 days in the year preceding termination and that his termination without complying with the provisions of s 25F was illegal

and directed reinstatement with 50% back wages and continuity of service. *The most significant fact of the case is that the termination of service of the workman was effected some 7 years before the Amended section came into force.* The said award was quashed by the Division Bench of Karnataka High Court. Justice Raveendran, while interpreting that portion of the amended s 10(4A), ie, "*the individual workman concerned may, within six months from the date of communication to him of the order of discharge, dismissal, retrenchment or termination or the date of commencement of the Industrial Disputes (Karnataka Amendment) Act, 1987, whichever is later*", held that the legislative intent behind the said portion of the amendment was not to revive stale or non-existing claims, but only ensures that claims which were live, by applying the six month rule in s 10(4A) as on the date when the section came into effect, have a minimum of six months' time to approach the Labour Court; and therefore, the words *within six months from the date of commencement of the Karnataka Amendment 1987, whichever is later* only enables those who had been communicated order of termination within six months prior to 7-4-1988, to apply under s 10(4A). On this view of the matter, the learned judge summarized the position with regard to question (2) above thus:

(i) In regard to termination orders communication on or after 7-4-1988, the outer limit for making an application under Section 10(4A) is six months from the date of communication of the order.

(ii) In regard to termination orders communicated during a period of six months prior to 7-4-1988, the period of limitation would be up to 7-10-1988 even though the six months' period from the date of communication may actually expire between 7-4-1988 to 7-10-1988.

(iii) In regard to termination orders communicated prior to 7-10-1987, no claim application under Section 10(4A), could be filed, as there is no provision for such applications. The remedy under section 10(1) (c) and (d) will continue to be available, subject, however, to the rule that stale and dead claims will not be referred.

The learned judge finally concluded thus:

> The intent of Section 10(4A) is to give a right to the aggrieved workman to challenge the termination order within six months from the date of accrual of cause of action and not to furnish an one time revival in regard to stale and non-existing claims. Therefore, a claim application of the petitioner filed on 4.10.1988 in regard to alleged termination on 1.3.1980 (or 19.2.1978 as found by the Labour Court) was not maintainable under Section 10(4A) of ID Act and could not have been entertained by the Labour Court... We, therefore, find no reason to interfere with the final order in the judgment of the High Court setting aside the award, though for different reasons. The appellant is not entitled to any relief. The appeal is, therefore, dismissed.[88] (Paras 30 & 31)

SUB-SECTION (5): POWER OF GOVERNMENT TO ADD PARTIES

This provision confers jurisdiction on the 'appropriate government' to include in an order of reference any other establishment, group or class of establishments of a similar nature, who in the opinion of the government are likely to be interested in or affected by, the dispute. The government has to form its opinion *suo motu* on an application being made to it. Further, the government can include such establishments, group or class of establishment, at the time of making an order of reference or at any time subsequent to that. It is not material whether at the time of inclusion of such establishments, group or class of establishments, any dispute actually exists or is apprehended in it.[89] The 'appropriate government' can, by a common order of reference, refer a common dispute between various establishments engaged in the same business and their respective workmen.[90] This provision contemplates the case of adding of parties to a reference which has already been made when the dispute involved is of such a nature that any other establishment, group or class of establishments of a similar nature is likely to be interested in or affected by such dispute. In such a case, the 'appropriate government' making the reference may, either at the time of making the reference or at any time thereafter, but before the submission of the award by the tribunal, include in that reference such establishment, group or class of establishments. This power can be exercised by the government even when such dispute did not exist or was not apprehended in that establishment, group or class of establishments at the time of such inclusion. This sub-section, therefore, applies to the establishment other than the one or ones who are parties to the 'industrial dispute' in respect of which a reference has been made under s 10(1)(d) of the Act.[91] The order under s 10(5) is an administrative order.[92]No doubt, the words 'any other establishment, group or class of establishments of a similar nature is likely to be interested in, or affected by such dispute' in this section are of wide amplitude. However, they cannot be interpreted so as to bring in the establishments in which a dispute cannot be raised on account of subsisting settlements. Otherwise, the result will be that even after adjudication in a reference, the parties bound by such adjudication could claim to be interested in or affected by a dispute in an establishment of a similar nature and seek to be included as parties to reference of such a dispute. The harmonious construction which could be placed on ss 10(1), 10(5), 18 and 19 of this Act is that parties who are bound by subsisting settlements cannot seek to be included in a reference by virtue of this provision even if such a reference is industry-wise. Furthermore, this sub-section does not override ss 18 and 19 of the Act.[93] Subject to the conditions mentioned in s 10(5), the 'appropriate government' is authorised to add other parties to a pending dispute.[94] However, under the guise of adding parties under s 10(5), the government cannot supersede the previous order of reference or substantially vary it. In *DN Ganguly*,

the order of reference *inter alia* referred the point 'whether the dismissal of workmen in attached list A and the indefinite suspension of workmen in attached list B are justified'. By a subsequent notification, the government issued a corrigendum to the order of reference purporting to be under s 10(5), by which the names of the workmen in list B were included in list A and the names of workmen in list A were included in list B and also included further certain other names in list B. The Supreme Court held that the corrigendum including fresh names in list B in the circumstances of the case was beyond the powers of the state government and did not fall within the provisions of s 10(5) of the Industrial Disputes Act.[95] In *Pioneer Ltd*, the government, after making a reference of the dispute under s 3(1) of the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act 1955 read with s 10 of the Industrial Disputes Act 1947 added parties to the reference and made certain other amendments to the original reference, which was challenged by the management. Rejecting the contention, DP Singh J of Allahabad High Court held that the government was entitled to add parties and to make the amendments to the reference.[96]

SUB-SECTION(6): BAR OF REFERENCE TO NATIONAL TRIBUNAL

Reference to National Tribunal bars reference to adjudication by Labour Court and Industrial Tribunal

Section 10(1A) empowers the Central Government to refer an industrial dispute to a national tribunal in the circumstances stated therein. However, sub-s (6) has been devised for avoiding multiplicity of proceedings which may result from such a reference. This provision bars adjudication upon any matter by a labour court or an industrial tribunal, when such matter has been referred for adjudication to a national tribunal, under sub-s (1A). The effect of the *non-obstante* clause is that irrespective of the other provisions in the Act, it is the national tribunal alone which will be seized of the matter referred to it after a reference under sub-s (1A) to the complete exclusion of adjudication by other adjudicatory authorities either under this Act or any state statute.

Pending proceedings to be deemed to have been quashed

This clause provides that if the matter, referred to the national tribunal under sub-s (1A), is at the time of such reference pending in a proceeding before a labour court or industrial tribunal, the proceeding before such labour court or tribunal, as the case may be, insofar as it relates to such matter, shall be deemed to have been quashed. The opening part and cl (a) are not independent of one another, but are linked together by the use of the word 'accordingly'. The combined effect of these provisions is not merely to impose a prohibition against proceeding with the inquiry before the tribunal, but there is also an obligation cast on the tribunal to treat the proceedings which would include the reference itself, as void as having been quashed by the reference to the national tribunal. This provision should be applied only if the tribunal is satisfied that the subject-matter of the specific reference in regard to which the provision is invoked, is comprised in the subject-matter of the general reference to the national tribunal.[97]

Appropriate Government barred from referring matter pending before the National Tribunal to any Labour Court or a Tribunal

This clause bars the 'appropriate government' from referring a matter to a labour court or an industrial tribunal for adjudication during the pendency of the proceeding in relation to such matter before the National Tribunal. The effect of this provision is that if such a matter is referred to a labour court or an industrial tribunal for adjudication, the order of reference shall be *void ab initio* and the labour court or the industrial tribunal shall have no jurisdiction to proceed with the adjudication.

Explanation—The effect of the explanation is that not only the reference of a matter pending adjudication before a national tribunal cannot be made to any labour court or industrial tribunal under the Industrial Disputes Act 1947, but that such reference cannot be made even to adjudicatory authorities under the state statutes as well. Further, if such a matter is pending before anyone of such adjudicatory authorities under any state statute, it shall be deemed to have been quashed.

SUB-SECTION (7): CENTRAL GOVERNMENT IS THE APPROPRIATE GOVERNMENT - REFERENCE TO NATIONAL TRIBUNAL

This sub-section provides that if a dispute is referred to a national tribunal, then notwithstanding anything contained in ss 15, 17, 19, 33A and 36A, the 'appropriate government' in relation to such dispute shall be the Central Government.

SUB-SECTION (8): ABATEMENT

This sub-section has been inserted by the Amending Act 46 of 1982.[1]It lays down that by reason of the death of a workman who was a party to an industrial dispute pending adjudication before a layout court, tribunal or national tribunal, the proceedings before such adjudicatory authority will not abate. However, the adjudicator will have to complete such proceedings and submit his award to the appropriate government. The scope of adjudication by the adjudicatory authority under

the Act is much wider than the determination of the legal rights of the parties involved in redressing the grievances of an aggrieved workman in accordance with law. Resolution of industrial disputes by such authorities is necessary for industrial peace notwithstanding the death of the workmen concerned pending proceedings.[2] This provision gives effect to the law evolved by the Supreme Court when the maxim *'actio personalis moritur cum persona,* a personal action dies with the person' has limited application. It operates in a limited class of actions, *ex delicto* actions such as for damages for defamation, assault or other personal injuries not causing the death of the party, and in other actions where after the death of the party, the relief granted could not be enjoyed or granting it would be nugatory.[3] This maxim 'though part of English law, has been subjected to criticism even in England. It has been dubbed as an unjust maxim, obscure in its origin, inaccurate in its expression and uncertain in its application. It has often caused grave injustice'.[4] The applicability of this maxim depends upon the 'relief claimed and the facts of each case. By and large, the industrial dispute under s 2A of the Act relates to wrongful termination of services of a workman. In the event of death of the workman during the pendency of the proceedings, the relief of reinstatement, obviously, cannot be granted. However, the final determination of the issues involved in the reference may be relevant for regulating the conditions of service of other workmen in the industry. The adjudicatory authorities under the Act are the instruments for achieving the primary object of the Act to bring industrial peace. The death of a workman during the pendency of proceedings, therefore, cannot deprive his heirs or the legal representatives of their right to continue the proceedings and claim the benefits as successors to the deceased workmen.[5]

The Bombay High Court in *Ambabai Amin,* observed that this provision implies that the effective hearing of the dispute must continue despite the death of one of the parties and an order on merits of the rival contentions should be pronounced and not that an award dismissing the reference or rejecting the claim simpliciter should be passed by reason of the death. This provision can only be read to imply that the cause of action which is not personal to the Worker will ensure for the benefit of his heirs and legal representatives and will be gone into by the tribunal which will dispose of the matters referred to it as are necessary for deciding these points. In other words, this provision makes it unequivocally clear that the adjudication proceedings will not abate even if the dispute was of an 'individual' nature and the relief could only be given to the workman himself.[6] For instance, in case of wrongful termination of the service of an individual workman, where he claims the relief of reinstatement and back wages, the tribunal will continue the adjudication proceedings even after the death of the workman. In case he is awarded reinstatement with back wages, the heirs and successors of the deceased workman will be entitled to the back wages and other benefits from the date of termination of the service to the date of death of the workman. However, in such a case, the reinstatement of the workman will be notional for quantifying the benefits up to the date of his death. A single judge of the Karnataka High Court, held that even if the workmen dies while the dispute is in the conciliation stage before a conciliation officer, the dispute will not abate by reason of the death of the workman and the legal representatives of the workman can be brought on record in the conciliation proceedings and continue the same.[7] The provisions of this sub-section should be deemed to apply to all references and other proceedings which were pending on that day.[8] In view of s 10(8), an industrial dispute does not come to an end with the death of the workman, and his legal heirs can initiate and prosecute the industrial dispute.[9]

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25 *Poona Labour Union v State of Maharashtra* (1969) 2 LLJ 291, 293 (Bom) (DB), per Madon J.

26 *Travancore Mineral Workers' Union v Govt of India* (1957-58) 12 FJR 180 (Punj), per Bishan Narain J.

27 *Indian Iron & Steel Co Ltd v Triegi Nath* (1965) 1 LLJ 620, 628 : AIR 1964 Cal 102 [LNIND 1963 CAL 132] (Cal) (DB), per Mitter J.

28 *Vallamalai Estate v Workers of Vallamalai Estate* (1973) 1 LLJ 273 [LNIND 1972 MAD 165], 276-77 (Mad) (DB), per Veeraswami CJ.

29 *Toronto Rly Co v Corpn of City of Toronto* [1904] AC 809.

30 *Free Press Labour Union v State of Madras* (1951) 2 LLJ 302 (Mad), per K Naidu J.

31 *Travancore Mineral Workers' Union v Government of India* 12 FJR 180 (Punj), per Bishnu Narain J.

32 *Karamchand Thapar & Bros Ltd v Clerical Employees* 4 FJR 365, 371 (LAT).

33 *HD Singh v Reserve Bank of India* 1985 Lab IC 1733, 1738 : AIR 1986 SC 132 [LNIND 1985 SC 278]: (1986) I LLJ 127(SC), per Khalid J.

34 *Inder Mohan v Union of India* CWP No 2646 of 1982 (Delhi).

35 Cf, *Remington Rand of India Ltd v Workmen* (1967) 2 LLJ 866 [LNIND 1967 SC 226] (SC), per Mitter J.

36 *Ganges Printing Ink Factory EIC Societies Ltd v 7th IT* 1985 Lab IC 1762 (Cal), per Padma Khastgir J.

37 *Mysore City PGW Assn v State of Karnataka* 1984 Lab IC 1735, 1737 (Kant), per Rama Jois J.

38 *Workmen of Edward Keventers Pvt Ltd v Delhi Admn* 1969 ILR Del 767(DB), per HR Khanna CJ.

39 Maxwell, *Interpretation of Statutes*, 1969, 12th ed, p 1.

40 *Shahdara-Saharanpur Light Rly Co Ltd v SS Rly Workers' Union* (1969) 1 LLJ 734 [LNIND 1968 SC 281], 749 (SC), per Shelat J.

41 *Keventers Karamchari Sangh v Lt Governor, Delhi* (1971) 2 LLJ 375 [LNIND 1970 DEL 70] (Del) (DB), per Andley J.

42 *Delhi Administration v Workmen of Edward Keventers* 1978 Lab IC 706, 707 : AIR 1978 SC 976 [LNIND 1978 SC 31] (SC), per Krishna Iyer J.

43 *Badri Narayan Saha v Union of India* (1999) 3 LLN 365 (Pat) (DB), per Sharma J.

44 *Dewar's Garage (I) Pvt Ltd v Third IT* 1977 Lab IC 86 (NOC) (Cal), per Hazra J.

45 *Maharaja Kishangarh Mills Ltd v State of Rajasthan* AIR 1953 Raj 188 [LNIND 1953 RAJ 188], 190-91, per Ranawat J.

46 *AK Kaliappa Chettiar and Sons v State of Kerala* (1970) 1 LLJ 97 (Ker), per Isaac J.

47 *Keventers Karamchari Sangh v Lieutenant Governor, Delhi* (1971) 2 LLJ 375 [LNIND 1970 DEL 70] (Del), per Andley J.

48 *Eenadu Press Workers Union v Govt of AP* (1979) 1 LLJ 391 (AP) (DB), per Kuppuswami J.

49 *Mysore City P&GW Assn v State of Karnataka* 1984 Lab IC 1735, 1738 (Kant), per Rarna Jois J.

50 *Harish Bijaykumar Khaitan v State of Maharashtra* 1987 Lab IC 836, 840 (Bom), per Kantharia J.

51 *Birla Tyres Workers Union v State of Orissa* (2011) 3 LLJ 859 : 111 (2011) CLT 554 (Orr), per Mahapatra J.

52 *Coats India v State of Bihar* (2011) 4 LLJ 872 (Pat), per SP Singh J.

53 *Niemla Textile Finishing Mills Ltd v Second Punjab Tribunal* (1957) 1 LLJ 460 [LNIND 1957 SC 1], 470 (SC), per Bhagwati J. .

54 *Ujjambai v State of Uttar Pradesh* AIR 1962 SC 1621 [LNIND 1962 SC 584], 1629, per SK Das J.

55 *Western India Automobile Assn v IT* (1949) 1 LLJ 245, 253 (FC), per Mahajan J.

56 *United Commercial Bank Ltd v Workmen* (1951) 1 LLJ 621 [LNIND 1951 SC 26], 630 : AIR 1951 SC 230 [LNIND 1951 SC 26] (SC), per Kania CJI.

57 *Jai Bhagwan v Mgmt of Ambala CCB Ltd* 1983 Lab IC 1694, 1696 (SC), per Chinnappa Reddy J.

58 *Bharat Bank Ltd v Employees of Bharat Bank Ltd* (1950) 1 LLJ 921 [LNIND 1950 SC 4], 931 (SC), per Mahajan J.

59 *State of Madras v CP Sarathy* (1953) 1 LLJ 174 [LNIND 1952 SC 84] (SC), per Patanjali Sastri CJI.

60 *Cawnpore Tannery Ltd v S Guha* (1961) 2 LLJ 110 [LNIND 1960 SC 266], 112 (SC), per Gajendragadkar J.

61 *Delhi Cloth & General Mills Ltd v Workmen* (1969) 2 LLJ 755 [LNIND 1968 SC 298], 767 (SC), per Shah J.

62 *State of Bombay v Hospital Mazdoor Sabha* (1960) 1 LLJ 251 [LNIND 1960 SC 19], 257 (SC), per Gajendragadkar J.

63 *Basti Sugar Mills Co Ltd v State v Uttar Pradesh* (1978) 2 LLJ 412 [LNIND 1978 SC 232], 419 (SC), per Krishna Iyer J.

64 *JK Cotton Spg and Weaving Mills Co Ltd v LAT* (1963) 2 LLJ 436 [LNIND 1963 SC 157], 444 (SC), per Gajendragadkar J.

65 *Patna Electric Supply Co Ltd v Panza Electric Supply Workers' Union* (1959) 2 LLJ 366 [LNIND 1959 SC 75], 370 (SC), per Gajendragadkar J.

66 *Western India Automobile Assn v IT* (1949) 1 LLJ 245, 256 : AIR 1949 FC 111 (FC), per Mahajan J.

67 *Bidi, Bidi Leaves and TM Assn v State of Bombay* (1961) 2 LLJ 663 [LNIND 1961 SC 353], 670 (SC), per Gajendragadkar J.

68 *Bharat Bank Ltd v Employees of Bharat Bank Ltd* (1950) 1 LLJ 921 [LNIND 1950 SC 4] (SC), per Kania CJI.

69 *Western India Automobile Assn v IT* (1949) 1 LLJ 245 (FC), per Mahajan J.

70 *The Bharat Bank Ltd v Employees of the Bharat Bank Ltd., Delhi and The Bharat Bank Employees' Union, Delhi* (1950) 1 LLJ 921 [LNIND 1950 SC 4], 948 : AIR 1950 SC 188 [LNIND 1950 SC 4] (SC), per Mukherjee J.

71 *Rohtas Industries Ltd v Brijnandan Pandey* (1956) 2 LLJ 444 [LNIND 1956 SC 77], 449 (SC) ; AIR 1957 SC 1 [LNIND 1956 SC 77]; (1957) 27 AWR 210, : 1957 (5) BLJR 26, per SK Das J.

72 *Premier Automobiles v KS Wadke* (1975) 2 LLJ 445 [LNIND 1975 SC 299], 450 (SC) : AIR 1975 SC 2238 [LNIND 1975 SC 299]: [1975] (31) FLR 195 : 1975 Lab IC 1651 : (1976) 1 SCC 496 [LNIND 1975 SC 299], per Untwalia J.

73 Ludwig Teller, *Labour Disputes & Collective Bargaining*, 1940, Vol 1, p 536.

74 *Patna Electric Supply Co v Patna Electric Supply Co Workers' Union* (1959) 2 LLJ 366 [LNIND 1959 SC 75], 370 (SC), per Gajendragadkar J.

75 *Niemla Textile Finishing Mills Ltd v Second Punjab Tribunal* (1957) 1 LLJ 460 [LNIND 1957 SC 1] (SC), per Bhagwati J.

76 *Rai Bahadur Diwan Badri Das v Industrial Tribunal* (1962) 2 LLJ 366 [LNIND 1962 SC 293], 370 (SC) : AIR 1963 SC 630 [LNIND 1962 SC 293]: [1963] 3 SCR 930 [LNIND 1962 SC 293], per Gajendragadkar J.

77 *Punjab National Bank Ltd v IT* (1957) 1 LLJ 455 [LNIND 1956 SC 113], 458 (SC), per SK Das J.

78 *General Secretary, Madras Harbour Workers' Union v IT* (1972) 1 LLJ 8, 14(Mad), per Palaniswamy J.

79 *Bharat Bank Ltd v Employees of Bharat Bank Ltd* (1950) 1 LLJ 921 [LNIND 1950 SC 4], 932 (SC), per Mahajan J.

80 *Sussanah Sharp v Wakefield* [1891] AC 173, 179, per Lord LC Halsbury.

81 *Rohtas Industries Ltd v Brijnandan Pandey* (1956) 2 LLJ 444 [LNIND 1956 SC 77], 449 (BC), per SK Das J.

82 *New Maneckchowk Spg and Wvg Co Ltd v Textile Labour Association* (1961) 1 LLJ 521 [LNIND 1960 SC 321], 526 (SC) : AIR 1961 SC 867 [LNIND 1960 SC 321]: [1961] 3 SCR 1 [LNIND 1960 SC 321], per Wanchoo J.

83 *Delhi Cloth & General Mills Ltd v Workmen* (1969) 2 LLJ 755 [LNIND 1968 SC 298], 767 (SC), per Shah J.

84 *RB Dewan Badri Das v IT* (1962) 2 LLJ 366 [LNIND 1962 SC 293], 370 (SC), per Gajendragadkar J.

85 *Remington Rand of India Ltd v Workmen* CAS No 856, 1475 & 2119 of 1968 (SC) per Shelat J.

86 *Workmen of Dharampal Premchand (Saughandhi) v Mgmt* (1965) 1 LLJ 668 [LNIND 1965 SC 83], 673 (SC), per Gajendragadkar CJI.

87 *Harinagar Cane Farm v State of Bihar* (1963) 1 LLJ 692 [LNIND 1963 SC 71], 695 (SC), per Gajendragadkar J.

88 *State of Bombay v Hospital Mazdoor Sabha* (1960) 1 LLJ 251 [LNIND 1960 SC 19], 257 (SC), per Gajendragadkar J.

89 *Western India Match Co Ltd v Workmen* (1963) 2 LLJ 459 [LNIND 1963 SC 142], 463-64 (SC), per Das Gupta J.

90 *NR Mukherjee v Arnold Hartman Just* AIR 1961 Cal 95 [LNIND 1960 CAL 112] (DB), per Lahiri CJ.

91 *Workmen of Dahingeapar Tea Estate v Dahingeapar Tea Estate* (1958) 2 LLJ 498 [LNIND 1958 SC 79] (SC), per SK Das J.

92 *Mgmt of OSRT Corporation v IT* (1998) 3 LLN 470 (Ori) (DB), per Pasayat J.

1 *Delhi Cloth and Genl Mills Co Ltd v Workmen* (1969) 2 LLJ 755 [LNIND 1968 SC 298], 767-68 (SC) : AIR 1970 SC 919 [LNIND 1968 SC 298]: [1970] (20) FLR 176 : 1970 Lab IC 78, per Shah J.

2 *Rifle Factory Co-op Society Ltd v Fourth IT* (1960) 2 LLJ 517 [LNIND 1959 CAL 4], 521 (Cal), per PB Mukharji J.

3 *JK Iron & Steel Co Ltd v Iron & Steel Mazdoor Union* (1956) 1 LLJ 227 [LNIND 1955 SC 119], 234 (SC), per Bose J.

4 *Parry & Co Ltd v PC Pal* (1970) 2 LLJ 429 [LNIND 1968 SC 358], 438 (SC), per Shelat J.

5 *Harinagar Lime Farm v State of Bihar* (1963) 1 LLJ 692 [LNIND 1963 SC 71], 695 (SC), per Gajendragadkar J.

6 *Rai Bahadur Diwan Badri Das v Industrial Tribunal* (1962) 2 LLJ 366 [LNIND 1962 SC 293], 370 (SC) : AIR 1963 SC 630 [LNIND 1962 SC 293], per Gajendragadkar J.

7 *State of Bombay v Hospital Mazdoor Sabha* (1960) 1 LLJ 251 [LNIND 1960 SC 19], 257 (SC), per Gajendragadkar J.

8 *Madras Gymkhana Club Employees' Union v Gymkhana Club* (1967) 2 LLJ 720 [LNIND 1967 SC 292] (SC), per Hidayatulla J.

9 *HD Singh v Reserve Bank of India* 1985 Lab IC 1733, 1738 (SC), per Khalid J.

10 *Assam Chah Karmachari Sangha v Assam Co Ltd* (1956) 1 LLJ 157 (LAT).

11 *Ghatge and Patil CE Union v G&P (Tpt) Pvt Ltd* (1968) 1 LLJ 566 [LNIND 1967 SC 239], 570 (SC) : AIR 1968 SC 503 [LNIND 1967 SC 238]: [1968] 1 SCR 300 [LNIND 1967 SC 238], per Hidayatullah J.

12 *Parry & Co Ltd v PC Pal* (1970) 2 LLJ 429 [LNIND 1968 SC 358], 438 (SC) : AIR 1970 SC 1334 [LNIND 1968 SC 358], per Shelat J.

13 *Hathising Manufacturing Co Ltd v Union of India* (1960) 2 LLJ 1 [LNIND 1960 SC 122] (SC), per Shah J.

14 Ludwig Teller, *Labour Disputes and Collective Bargaining*, 1940, Vol 1, p 536.

15 *Bombay Labour Union v International Franchises Ltd* (1966) 1 LLJ 417 [LNIND 1965 SC 294], 419 (SC) : AIR 1966 SC 942 [LNIND 1965 SC 294]: : [1966] 2 SCR 493 [LNIND 1965 SC 294], per Wanchoo J.

16 *Doom Dooma Circle Cha Mazdoor Sangh v Budla Beta Tea Estate* (1953) 2 LLJ 828 (LAT).

17 *Orissa Cement Ltd v Workmen* (1960) 2 LLJ 91 [LNIND 1960 SC 86] (SC), per Gajendragadkar J.

18 *Bangalore WCS Mills Co Ltd v Workmen* (1968) 1 LLJ 555 [LNIND 1967 SC 274]-65 (SC) : AIR 1968 SC 585 [LNIND 1967 SC 273]: : [1968] 1 SCR 581 [LNIND 1967 SC 273], per Vaidialingam J.

19 *State of Bihar v PO, IT* 1977 Lab IC 803, 807-09 (Pat) (DB).

20 *Western India Automobile Assn v IT* (1949) LLJ 245 (FC), per Mahajan J.

21 Ludwig Teller, *Labour Disputes and Collective Bargaining*, 1940, Vol 1, p 536.

22 *Workmen of Willamson Milgor & Co Ltd v Mgmt* (1982) 1 LLJ 33 [LNIND 1981 SC 452] (SC), per Baharul Islam J.

23 *Tocklai Experimental Station v Workmen* (1961) 2 LLJ 694 [LNIND 1961 SC 361], 697-98 (SC), per Gajendragadkar J.

24 *Gujarat Engineering Co v Ahmedabad Misc Industrial Workers' Union* (1961) 2 LLJ 660, 662 (SC), per Wanchoo J.

25 *Delhi Cloth & General Mills Co Ltd v Workmen* (1969) 2 LLJ 755 [LNIND 1968 SC 298], 767 (SC), per Shah J.

26 *Imperial Chemical Industries (Ind) Pvt Ltd v Workmen* [1961] 2 SCR 349 [LNIND 1960 SC 268], 354, per Gajendragadkar J.

27 *Abhey Raj Singh v LC* (1998) 1 LLN 668 (P&H) (DB).

28 *A Sambanthan v PO Addl LC* (1998) 3 LLN 388, 392 (Mad), per Balasubramanian J.

29 *Workmen of Andrew Yule & Co Ltd v Eighth IT* (1999) 1 LLN 722, 725 (Cal), per Sinha J.

30 *Workmen of KGID v Principal IT* (1999) 3 LLN 219 (Kant), per Gopala Gowda J.

31 *Blow Plast Ltd v NSH Mashraqui* (1997) 4 LLN 430 (Bom).

32 *First Flight Couriers Ltd v KCCGE Union* (2001) 4 LLN 1221 (Kant), per Chinnappa J.

33 *LIC of India v IT* (2002) 1 LLN 305 (Ker), per Hariharan Nair J.

34 *Muir Mills Ltd v Suti Mill Mazdoor Union* (1955) 1 LLJ 1 [LNIND 1954 SC 159], 6 (SC) : AIR 1955 SC 170 [LNIND 1954 SC 159]: [1955] 1 SCR 991 [LNIND 1954 SC 159], per Bhagwati J.

35 *JK Iron & Steel Co Ltd v Iron and Steel Mazdoor Union, Kanpur* AIR 1956 SC 231 [LNIND 1955 SC 119]: (1956) 1 LLJ 227 [LNIND 1955 SC 119] SC : [1955] 2 SCR 1315 [LNIND 1955 SC 119] : 1955 SCR (2) 1315

36 *Punjab National Bank Ltd v Sri Ram Kanwar, Industrial Tribunal* (1957) 1 LLJ 455 [LNIND 1956 SC 113], 456-58 (SC) : 1957 (1) An WR 53 : [1957] 1 SCR 220 [LNIND 1956 SC 113], per SK Das J.

37 *Crown Aluminimum Works v Workmen* (1958) 1 LLJ 1 [LNIND 1957 SC 106],6 (SC), per Gajendragadkar J.

38 *State of Mysore v Workers in Gold Mines* (1958) 2 LLJ 479 [LNIND 1958 SC 82], 484 (SC), per Gajendragadkar J.

39 *Rashtriya Mill Mazdoor Sangh v Apollo Mills Ltd* (1960) 2 LLJ 263 [LNIND 1960 SC 72], 271 (SC), per Hidayatullah J.

40 *JK Cotton Spg and Wvg Mills Co Ltd v LAT* (1963) 2 LLJ 435, 444 (SC), per Gajendragadkar J.

41 *Ahmedabad Mfg and Calico Ptg Co Ltd v Ram Tahel Ramnand* (1972) 2 LLJ 165 [LNIND 1972 SC 226], 174 (SC) : AIR 1972 SC 1598 [LNIND 1972 SC 226]: 1972 Lab IC 864 [LNIND 1972 SC 226] : (1972) 1 SCC 898 [LNIND 1972 SC 226], per Dua J.

42 *Indian Oxygen Ltd v Workmen* (1969) 1 LLJ 235 [LNIND 1968 SC 193], 242 (SC), per Shelat J.

43 *Burmah Shell OS&D Co of India Ltd v Workmen* (1970) 1 LLJ 363, 366 (SC), per Hegde J.

44 *Indian Express Newspapers (B) Pvt Ltd v Employees Union* (1978) 2 LLJ 11 [LNIND 1978 SC 97] (SC) : AIR 1978 SC 1137 [LNIND 1978 SC 97]: [1978] (36) FLR 333 : 1978 Lab IC 848 : (1978) 2 SCC 188 [LNIND 1978 SC 97], per Krishna Iyer J.

45 *Basti Sugar Mills Co Ltd v State of UP* (1978) 2 LLJ 412 [LNIND 1978 SC 232], 419 (SC) : AIR 1979 SC 262 [LNIND 1978 SC 232]: 1979 Lab IC 129 [LNIND 1978 SC 232] : (1979) 2 SCC 88 [LNIND 1978 SC 232], per Krishna Iyer J.

46 *Western India Vegetable Products Ltd v Workmen* CA 497 of 1966 (SC), per Vaidialingam J.

47 *Central Inland Water Transport Corpn Ltd v Second LC* 1971 Lab IC 229, 236 (Cal), per BC Mitra J.

48 *Central Bank of India Ltd v PS Rajagopalan* (1963) 2 LLJ 89 [LNIND 1963 SC 117], 94 (SC), per Gajendragadkar J.

49 *Workmen of Cochin Port Trust v Board of Trustees* 1978 Lab IC 1111 [LNIND 1978 SC 158], 1115 (SC), per Untwalia J.

50 *State of UP v Nawab Hussain* 1977 Lab IC 911 [LNIND 1977 SC 167], 913 (SC) : AIR 1977 SC 1680 [LNIND 1977 SC 167]: (1977) 2 SCC 806 [LNIND 1977 SC 167] : [1977] 3 SCR 428 [LNIND 1977 SC 167], per Singhal J.

51 *DP Dunderdale v GP Mukherjee* (1958) 2 LLJ 183 [LNIND 1958 CAL 103] (Cal), per PB Mukharji J.

52 *Burn and Co Ltd v Employees* (1957) 1 LLJ 226 [LNIND 1956 SC 78], 230 (SC) : AIR 1957 SC 38 [LNIND 1956 SC 78], per Venkatarama Aiyyar J.

53 *India General Navigation & Rly Co Ltd v Workmen* (1960) 1 LLJ 561 [LNIND 1960 SC 89]-62 (SC), per Wanchoo J.

54 *Workmen of Straw Board Mfg Co Ltd v Mgmt* (1974) 1 LLJ 499 [LNIND 1974 SC 114] (SC), per Goswami J.

55 *Sankar Prasad Banerjee v Central Government, Labour Court* (1975) 1 LLJ 71 (Cal) (DB) : 78 CWN 780, per SK Datta J.

56 *Workmen of Hindustan Lever Ltd v Mgmt* 1984 Lab IC 276 [LNIND 1984 SC 6], 286 (SC), per Desai J.

57 *Punjab Cooperative Bank Ltd v RS Bhatia* (1975) 2 LLJ 373, 375 (SC) : AIR 1975 SC 1898 [LNIND 1975 SC 537]: 1975 Lab IC 1439 : (1975) 4 SCC 696 [LNIND 1975 SC 537], per Untwalia J.

58 *Bombay Gas Co Ltd v Jagannath Pandurang* (1975) 2 LLJ 345 [LNIND 1975 SC 268], 351 (SC), per Alagiriswami J.

59 *Mumbai Kamgar Sabha v Abdulbhai Fazullabhai* (1976) 2 LLJ 186 [LNIND 1976 SC 84], 203 (SC) : AIR 1976 SC 1455 [LNIND 1976 SC 84]: (1976) 3 SCC 832 [LNIND 1976 SC 84] : [1976] 3 SCR 591 [LNIND 1976 SC 84] per Krishna Iyer J.

60 *Deepak Puri v Fifth IT*, 1986 Lab IC 132, 136 (Cal), per UC Banerjee J.

61 *Workmen of Straw Board Mfg Co Ltd v Mgmt* (1974) 1 LLJ 499 [LNIND 1974 SC 114], 501 (SC), per Goswami J.

62 *National Projects Construction Corpn Ltd v Workers Union* 1974 Lab I C 812, 814-15 (All), per Gopi Nath J.

63 *Dalmia Dadri Cement Ltd v Avtar Narain Gujral* (1962) 1 LLJ 261 [LNIND 1962 SC 65] (SC), per Venkatarama Aiyyar J.

64 *National Tobacco Co Ltd v Miriyala Kalidas* (1962) 2 LLJ 207 (AP), per Chandra Reddi CJ.

65 *Mathura Prasad Bajoo Jaiswal v DNB Jeejeebhoy* AIR 1971 SC 2355 [LNIND 1970 SC 84], 2359 : (1970) 1 SCC 613 [LNIND 1970 SC 84], per Shah J.

66 *Rajendra Jha v PO, LC* 1984 Lab IC 1583 [LNIND 1984 SC 218] (SC), per Chandrachud CJI.

67 *Bharat Barrel & Drum Mfg Co Pvt Ltd v Bharat Barrel Employees Union* (1987) 1 LLJ 492 [LNIND 1987 SC 375], 497 (SC) : AIR 1987 SC 1415 [LNIND 1987 SC 375]: (1987) 2 SCC 591 [LNIND 1987 SC 375], per Venkataramiah J.

68 *Punjab State Coop Bank Ltd v Presiding Officer, Labour Court* (1993) 2 LLJ 260, 262 (P&H) (DB) : (1993) 103 PLR 310 [LNIND 1992 PNH 59], per Bahri J.

69 *B Choudhury v PO, LC* 1983 Lab IC 1755, 1758 (Pat) (DB), per Nagendra Prasad Singh J.

70 *Workmen of Straw Board Mfg Co Ltd v Straw Board Manufacturing Co. Ltd.* (1974) 1 LLJ 499 [LNIND 1974 SC 114], 510 (SC) : AIR 1974 SC 1132 [LNIND 1974 SC 114]: [1974] (28) FLR 357 : 1974 Lab IC 730 [LNIND 1974 SC 114] : (1974) 4 SCC 681 [LNIND 1974 SC 114], per Goswami J.

71 *Bharat Barrel & Drum Mfg Co Pvt Ltd v BB Employees Union* (1987) 1 LLJ 492 [LNIND 1987 SC 375], 497 (SC), per Venkataramiah J.

72 *Army & Navy Stores Ltd v Workmen* (1951) 2 LLJ 31 (LAT).

73 *Burn & Co Ltd v Employees* (1957) 1 LLJ 226 [LNIND 1956 SC 78], 229 (SC) : AIR 1957 SC 38 [LNIND 1956 SC 78], per Venkatarama Aiyyar J.

74 *India General Navigation and Rly Co Ltd v Workmen* (1960) 1 LLJ 561 [LNIND 1960 SC 89], 562 (SC) : AIR 1960 SC 1286 [LNIND 1960 SC 89], per Wanchoo J.

75 *Remington Rand of India Ltd v Workmen*, (1962) 1 LLJ 287 [LNIND 1962 SC 87], 288-90 (SC), per Gajendragadkar J.

76 *Workmen of Balmer Lawrie & Co Ltd, v Mgmt* (1964) 1 LLJ 380 [LNIND 1963 SC 248], 383-84 (SC) : AIR 1964 SC 728 [LNIND 1963 SC 248], per Gajendragadkar J.

77 *Shahdara-Saharanpur Light Rly Co Ltd v Workers Union* (1969) 1 LLJ 734 [LNIND 1968 SC 281], 742 (SC), per Shelat J.

78 *Workmen of Balmer Lawrie & Co Ltd v Mgmt* (1964) 1 LLJ 380 [LNIND 1963 SC 248], 381-84 (SC), per Gajendragadkar J.

79 *Bengal Chemical & Pharmaceutical Works Ltd v Employees* (1959) 1 LLJ 413 [LNIND 1959 SC 13] (SC), per Subba Rao J.

80 *Bengal Chemical & Pharmaceutical Works Ltd v Workmen* (1969) I LLJ 751, 756 (SC) : AIR 1969 SC 360 [LNIND 1968 SC 279], per Vaidialingam J.

81 Cf, *Bombay Gas Co Ltd v Jaganath Pandurang* (1975) 2 LLJ 345 [LNIND 1975 SC 268] (SC), per Alagiriswami J.

82 *Varahalakshmi Rice and Oils Mills v Industrial Tribunal* (1960) 2 LLJ 473 (AP), per Seshachalapathi J.

83 *Trichinopoly Mills Ltd v NCT Mills Workers Union* (1960) 2 LLJ 46, 48 (SC) : AIR 1960 SC 1003 [LNIND 1960 SC 6],, per Gajendragadkar J.

84 *Chittivalasa Jute Mills v BV Rao* (1989) 2 LLJ 76, 80 (AP) : 1989 (1) APLJ 473, per Panduranga Rao J.

85 *Shoba Puri v Sadhu Ram* 1987 Lab IC 1751 (Del), per Sunanda Bhandare J.

86 *Sankar Prasad Banerjee v Central Government, Labour Cour* t (1975) 1 LLJ 71, 76 (Cal) (DB) : 78 CWN 780, per SK Datta J.

87 *Workmen of Straw Board Mfg Co Ltd v Straw Board Manufacturing Co. Ltd.* (1974) 1 LLJ 499 [LNIND 1974 SC 114], 510 (SC) : AIR 1974 SC 1132 [LNIND 1974 SC 114]: [1974] (28) FLR 357 : 1974 Lab IC 730 [LNIND 1974 SC 114] : (1974) 4 SCC 681 [LNIND 1974 SC 114], per Goswami J.

88 *Workmen of Theosophical Society v Govt of TN* (1992) 1 LLJ 375, 378 (Mad), per Kanakaraj J.

89 *DP Dunderdale v GP Mukherjee* (1958) 2 LLJ 183 [LNIND 1958 CAL 103], 189-90 (Cal), per PB Mukharji J.

90 *Sir Sobha Singh & Sons Pvt Ltd v Delhi Administration* (1968) 1 LLJ 752, 754 (Punj), per SK Kapur J.

91 *DP Dunderdale v GP Mukherjee* (1958) 2 LLJ 183 [LNIND 1958 CAL 103], 189-90 (Cal), PB Mukharji J.

92 *Indian Statistical Institute v State of West Benga1* 1975 Lab IC 99 (Cal) (DB), per Sabyasachi Mukharji J.

93 *Walford Transport Ltd v First IT* (1961) 2 LLJ 25, 28-29 (Cal), per Ray J.

94 *Mgmt of Rajagopal Transport Pvt Ltd v State of TN* (1974) 2 LLJ 154 (Mad) (DB).

1 *Indodan Milk Products Ltd v LC* (1992) 2 LLJ 234 [LNIND 1991 ALL 536], 237 (All) per Palok Basu J.

2 *Rifle Factory Co-op Society Ltd v Fourth IT* (1960) 2 LLJ 517 [LNIND 1959 CAL 4] (Cal), per PB Mukharji J.

3 *Tamil Nadu Madurai v Working Journalists* (1958) 2 LLJ 752 [LNIND 1958 MAD 100], 756 (Mad), per Balakrishna Ayyar J.

4 *Manabendra Kumar Choudhury v First Labour Court* (1992) 1 LLJ 455 [LNIND 1989 CAL 354], 457 (Cal) : 94 CWN 743, per K Ganguly J.

5 *Mgmt of Food Corpn of India v IT* 1992 Lab IC 2059, 2066 (Ori) (DB), per Hansaria J.

6 *Bengal River Transport Assn v Calcutta PS Union* 1978 Lab IC 1416 (Cal), per Amiya Kumar Mookerji J.

7 *Bharat Bank Ltd v Employees of Bharat Bank Ltd* (1950) 1 LLJ 921 [LNIND 1950 SC 4] (SC), per Kania CJI.

8 *RS Ramdayal Ghasiram Oil Mills v Labour Appellate Tribunal* (1963) 2 LLJ 65 [LNIND 1962 SC 415], 67-68 (SC) : AIR 1964 SC 567 [LNIND 1962 SC 415]: 1964 (66) Bom LR98, per Mudholkar J.

9 *Calcutta Electric Supply Corpn Ltd v CES Workers Union* AIR 1959 SC 1191, 1192, per Gajendragadkar J.

10 *Pottery Mazdoor Panchayat v Perfect Pottery Co Ltd* 1979 Lab IC 827, 829 (SC), per Chandrachud CJI.

11 *Delhi Cloth & General Mills Co Ltd v Workmen* (1967) 1 LLJ 423 [LNIND 1966 SC 261] (SC) : AIR 1967 SC 469 [LNIND 1966 SC 261], per Mitter J.

12 *Mgmt of Madhadevi Textile Mills v Addl IT* 1976 Lab IC 1284, 1288 (Kant), per Shetty J.

13 *Jhagrakhand Collieries Pvt Ltd v CGIT* (1960) 2 LLJ 71 [LNIND 1960 SC 41] (SC), per Gajendragadkar J.

14 *Jardine Henderson Ltd v State of West Bengal* 1969 Lab IC 1259, 1261 (Cal), per TK Basu J.

15 *Express Newspapers Ltd v Workers* (1962) 2 LLJ 227, 234 (SC), per Gajendragadkar J.

16 *Sheshrao Bhaduji Hatwar v PO, First Labour Court* (1992) 1 LLJ 672, 674 (Bom) (DB), per Mohta J.

17 *Parry & Co Ltd v PC Pal* (1970) 2 LLJ 429 [LNIND 1968 SC 358], 438, per Shelat J.

18 *Delhi Cloth & General Mills Co Ltd v Workmen* (1967) 1 LLJ 423 [LNIND 1966 SC 261], 431 (SC) : AIR 1967 SC 469 [LNIND 1966 SC 261], per Mitter J.

19 *Uttar Pradesh SEB v PO, IT* (2002) 2 LLN 41 (All), per Singh J.

20 *WPAR Ramamoorthy v Tirunelveli Dist National Plantation Workers' Union* (1963) 1 LLJ 507 (Mad), per Veeraswami J.

21 *Hindustan Housing Factory Ltd v Hindustan Housing Factory Employees' Union* 1969 Lab IC 1450 (Del), per Tatachari J.

22 *Workmen of Mysore Paper Mills Ltd v Mysore Paper Mills Ltd* 1970 Lab IC 1113, 1116-17 (Mys) (DB).

23 *Hindustan Steel Ltd v IT-cum-LC* 1971 Lab IC 241 (MP) (DB), per Bishambhar Dayal CJ.

24 *A Raman v KN Vani* (1982) 2 LLJ 1 (Bom), per Pendse J.

25 *Indian Oxygen Ltd v Workmen* (1969) 1 LLJ 235 [LNIND 1968 SC 193] (SC) : AIR 1969 SC 306 [LNIND 1968 SC 193]: [1969] 1 SCR 550 [LNIND 1968 SC 193], per Shelat J.

26 *Jaipur Udyog Ltd v CWK Sangh* (1972) 1 LLJ 437 [LNIND 1972 SC 66] (SC) : AIR 1972 SC 1352 [LNIND 1972 SC 66]: 1972 Lab IC 676 [LNIND 1972 SC 66], per Mitter J.

27 *Firestone Tyre India Pvt Ltd v Workmen* (1981) 2 LLJ 218 [LNIND 1981 SC 294], 221 (SC) : AIR 1981 SC 1626 [LNIND 1981 SC 294]: 1981 Lab IC 1110 [LNIND 1981 SC 294], per Gupta J.

28 *Central Inland Water Tpt Corpn Ltd v Seventh IT* (1983) 1 LLJ 157, 162 (Cal) (DB) : AIR 1983 SC 658 [LNIND 1983 SC 147]: (1983) 3 SCC 401 [LNIND 1983 SC 147], per Pyne J.

29 *Glaxo Laboratories (India) Ltd v PO, LC* 1977 Lab IC 1523, 1533-34 (AP) (DB), per Sheth J.

30 *EID Parry (India)* 1990 Lab IC NOC 135 (Mad) (DB).

31 *Senior Regional Manager, HPCL v PO, IT* (2002) 4 LLN 893 (AP) (DB), per Nayak J.

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1 Brought into force wef 21 August 1984.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

*CHAPTER IV Procedure, Powers and Duties of Authorities

S. 11. Procedure and Powers of Conciliation Officers, Boards, Courts, and Tribunals.—

1[(1)Subject to any rules that may be made in this behalf, an arbitrator, a Board, Court, Labour Court, Tribunal or National Tribunal shall follow such procedure as the arbitrator or other authority concerned may think fit.]

(2) A conciliation officer or a member of a Board [2][or Court or the presiding officer of a Labour Court, Tribunal or National Tribunal] may for the purpose of inquiry into any existing or apprehended industrial dispute, after giving reasonable notice, enter the premises occupied by any establishment to which the dispute relates.

(3) Every Board, Court, [3][Labour Court, Tribunal and National Tribunal] shall have the same powers as are vested in a civil court under the Code of Civil Procedure 1908 (5 of 1908), when trying a suit, in respect of the following matters, namely:

(a) enforcing the attendance of any person and examining him on oath;

(b) compelling the production of documents and material objects;

(c) issuing commissions for the examination of witnesses;

(d) in respect of such other matters as may be prescribed;

and every inquiry or investigation by a Board, Court, [4][Labour Court, Tribunal or National Tribunal] shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860).

(4) A conciliation officer [5][may enforce the attendance of any person for the purpose of examination of such person or call for] and inspect any document which he has ground for considering to be relevant to the industrial dispute [6][or to be necessary for the purpose of verifying the implementation of any award or carrying out any other duty imposed on him under this Act, and for the aforesaid purposes, the conciliation officer shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure 1908 (5 of 1908), [7][in respect of enforcing the attendance of any person and examining him or of compelling the production of documents]].

8[(5)A Court, Labour Court, Tribunal or National Tribunal may, if it so thinks fit, appoint one or more persons having special knowledge of the matter under consideration as assessor or assessors to advise it in the proceeding before it.

(6) All conciliation officers, members of a Board or Court and the presiding officers of a Labour Court, Tribunal or National Tribunal shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

(7) Subject to any rules made under this Act, the costs of, and incidental to, any proceeding before a Labour Court, Tribunal or National Tribunal shall be in the discretion of that Labour Court, Tribunal or National Tribunal and the Labour Court, Tribunal or National Tribunal, as the case may be, shall have full power to determine by and to whom and to what extent and subject to what conditions, if any, such costs are to be paid, and to give all necessary directions for the purposes aforesaid and such costs may, on application made to the appropriate

government by the person entitled, be recovered by that government in the same manner as an arrear of land revenue.]

9[(8) Every [10][Labour Court, Tribunal or National Tribunal] shall be deemed to be civil court for the purposes of [11][Sections 345, 346 and 348 of the Code of Criminal Procedure 1973(2 of 1974)]].

12[(9) Every award made, order issued or settlement arrived at by or before Labour Court or Tribunal or National Tribunal shall be executed in accordance with the procedure laid down for execution of orders and decree of a Civil Court under order 21 of the Code of Civil Procedure 1908 (5 of 1908).

(10) The Labour Court or Tribunal or National Tribunal, as the case may be, shall transmit any award, order or settlement to a Civil Court having jurisdiction and such Civil Court shall execute the award, order or settlement as if it were a decree passed by it.]

LEGISLATION

This section corresponds to s 9 of the repealed Trade Disputes Act 1929, which dealt with 'procedure and powers'. However, the section as enacted in the original Industrial Disputes Act 1947 has been made much wider in ambit and scope than its counterpart in the old Act. The section has undergone further substantial amendments as indicated in the footnotes to the text of the section.

SUB-SECTION (1): PROCEDURE IN ADJUDICATION OF THE REFERENCE

Unlike the superior courts, the tribunal being the creation of statute, derives power from the statute. Such tribunals have no inherent powers. But apart from powers expressly mentioned in the statute, these tribunals may have powers which are incidental or ancillary. Such incidental or ancillary powers might have been derived by the tribunals either from the express provisions of the statute creating such tribunals or by necessary implication of the powers conferred.[13]Section 11 (1) empowers an industrial adjudicator to follow 'such procedure' as he 'may think fit' subject to any rules that may be made in this behalf. In other words, the conduct of the adjudication is absolutely within the control of the adjudicator, subject only to any rules that may be made by the appropriate government in this behalf.[14]In other words, if the Act and the Rules prescribe a particular procedure, the adjudicator shall have to follow that and no other procedure. If, however, the rules are silent on any particular matter, it is open to the adjudicator to follow such procedure, as he may think fit. That is to say, the width and amplitude of the power of the adjudicator is unrestricted unless the same is restricted by any provision of the Act and the Rules.[15]The wide powers given to the adjudicators to follow their own procedure are aimed at mitigating the rigors of the technicalities of the procedural law for achieving expeditious investigation and settlement of industrial disputes. However, the words 'as it thinks fit' used in this sub-section are not to be taken literally. They do not mean that an adjudicator or arbitrator is a lawless autocrat and he can follow any procedure or no procedure according to his whim or fancy or that he can act in one way in one case and in a different way in another case.[16] This power is conferred on the tribunals for regulating the procedure and not for the exercise of the substantive power conferred under provisions of the Act and is by itself no source of substantive power.[17] An adjudicator, therefore, has to follow the rules of natural justice in carrying out his functions under the statute because the courts have implied such procedure in construing the statutes.[18] Except to the extent specified in sub-s 3 and the relevant rules, the provisions of the Code of Civil Procedure 1908, are not applicable to proceedings before the authorities mentioned in sub-s (1). The provisions of the Evidence Act, in their strict sense too, do not apply to proceedings before these authorities. Nevertheless, all these authorities, being of a quasi-judicial character objectively determining matters referred to them, have to exercise their discretion in a judicial manner, without caprice, and according to the general principles of law and rules of natural justice.[19]

The first point of importance is that the adjudicator should inform himself as to the nature of the dispute and as to the powers and duties entrusted to him or, in other words, as to the scope of the reference. His next duty is to hear the case, for being able to give a decision in the matter. In some cases, the parties may be ready to appear before the adjudicator at once, but in others, time may be required by the parties for the preparation of their cases or preliminary proceedings may be necessary before the actual hearing. In connection with adjudication, it is necessary to consider the evidence that may be adduced by the parties, the circumstances under which the adjudicator may obtain the assistance of assessors, and the method of dealing with points of law which may arise in the course of the adjudication. An arbitrator under s 10A, labour court, industrial tribunal or national tribunal which has to adjudicate upon a matter on reference under s 10 or s 36A or applications under s 33 or s 33C(2), exercises quasi-judicial powers which means that certain content of the judicial powers of the state is vested in it and it is called upon to exercise it.[20] A quasi-judicial decision pre-supposes an existing dispute between two or more parties and involves presentation of their case by the parties to the dispute and if the dispute between them is on a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of arguments by or on behalf of the parties on the evidence.[21] Parties are arrayed

before these quasi-judicial tribunals. There is thus a *lis* between the parties. There would be assertion and denial of facts on either side. With the permission of the tribunal and consent of the opposite side, parties are entitled to appear through legal practitioners before these quasi-judicial tribunals. The system adopted by these tribunals is the adversary system, a word as understood in contradistinction to inquisitorial system. Rules 9 to 30 contained in Pt III of the Industrial Disputes (Central) Rules 1957 and the forms prescribed thereunder, lay down the powers, procedure and duties of these tribunals. Forms prescribed under the rules are more or less analogous to a plaint in a suit and the reply to be filed would take, more or less, the form of a written statement. Any party appearing before these tribunals must make a claim or demur a claim of the other side. Where the parties are at variance, for facility of disposal, issues will have to be framed. It is open to the tribunal to frame an issue and dispose it off as a preliminary issue.[22]

Parties have to lead evidence. When there is a burden upon a party to prove or establish the fact so as to invite a decision in its favour, it has to lead evidence. Obligation of leading evidence to establish an allegation or averment made by a party is on the party making such allegation or evidence. It must seek an opportunity to lead evidence but evidence can be led only in support of the contentions pleaded. If there is no pleading raising a contention, there is no question of substantiating such a non-existing contention by evidence. It is well-settled that, an allegation which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side had no notice of it and if entertained, it would tantamount to granting an unfair advantage to the first party. Though pleadings before such tribunals have not to be read strictly, it is equally true that pleadings must be such as to give sufficient notice to the other party of the case it is called upon to meet.[23] The rules of fair-play demand that where a party seeks to establish a contention which, if proved, would be sufficient to deny relief to the opposite side, such a contention has to be specifically pleaded and then proved. But if there is no pleading, there is no question of proving something which is not pleaded. The tribunal would then proceed to decide the *lis* between the parties. It has to decide the *lis* on the evidence adduced before it by the parties, in respect of the averments and allegations made and contentions raised in their pleadings. Rule 15 provides that the tribunal may accept, admit or call for evidence at any stage of the proceedings before it and in such a manner as it may think fit. While it may not be hidebound by the Rules prescribed in the Evidence Act, it is nonetheless a quasi-judicial tribunal proceeding to adjudicate upon a *lis* between the parties before it and must decide the matter on the evidence produced by the parties before it. It would not be open to it to decide the *lis* on any extraneous considerations. Justice, equity and good-conscience will inform its adjudication. Therefore, these tribunals have all the trappings of a court of law. Sub-section 1 of s 11 confers powers upon the authorities mentioned therein to follow such procedure as they 'may think fit' and sub-s 3 confers upon them powers of a civil court under the Code of Civil Procedure in respect of matters therein specified.[24] Rules 10A and 10 B of the Industrial Disputes (Central) Rules 1957 prescribe the procedure for filing pleadings of the parties, hearings, grant of adjournments, examination of witnesses etc before the labour courts, the tribunals and the national tribunals, it has been made mandatory for the national tribunals to follow the procedure laid down in r 5 of O 18 of the First Schedule to the Code of Civil Procedure 1908 while it is only directory for the labour courts and the industrial tribunals to follow these provisions of the Code of Civil Procedure if they consider it necessary in view of the nature of the particular industrial dispute pending before them.

(i) Notice of Proceedings

An industrial adjudicator, after receipt of a reference, is enjoined to serve notice upon the parties to the reference in accordance with the relevant rules. But it is not clear as to whether the government should give notice to the parties when it makes an order of reference. Rule 13, however, requires the authority to whom a reference has been made to 'inform the parties' of the time and place of hearing fixed by it 'in such manner as he thinks fit'. Rule 18 prescribes that any notice or summons of such authority may be served either personally or by registered post. Rule 19 lays down the manner of describing the parties where there are numerous persons arrayed on any side before such authority. Rule 20 prescribes the manner of service in a case where there are numerous parties to a dispute. In *GSeshagiri Rao*, a notice was issued by the labour court under r 20 of the Andhra Pradesh Industrial Rules, which provides that a notice, summons, process or order may be served either personally or by registered post. The notice was returned with the postal indorsement 'not available'. Thereupon a second notice was again issued and that was also returned with the postal indorsement 'evading to take delivery'. In these circumstances, the labour court found it unnecessary to order notice once again to the workman. The Andhra Pradesh High Court held that there was no service either personally or by registered post. It was held that the case of evasion to take delivery could not be equated with service of the notice. Therefore, the requirement of personal service or service through registered post was not complied with. Consequently, the award of the labour court was quashed.[25]

On the construction of r 22(2) of the Industrial Disputes (Bihar) Rules, the Patna High Court in *Rameshwar Prasad*, held that the correct, reasonable and legitimate view is that when an industrial dispute is raised on behalf of the entire body of workmen, they must be deemed to have knowledge of the reference when the notification is published in the Gazette. Hence, publication of the notification must be held to be constructive notice to them and it is not obligatory on the government to forward copies of orders of reference to all the unions if there be more than one which have raised the dispute individually or collectively or to other workmen who are not members of any union. It is not possible to do so nor

any rule casts any such obligation on the government. Nor is there any obligation on the tribunal to give any notice to the workmen individually either in accordance with r 22(2) of the Bihar Rules or otherwise. However, the High Court observed that it would be better for the tribunals to whom reference is made, to avoid any technical dispute, to take recourse to the general method of service of notice prescribed in r 22(2) of the Bihar Rules which would obviate any objection. A reasonable notice of the time and place of hearing should be given to the parties so that they may be prepared for the hearing.[26] An award made by a tribunal without summoning the parties likely to be affected by its award will be fundamentally wrong.[27] In *Bengal Box Manufacturing Co*, the facts were: on the date fixed for hearing of the dispute before the industrial tribunal, none of the parties appeared; hence the tribunal fixed another date for hearing. Even on the next date, none of the parties appeared. The notice of hearing was not sent to the principal place of business of the employer, but was sent to another address, which was returned as 'refused'. Hence, the tribunal fixed another date for *ex parte* hearing with notice only to the union and passed an *ex parte* award against the employer. The award was challenged by the employer on the ground of violation of the rules of natural justice. The High Court quashed the award holding that proper opportunity was not given to the employer for presenting its case and the case was remanded to the tribunal for hearing after fresh service of notice was served to the employer firm at its principal place of business.[28]

(ii) Procedure and Practice

Though an adjudicator has the power to follow his own procedure, it is usual practice in all adjudication proceedings to follow the procedure of an action at *nisi prius*, ie, a civil suit before a civil court. Depending upon the terms of the order of reference, the tribunal will decide which party shall have the right to begin, by custom the party having to prove the affirmative is entitled to open to the case first. After the receipt of the order of reference, the adjudicator issues a notice to the parties to the dispute and then the following order of proceedings is usually followed:

(1) The claimant files his claim statement.

(2) The respondent files the reply to the claim statement.

(3) The claimant may file a rejoinder to the reply of the respondent.

(4) On these pleadings, the adjudicator frames issues. It also may frame preliminary issues where preliminary objections are raised.

(5) The claimant opens his case by himself or through his representative and examines his witnesses, who are, in turn cross-examined by or on behalf of the respondent.

(6) The respondent opens his case by himself or through his representative and examines his witnesses, who are, in turn cross-examined by or on behalf of the respondent.

(7) The claimant or his representative addresses 'oral arguments' to the tribunal.

(8) The respondent or his representative addresses his 'arguments' to the tribunal.

(9) The claimant may reply to the arguments of the respondent.

(10) The hearing is then finished and the case is closed by the parties. Then it only remains for the tribunal to consider the materials before him and prepare his award.

In *JK Iron*, Bose J delineated the contours of the scope of the procedural jurisdiction of the industrial tribunals in following words:

> Very broadly it follows the pattern of the civil courts when the reference is made by government, the tribunal has to take the pleadings of the parties in writing and to draw up issues. Then it takes evidence, hears arguments and finally pronounces its 'judgments' in open court. It is evident from this that though these tribunals are not bound by all technicalities of civil courts, they must nevertheless follow the same general pattern. Now, the only point of requiring pleadings and issues is to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. It is not open to the tribunals to fly off at a tangent and disregarding the pleadings, to reach any conclusions that they think are just and proper.[29]

This principle equally applies to the adjudicatory proceedings on a reference under s 10 or on an application under s 33 as well as on a petition under s 33C(2).[30]It is the duty of the tribunal to act fairly between the parties and to hear and determine the case as a judge upon the evidence, oral and documentary, adduced before, him. If the tribunal allows a prayer from one party, it should not refuse a similar prayer by the other party.[31] He should endeavour to exclude from his mind any previous personal knowledge or pre-conceived notion of the dispute. Both parties should be present when the hearing is commenced unless the case has taken such a course as to justify the tribunal in proceeding *ex parte*. Subject to

this exception, the case should *be* opened and the evidence taken in the presence of both the parties. At no time during the adjudication proceedings should the tribunal receive any evidence or communication, relating to the case from one of the parties or give him an attendance behind the back of another. To do so would have the appearance of partiality or unfair dealing between the parties which might vitiate the award. If any such communication does come before him he should at once inform the other party. It is desirable that all entries in the *roznama* of the tribunal in the proceedings should be signed by the presiding officer and all corrections or alterations therein should be signed or initialed by him. Not doing so would leave scope for the parties to make allegations with respect to the correctness of such corrections or alterations.[32]

(iii) Parties

Section 11(3) of the Act prescribes, *inter alia*, that the tribunal shall have the same powers as are vested in a civil court under the Code of Civil Procedure, when trying a suit in respect of the matters specified in cll (a) and (b), from which it is clear that the power to add a party to the proceedings pending before a tribunal, which a civil court may exercise under the Code of Civil Procedure, O 1, r 10, is not included in s 11(3). There is no other section in the Act which confers such a power on the tribunal. However, there is ample authority under s 18(6) to add any person, including the government or establishment, whose presence is necessary or proper for due adjudications. In other words, while dealing with an industrial dispute, if the tribunal comes to the conclusion that persons other than those mentioned as parties to the order of reference were necessary for a valid determination of the dispute, it has the power to summon them; and if such persons are summoned to appear in the proceedings, the award of the tribunal would be binding on them. Since in cases where persons are added as parties to an industrial dispute, are likely to raise the question as to whether the joinder of the parties was justified or not, s 11(3)(b) requires that the tribunal should record its opinion as to whether these persons were summoned without proper cause. However, it is not open to the tribunal to travel materially beyond the terms of reference for it is well-settled that the terms of reference determine the scope of its power and jurisdiction from case to case. In other words, this power cannot be exercised by the tribunal so as to enlarge materially the scope of the reference itself, because basically the jurisdiction of the tribunal to deal with an industrial dispute is derived solely from the order of reference made by the appropriate government. 'If the reference directs the tribunal to adjudicate upon a dispute between *X* and *Y,* the tribunal cannot enlarge the scope of inquiry by bringing in additional parties'. Addition can be made incidentally but not substantially so as to open up new avenues of inquiry. The test in such cases, therefore, must always be: Is the addition of the party necessary to make the adjudication effective and enforceable?[33] Once a person is impleaded as a party in the proceedings before a tribunal, principles of natural justice would require that he should be given an opportunity to lead his own and rebut evidence of other sides.[34]

(iv) Representation of Parties

A party to an industrial dispute may conduct his case in person or they may be represented by a representative as permitted by s 36 of the Act.

(v) Pleadings

It is well-settled now that the industrial adjudicators are exercising quasi-judicial powers. A quasi-judicial decision presupposes an existing dispute between two or more parties and involves presentation of their case by the parties to the dispute and if the dispute between them is on a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute. Any party appearing before the adjudicator must make a claim and demur the claim of the other side and when there is a burden upon it to prove or establish the fact so as to invite a decision in its favour, it has to lead evidence.[35] Claim statements and written statements are called for enabling the parties to set out their own cases as well as to give the adversary an opportunity to meet the objections.[36] A tribunal is not required to advise the parties about their rights or what they should do or omit to do.[37] Normally, *in industrial adjudication, the plaint of the workmen is known as 'claim statement' to which the employer files the 'written statement'. Then, the workmen may file a 'rejoinder' to the 'written statement' of the employer.* These pleadings are to be made as prescribed by the rule of the 'appropriate government'. Rule 10B of the Industrial Disputes (Central) Rules 1957 provides procedure before the adjudicatory authorities. Sub-rules (1) to (4) prescribe procedure and the time-limit for filing the pleadings before such authorities. Various states have promulgated their own rules detailing the procedure of filing the pleadings. Since under s 10(4), the tribunal has to confine its adjudication to the points specified in the order of reference and matters incidental thereto, the parties are not permitted to introduce any matters *de hors* the points of reference and matters incidental thereto. The parties, however, may raise preliminary objections with respect to the maintainability of the reference. At the preliminary hearings, any question as to the production of documents may be raised and the adjudicator's directions taken thereon. It is within the power of the tribunal to make an order for 'discovery, production and inspection of documents'. It is common practice in industrial adjudication for the parties to exchange lists of documents upon which they rely and to which they propose to refer in the proceedings. An adjudicator will generally make an order to this effect-a course which, although not so far-reaching as an order for discovery, is often sufficient to meet the requirements of the dispute.

Pleadings in industrial disputes need not strictly conform to the provisions of the Civil Procedure Code. Not only for the reason that the Code of Civil Procedure has restricted application to the industrial adjudication under the Act, but the fact that the Workers generally are illiterate and not conversant with legal formalities, has also to be borne in mind. Hence, the pleadings in industrial adjudication cannot be strictly construed. Merely because a provision of law has not been mentioned in a pleading, it cannot be said that there was no proper pleading as long as a party is not taken by surprise and disabled from leading proper evidence to meet the case of the opposite party.[38]For instance, where though s 9A of the Industrial Disputes Act was not pleaded by either party, the consideration of that provision by the tribunal was upheld by the High Court because it had a vital bearing on the dispute before it.[39] but the rules of natural justice require that the pleadings must at least be such as to give sufficient notice to the other party of the case it is called upon to meet.[40] In any case, the pleadings must be definite for laying the foundation of the evidence in the case. Though the pleadings before the industrial tribunals have not to be read strictly, it is equally true that the pleadings must be such as to give sufficient notice to the other party of the case, it is called upon to meet. Where a party seeks to establish a contention, which if proved would be sufficient to deny relief to the opposite side, such a contention has to be specifically pleaded and proved. If there is no pleading, there is no question of proving something which is not pleaded. In other words, a contention which is not pleaded even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained, it would tantamount to granting an unfair advantage to the first party.[41] It is well settled that no amount of evidence can be looked upon a plea which was never put forward. The reason is that a party cannot be allowed to benefit himself from such evidence which is at variance with his pleadings. If he were allowed to do so, the opposite party would be taken by surprise.[42] After a plea has been rejected by the tribunal, a party cannot be permitted to make a somersault and take a different plea. For instance, where the management had taken the plea that the employee in question was not a workman because he was employed in a supervisory capacity and was drawing wages more than Rs 1600 was not allowed subsequent to the rejection of this plea, to take the new plea that the employee was actually employed in a managerial and administrative capacity.[43]

(vi) Amendments

The amendments are to be allowed so as to give full effect to the adjudication without, however, causing substantial injury to the other party. An injury may be remedied by an amendment and an appropriate order as to costs. The principle governing the amendments of pleadings cannot be better stated than in the words of Shah J speaking for the Supreme Court in *Jai Jai RM Lal:*

> Rules of procedure are intended to be a hand-maid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The court always gives leave to amend the pleadings of a party, unless it is satisfied that the party applying was acting *mala fide*, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However, negligent or careless may have been the first omission, and, however, late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side ... all amendments should be permitted as may be necessary for the purpose of determining the real question in controversy between the parties, unless by permitting the amendment injustice may result to the other side ... In our view, there is no rule that unless in an application for amendment of the plaint it is expressly averred that the error, omission or mis-description is due to a *bona fide* mistake, the court has no power to grant leave to amend to plaint. The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations. [44]

Thus, the tribunal always ought to give leave to amend pleadings of a party, unless it is satisfied that the party applying was acting *mala fide* or that by his blunder he caused injury to his opponent which cannot be compensated for by an order of costs. However, there is no rule that in the application for amendment, the party must expressly aver that the error, omission or mis-description was due to a *bona fide* mistake. It would be sufficient if a *prima facie* case for the amendment is made out by the applicant. The amendment can only be refused on recording findings that the party applying was acting *mala fide* or the injury caused to the opposite party by the mistake, omission or mis-description committed by the applying party cannot be compensated for by payment of costs. But where no injury is caused to the opponent and the applying party acted *bona fide*, the rules of natural justice required that in appropriate cases, the tribunal may allow the amendment of pleadings. In other words, the industrial adjudicators are competent to allow the parties, when they are not actuated by any oblique motive, to modify their pleadings to sub-serve the interests of justice.[45] In *Patna Electric Supply*, the original application was filed by the employer for permission to dismiss the concerned workmen from its employment under a particular Standing Order but by a subsequent application, the employer sought permission to discharge the workmen under a different Standing Order, thus altering the relief which it had prayed for in his original application. In other words, the subsequent application, in substance, was a new application made by the employer to the tribunal, though relying upon the same facts and circumstances which were set out in the original application. This application was resisted by the

workmen, but was entertained by the tribunal in permitting the employer to discharge the concerned workmen. In view of the express finding recorded by the tribunal that the application for leave to discharge the workmen was *bona fide* and what the employer did by making the subsequent application was actuated by the honest motive of exercising its right to discharge the workmen under the relevant Standing Orders instead of dismissing them, the Supreme Court held that once the tribunal was of the opinion that the subsequent application and the discharge of the workmen for which its permission was sought was in the honest exercise of the employer's right, its decision could not be assailed. Amendment of pleadings should be liberally allowed provided it does not make out a new case. [46]

In *Royal Nepal Airlines*, the Calcutta High Court upheld the validity of an amendment of the written statement for bringing on record the fact that a certain employee was a Nepalese national because the question of nationality was relevant for the determination of relief to be granted. The court observed that there was no reason why such amendment should not be allowed and it could not be said that it would extend the scope of the dispute or introduce a new dispute.[47] Likewise, in *Lipton*, the tribunal disallowed the amendment of an application filed by the employer for amending its written statement for the reason that the application was 'belated, repetitive, argumentative, raising legal pleas and was *mala fide* in certain other respects'. The Delhi High Court set aside the order of the tribunal holding that the amendments sought were neither frivolous nor in the nature of surprise to the workman concerned nor did they amount to withdrawal of any admission made by the management earlier. The amendment application was made even before the evidence of the workmen was started. In that sense the application was not belated. The mere fact that the application was repetitive and argumentative and in some parts legal submissions were elaborate, did not make the application bad in law or *mala fide*. The holding of the tribunal, therefore, was contrary to well-known principles of law in regard to amendment of pleadings.[48]

(vii) Issues

In *Shankar Chakravarti v Britannia Biscuit Co* , the Supreme Court observed:

> 'Where parties are at variance for facilities of disposal, issues will have to be framed.' Issues in industrial disputes are usually of two types, namely, (a) issues referred by the government for adjudication, and (b) incidental issues which are sometimes issues of law or issues of mixed law and fact.[49]

As far as issues of the first category are concerned, there is no question of framing such issues by the tribunals, because they have to adjudicate upon such issues as are referred to them. The tribunal has no power to vary or alter such issues. However, on pleadings of the parties, the tribunals may frame issues of the second category. Such additional or ancillary issues are framed for better appreciation of the cases of the parties with reference to the principal issue or issues which have been referred for adjudication and on the basis of which the jurisdiction of the tribunal will have to be determined.[50] It is open to the tribunal to frame an issue on a jurisdictional point and dispose it off as a preliminary issue. The tribunal may as well frame preliminary issues if the point on which the parties are at variance, as reflected in the preliminary issue, would go to the root of as the matter. However, the tribunal cannot travel beyond the pleadings and arrogate to itself the power to raise issues which the parties to the reference are precluded or prohibited from raising; to wit if the employer does not question the status of the workman, the tribunal cannot *suo motu* raise the issue and proceed to adjudicate upon the same and throw out the reference on the sole ground that the concerned workman was not a 'workman' as defined in the Act.[51] Sometimes, the failure of the tribunal to frame such preliminary issues may lead to miscarriage of justice. For instance, where having framed one omnibus vague issue as to validity of a Worker's dismissal, because of criminal misconduct, the tribunal committed several errors in proper assessment of evidence and laid wrong burden of proof on the management in respect of points of fact not even agitated in the pleadings and which the management was not even called upon, in law, to meet, the resulting award was held to be defective.[52]

But where the tribunal has ascertained the real dispute, the omission to frame formal issues cannot by itself vitiate its order, if it has dealt with the contentions raised by the parties before it.[53] In framing the issues, the tribunal has to consider the question of placing the burden of proving the issue on one of the two parties. All that 'burden of proof means is as to who has the right to begin leading evidence. The tribunal also in its discretion may, in the circumstances of a case, shift the burden of proof from one party to another. A single judge of the Punjab and Haryana High Court has taken the view that the question of shifting of burden of proof on an issue howsoever erroneous is not amenable to judicial review.[54] If an objection as to the maintainability of the dispute or jurisdiction of the tribunal is raised, the tribunal has to examine it as a preliminary issue. The finding which the tribunal may record on this preliminary issue, will decide whether it has jurisdiction to deal with the merits of the dispute or not. For instance, in a disciplinary case, the tribunals must decide the legality and validity of the domestic inquiry as a preliminary issue and on that decision being pronounced, it will be for the management to decide whether it will adduce any evidence before the tribunal.[55] The consequences which ensue if the domestic inquiry is valid, are entirely different from the consequences which ensue if it is held invalid. In other words, scope of inquiry and hearing gets restricted or enlarged, as the case may be. Therefore, it is not possible for the tribunal to

hear such a preliminary issue along with the main reference, as the scope of hearing and inquiry stands restricted and enlarged, depending on the finding one way or the other on the preliminary issue.[56] If the tribunal finds that it has no jurisdiction, there will be an end of the proceedings before it, so far as the main dispute is concerned and the tribunal will have no jurisdiction to go into the merits of the reference and any finding recorded by the tribunal on merits will be ineffective, being without jurisdiction.[57]

(viii) Burden of Proof

The general principle of the law of evidence is that he who asserts must prove. In other words, burden of proof is the obligation to adduce evidence to the satisfaction of the tribunal or court in order to establish the existence or non-existence of a fact contended to by a party. The principle of burden of proof is founded on the rule of roman law, ie, *ei incumbit probatio, qui dicit, non qui negat*—the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it, for a negative is usually incapable of proof. This rule of evidence has been adopted in practice not because it is impossible to prove a negative but because the negative does not admit of direct and simple proof, of which the affirmative is capable. The expression 'burden of proof has two distinct and often blurred meanings *viz:*

(a) the burden of proof as a matter of law and pleadings. This, burden, as it has been called, for establishing a case, whether by preponderance of evidence or beyond a reasonable doubt; and,

(b) the burden of proof in the sense of introducing evidence.

In the Indian Evidence Act, s 101 uses the expression in the former sense while s 102 uses it in the latter sense. The former type of onus *viz* the burden of proof of the facts in issue is usually known as the general burden of proof or the burden of proof on pleadings. This type of burden of proof has been called by jurists, the 'legal burden'. The phrase 'legal burden' was coined by Lord Denning while the phrase 'persuasive burden' was used by Dr Glanville Williams. Other jurists have referred to it as the burden of proof on the pleadings.[58] This burden is entitled to be called the 'legal burden' because its incidence is determined by the substantive law, and the adjective 'persuasive' gives some indication of its real nature. The legal or persuasive burden is the burden borne by the party who will lose the issue unless he satisfies the tribunal of the facts to the appropriate degree of conviction. The pleadings do not always indicate which party bears the burden, and the answer to a somewhat controversial question is assumed if it is said to be 'fixed', for the epithet is designed to emphasise the fact that this burden does not shift in the course of a trial-a matter of words about which there is room for two views in the case of issues to which certain rebuttable presumptions of law are applicable.[59] The latter type of onus is called the professional or the tactical burden.[60] The burden of proof in the first sense is fixed at the beginning of the trial by the state of pleadings and it is settled as a question of law, remaining unchanged, throughout the trial exactly where the pleadings place it and never shifts in any circumstances whatsoever. The burden of proof in the second sense, however, constantly shifts, as one scale of evidence or the other preponderates.[61]

In *Shankar Chakravarti*, the Supreme Court observed that though the adjudicatory authorities under the Act have all the trappings of a court, they are not hide-bound by the statutory provisions of the Evidence Act. Section 11 (3) of the Act confers on them powers of a civil court under the Code of Civil Procedure, only in respect of the matters specified therein. Such authorities are created for adjudication of the industrial disputes between the parties arrayed before them. Their functions being of quasi-judicial nature, they have to adjudicate upon such disputes, on the basis of pleadings of the parties and the evidence adduced before them in accordance with the rules of natural justice. Therefore, any party appearing before anyone of such authorities must make a claim or demur the claim of the other side. When there is a burden upon a party to establish a fact so as to invite a decision in its favour, it has to lead the evidence. The obligation to lead evidence to establish an averment made by a party is on the party making the averment. The test would be as to who would fail if no evidence is led. Such party, therefore must seek opportunity to lead evidence. The burden of proof in this sense as the proceedings advance, may be as to shifted from one party on whom it rested at the first instance by his proving facts which raise a presumption in his favour. In other words, the difference between the onus of proof and burden of proof is that the onus of proof is fixed whereas the burden of proof shifts, is to be borne in mind. It is, however, not necessary that such burden must be discharged by positive evidence of a party. A party could rely on the evidence given by the other party and prove certain facts. In case, no evidence is adduced on either side, the party on whom the onus lies to prove certain facts must fail. But if it has on the evidence no difficulty in arriving at a definite conclusion, then the burden of proof on the pleadings recedes to the background.[62] Where, however, evidence has been led by the contesting parties on the mooted question, abstract considerations of onus are out of place and in such a situation the truth or otherwise of the case must always be adjudged on the evidence led by the parties.[63] This point has been illustrated in the judgment of the Supreme Court in *Damodar Valley Corpn*, in which an argument was advanced on behalf of the management that the contents of a document filed along with the written statement on behalf of the workmen before the tribunal were not explained by any witness with reference to categories of workmen eligible to construction allowance. But the court held that this did not

absolve the management, which was in possession of all information, of its responsibility to place the necessary materials before the tribunal to show the distinguishing and differentiating feature of the categories of workmen entitled to construction allowance. Since the management was in possession of all facts, it was for it to furnish the relevant information to the tribunal.[64]

The Evidence Act does not apply to industrial adjudicators, but even so the principle of law enunciated on the burden of proof and onus, is a basic principle of law which the industrial tribunals are also required to follow. If there is no sufficient evidence on the part of a party to prove the existence of facts which would entitle him to the reliefs prayed for, it must be held that he has failed to discharge the burden of proof on pleadings which lie on him only. Where the court finds it difficult to make up its mind, the question comes to the fore-ground and takes a deciding factor. When after the entire evidence is adduced, the tribunal feels that it cannot make up its mind as to which of the versions is true, it will hold the party on whom burden lies, has not discharged the burden.[65] Where an employee claims that he is entitled to a benefit under the provisions of ch 5 A, by claiming compensation for retrenchment, he must prove that he was retrenched from service. Normally, it is for the person putting forward the claim to establish the facts and circumstances supporting his claim. It is not for the employer to prove that the discharge or termination of the services of the employee was otherwise than by way of retrenchment.[66] Likewise, where the workman alleged a practice of the management, that bonus had been paid even to Workers dismissed for misconduct in the prior years, the burden of proof as to such practice is on the workman and the management cannot be asked to prove that there was no such practice. But on the other hand, in case of the refund of the security which belongs to the workman and normally he is entitled to its refund, it is for the management to prove satisfactorily that it had a lien on that amount for loss caused to it. [67]

In *Dominent Offset*, where the management terminated the services of a few workmen by serving on them a notice of termination containing allegations of indisciplined behaviour purporting to be in terms of the Standing Orders, but without holding any inquiry into the said allegations, a single judge of the Punjab and Haryana High Court held that the burden lies on the management to prove that its action has a legal basis in the Standing Orders.[68] Where the workmen claimed that they did not resign from service, but alleged that the management forged the blank papers on which it obtained their signatures/thumb impressions and terminated their services, the burden of proving that the management so obtained their signatures/thumb impressions on blank papers rests on the workmen who raised the dispute, and it is only after such evidence is adduced that the management should be called upon to prove that the workmen have voluntarily resigned.[69] While the burden of proof of misconduct lies with the employer, the contention of victimisation has to be proved by the employee.[70] When the industrial tribunal is called upon to decide the validity of domestic enquiry as preliminary issue, the burden of proving such validity is on the employer who wants to rely on the fairness of domestic enquiry in defence.[71] In *Northcote*, a single judge of the Bombay High Court held that, where a 'resident medical officer' raised an industrial dispute against his dismissal, which was contested by the employer, the burden was on the employee to prove that he was a 'workman' within the meaning of s 2(s) and it was not for the management to prove the negative facts.[72] Where the workman claimed that he had worked for over one and a half year before being terminated on grounds of unauthorised absence, the burden of proof is cast on the person having the best evidence, ie, the management. The management having failed to produce the muster roll, adverse inference has to be drawn against them.[73] In *Range Forest Officer*, the Supreme Court held that where the workman claims to have worked for 240 days in a year preceding his termination not supported by salary receipt or record, the onus of proving that he had worked for 240 days lies on him, and that the mere filing of an affidavit, being only his statement in his favour, is not adequate evidence for a court or tribunal to come to the conclusion that the workman had, in fact, worked for 240 days in the year preceding his termination.[74] Where the management contended that the employee, who was employed as gradation analyst and assistant production manager was not a workman within the meaning of s 2(s), the burden of proving that he was not a workman lies on the management.[75] Where the labour court upheld the contention of the employer that the workman, whose service were terminated, had worked only for 239 days (ie, less than 240 days) and hence there was no violation of s 25F, and the High Court reversed the order of the labour court, the Supreme Court held that the burden of proving that he had worked for 240 days was on the workman and he himself having stated at the evidence stage that he had not worked for 240 days, the High Court erred in overturning the order of labour court without there being anything to show that the said order was perverse, and, hence, the order of High Court is set aside.[76]

(ix) *Ex-parte* Adjudication

At the time of the commencement, the parties should be present unless the case has taken such a course as to justify the adjudicator in proceeding *ex parte*. If, however, a party willfully absents himself or conducts himself in such a way that the adjudication is likely to be impeded, or willfully tries to delay or avoid the proceedings, the tribunal may fix a preemptory hearing on a particular day. After reasonable notice of hearing has been given to the defaulting party, if he still neglects or refuses to attend, the tribunal may and ought to hear in his absence. Prompt discharge of business is of particular importance before a tribunal adjudicating an industrial dispute. Dilatory tactics must, therefore necessarily be discouraged. When a claimant in a dispute appears to be contumacious in his conduct, the tribunal is justified in relieving the opposite

party of the ill-effects of such harassing dilatoriness.[77] But to proceed *ex parte* is a serious matter, and before doing so the tribunal should satisfy itself that the absenting party has no good ground for not appearing. Rule 10B(9) of the Industrial Disputes (Central) Rules 1957 prescribes the procedure to be followed by a labour court, tribunal or national tribunal and r 22 empowers the authorities specified therein to proceed *ex parte* where any party fails to attend or to be represented, as if that party 'had duly attended or had been represented'. Rule 10B(9) and r 22 somewhat overlap one another. However, the purpose of both the provisions is that if any party, without sufficient cause, defaults and fails to appear at any stage of adjudication before the tribunal, the tribunal may proceed with the reference *ex parte* and decide the reference or any application in the absence of the defaulting party. But the proviso to sub-r (9) provides that on an application made by either party before the submission of the award, the tribunal may revoke its order to proceed *ex parte*, if it is satisfied that the absence of the party was on justifiable grounds. However, neither the Act, nor the Rules framed under it authorise or empower an industrial adjudicator to decide references without going into the merits of the disputes even in cases where one of the parties does not file written statements or does not appear before it.[78]

A rule empowering the tribunal to proceed *ex parte* if a party is absent and sufficient cause is not shown for his absence, would not enable it either to do away with the inquiry or to straightway pass an award without giving a finding on the merits of the dispute. In other words, the absence of a party does not entail consequence that an award will straightway be made against him.[79] A reference made to an adjudicatory authority, by appropriate government under s 10, confers upon it jurisdiction to adjudicate on the issues referred to it. Section 20(3) says that the proceedings before such an authority commence on the date of reference of the dispute and are concluded on the date on which the award becomes enforceable under s 17A. A reference under s 10 sets in motion adjudication proceedings and they cannot be stopped except by passing of award. An adjudicatory authority cannot refuse to adjudicate on the dispute and it cannot dismiss the dispute for non-prosecution. It is of necessity to make an award and forward the same to the appropriate government. An award, once published, becomes final and enforceable after the lapse of 30 days from the date of publication and it cannot be called into question by any court in any manner whatsoever.[80] To satisfy the definition of an award, there must be an interim or final 'determination' of the dispute and there is none where the tribunal merely dismisses the reference for non-prosecution.[81] The normal procedure before a tribunal is that whenever a date is fixed, parties or their representatives are required to note the next date and sign the order sheet accordingly. In case on a date fixed for hearing, there is no sitting of the tribunal for unforeseen reasons, the parties are not required to appear before it. In such a case, unless the next date is fixed in the presence of the parties or their representatives, the tribunal cannot proceed with the case on the next date without informing the parties concerned about it. In *UPRTC*, on a date fixed for hearing, the presiding officer of the tribunal was absent and another date was fixed for hearing in the absence of the parties. On the next date of hearing, the tribunal made an *ex parte* award against the employer directing the reinstatement of the workman with back wages. The application of the employer for setting aside the *ex parte* award was also rejected by the tribunal. A single judge of the Allahabad High Court set aside the award holding that the tribunal by not granting an opportunity to the employer of being heard violated the principles of natural justice.[82] Likewise, where the tribunal arbitrarily rejects the application for setting aside the *ex parte* award, such order of the tribunal is liable to be set aside.

In *Jagran Prakashan*, the employer's representative could not attend the hearing before the tribunal because on his way he fell from the bus and suffered injuries. The tribunal rejected the application for the reason that the name of the employer's representative was not mentioned in the application for setting aside the *ex parte* award though it was mentioned in the affidavit in support of the application. A single judge of the Allahabad High Court set aside the order of the tribunal being not proper. The further reason of the tribunal for rejecting the application that some other person should have been deputed to conduct the case was not found proper.[83] The expression '*ex parte*' only means in the absence of the other party but the absence of such party shall not hinder or affect the progress of the proceedings. Rule 22 not only authorises an adjudicatory authority to proceed in the absence of a party, but it also creates a fiction which enables the tribunal to presume that all the parties are present before it although, in fact, it is not true, and thus make an *ex parte* award. Hence, an adjudicator may imagine that the absentee is present, and having done so, he may give full effect to his imagination and carry it to its logical conclusion. It has to bear in mind the purposes for which fiction is created and has to give effect to them. Obviously, the intention of r 22 is to enable the tribunal to imagine that a person is present, he is unwilling to adduce evidence or argue his case. The adjudicator then has of necessity to pass an order on the basis of the evidence placed before it by the party that, in fact, participated in the proceedings. That is the object of the fiction caused by the words 'as if he had duly attended'. Of course, this does not mean, that the adjudicator could have shut his eyes to the intrinsic character of such evidence produced by the party present and blindly put its imprimatur to it. It has to apply its mind like any other judicial officer who examines the evidence and hears arguments before forming conclusions. In other words, the adjudicator has to focus his judicial mind on the merits of the points in dispute, impartially, dispassionately and objectively.[84]

He is required to take into account the pleadings of the parties and whatever evidence has been produced by the other party and come to a judicial conclusion stating its reasons for the same.[85] But the tribunal is not saddled with the additional responsibility to embark on an independent research and investigation of its own to collect materials for adjudication of the

disputes so long as the tribunal has applied its mind fully to the statements and documents placed before it by the appearing party before making the award, although *ex parte*, such an award is not assailable.[86] For instance, where the employer fails to file the written statement to the claim of the workman despite sufficient opportunity having been afforded, an *ex parte* award in favour of the workman is passed on the facts found by the workman to exist, the award is not liable to be interfered with.[87] The language of r 22 unequivocally makes the jurisdiction of the tribunal, to render the *ex parte* award, conditional upon the fulfilment of its requirements. If there is no sufficient cause for the absence of a party, the tribunal undoubtedly has jurisdiction to proceed *ex parte*. But if there is sufficient cause shown which prevented a party from appearing, then under the terms of r 22, the tribunal will have no jurisdiction to proceed *ex parte*.[88] In *ND Patel*,[89] the employer had not appeared before the labour court after receiving notice on the ground that the notice was not in the prescribed form. The Gujarat High Court held that the employer did have the notice and it was not material whether the notice was in the prescribed form or in any other form. He was, therefore, bound to appear before the court.

Rule 24 of the Andhra Pradesh Industrial Disputes Rules 1958 empowers the industrial adjudicators to proceed *ex parte* with a case if any of the parties is absent and if sufficient cause is not shown for the absence. The concept of 'sufficient cause' differs from case to case. It is, therefore, not to be applied rigidly. The tribunal has to consider the facts and circumstances of each case whether 'sufficient cause' has been shown or not. The Andhra Pradesh High Court in *DM, APSRTC*,[90] held that the rule merely enables the adjudicator to proceed as if the party is present, but this does not enable it either to do away with the inquiry or to straightaway pass an award without giving a finding on the merits of the dispute before him. The absence of a party does not entail the consequences that an award straightaway be made against him. It is incumbent on the adjudicator to go into the merits of the dispute and give such finding as can be on the material placed before him. Accordingly, the court set aside the award of the tribunal. In *Eagle Wood*, a single judge of the Calcutta High Court held that the award of the tribunal was a nullity for non-compliance of the mandatory requirements of r 20B(1) and (5) which prescribe the mode and manner of filing pleadings and serving a copy of such pleadings on the opposite party. Apart from these mandatory requirements, there was also the question of compliance of the rules of natural justice. The learned judge held:

> The employer, however, bad cannot be denied the opportunity of hearing in accordance with the provisions of law. If in spite of such compliance the employer or the employee as the case may be, chooses not to appear, then the tribunal need not wait for the pleasure of appearance of such a party but not before that.[91]

In this view of law, the court held that the award was a nullity *ab initio* or a *non-est* phenomenon. If there is no award in the eye of law, mere publication of the same will not confer any sanctity conferring the status of an 'award' on it. Accordingly, instead of quashing the award the court issued a writ of mandamus commanding the government not to give any effect to the impugned award and remanded the matter to the tribunal with the direction to rehear the matter *de novo*.

(x) Restoration of Proceedings

Some State Governments like Assam, Madras, UP and Kerala have framed rules under the Act for setting aside *ex parte* decisions of the industrial tribunals on showing sufficient cause. Such cases present no difficulty for a tribunal to set aside its *ex parte* order, where the defaulting party can show sufficient cause for not attending the proceedings when the order to proceed *ex parte* was made. In such a case, an application for restoration should be moved in the open court and should not be prefaced by a private visit to the presiding officer of the tribunal.[92] However, the rules of some of the states such as Andhra Pradesh, Maharashtra, Orissa etc like the Central Rules, have no provisions for setting aside the *ex parte* orders or awards. On the question, whether in the absence of the enabling Rules, a tribunal has jurisdiction to set aside an *ex parte* order or award and restore the proceedings, there is conflict of judicial dicta. The various High Courts expressed diametrically opposite views on the question '*whether the tribunal has the inherent power to set aside an ex parte order in the absence of an express rule to that effect*'. While some High Courts were against such an implied power, other High Courts held that the tribunal had the power to set aside an ex parte award if sufficient cause was shown by the party for its absence. The conflict was set at rest by the decision of the Supreme Court in *Grindlays Bank*.[93]The court observed that even if there is no express provision in the Act or the rules framed thereunder giving the tribunal jurisdiction to set aside an *ex parte* order, words 'shall follow such procedure as the arbitrator or other authority concerned may think fit' in s 11 (1) of the Act, are of the widest amplitude and confer ample power upon the tribunal and other authorities to devise such procedure as the justice of the case demands. In view of this power, the industrial tribunal must necessarily be endowed with all powers, which bring about an adjudication of an existing industrial dispute, after affording all the parties an opportunity of hearing. Therefore, 'where a party is prevented from appearing at the hearing due to sufficient cause and is faced with an *ex parte* award, it is as if the party is visited with an award without a notice of the proceedings. It is needless to stress that where the tribunal proceeds to make an award without notice to a party, the award is nothing but a nullity. In such circumstances, the tribunal has not only the power but also the duty to set aside the *ex parte* award and to direct the matter to be heard afresh.'

The discretion conferred on the authorities to determine the procedure as they think fit, is subject to the rules made by the appropriate government in this behalf Rule 22 of the IDCR empowers the authorities to proceed *ex parte* where any party fails to attend the proceedings. If this power is implicit, the power to set aside the *ex parte* award because the power to proceed *ex parte* carries with it the power to inquire whether or not there was sufficient cause for the absence of the party at the hearing. The court further held that even if the award was published in the Official Gazette, the tribunal has the power to deal with the application properly made before it for setting aside the *ex parte* award and pass suitable orders. This holding was followed by the court in *Satnam Verma*, in which the first date of hearing of the reference was fixed for framing issues, leading evidence and disposal of the reference on 23 February 1982. But the workman understood the date of hearing to be 26 February 1982 on which date he appeared and found that the matter had been disposed of *ex parte* on 23 February 1982. On the same day, he moved an application pointing out that his information about the date was incorrect. But the labour court held that since the award had already been published in the Official Gazette, it had no jurisdiction to recall and set aside the *ex parte* order and to restore the case to the file. The Supreme Court held that the labour court was in error in rejecting the request of the workman, particularly, when the assertion on the part of the workman was *bona fide* and was not seriously controverted.[94] It is, therefore, now settled law that the adjudicator has ample jurisdiction to entertain an application to set aside an *ex parte* award even after it has published. But it does not mean that the tribunal can entertain such an application to set aside an *ex parte* order even after an inordinate delay. For instance, in CJ *Thomas*, a single judge of Kerala High Court refused to entertain an application to set aside the *ex parte* order after a delay of more than three years.[95] Furthermore, it will be well within the jurisdiction of the adjudicator to reject an application for setting aside an *ex parte* order or award, if the applicant fails to show sufficient cause for his default.[96] However, good or sufficient cause should relate to the date of absence on which the tribunal decides to proceed *ex parte* and not to a date subsequent to that date. Refusal of the tribunal to entertain an application showing good cause relating to absence of a date subsequent to the date on which the labour court decided to proceed *ex parte*, will not normally be amenable to interference in judicial review.[1] But in *Maharashtra GK Union*, the orders of the labour court, dismissing the application for setting aside the *ex parte* award as well as the *ex parte* award were quashed. In this case, the workman was represented before the labour court by the union which had sponsored the dispute. But the union lost interest in the case as the workman had joined another union and failed to appear before the labour court. Furthermore, the absence was also due to industrial unrest and strike. In these circumstances, it was held that the workman should not suffer for lapse of the union and the matter was remitted back to the labour court for deciding it afresh.[2] An application for reviewing an *ex parte* award passed by an industrial tribunal, filed before the tribunal after 30 days of the publication of the award, was held to be barred by limitation as the tribunal had become *functus officio* after the expiry of 30 days from the date of the publication of the award.[3]

In *Indian Metals & Ferro Alloys*, after the written statement had been filed, issues were framed. On the next date of hearing, the management was present while the union representing the workmen did not appear. The tribunal, therefore, made a no dispute award which was subsequently published. The union, then, filed an application for restoration of the proceedings after setting aside the *ex parte* award. On the date fixed for hearing of the application, neither party appeared and the tribunal dismissed the application for non-appearance of the parties. The union again filed another application for restoration of the earlier application and the tribunal dismissed the same as not maintainable. In writ proceedings against that order, the Orissa High Court upheld the order of the tribunal and held that O 9, r 13 of the CPC was applicable to proceedings by reason of Orissa Rules specifically applying O 17 and s 11(1) of that Act provided that the tribunal shall devise such procedure as it thinks fit but unless s 141 or 151 is applied to proceedings before the labour court, a second application would not be maintainable.[4] A single judge of Madras High Court, interpreting r 22 of the IDCR, held that the adjudicator should take into consideration the statements filed by the party which remained *ex parte* and only on comparative merits of claims and counter claims an *ex parte* award has to be passed. It is clear that the *ex parte* award passed without considering the contentions raised in the counter statement filed before the conciliation officer or before the labour court or industrial tribunal would not be valid.[5] In *Virendra Bhandari*, the facts were that a dispute regarding termination of service was referred for adjudication. The tribunal held that there was no dispute as the workman did not appear in spite of notice and hence the workman remained *ex parte*. Thereafter, the government by another order made a reference of a dispute to the tribunal on the same questions on which the earlier reference was made. The tribunal adjudicated the matter and passed its award. In a writ petition challenging both the reference and award, the High Court held that in the first reference, the tribunal recorded a finding that no industrial dispute existed and the said determination fell within the definition of the term ‘award’ under the ID Act, and, therefore, the second reference on the same dispute was incompetent. On special leave, the Supreme Court, while quashing the order of the Division Bench of High Court, observed that a perusal of the award made on the earlier occasion would clearly indicate that there was no adjudication of the dispute at all, and what was stated was that the parties had not appeared before the tribunal; that where there was no adjudication of the dispute on merits, it could not be said that the industrial dispute did not exist. In such a situation, it is open to the government to make a second reference of the dispute.[6]

The above decision calls for some analysis. Once an award was passed by the tribunal in the first reference, setting the

workman *ex parte* on ground that he did not enter appearance in spite of notice, the matter stood disposed off once and for all. An award passed *ex parte*, after going into the merits of the dispute, is still an award unless it is shown that the tribunal had recalled the award on an application made by the party explaining his absence to the satisfaction of the tribunal. It is also not the case that the workman made an application to the first tribunal with a request to condone his non-appearance, before the publication of the *ex parte* award. By the same token, a second reference of the same dispute is incompetent. The observation of the apex court that 'there was no adjudication' of the dispute is equally without basis. If the parties do not appear despite notice, what should the labour court or tribunal do? Should it be asked to wait indefinitely and keep the matter hanging till such time, the parties find it convenient to appear or respond at their sweet will? Going by the view expressed by the Supreme Court, either party at its sole discretion may choose not to enter appearance, and raise a fresh dispute on the same matter on which an *ex parte* award was already passed and published. It is submitted that the decision of Supreme Court is clearly wrong and that of the Division Bench of the High Court is right.

(xi) Adjournments

Rule 24 of the Industrial Disputes (Central) Rules 1957, prescribes that among other matters, the provisions of the Code of Civil Procedure shall apply to the authorities mentioned in s 1 (3) in connection with granting adjournments.[7] Rule 10B(8) of these rules lays down the procedure and prescribes the time-limit for granting adjournments. The question, therefore, whether an adjournment should or should not be granted in a particular case, is in the discretion of the tribunal.[8] The discretion, however, has to be judicially exercised in the circumstances of the case.[9] The tribunal, therefore, must grant such reasonable adjournments as may be necessary so that justice may be done.[10] But while granting adjournments in the course of adjudication of industrial disputes, the tribunal has to bear in mind that speedy settlement of an industrial dispute is the very essence of industrial adjudication. Hence, long and elaborate adjournments for any small step that a party may intend to take, would defeat the purpose of such adjudication.[11] Nevertheless, expedition though has its own virtue, an adjudicator must realise that he has to decide and not simply dispose of a case as quickly as possible. A short adjournment, therefore, if required by the exigencies of a case, must be allowed in the interest of fair adjudication.[12] The order refusing to grant adjournment in an arbitrary manner or in violation of the rules of natural justice resulting in injustice to a party will be liable to be quashed on certiorari.[13] For instance, where after refusing to grant an adjournment on account of the illness of the employer's representative, the tribunal did not adjourn the case for the evidence of the witnesses, who had not turned up on that date and proceeded *ex parte* to decide the entire case on the very same day, in the absence of the party and without hearing him at all, the award was quashed on certiorari.[14] A typical illustration of arbitrariness in exercising discretion in the matter of adjournment is the case of *Technological Institute.*[15] The tribunal adjourned the matter on various occasions from time to time to enable the workmen to produce evidence. As a matter of fact, it had been doing nothing but merely adjourning the matter for over two years at the request of the workmen. Ultimately, after adducing some evidence, the union closed its case. Inspite of the helpful attitude adopted by the management, the tribunal rejected the request of the management, for leave to adduce evidence and closed the case of the management *suo motu* very abruptly without permitting the management to produce evidence on its behalf which it was entitled, in law, to place before the tribunal. In appeal by special leave, the Supreme Court not only set aside the award of the tribunal but strongly deprecated the arbitrary attitude of the tribunal and observed that 'to say the least, this attitude of the tribunal is highly arbitrary and unjust'. But, where a party remained absent on the date fixed for recording evidence in the presence of representatives of the parties, nor sent a request for adjournment, there was no denial of opportunity to the party to produce evidence when the tribunal proceeded *ex parte*.[16] Likewise, where the company had taken some adjournments and on the last occasion its counsel had given an undertaking not to pray for further time in future, it was held that the tribunal had not denied reasonable opportunity of being heard by refusing to grant further adjournment to the company. It was observed that the tribunal had not acted unfairly in disallowing unreasonable prayer for adjournment made by the employer company.[17]

(xii) Evidence

(a) Application of the Indian Evidence Act 1872

After the pleadings have been completed and issues have been framed, the tribunal has to record evidence. On an analysis of the provisions of s 11, it will appear that the adjudicatory authorities under the Act, are authorised to take evidence and may be treated as courts within the meaning of s 3 of the Indian Evidence Act. But proceedings before such authorities are to be deemed as judicial proceedings only within the meaning of s s 193 and 228 of the Indian Penal Code and such authorities are to be deemed as civil courts only for the purposes of s s 345, 346 and 348 of the Code of Criminal Procedure 1973. For all other purposes, these authorities shall not be deemed to be 'civil courts' and the proceedings before them shall not be treated as judicial proceedings. Rule 15 of the Industrial Disputes (Central) Rules 1957 authorises the board, labour court, tribunal or national tribunal or an arbitrator under s 10A to accept admit or call for evidence at any stage of proceedings in such manner as it may think fit. Rule 16 empowers these authorities to administer oath. The state governments have also framed rules under the Act relating to the procedure of recording evidence after the issues have

been settled. The pleadings of the parties do not amount to evidence. The evidence may be oral or by affidavits. The party controverting the statement of the deponent of an affidavit should either file a counter affidavit or ask for an opportunity to cross-examine the deponent of the affidavit. It is not the duty of the tribunal to invite the party concerned to cross-examine the deponent. Not inviting a party to cross-examine the deponent will not amount to denial of an opportunity to cross-examine the deponent.[18]

Proceedings before these tribunals are quasi-judicial proceedings but on the question whether s 1 of the Indian Evidence Act makes it applicable of its own force to proceedings before the adjudicatory authorities under the Industrial Disputes Act there is some divergence of judicial opinion. In an early decision, the Madras High Court went to the extent of saying that though a court of law is not generally entitled to arrive at a finding in any manner except on the evidence adduced before it, quasi-judicial tribunals, like the industrial tribunal not hampered by the rules of evidence applicable to proceedings in a court of law, would be entitled to rely on data available to them otherwise than from evidence adduced on behalf of the parties.[19] On the other hand, the Calcutta High Court, has not only dissented from this decision of the Madras High Court, but also has dissented from some of its own earlier decisions and held that 'an industrial tribunal is a 'court' in the wider connotation of the terms as defined in s 3 of the Evidence Act and the Act applies to judicial proceedings before an industrial tribunal'.[20]But the preponderance of judicial opinion is that the industrial tribunals not being civil 'courts' except for limited purposes within the meaning of s 3 of the Evidence Act, the proceedings before them are merely of quasi-judicial nature and s 1 of the Indian Evidence Act does not make that Act applicable of its own force to such proceedings.[21]Hence, they are not bound by the strict rules of procedure of the Indian Evidence Act. The trend of recent judicial thinking is that the application of technical rules such as acquiescence, and estoppel etc, are not appropriate to industrial adjudication.[22] The question of acquiescence was dealt with by the Supreme Court in *Guest Keen Williams,* in which the pleas of acquiescence and laches were negatived by the court.[23] Industrial tribunals should be slow and circumspect in applying technical principles such as acquiescence and estoppel.[24] In *Bennett Coleman,* the Supreme Court observed:

> ... assuming that the rule of estoppel, as incorporated in section 115 of the Evidence Act, were to apply, the foundation of that rule is that it is inequitable and unjust to person, that if another person by a representation induces him to act as he would not have otherwise acted, the person who made the representation should be allowed to deny the effect of his former statement on the loss, and injury of the person who has acted on it *[Sarut v Gopal].* [25]The rule is one of evidence only and does not create any substantive right or confer any cause of action on the other. It comes into operation if a statement as to the existence of a fact has been made with the intention that the other person to whom it is made should believe and act on it and that another person does in fact act upon the faith of it ... The burden of proving the ingredients of section 115 of the Evidence Act lies on the party claiming estoppel. The representation which is the basis for the rule must be clear and unambiguous and not indefinite, upon which the party relying on it is said to have, in good faith and in belief of it, acted.[26]

The Assam and Nagaland High Court, however, held that the employees who were pitched against the management were not in an equal position in bargaining. Therefore, it was open to the union, which took up the cause of the employees to raise the dispute by way of collective bargaining on their behalf. Hence, no question of estoppel would arise in industrial matters.[27] On the other hand, the Madras High Court has on the facts of the case in *Natarajan Engineering,* applied the principle of estoppel.[28] Though not bound by strict rules of the Evidence Act, industrial tribunals have to comply with the rules of natural justice in the proceedings before them. Stating it broadly and without intending it to be exhaustive, it may be said that: rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them.[29] Fair play requires that evidence on an allegation made against a delinquent workman, must be produced before the tribunal in the 'appropriate manner' giving an opportunity to the workman to rebut the same. If that is not done, it will be against the rules of natural justice. For instance, if the past record of the workman is to be taken into account for determining the quantum of punishment then that record must be produced before the labour court and the workmen should be given an opportunity before such record is taken into account. If that is not done, the award of the labour court not taking such record into consideration will not be vulnerable[30] but, when documents are admitted in evidence and are taken into consideration by the tribunal, opportunity should be given to the party adversely affected by them to rebut such evidence or to contradict statements contained in such documents which are prejudicial to such party.[31]

Similarly, even though all the technicalities of the Evidence Act may not be strictly applicable, it is inconceivable that an industrial tribunal could act on what was not evidence such as hearsay. Nor can the tribunal be justified in basing its award on copies of documents when the originals which were in existence but were not produced and proved by one of the methods ie either by an affidavit or by witnesses who had executed them if they were alive and could be produced.[32] The general principles of law of evidence, however, may be applicable.[33]For instance, parties to industrial adjudication are

entitled to inspect the record of the tribunal and also to get certified copies under s 74 of the Evidence Act. Even in proceedings governed by the strict requirements and rules of the Evidence Act, it might not be correct to rule out certain instances altogether as irrelevant, because they might specifically become relevant as *res gestae*. That apart, the tribunal has wide powers in regard to industrial adjudication and is not hide-bound by the niceties of the Evidence Act or the principles or *res gestae*.[34] It is however, well settled that where there is no evidence before the tribunal on the basis of which it can form the opinion which finds expression in the award, such opinion will not be sustainable in law.[35] Though in industrial adjudication, the evidence of recognition and identification may have to be considered, the requirement of recognition and identification cannot be stretched to import the standard of criminal trials, *viz* that before a workman can be found guilty of an offence meriting dismissal, he must be recognised, implicated and named by more than one witness.

It is not the quantity of evidence but the quality of the same which has to be looked into and the evidence has to be read as a whole.[36] In *Bhagwandas Chopra*, during the pendency of adjudication proceedings in connection with the termination of the services of the workmen before the industrial tribunal in place of the original employer, Narang Bank of the India Ltd, its successor-in-interest, the United Bank of India, was impleaded as a party to the proceedings before the tribunal. Prior to the United Bank of India becoming a party, the workman examined himself and he was examined by the representative of the Narang Bank of India Ltd. Thereafter, the evidence of the workman was closed. Sometime after being impleaded as a party, the United Bank of India made an application to the tribunal for recalling the workman for cross-examination by it, but the tribunal rejected the application. The award of the tribunal was quashed by the Delhi High Court on the ground that the tribunal violated the rules of natural justice by not allowing the United Bank of India to cross-examine the workman. In appeal by special leave, the Supreme Court set aside the decision of the High Court and held that if the Narang Bank of India had no right to recall the workman for cross-examination on the day on which the United Bank of India applied to the tribunal for his cross-examination, the latter bank also could not be granted permission to do so. In the absence of any exceptional circumstance which would have entitled, in the ordinary course, a party to a proceeding to recall a witness whose evidence had already been completed, for further cross-examination, the latter bank could also not make such a claim at all, particularly after both the parties had closed their respective cases before the tribunal. The dismissal of the application of the United Bank of India for recalling the workman for further cross-examination, in the absence of any exceptional circumstances, could not be considered as violation of the rules of natural justice.[37]

A Full Bench of the Andhra Pradesh High Court, in *Nalgonda CMS Ltd*, held that merely because an industrial tribunal had certain trappings of a civil court, it could not be considered to be a civil court because the judicial functions performed by an industrial tribunal under this Act are different from those performed by ordinary courts of law. An industrial tribunal has no other function except that of adjudicating matters entrusted to it under the provisions of this Act. It is therefore, outside the hierarchy of the ordinary judicial system. Hence the provisions of Code of Civil Procedure or Evidence Act are applicable to its proceedings only to a limited extent and it is open to the tribunal to adopt such procedure which it deems necessary. Furthermore, the preponderance of judicial opinion based on well-established principles of law is to the effect that the provisions of s 5 of the Limitation Act are not applicable to the proceedings before an Industrial Tribunal. [38] In *FCI*, under an earlier order of the Supreme Court, the only question that the tribunal was required to consider was 'the identity' of certain workmen and not whether they or anyone of them had been in employment of the corporation at the relevant time. However, the tribunal conducted a fresh appraisal to determine as to whether all or any of such workmen were in employment of the corporation at the relevant time. Apart from holding that the tribunal misconceived the nature of the orders of the Supreme Court, in conducting a fresh appraisal as to whether all or any such workmen were in employment of the corporation at the relevant time, the court observed that the tribunal, even in the matter of marshalling or considering the material placed before it, had gone wrong. As the tribunal is not a court, there should be only 'material' and not 'evidence' as required by the Evidence Act to prove the facts. The tribunal had examined a number of witnesses and stated that the evidence of the workmen was not 'duly proved', 'legally proved' or 'proved beyond reasonable doubt'. This approach of the tribunal was also wrong because the only question before it was whether, on weighing the probabilities, the material placed by the workmen was acceptable or rendered probable. It was not required to consider at length the minutest particulars in the case, in the light of requirements of the Evidence Act and it should not have magnified the minor lapses in evaluating the probability.[39]

(b) Admissibility of Evidence

A quasi-judicial decision presupposes an existing dispute between two or more parties and involves presentation of their cases by the parties to the dispute and if the dispute between them is on a question of fact, the assertion of the fact by means of evidence adduced by the parties to the dispute. Any party appearing before a tribunal must make a claim or demur the claim of the other side and when there is a burden upon it to prove or establish a fact so as to invite a decision in its favour, it has to lead evidence. The obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be as to who would fail if no evidence is led. It must seek an opportunity to lead evidence.[40] Sub-rules (5) and (6) of r 10B prescribe the procedure and time-limit for recording evidence while sub-r (7) prescribes the procedure and time-limit for hearing the arguments after closing of evidence by the parties. The question as

to what evidence should be allowed to be adduced on the facts and in the circumstances of a case is in the discretion of the tribunal. Since the technicalities of the Evidence Act regarding the admissibility of evidence, do not apply to industrial adjudication, the discretion, of the tribunal is to be exercised for achieving the effective settlement of the industrial disputes.

In *National Insurance*, at the stage of arguments, the union produced before the tribunal, a statement showing various items which should be added back to the net profits, on the basis of which the tribunal added back the items shown in the statement, to the net profits of the company. The award of the tribunal was challenged in appeal before the Supreme Court on the ground that at the stage of arguments the tribunal ought not to have permitted the union to adduce additional evidence and by so doing it deprived the employer-company of the opportunity to lead evidence to counter the contents of the statement. The court rejected this plea as the statement was not produced as additional evidence before the tribunal which was, in fact, merely a statement of certain figures from the company's own balance sheet and the profit and loss account produced before the tribunal by the company and the statement in question was produced before the tribunal merely for its ready reference. It was observed that since it did not contain any new material, the company could not rightly complain that it was taken by surprise or that it was entitled to lead any additional evidence to contest the figures in that statement and further that if the company wanted to refute that statement, it could very well have done so from the balance sheet, its directors' report and profit and loss accounts and other documents on record. On this fact-situation, the court upheld the view taken by the tribunal in relying upon the statement and declining the company's request to lead additional evidence on the ground that the statement contained fresh material.[41]

However, from *Khardah & Co*, decided earlier, it would appear that the Supreme Court justified the admission of certain evidence by the tribunal even after the case had been fully argued, and without notice to the other side. In this case, after the hearing of the case was over, the union requested the tribunal to send for the records from the registrar of trade unions to ascertain the fact about the status of the concerned workman as to whether he was an office-bearer of the union, which fact was disputed by the employer, while dealing with the plea of victimisation. The tribunal acceded to the request of the union without notice to the other side. In the peculiar circumstances of the case, the Supreme Court, in appeal by special leave, against the resulting award, held that it could not be contended that the procedure adopted by the tribunal to send for an authenticated record to ascertain the disputed fact about the status of the concerned workman vitiated the award made by it. Since this case was decided on its own peculiar facts, it does not lay down a general proposition of law that the tribunal can always admit evidence after the case has been closed by the parties.[42] Even if the tribunal has the power to allow the parties to adduce further evidence in support of their case at the stage after the closure of arguments and before the passing of the award on an application made for this purpose and explaining the *bona fides* of the delay, the tribunal has the discretion to reject such an application if no case has been made out justifying the production of such evidence.[43]

If an *ex parte* inquiry is ordered against a delinquent workman on the ground of his non-participation in the inquiry and the validity of the inquiry is upheld by the tribunal, there is no provision in the Act which, in such a case, entitles the workman to lead evidence before the tribunal to show that the charges levelled against him were false and baseless.[44] In such a situation, the employer can validly take advantage of relying on findings of the domestic inquiry as *prima facie* proof of alleged misconduct.[45] It is well-settled that an allegation which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side had no notice of it and if entertained, it would tantamount to granting unfair advantage to the other side.[46] But the mere fact that a party has not filed its written statement would not disentitle it to adduce evidence to rebut or demolish the case of the other side, as it would not be proper to refuse examination of witnesses when the party later presses for it as it would be against the principles of natural justice.[47] In *NBCC*, in support of the case of the workman, the labour court principally relied on the oral testimony of an employee of the corporation who had left its service and subsequently had made claim for damages against the corporation. In a writ petition against the award of the labour court, a single judge of the Delhi High Court held that the fact that the witness had left the service of the corporation and had made a claim for damages, by itself would not make his evidence inadmissible and disentitle the labour court to accept his sworn evidence.[48] In *Oriental Containers*, the Bombay High Court observed that the evidence of an accomplice cannot be rejected outright and it can be accepted if it receives some independent corroboration.[49] In *Chennai ACW Union*, a single judge of Madras High Court held that so long as proceedings are pending, there is no lack of jurisdiction in the adjudicating forum for permitting any party to the proceedings to let in evidence at any stage of the proceedings before the passing of the award, so long as the material sought to be introduced by way of evidence would bring forth the truth of the claim made or the defence taken.[50]

(c) Appreciation of Evidence

The oral or documentary evidence adduced before industrial tribunals must be the evidence which is legally adduced.[51] But a tribunal in its discretion may consider that some evidence adduced by one of the parties is irrelevant or immaterial.[52] The admission or rejection of a piece of evidence placed before a tribunal and its appreciation is a matter exclusively within the jurisdiction of the tribunal and sufficiency and quality of evidence on which a finding would be arrived at, is also a matter

for the tribunal to consider.[53] Refusal to admit evidence by a tribunal cannot in every case necessarily be deemed to render the adjudication unfair. But if it has totally ignored certain evidence on record in arriving at a finding, such a finding will be perverse.[54] Similarly where the tribunal finds that a witness has no regard for truth and still relies on his statement, the resulting conclusion will be perverse.[55] Nor can the tribunal allow evidence to be led by one party in the absence of the other,[56] but the tribunal cannot completely ignore the evidence adduced by the parties and record a finding contrary to such evidence as such a finding would be perverse.[57] In *Singareni Collieries Ltd*, the Supreme Court held that where the tribunal, on the appreciation of oral and documentary evidence, passed an award granting 'charge allowance' to fitters as referred by the government, it would not be proper for the High Court to interfere with the said award and direct the payment of said allowance to electricians without any evidence before it.[58]

(xiii) Preliminary Issues

Section 10(4) of the Act circumscribes the parameters of the jurisdiction of the adjudicatory tribunals requiring them to confine their adjudication to the points specified in the order of reference and matters incidental thereto. Thus, there are two categories of points which a tribunal has to decide. Firstly, the points which have been specified in the order of reference for adjudication. Secondly, the points which are incidental to the points specified in the order of reference for adjudication. In this category, will come the determination of the questions which go to the root of the jurisdiction of the tribunal. On the determination of such points will depend the question as to whether the tribunal has the jurisdiction to adjudicate upon the points referred to it for adjudication. If the decision on the preliminary issues is in the affirmative, the tribunal proceeds further with the adjudication while if it decides it in the negative, it will have no jurisdiction to proceed further with the adjudication. Preliminary issues in a suit or proceeding may relate to a question of law, which, if decided at the commencement of the proceeding, would render the very suit or proceeding incompetent and save the precious time of the court and unnecessary costs to parties. The purpose of framing preliminary issue, generally on the request of the defendant, and deciding it at the commencement of the proceeding is that in a number of cases, the very decision thereon can dispose of the suit or proceeding, without the court having to go into the merits of the case. In *TISCO*, while observing that the Tribunal was in error in refusing to decide, as a preliminary issue, the question whether s 33 applied to the case, Gajendragadkar CJI, held:

> It would be legitimate for an employer. to make an application under section 33 without prejudice to his case that section 33 did not apply...it would be idle and unreasonable to suggest that the employer should make up his mind whether section 33 applies or not, and if he thinks that section 33 does not apply, he need not make the application; on the other hand, if he thinks that section 33 applies, he should make an application, but then he cannot be permitted to urge that the application is unnecessary. Such a view is...wholly illogical and unsatisfactory.[59]

The judicial process outlined by the learned Chief Justice is the only right way of handling cases which fall in the twilight zones involving questions of jurisdiction. The above view was followed in several subsequent cases. In *Strawboard*, Goswami J, held that additional or ancillary issues are framed for better appreciation of the cases of the parties with reference to the principal issues which have been referred for adjudication and on the basis of which the jurisdiction of the tribunal would have to be determined.[60] Justice Desai held that it is open to the tribunal to frame an issue on a jurisdictional point and dispose it of as a preliminary issue.[61] Sometimes, the failure of the tribunal to frame such preliminary issues may lead to miscarriage of justice.[62] In *Cooper Engineering*, Goswami J, held that in a case of dismissal or discharge, if the employer makes a request to the labour court to try the validity of the domestic enquiry as a preliminary issue before proceeding with the merits of the case, the court should first decide that issue as a preliminary issue; that on the said issue being pronounced against the employer, it would be for him to decide whether he would adduce additional evidence; and that if the employer chooses not to adduce additional evidence, it would not thereafter be permissible to him to raise the issue in any further proceeding.[63] In *Shankar Chakravarty*, the facts disclosed that the management, in an application under s 33(2)(b), did not make a formal request to permit it to lead evidence. Accordingly the tribunal passed the award, which was challenged by the management on the ground that the said award was vitiated as the tribunal did not call upon the management to adduce additional evidence and justify the dismissal. Repelling the contention, Desai J, held:

> In an application under section 33 the employer has to plead that a domestic enquiry has been held and it is legal and valid. In the alternative it must plead that if the Labour Court or Industrial Tribunal comes to the conclusion that either there was no enquiry or the one held was defective, the employer would adduce evidence to substantiate the charges of misconduct alleged against the workman. ...there is no duty cast on the Industrial Tribunal or the Labour Court while adjudicating upon a penal termination of service of a workman either under section 10 or under section 33 to call upon the employer to adduce additional evidence to substantiate the charge of misconduct by giving some specific opportunity after decision on the preliminary issue whether the domestic enquiry was at all held, or if held, was defective, in favour of the workman.[64]

As rightly held by Desai J, no duty is cast upon the tribunal to prompt the employer to lead additional evidence, and it is the sole responsibility of the employer to make a request therefor at the appropriate stage. If the employer does not make any such request, the tribunal would be perfectly right in deciding the case on the strength of the material on record. However, contrary to this settled legal position, Varadarajan, J, held that the employer must seek permission to adduce evidence either at the time of making application under s 33 or after the written statement of defence is filed by the workman u/s. 10 and that, if it fails to make a request at the commencement of proceedings, it would not be allowed to do so at any later stage, as any delay in making such a request would prejudicially affect the workman and compel him to surrender which he may not otherwise do.[65] Before analysing the merits of this case, we may take a look at another set of observations of Hegde J (for majority) in *Laxmidevamma's* case:

> ...the directions issued by this Court in *Shambhu Nath Goyal's* case need not be varied, being just and fair. There can be no complaint from the management side for this procedure because this opportunity of leading evidence is being sought by the management only as an alternative plea and not as an admission of illegality in its domestic enquiry. At the same time, it is also of advantage to the workman inasmuch as they will be put to notice of the fact that management is likely to adduce fresh evidence, hence, they can keep their rebuttal or other evidence ready. ...There is one other reason why we should accept the procedure laid down by this Court in *Shambhu Nath Goyal's* case. ...This judgment having held the field for nearly 18 years...the doctrine of *stare decisis* require us to approve the said judgment to see that a long standing decision is not unsettled without strong cause…[66]

Justice Sabharwal, dissenting, observed:

> To allow or not to allow the prayer of the management to adduce in such a matter should essentially lie within the discretion of labour court/Industrial Tribunal to be exercised on well settled judicial principles. ..It appears that earlier to *Shambhu Nath Goyal*...it was not doubted that the employer could ask for an opportunity to adduce evidence before the proceedings are closed before the labour court/Industrial Tribunal. The departure came up only in *Shambhu Nath Goyal*. ...Except the main judgment of *Shambhu Nath Goyal…*, no other decision of the court was cited before us wherein it may have been held that the prayer of the management to adduce evidence is to be rejected if not made either in the written statement filed to the statement of claim in a reference under section 10 or at the initial stage of proceedings under section 33(2)(b) … (at pp 206-11).

The settled law has been that the employer has a right to make a request to the Tribunal for adducing evidence at any stage, but before the close of the adjudication proceedings. Even so, given the peculiar facts and circumstances of the case, the decision in *Shambhu Nath Goyal* was correct, regardless of the departure made by the court on a vital aspect. Justice Varadarajan observed that it was the duty of the management to have got the issue 'whether the workman was gainfully employed or not in the intervening period' framed by the Tribunal and adduced the necessary evidence, unless the object was to rake up that question at some later stage to the disadvantage of the workman. The exceptional facts and circumstances disclosed in that case do not justify the laying down of an inflexible rule of universal application, contrary to the settled principles. The question of adducing additional evidence arises only after the tribunal records a finding that the domestic enquiry suffers from some infirmity, and not before. No employer can be asked to proceed ab initio on the presumption that the domestic enquiry was defective and accordingly make a pre-emptive request for adducing evidence at the stage of filing written statement or an application under s 33(2)(b). The record of domestic enquiry should be presented to the tribunal for its scrutiny and a result thereon pronounced before the employer could make a request for permission to lead further evidence. If, for instance, the tribunal comes to the conclusion that the domestic enquiry is unassailable, then the question of employer adducing additional evidence does not arise. Thus, the employer's right to make a request for adducing additional evidence is contingent upon the tribunal recording a finding against the domestic enquiry. The rulings in *Motipur*, *Ludh Budh Singh*, and *Cooper Engineering* consistently upheld the *right of employer to make the request at any stage before the close of proceedings*, and not compulsorily at the commencement of the proceeding. The observation of Varadarajan J, that the filing of application at a later stage would 'result in delay' is ill-founded and without substance. As a matter of fact, any denial of opportunity to the employer to adduce additional evidence for the reasons mentioned by the learned judge would work out to the ultimate detriment of the workman himself, as the employer would go back, initiate fresh disciplinary action, cure the defects and file a foolproof case for approval. In such an event, the workman would be permanently deprived of the benefit of an enquiry held by an independent judicial authority. The observations of Hegde J, in *Laxmidevamma* are as misconceived as those of Varadarajan J. Once the right of employer to adduce additional evidence is conceded, the discretion whether or not to permit the employer to lead evidence should rest with the labour court, which can always go into the question of genuineness or otherwise of the request. At any rate, it should not be superimposed by higher courts thereby robbing the flexibility and, what is more, the discretionary power available to the trial court under ss 33 & 10(1) read with s 11A.

There is no rule of law which mandates the employer to make a request even before the court has recorded a finding

against the validity of domestic enquiry. If the employer makes a request immediately after the labour court records a finding against the domestic enquiry, it could not be said that the employer was guilty of delaying the adjudication process nor could it be said that such a request operates to the prejudice of the workman. His further observation that *'it is also of advantage to the workmen inasmuch as they will be put to notice of the fact that management is likely to adduce fresh evidence, hence, they can keep their rebuttal or other evidence ready'*, is equally without merit for the reason that the question of the workman leading evidence *contra* arises only after management has adduced evidence from its side. At any rate, the workman cannot be expected to indulge in guesswork as to the kind and quality of evidence to be led by him *contra* without first knowing what the management has adduced in support of the order of dismissal. His observation that *Shambhu Nath Goyal* held the field for 18 years rests on a tenuous foundation. The concern shown by Hegde J for upholding *stare decisis*, though commendable, is unsupported by facts, because *Motipur* was decided by a four-judge Bench comprising Gajendragadkar CJI, Wanchoo, Hidayatullah and Ramaswamy JJ, which was no less long-standing, having held the field for as many years as *Shambhu Nath Goyal*. From the standpoint of judicial precedent, the ratio of *Motipur* is binding on all the subsequent Benches of four judges or less, and thus it clearly binds the three-judge Bench which decided *Shambhu Nath Goyal*. With respect, it is submitted that both *Shambhu Nath Goyal* and *Laxmidevamma* are monumental illustrations of judicial indiscipline at its pinnacle. It is shocking that Hegde J (speaking for a Constitution Bench), should have affirmed *Shambhu Nath Goyal* over the decision of a four-judge Bench and, in the same strain, express his concern for *stare decisis.* The dissenting judgment of Sabharwal J places the law in the correct perspective and is right, whereas that of the majority is completed misconceived and flawed. In *Divyash Pandit*, the labour court framed the following issues:

(1) Whether the management is an industry or not under section 2(j) of IDA?

(2) Whether Delhi Administration is not the appropriate Government'?

(3) Whether the petitioner is a 'workman' under section 2(s) of IDA?

(4) Whether the domestic enquiry is improper/invalid and whether the finding is perverse?

The labour court decided issue (4) by holding that the findings were perverse and hence was '*non est* in the eye of law', and accordingly directed reinstatement of the workman. The court noted the fact that no request was made by the management to lead evidence in support of charges and to prove the same. A two-judge Bench of the Supreme Court comprising Ruma Paul and Thakkar JJ swung to the other extreme, and held:

> It is true no doubt that the respondent may not have made any prayer for additional evidence in its written statement but, as held by this Court in *Karnataka Road Transport Corporation...* did not place a fetter on the powers of the Court/Tribunal to require or permit parties to lead additional evidence including production of document at any stage of proceedings before they are concluded. Once the Labour Court came to the finding that the enquiry was *non est*…the Labour Court should have given one opportunity to the respondent to establish the charges before passing an Award in favour of the workman.[67]

The above decision swung the pendulum to the other extreme and is as misconceived as that of *Laxmidevamma.* It is a little difficult to understand what prompted the learned judges in *Shambhu Nath*, *Laxmidevamma* and *Divyash* cases, to struggle so hard to read so many possibilities within a single set of facts, which *ipso facto* were comprehensively covered by a spate of authoritative decisions in the 1960s itself. It is not in dispute that the responsibility to make a request to the labour court at the appropriate stage for leading additional evidence squarely rests on the employer. But, in no case could it be contended that the Labour Court is under an obligation to read into the mind of the employer and direct him to lead additional evidence even without a formal request from the latter. Further, such a course on the part of labour court amounts to prompting one party to do something against the other and would place the dismissed workman's case in jeopardy, apart from being repugnant to the principles of natural justice and of sound judicial disposition. If the employer does not make a formal prayer for permission to lead additional evidence, the implication is that he relies on the validity of the domestic enquiry proceedings as being unassailable and that he is not interested in leading additional evidence. The employer would thus miss the opportunity for ever, and cannot be permitted to agitate before the High Court or Supreme Court that the labour court denied opportunity to him, as the situation was of his own making. The decision in *Divyash Pandit* is as unsatisfactory and defective as that of Hegde J in *Laxmidevamma*. The law on the subject is well-settled and unambiguous. Eschewing the judicial extremes disclosed in *Laxmidevamma* and *Divyash Pandit*, the correct legal position can be stated thus: '*The management should make a specific prayer for permission to adduce additional evidence, either in the application under s 33(2)(b) or in the written statement in a reference under s 10(1) or at a later stage in the adjudication process, but certainly before the conclusion of the proceeding. Once a prayer is thus made, it is not within the power of the Labour Court to refuse permission. However, no obligation of whatsoever nature is cast on the Labour Court to direct the employer, on its own motion, to adduce additional evidence*'.

In *Cooper Engineering, the case turned on the question 'whether the Labour Court should decide, as a preliminary issue, whether the domestic enquiry violated the principles of natural justice, particularly, where the parties are at variance on that issue'*. The main question was rightly decided by Goswami J, by holding that it is for the employer to take a stand and seek permission to adduce additional evidence before the labour court; that if it chooses not to adduce any evidence, it would not thereafter be permissible for the management to raise the issue in any proceeding. But the further gloss added by the learned judge, to the effect that '*there would be no justification for any party to stall the final adjudication of the dispute by the labour court by questioning its decision with regard to the preliminary issue when the matter, if worthy, can be agitated even after the final award*', is capable of producing great public mischief to the detriment of justice itself. In the first place, the said observation was more in the nature of *obiter* and, by no means was part of the *ratio decidendi*, as can be seen from his own statement: '*We are making these observations in our anxiety that there is no undue delay in industrial adjudication'* (in para 22). In this connection, it should be noted that the above case was decided long before s 17B was inserted in IDA. According to the then prevailing legal position, it made no difference in terms of the legal consequences for employer, whether the labour court decided the preliminary issue first or decided both the preliminary issues and merits together. *Secondly*, the insertion of s 17B changed the complexion of the Act insofar as the employer is required to pay the last drawn wages, in the event he chooses to challenge the order of reinstatement, which means the final order of the labour court on merits gives rise to certain legal and financial consequences to the employer. *And, lastly*, whatever might be the considerations that weighed with Goswami J in *Cooper Engineering*, as regards the power to decide preliminary and merits together, they ceased to have any application or sanctity the moment s 17B was enforced. In *HD Singh*, Khalid J (for self and Reddy J), held that the employer was prohibited from raising preliminary objections touching upon fundamental questions of law or jurisdiction of the court, and that the High Court should not interfere under Art 226. In *DP Maheshwari*, Reddy J, who was a member of the Bench that decided *HD Singh*, added further gloss in his own ultra-radical style, which runs thus:

> There *was a time when it was though prudent and wise policy to decide preliminary issues first*. But the time appears to have arrived for a reversal of that policy. *We think it is better that Tribunals*, particularly those entrusted with the task of adjudicating labour disputes where delay may lead to misery and jeopardise industrial peace, *should decide all issues in dispute at the same time without trying some of them as preliminary issues*. Nor should High Courts in exercise of their jurisdiction under Article 226 of the constitution stop proceedings before a Tribunal so that a preliminary issue may be decided by them. [68](Italics supplied).

The above observations of Khalid and Reddy JJ are not only misplaced but are patently unconstitutional as well. The need for determining the preliminary issue is not merely confined to s 33, but extends to the adjudication of disputes referred u/s 10 as well. Order 14, r 2 of CPC, runs thus:

> **2. Court to pronounce judgment on all issues—**
>
> (1) Notwithstanding that a case may be disposed of on preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.
>
> (2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—
>
> (a) the jurisdiction of the Court, or
>
> (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

Rules 10B to 29 of IDCR prescribe the procedure to be followed by the Labour Courts and Tribunals, which, to a large extent, is similar to that of a civil court. Reading the provisions of CPC and IDCR together, it becomes clear that where the issue raised is one of jurisdiction or of law, and if the proceeding can be disposed of on that issue only, the court should try that issue as a preliminary issue before going into the merits. It would be futile for the court to go into the merits of the case, if it has no jurisdiction at all to try the matter or if the issue involves a question of law. In the face of this legal position coupled with the lethal effect of s 17B, to say that the Tribunals would be justified in short-circuiting the adjudication process by arrogating jurisdiction wrongfully, merely because the trying of preliminary issues would lead to misery to one party, is outrageous. The further observation of Reddy J to the effect that the time had changed so much, warranting the trying of preliminary issues and merits together, is no less ill-founded. Even assuming so, yet the letter and spirit of Arts. 226 & 32 have certainly not changed to such an extent as to justify cutting corners by Tribunals. It is not as if the Constitution is meant exclusively for the benefit of one section of society to the detriment of others. This country has

not yet decided to patronise communism as an ideology to be pursued at the national level so as to dispense the kind of lop-sided justice advocated by Reddy J. The said issue '*whether the Tribunals should decide preliminary issues first or decide them together with merits*' was not raised at any forum below or even before Supreme Court. In these circumstances, should the above observation be taken as *ratio decidendi* or an irrelevant and uncalled for *obiter* coming from an over-speaking judge?

Chief Justice Sethi of Karnataka High Court followed the anarchic view of Reddy J and held that the practice of framing preliminary issues in industrial disputes was contrary to 'law' and if permitted would defeat the very purpose for which the IDA was enacted.[69] *It is obscure as to which 'law' the learned Chief Justice was referring to—is it the law of jungle or of a modern, civilised democracy governed by a Constitution of its own?* If it were contrary to the so-called 'law', what prevented him from enlightening the Bar and Bench by citing the relevant legal provision? In the first place, whatever may be the legislative intent as regards 'speedy disposal' of industrial disputes, no provision of IDA prescribes 'summary procedure' of the kind provided for under O 37 of CPC. Section 11(3) of the IDA clearly states that the Labour Courts, etc., shall have the same powers as are vested with the civil court under CPC when trying a suit in respect of enforcing attendance, examination on oath, production of documents, issuing commissions, and other matters. It further stipulates that every investigation by Labour Court, etc, shall be deemed to be a judicial proceeding within the meaning of s s. 193 and 228 of IPC. Rule 10B of the IDCR prescribes the powers of, and procedure to be followed by, Labour Courts, etc, which are analogous to that of a civil court.[70]

The observation of Reddy J in *Maheswari*, though does not deserve to be elevated to the status of a sound, much less a sane, legal proposition, suffers from the further vice of being repugnant to the Constitution, given that it comes from a Supreme Court Judge, who is supposed to be the custodian of the Constitution. Even assuming that it was right, without conceding in the least, still its validity stood expired with the insertion of s 17B. Examples of gross abuse of power, self-misdirection, jurisdictional lapses and excesses on the part of Labour Courts far outnumber those which had been, and are being, decided in accordance with the law. A glance at the ever-inflating volumes of law journals in this branch bears eloquent testimony to this fact. If, in a chaotic dispensation bordering on licentiousness, the trial courts were to be directed not to frame preliminary issues that touch upon questions of jurisdiction and law, it would produce great public mischief to the detriment of the very concept of justice. To illustrate, where the preliminary issue touches upon questions such as -

(i) *whether the Labour Court has jurisdiction at all to try the dispute; or*

(ii) *whether the person raising the dispute was the employee of the principal employer or of the contractor; or*

(iii) *whether the person answers at all to the definition of 'workman' under section 2(s) ; or*

(iv) *whether it is a case of abandonment on the part of the workman or a positive act of termination by the employer; or*

(v) *whether a workman can be said to be a 'workman concerned in the dispute' under section 33 ; or*

(vi) *whether the dispute referred for adjudication is an 'industrial dispute' under section 2(k)* -

if the Labour Courts were to decide preliminary issues along with merits, it corrupts the judicial process and reduces it to what may be called '*unadulterated gambling*'. Should the employer go on paying last drawn wages to the employee under s 17B on the basis of an award, which is *prima facie* incompetent, absurd and outside the competence of the labour court? Could it be said that s 17B is meant for imposing such a preposterous obligation on the employer with no recourse in the event of the Labour Court arrogating to itself jurisdiction beyond the contemplation of the law? The decisions rendered in *Maheshwari* and *Senapathy* deserve to be condemned in the strongest possible language and terms as being perverse and repugnant to CPC as well as *ultra vires* the Constitution. In the midst of judicial chaos of this magnitude, the decision of the Supreme Court in *Hussain Mhasvadkar* comes very refreshing in that the apex court made an attempt to undo the damage done by the likes of Reddy J. Two points were urged in the said case: (i) Whether the Bombay Iron and Steel Labour Board constituted under the provisions of the MMHOMWREWA falls within the definition of 'Industry' under s 2(j) of IDA; and (ii) Whether the appellant, working at the relevant point of time as an Inspector, discharging duties, powers and obligations envisaged under s 15 of the said Act answers to the description of 'workman' under s 2(s) of IDA. Justice Raju (for self and Rajendra Babu, J), held that, in view of the fact that the court below entertained doubts about the status of the workman under s 2(s) of IDA, they should have refrained from embarking upon adjudication on merits, and that the larger issue should have been entertained for consideration only if it was absolutely necessary, and not when the claim could have been disposed of otherwise without going into the nature and character of the undertaking itself.[71] This decision is consistent with the principles laid down in *Motipur*, *Tata Iron and Steel* and *DCM* as against the defective rulings given in *Maheshwari* and other cases.[72] In *Satyadev Chemicals*, a single judge of the Gujarat High Court observed:

...It is always desirable that all the issues arising in a matter should be decided together and as expeditiously as possible. However,

> in the present case, the issue is in respect of the inherent jurisdiction of the authority and the application of the Act itself. Further, no evidence is required to be led for deciding the said issue. It is an admitted fact that each of the above referred 50 employees received monthly wages exceeding Rs 1600. In view of the provision contained in sub-s (6) of s 1, the provisions of the Act shall not apply. The application made before the concerned authority is, therefore, not maintainable. Besides, it is also an admitted fact that all the said employees have also availed of thestatutory remedy available under the Industrial Disputes Act, 1947 and have filed recovery application before the labour court at Vadodara.[73] (in Para 7)

In *Gujarat Kamgar Panchayat*, Tripathi J rightly held that, where a preliminary objection which goes to the root of the matter touching upon the very jurisdiction of the tribunal to adjudicate the dispute was raised, the tribunal must first decide that issue, before deciding other issues. The learned judge further observed that, having decided the preliminary issue about jurisdiction, there was no reason for the tribunal in the instant case to postpone the decision on the preliminary issue of such nature, the decision of which would have disposed of the entire case.[74] It is submitted that the above two decisions of Gujarat High Court lay down the correct law consistent with the ratio of *Express Newspapers.*[75]

(xiv) Review and Rectification of Errors

The expression 'review' is used in two distinct senses, namely,

(i) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record; and,

(ii) a procedural review which is either inherent or implied in a court or tribunal to set aside a palpably erroneous order passed under a misapprehension by it.

No review lies on merits unless a statute specifically provides for it. In other words, the power of review is not an inherent power. It must be conferred either specifically or by necessary implication.[76]Industrial tribunals and labour courts, therefore, have no power of review because there is no provision in the Act vesting inherent powers in such tribunal or courts analogous to those expressly vested in the civil courts by s 151 of the Code of Civil Procedure. The operative words of s 11 (3) of the Act cannot be construed to confer power of review on the authorities mentioned therein expressly or by necessary implication. Therefore, such tribunals, do not have the power to alter, clarify or even interpret or explain the award they have already made, except the power to correct the clerical mistakes.[77]The provisions of s 36A of the Act which require a reference to labour court, industrial tribunal or national tribunal of any matters of doubt or difficulty arising as to interpretation of an award, clearly indicates that an industrial tribunal does not have an inherent power to interpret or to review its award.[78] In *Tata Consulting Engineers*, the industrial tribunal reduced the wage scales with retrospective effect and it also laid down the principle enabling the actual fitment of the workmen in their respective wage-scales and also provided for a number of increments to which they would be entitled having regard to the period of completed service. Subsequently, on an application by the workmen, the tribunal made an insertion in the award purporting to clarify and correct the award. A majority of the Supreme Court has taken the view that the words subsequently inserted by the tribunal were omitted by an accidental slip which the tribunal was entitled to correct.[79] But according to the minority judge, it was not a case of accidental slip or omission because the insertion completely changed the character of the award, which was not permissible in the guise of correcting an accidental slip or omission. Therefore, the tribunal travelled outside and beyond the terms of the original award and thus committed a jurisdictional error. On the facts and circumstances of the case, the view of the minority judge is correct.

However, when the 'review' is due to a procedural defect, the inadvertent error committed by the tribunal must be corrected *ex debito justitiae* to prevent the abuse of its process and such power is inherent in every court or tribunal.[80] Rule 28 of the Industrial Disputes (Central) Rules 1957, empowers the industrial tribunals to correct clerical mistakes or errors arising from an accidental slip or omission in any award issued by them. Such clerical errors or mistakes, tribunals are entitled to correct even without notice to the opposite party.[81] This correctional jurisdiction conferred on tribunals is, in terms, identical with the one conferred on the civil courts under s 152 of the Code of Civil Procedure. It is in consonance with the first and foremost principles that no party should suffer any detriment on account of a mistake or an error committed by a tribunal. The circumstance that the proceedings before the tribunal are deemed to be concluded when its award becomes enforceable or that thereupon it becomes *functus officio* would be no ground for inferring any limitation of time in the correctional jurisdiction of the tribunal. The legislature has not chosen to lay any limitation of time for exercising the correctional jurisdiction of the tribunal.[82] In *Grindlays Bank* (supra), the tribunal passed an *ex parte* award against the workman which was duly published by the Central Government. Before the award became enforceable on the expiry of 30 days after its publication, the workmen applied for setting it aside on the ground that they were prevented by sufficient cause from appearing when the reference was called for hearing. Accordingly, the tribunal set aside the *ex parte* award on being satisfied that there was sufficient cause. The Supreme Court repelled the contention that the tribunal had become *functus officio*, and therefore, had no jurisdiction to set aside the *ex parte* award. In view of the provisions in s

20(3) of the Act, which lays down that the proceedings before a tribunal would be deemed to be continued till the date on which the award becomes enforceable under s 17A, after the expiry of 30 days from the date of its publication, the court held that the tribunal retains jurisdiction over the dispute referred to it for adjudication up to the date it becomes enforceable and till that date it has the power to entertain an application in connection with such dispute. Since the application for setting aside the *ex parte* award was filed before the expiry of 30 days of its publication, the tribunal rightly entertained it and had jurisdiction to entertain it and decide it on merits. It was further held that the jurisdiction of the tribunal had to be seen on the date of the application made to it and not on the date on which it passed the order setting aside the *ex parte* award as 'there is no finality attached to an *ex parte* award because it is always subject to its being set aside on sufficient cause being shown'.

Against an *ex parte* order or award, the aggrieved party has to apply to the labour court for setting aside such order or award and the labour court has the jurisdiction to entertain such an application. In *Chanchal Singh*, an *ex parte* order was made against the employer company on 17 March 1979 which was published on 12 April 1979. The company applied for setting aside the award on 25 April 1979 which was dismissed on 2 November 1979 for default of appearance. The company then filed a review petition on 30 November 1979 which was rejected by the labour court on 5 March 1980 on the ground that it had no power to review its judgment. The company then filed a fresh review petition for review of the order dated 5 March 1980 which was entertained by the labour court. In a writ petition by the workman, against the order of the labour court entertaining the review petition, the Delhi High Court held that the order of the labour court dated 5 March 1980 was a decision finally deciding the case as far as the labour court was concerned.[83] This decision even if erroneous in law or on facts was not defective due to any procedural defect. Hence the order could not be reviewed by the labour court though could have been challenged in a writ petition before the High Court or by a petition for special leave to appeal before the Supreme Court.

In *Subrata Guha Sarkar*, the company filed a review application of an order of the labour court computing the back wages and other benefits to which the workman was entitled under an award of the industrial tribunal which was rejected by the labour court. Subsequently, the employer filed another review petition which was, allowed by the labour court depriving the legal representatives of the workman, who had died in the meanwhile. A single judge of the Calcutta High Court, in the circumstances of the case, particularly the dilatory tactics adopted by the employer company, held that the second application for review was not maintainable particularly when the review application had been disposed of on contest after hearing both the parties. Speaking for the court, Bhattacharjee J made a very touching observation: 'What may be a luxury for the affluent employer is a death-knell to the poor employee. Indeed, if any honest reckoning is made, it will be evident that the employer incurred expenditure much more than its liability towards the outstanding wages of the employee'.[84] This attitude on the part of the unscrupulous employers apart from being deprecated requires serious sanctions. The analogy of an *ex parte* order or decree of a civil court does not apply to an *ex parte* order or award of the labour court. In the Code of Civil Procedure which governs the trial of suits by civil courts, there are no provisions analogous to s 17 A(2) and s 20(3) of this Act. The Code of Civil Procedure does not declare that any order or decree of the civil court shall be final or the proceedings before a civil court shall be concluded within the prescribed time of the publication of such order or decree. There is an elaborate procedure enacted in r 30 of O 9 of the Code of Civil Procedure for setting aside an *ex parte* order or decree and limitation has been provided therefor.[85] In *Birla CSW Mills*, the Calcutta High Court held that the operative words of s 11 (3) could not certainly be construed to confer on the tribunal, the power to review or recall the award. Once the award is published, the tribunal cannot alter, modify, clarify or even interpret the award except a possible power to correct clerical mistakes. The Bench further observed: we are of the view that the tribunal was not justified in exercising the power of review/recall of its earlier order on the premise or that it was competent to set aside the *ex parte* award.[86]

SUB-SECTION (2): POWER OF ENTRY INTO PREMISES - REQUIREMENT OF NOTICE

This sub-section is analogous to O 18, r 18 of the Code of Civil Procedure, which provides: 'The court may at any stage of a suit inspect any property or thing concerning which any question may arise'.[87] The sub-section authorises the authorities mentioned therein to enter the premises occupied by any establishment to which the dispute relates after giving reasonable notice. This notice is only for the purpose of entering the premises to make an inquiry into any existing industrial dispute or any apprehended industrial dispute. In the under-noted case,[88]where the conciliation officer had entered the premises of a distillery without giving any reasonable notice as required by s 11(2), the Supreme Court discountenanced the contention that the settlement brought about by him was not legal and binding, as he had lost jurisdiction on account of non-compliance with the requirement of the notice under s 11(2) and held that the purpose of the notice under s 11(2) is merely to apprise the establishment that it is a conciliation officer who is coming and not an absolute stranger who has no connection at all with the machinery set up for the purpose of the Act and that non-compliance with the requirement of notice under s 11(2), therefore, would not affect the competence of the conciliation officer, to bring about a settlement.

SUB-SECTION (3): POWERS UNDER THE CODE OF CIVIL PROCEDURE 1908

This sub-section provides that the authorities mentioned therein, such as, industrial tribunals, etc, shall have the same

powers as are vested in a civil court under the Code of Civil Procedure 1908, when trying a suit, in respect of the matters enumerated therein. It is evident that the entire Code of Civil Procedure has not in terms been made applicable to the proceedings under this Act. Consequently, the specific provisions of the Code pertaining to jurisdiction do not *strictu sensu* govern the adjudicatory proceedings. However, even if the language of the specific sections of the Code is not applicable to a situation, the broader general principles underlying them would undoubtedly be relevant.[89]

(i) Oral Evidence - Enforcing Attendance of Witnesses

The evidence to be submitted in industrial adjudication may be:

(a) 'oral' consisting of statements made verbally by the parties or their witnesses at the hearing; or

(b) 'documentary', consisting of letters, agreements, deeds, statements of accounts, balance-sheets and other documents put in by either side.

This clause vests the tribunal with the same powers as are vested in a civil court in the matter of enforcing attendance of any person and examining him on oath. This power includes the power to recall a witness for further examination or cross-examination.[90] The relevant provisions of the Code of Civil Procedure in this behalf are s 27 to s 32 and Orders 16 and 18. Section 27 to s 32 deal with 'summons and discovery'. Order 16 deals with 'summoning and attendance of witnesses' and O 18 deals with 'hearing of the suits and examination of witnesses'. Where the summons issued by the tribunal to the Managing Director was challenged on the ground that the summons should have been issued to the Branch Manager who is dealing with the issues raised in the dispute and not to the Managing Director, it was held that under s 11 (3), the tribunal is vested with the same powers as a civil court under the CPC in respect of enforcing attendance of any person, etc., and that the Managing Director alone was competent to file the writ petition against the summons issued to him.[91] The evidence is to be taken on oath. However, a party must produce all the witnesses whose evidence is relevant and material to the case. Particularly in disciplinary matters, the real witness who can prove or disprove the charge levelled against the delinquent must be produced and failure to produce such a witness would lead to the adverse inference against the party who should have produced that witness.[92]False evidence given on oath or affirmation in industrial adjudication proceedings is perjury, and the person guilty of willfully giving such evidence may be prosecuted and punished for such crime. Similarly, it is offence to manufacture false evidence to be used in industrial adjudication, even though the adjudication may not have taken place or the false evidence may not, in fact, have been used. Though the strict technicalities of the Evidence Act do not apply to industrial adjudication, the rules of evidence to be observed by industrial adjudication are the same as those which will apply in the courts of law. Adjudicators are often called upon to decide difficult questions as to admissibility of evidence which is tendered before them. Objections may be taken to the admission of evidence, either on the ground of incompetency of the witness or of the nature or materiality of the evidence. In the former case, the adjudicator is the absolute judge, and if he makes an error in receiving or rejecting any evidence, the award cannot usually be challenged or set aside. But an error as to the materiality of evidence on the part of the adjudicator may be attended with more serious consequences. The danger usually lies, not in receiving immaterial evidence, but in rejecting material evidence. If he takes the evidence which is not material, and therefore, ought to have been rejected, no harm will be done, if such evidence has not been taken into consideration.

An award cannot, in general, be impeached on the ground that the adjudicator has admitted inadmissible evidence, though where the irrelevant and extraneous evidence goes to the root of the matter and the adjudicator had taken it into consideration in arriving at his conclusion, the award will be quashable. But if the tribunal erroneously refuses to admit evidence, which is, in fact, material, he will not have heard everything which might have influenced his mind in coming to a decision upon the dispute. In such an event, the award will be liable to be quashed. Generally, an adjudicator should hear all the witnesses and examine all the documents tendered by the parties, though he may be of the opinion that sufficient evidence has already been adduced. A party will not be successful in getting the adjudicator's award quashed on the ground that he has rejected material evidence unless he has, in fact tendered the evidence to the adjudicator, and, if necessary, has stated its purport. If evidence is of a type which would not be admissible in a court of law, the tribunal must reject it. For instance, generally, all 'hearsay' evidence is inadmissible, ie, any written or verbal statement made by a person who is not going to be called as a witness at the adjudication. If either side wants to refer to a statement made by a certain person supporting his view of the case, he must, as a rule, call that person as witness. If he does not, then neither he nor any of his witnesses may introduce the statement in question as evidence of the truth of the fact stated.[93] In examining his own witnesses—'examination-in-chief', a party is not entitled to put 'leading questions'—ie questions so framed as to suggest the answer required or actually put that answer into the witness's mouth. But 'leading questions' are permissible in cross-examination. A party may sometimes wish to put further questions to one of his witnesses after cross-examination. Such 're-examination' must be confined to matters raised in cross-examination, fresh matter should not be introduced except with the tribunal's consent.

(ii) Documentary Evidence—Discovery, Production and Inspection of Documents

This clause invests the tribunal with the powers of civil court under s 30 and s 32 and O 11 of the Code of Civil Procedure in the matter of 'compelling production of documents and material objects'. Section 30 deals with power of the court, *inter alia*, of discovery of documents and s 32 gives the court some penal rights to compel the compliance of the orders under s 30. Order 11 deals with the discovery and inspection of the documents. Rule 24 of the Industrial Disputes (Central) Rules 1957 also, *inter alia*, gives the powers under O 11 of the tribunals in the matter of 'discovery and inspection of documents'. The combined effect of s 11(3)(b) and r 24 of the Industrial Disputes (Central) Rules 1957 is that the tribunal's powers in the matter of production, discovery and inspection of documents are strictly governed by the provisions of O 11 of the Code of Civil Procedure. An industrial adjudicator has jurisdiction to direct a party to produce any document that may be in possession of such party for the purpose of proper adjudication of any issue referred to it by the government or framed by it. However, in connection with the documentary evidence, the adjudicator has to observe a number of rules. For instance, it is desirable that he should allow evidence to be adduced in respect of all issues and not piecemeal. [94] In *Veeraraghavan*, on an application being made by the employer, the labour court issued summons to the electrical inspector for production of the register showing the employee as cinema operator and the electrical inspector did not attend the hearing and the application was closed but the employer again filed an application for summoning the electrical inspector on which the labour court refused to issue summons to the electrical inspector to produce the register. In a writ petition against the subsequent order of the labour court, a single judge of the Madras High Court held that the mere fact that the earlier application was closed on the ground of non-appearance of the electrical inspector is no grounds for rejection of the subsequent application because the document summoned was a material document.[95] The adjudicator is only entitled to consider documents put in evidence. He ought not to allow himself to be influenced by documents which might have come into his possession but have not been put in as evidence. Where a party wishes to prove the contents of a document, the 'best' or 'primary' evidence is production of the document itself 'secondary' evidence in the form of a copy or verbal evidence as to the contents, is admissible only where there is some good reason for failure to produce the original, but where the object of the party is not to prove the contents of a document but only to establish the position created by it, independent evidence is admissible. Where parties have entered into a written contract, external evidence - verbal or written - is not admissible to add to and vary or contradict what is written. However, there are important exceptions to this general rule. The adjudicator should take a careful note of the evidence called or put in before him or of any legal points raised in the course of the hearing.

(a) Interrogatories

Rules 1 to 11 of O 11 of the Code of Civil Procedure deal with interrogatories. A party to adjudication proceedings before an industrial tribunal cannot request it to deliver interrogatories to the other party in regard to points to be proved by the evidence of the other party, for 'a party to a suit may administer interrogatories on the material facts relied upon by the other party for his claim or defence as set out in the pleadings but not on the evidence by which a party's case may be proved'. Every party to the adjudicatory proceedings is entitled to see the nature of his opponent's case, so that he may know before-hand what case he has to meet at the hearing. But he is not entitled to know the facts which constitute exclusively the evidence of his opponent's case. Every adjudication contemplates two sets of facts, namely (1) facts which constitute a party's case, this must be pleaded with sufficient details, and (2) facts which constitute a party's case to be proved ie evidence which need not be pleaded. [1]

(b) Discovery, Production and Inspection of Documents

Rules 12 and 13 of O 11 of the Code of Civil Procedure deal with the discovery of documents. Rule 14 deals with the production of the documents and rr 15 to 20 deal with the inspection of documents. The employers and employees must make available to the tribunal all the relevant documents including account books as they are likely to assist proper decision of a question in issue. Where, therefore, any of the parties to the dispute asks the other for the production of such documents, it should ordinarily be possible for the opposite party to comply with the request, subject however, to the protection of s 21 of the Industrial Disputes Act. When any such prayer is made, the tribunal has to use its judicial discretion in the matter. In the absence of any special circumstances, it would ordinarily be justified in asking one party to give to the other party, reasonable access to all relevant papers and documents.[2]The tribunal on examination of the confidential information can record its conclusions without referring to the figures and facts provided in the confidential documents, unless the employer gives up his privilege under s 21 of the Act[3] but a party can only be ordered to produce documents which are in its possession or in its power, which evidently refer to existing documents which though not actually in the immediate possession of the party, are readily available to it. A party cannot be directed to prepare abstracts or lists from the records in his possession. Neither s 11 of the Act nor r 24 of the Industrial Disputes (Central) Rules 1957 specifically provides for the application of all the provisions of the Code of Civil Procedure governing discovery, inspection and production of documents. Nevertheless, in considering the powers of industrial adjudicators to order inspection of documents, the deciding factor should be as to what are the powers of civil court to order

inspection.[4]Similarly, where confidential correspondence of a party is sought to be discovered, such party can claim privilege under the provisions of the Evidence Act.[5]Section 34A of the Banking Companies Act and s 24 of the Payment of Bonus Act 1965, indicate that the tribunal dealing with a dispute regarding bonus between a banking company and its workmen has no power to direct the company to furnish particulars in respect of provisions made for doubtful and bad debts and other usual necessary provisions, because such a direction would be against the statutory provision and as such bad in law.[6] Once a privilege is claimed, it is not open to the tribunal to question the claim and assert the right to examine documents. There is no estoppel in claiming such privilege, and the fact that such a document has already been submitted, does not prevent a party from subsequently claiming the privilege.[7]

(c) Procedure to Order Discovery and Inspection

It is not an unlimited power or rather a power, the exercise of which is limited only by the discretion of the judge, that even s 30 of the Code of Civil Procedure, confers on a civil court. The power conferred by s 30 of the Code of Civil Procedure is specifically subjected to 'limitations and conditions as may be prescribed', ie the conditions and limitations prescribed, for instance, by relevant rules in O 11 of the Code of Civil Procedure. An industrial adjudicator, therefore, must conform to the general principles that underlie the provisions in O 11 of the Code of Civil Procedure, governing the inspection of documents. Unless the condition prescribed by r 18(2) of O 11 of the Code of Civil Procedure are satisfied, the power to order inspection of documents referred to in r 18(2) does not spring into existence. The court or a tribunal must apply its mind and satisfy itself that the limitations, under which jurisdiction or power is exercisable, are satisfied. If a tribunal fails to appreciate and apply its mind to the preliminary question it has to decide, it would amount to erroneous assumption of jurisdiction.[8] It follows that the tribunal must comply with the principles contained in the provisions of O 11, r 18, of the Code of Civil Procedure, before ordering production and inspection of documents. An order passed in contravention of the principles of the provisions in O 11, especially rr 11 and 18 will be quashable.[9] Under O 11, r 15, the right to seek inspection is confined to the documents referred to in the pleadings or affidavits of the parties against whom the right can be claimed. Rule 18 (1) of O 11 of the Code of Civil Procedure, provides for inspection of documents other than those referred to in r 15. The conditions to be satisfied, before the power under r 18(2) can be exercised, are:

(i) there should be an affidavit to show the documents, inspection of which is sought;

(ii) party who applies for the inspection of documents should establish that he is entitled to inspect them; and

(iii) the documents inspection of which is sought, must be in the possession of the party against whom the order for inspection is sought.

Overriding all these conditions is the further requirement that the court should be of the opinion that the document of which inspection is sought is necessary either for disposing of fairly the suit or for saving costs. Failure to confirm to the requirements of the affidavit will affect the power of the court to order inspection. The court, therefore, must insist upon filing of such affidavit. A party applying for inspection should establish that he is entitled to inspect the documents, full proof of which the court must insist upon, before ordering the inspection of the documents that fall within the scope of r 18(2). Whether the right to inspect claimed in a given case is to be held established or not must, of course, depend on the circumstances of that case and it is neither desirable nor even possible to prepare an exhaustive list of cases that would amount to an established right. The mischief of roving inspection should always be in the mind of the tribunal. Section 11 does not contemplate preparation of evidence by one party for the benefit of the other.[10] Until an affidavit of inspection of document has been directed to be filed, the court would have no jurisdiction to order inspection. This is not a procedure which can be omitted. It is not merely a shadow but a matter of substance that the party should be called upon and should be enabled to state on oath as to what documents are relevant and are in his possession or power, before being called upon to give inspection thereof. The industrial tribunals are creatures of statute and, therefore, they are bound to follow the procedure laid down by the statute. They cannot evolve their own procedure in the case of discovery and inspection of documents.[11]Though the principles regarding discovery and inspection of documents as observed in ordinary judicial trials are to be observed, 'in adjudicatory proceedings under the Act as well, in such proceedings 'too many technical rules ought not to be imported especially when such rules tend to defeat the purpose for which the Industrial Disputes Act was promulgated'. Normally, workmen have no access to the books and documents which remain in the possession of the employer. If on technical grounds, inspection is ruled out, no workman can prove his case. If the tribunal fails to order production and inspection of relevant evidence and bases its findings on insufficient evidence, its award will be unsustainable in law.[12]

In order to determine the relevance, there must be some material before the tribunal. In order that there should be material before the tribunal, the applicant must place it before the tribunal, and this he can do by setting out in the application, the necessary facts, the necessary contentions as to the nature of the document, the necessity for their production, what kind of reliance he wishes to place thereon and what is the case which he wishes to make out. The application for production of

documents must contain all the necessary materials in order to enable the tribunal to apply its mind, to determine relevancy of the documents and ascertain whether inspection should be allowed or not and then pass a proper order. It is settled law that a party to any litigation cannot be permitted to embark on a fishing or roving inquiry in the hope that some material will come to hand on the basis of which he can set out his case. No doubt, in a proper case, after the necessary material is on record, the tribunal may order production of relevant documents which would be necessary for the purpose of the adjudication. But before that can be done, it would be the duty of the party asking for production of the documents to make out a case as to why it would be necessary for certain documents to be produced.[13] Documents of confidential or privileged nature, such as proceedings, books of the board of directors' meetings or income tax returns etc, cannot be demanded, by one party from the other. The aid of the tribunal cannot be invoked for a roving investigation or discovery of possible or potential causes of action.[14] Nor can a party call upon the other to furnish information to him to make out a case to be presented in the plaint. The question of discovery arises only after the claim statement has been filed. An order passed by a tribunal, without having the statement of claim before it and with a view to enabling workmen to prepare their statement of claim, would be bad in law, being not in consonance with the fundamental principle of law contained in O 11 of the Code of Civil Procedure.[15] The tribunal should pass appropriate orders allowing or refusing discovery as discovery does not only relate to the specific documents mentioned in the application, but has to be made, if ordered by the tribunal, by filing an appropriate affidavit under O 11, r 13 of the Code in the prescribed Form 5 in the Appendix to the Code. So far as inspection is concerned, it is for the party claiming inspection to serve an appropriate notice on the other to allow inspection and on the failure of that party to do the needful, to take appropriate proceedings, before the tribunal in accordance with law.[16]

(d) Proof of Documents

In the words of Mahajan J, the adjudication of a dispute has to be in accordance with evidence legally adduced.[17]By s 11(3), and r 24 of the Industrial Disputes (Central) Rules 1957, certain provisions of the Code of Civil Procedure have been made applicable to the authorities mentioned therein. Those authorities have been given the same powers as are vested in civil courts for the purposes specified. There is considerable judicial opinion which holds that to the extent to which the provisions of the Code of Civil Procedure have been made applicable to the authorities in s 11, they are courts within the meaning of s 3 of the Indian Evidence Act and are therefore bound by its provisions.[18] Anyhow, it is now well settled that a party to an industrial dispute has to prove by satisfactory evidence, the particular claim he wishes to make.[19] But in *Sindhu Resettlement Corpn*, Bhargava J observed that if no objection is taken to the admissibility or about the genuineness of a document which has been filed but has not been proved by oral evidence, such document in certain circumstances may be relied upon by the tribunal because in proceedings before the industrial tribunal, strict proof of documents in accordance with the provisions of theEvidence Act is not required.[20] But this proposition seems to be confined to the facts of that case alone and cannot be said to be of uniform or universal application in industrial adjudication. In *Bareilly Electricity Supply*, Jaganmohan Reddy J observed:

> Even if technicalities of the Evidence Act are not strictly applicable except in so far as section 11 of the Industrial Disputes Act 1947 and the rules prescribed thereunder permit it, it is inconceivable that the tribunal can act on what is not evidence such as hearsay, nor can it justify the tribunal in passing its award on copies of documents when the originals which are in existence are not produced and proved by one of the methods either by affidavit or by witnesses who had executed them if they are alive and can be produced. Again if a party wants an inspection, it is incumbent on the tribunal to give inspection, in so far as that is relevant to the inquiry. The applicability of these principles is well-recognised and admits of no doubt.[21]

In other words, documents such as profit and loss account statements or balance sheets etc which are produced in the course of adjudication proceedings, must be proved like any other documents filed in a court of law,[22]though such documents may not be strictly admissible in evidence under the Evidence Act.[23] In *Metro Goldwyn Mayer*, the workmen relied upon a copy of the agreement in respect of wage scales said to have been entered into by their employer with the workmen at one of their branches. The employer, instead of producing the original agreement which was in its possession, attacked the accuracy of the wage scales mentioned in the copy produced before the labour court. The labour court accepted the copy of the agreement produced by the workmen as the basis of its award. In the writ petition against the award of the labour court, the High Court held that the award was not based on inadmissible or unproved evidence, as the employer did not do anything to prove the correct scales in force at the particular branch and it was open to the labour court to accept the evidence led in by the workmen.[24] If the signatures of a workman on a document is not disputed, it is not necessary to examine the person who signed it to prove the document.[25] It is well settled that where a party fails to produce a document required to be produced, it is open to the tribunal to draw an adverse inference against the party failing to produce the document. However, adverse inference can only be drawn where the documents in possession of a party is not produced before the tribunal. But such inference cannot be drawn if the document does not exist or is not in the possession of the party from whom it has been called.[26]

Profit and Loss Account and Balance Sheets

In *Associated Cement Companies*, for the purpose of working out the bonus formula, the Supreme Court stated as a general rule that the amount of 'gross profits' ascertained in the profit and loss account of the employer, is to be accepted without submitting such statement to a close scrutiny. Nevertheless, if it appears that entries have been made on the debit side deliberately and *mala fid* e to reduce the amount of 'gross profit', it would be open to the tribunal to examine the question and if it is satisfied that the impugned entries have been made *mala fide*, it may disallow them. Likewise, the tribunal may also exclude any items either on the credit or the debit side, if such items are wholly extraneous or entirely unrelated to the trading profits of the year. It was, however, pointed out, that it is only in glaring cases where the impugned item may be patently and obviously extraneous, that a plea for its exclusion should be entertained and the tribunal must resist the temptation of dissecting the balance sheet too minutely or of attempting to reconstruct it in any manner.[27] On the same day, the same Bench in *Indian Hume Pipe*, accepted the balance sheet of the company as good evidence to prove that certain amounts out of the returns were actually used as working capital. Since, these two cases did not talk of the requirement to prove the correctness of the items included in the profit and loss account statement or the balance sheet, it gave scope for the view that these documents could be relied upon for providing that the amounts of expenses stated therein were correct and were available for using as working capital and that it showed that they were in fact so used. But from the report of the case, it appears that, as a matter of fact, it was conceded that the reserves in fact were used as working capital. Presumably to meet the contention that the balance sheet had not been proved, Bhagwati J observed, '*moreover no objection was urged in this behalf, nor was any finding to the contrary recorded by the tribunal*'.[28] The ratio of *Indian Hume Pipe* was explained in *Khandesh Spg & Wvg Mills*, in which Subba Rao J pointed out that the observations of Bhagwati J in that case were not intended to lay down the law that the balance sheet by itself was good evidence to prove as a fact the factual utilisation of reserves as working capital and the court would not have accepted the items in the balance sheet as proof of user if it was not satisfied that no objection was taken in that behalf In support of this view, it was stated that since the accounts of the company were prepared by the management and so also, the profit and loss account statements and balance sheets, there would be tendency on the part of the employers to deflate the figures of rehabilitation etc and the labour has no concern with it and when so much depends upon a particular item in the balance sheet, the principles of equity and justice demand that the industrial adjudicator should insist upon a clear proof of the same and also give a real and adequate opportunity to the labour to canvass the correctness of the particulars furnished by the employer.[29] Thus in this case, the court clearly envisaged the requirement of the proof of the items included by the employer in the balance sheet and the right of the labour to test the veracity of the evidence adduced by the employer to prove such items.

The question as regards the sufficiency of the balance sheet itself to prove the fact of utilisation of any reserves as working capital was also considered in *Trichinopoly Mills*, where the court held that the balance sheet does not by itself prove any such fact and that the law requires such an important fact as the utilisation of a portion of the reserves as working capital has to be proved by the employer by evidence given on affidavit or otherwise and after giving an opportunity to the workmen to contest the correctness of such evidence by cross-examination.[30] The necessity of proof of the correctness of the statements in the balance sheet was again precisely pointed out in *Petlad Turkey*, where it was observed that it could not be presumed that the statements made in a balance sheet are always correct and that the burden is on the party who asserts the statements to be correct, to prove the same by relevant and acceptable evidence.[31] In *Metal Box*, the court said that if an employer claims the deduction of any items, say, depreciation, the burden of proof, that depreciation claimed by him is the correct amount in accordance with the provisions of Income-tax Act, is on the employer and that burden the employer must discharge once his figures are challenged.[32]

In *Peirce Leslie*, the balance sheet of the company for the year in question allowed some amount as provisions for taxation liability and other amount as provisions for proposed dividend on deferred ordinary shares. No evidence was let in by the company to show that these amounts were used as working capital in the year in question. The company did not contend that whatever appeared on the assets side in the balance sheet over and above the 'paid-up' capital came out of the reserves, apparently on the ground that some of the items shown as 'current liabilities and provisions' in the balance sheet would have to be met during the year out of the portion of current assets which portion would accordingly not be available for use as working capital. If that was the case as regards the other items under 'current liabilities and provisions', the same must be the case as regards the current liability under 'liability for taxation other than income-tax' and under 'proposed dividend on deferred ordinary shares'. In the absence of any evidence to the contrary, the court held that these 'current liabilities' had also to be met out of the current assets during the year in question as the company failed to prove that the amounts were used as working capital.[33] In *Cannanore Spg and Wvg Mills*, the requirement of proving the statements in the balance sheet was highlighted by pointing out that before an analysis of the statement in the balance sheet is undertaken, it is necessary to establish that the statements in it are, in fact, correct and in the absence of any evidence to show that any particular entry in the balance sheet is true, it cannot be presumed that the statements is correct.[34] In *Anil Starch*, the requirement of proper opportunity being given to the labour, to test the correctness of the evidence given on affidavit on behalf of the management in regard to the user of the reserves as working capital was emphasised.[35] These requirements were taken as settled law in *Bengal KM Union*, in which the court held:

> It is now well-settled that the balance sheet cannot be taken as proof of a claim as to what portion of the reserves has actually been used as working capital and that utilisation of a portion of reserves as working capital has to be proved by the employer by evidence on affidavit or otherwise, after opportunity to the workmen to contest the correctness of such evidence by cross-examination.[36]

In *UP Electric Supply*, the witness, deposing on the expenses incurred in connection with fuel, gave detailed break-up of the expense in his examination-in-chief and repeated in his cross-examination. In the cross-examination no question was posed to him as to how the figure of the expense was arrived at. The court held that though the tribunal was not bound to accept a particular figure appearing in the audited balance sheet, when a witness had deposed about the break-up thereof and was subjected to cross-examination, his evidence should not be discarded. On this view of the matter, it was held that the tribunal had erred in not accepting the balance-sheet figure and testified by the witness.[37] In *Bareilly Electricity Supply*, the court observed:

> When a document is produced in a court or a tribunal the questions that naturally arise are: is it a genuine document, what are its contents and are the statements contained therein true. When the appellant produced the balance sheet and Profit and Loss Account of the company, it does not by its mere production amount to a proof of it or of the truth of the entries therein. If these entries are challenged, the appellant must prove each of such entries by producing the books and speaking from the entries made therein. If a letter or other document is produced to establish some fact which is relevant to the inquiry, the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accord with principles of natural justice as also according to the procedure under Order 19, Civil Procedure Code and the Evidence Act both of which incorporate these general principles. Even if all technicalities of the Evidence Act are not strictly applicable except insofar as section 11 of the Industrial Disputes Act 1947 and the rules prescribed therein permit it, it is inconceivable that the tribunal can act on what is not evidence such as hearsay, nor can it justify the tribunal in basing its award on copies of documents when the originals which are in existence are not produced and proved by one of the methods either by affidavit or by witnesses who have executed them, if they are alive and can be produced.[38]

Again if a party wants an inspection, it is incumbent on the tribunal to give inspection, insofar as that is relevant to the inquiry. The applicability of these principles is well recognised and admit of no doubt. But a rebuttable presumption in favour of the duly audited profit and loss account statements and the balance sheets of the companies has been enacted by s 23 of the Payment of Bonus Act.[39]

Auditor's Certificates

The presumption raised by s 23 of the Payment of Bonus Act 1965 in favour of the duly audited profit and loss account and the balance sheets of the companies, will not apply to the auditor's certificate. As the Act does not provide for any such presumption, the auditor's certificates, therefore, have to be proved before the tribunal by adducing proper and sufficient legal evidence. In *Metal Box*, the Supreme Court said the burden of proof that depreciation claimed by it was the correct amount in accordance with the Income Tax Act, was on the employer and that burden he must discharge, once the figures were challenged and there was no presumption in favour of auditor's report as is available in case of audited balance sheets and profit and loss account under s 23 of the Payment of Bonus Act. Shelat J stated the principle in the following words:

> Mere production of auditor's certificate, especially when it is not admitted by labour, not by the auditor but by the employees of the company who admitted not to have been concerned with its preparation or the calculations on which it was based, would not be conclusive. We do not say that in such a case the tribunal should insist upon proof of depreciation on each and every item of the assets. It should, however, insist on some reasonable proof of the correctness of the figure of depreciation claimed by the employer either by examining the auditors who calculated and certified it or by some other proper proof Depreciation in some cases would be of a large amount affecting materially the available surplus. Fairness, therefore, requires that an opportunity must be given to the employees to verify such figures by cross-examination of the employer or his witnesses who have calculated depreciation amount***. The proper course for the tribunal in such a case was to insist upon the company adducing legal evidence in support of its claim instead of taking the figure of depreciation from the profit and loss account which was not worked out in accordance with the Income Tax Act but under section 205 of the Companies Act, and saying that the company had failed to prove that it was a mistaken figure.[40]

(iii) Commissions

This clause vests the tribunal with the powers of the civil court under the Code of Civil Procedure to issue commission for examination of witnesses. Order 26, rr 1 to 8 deal with the subject of commissions to examine the witnesses. The power to issue a commission also includes to re-issue the commission.[41]

(iv) 'Matters Prescribed'

The power with which the authorities mentioned in sub-s (3) have specifically been vested are enumerated in cll (a) to (c) of this sub-section. But with respect to other matters, powers have to be prescribed by the Central or the state government as the case may be.[42] With a view to enable the tribunal to function with a certain amount of agility, the legislature has not made its procedure hidebound. Only limited and specific provisions of the Code of Civil Procedure have been made applicable to the procedure of the tribunals in the investigation and adjudication of industrial disputes. However, with a view to overcome some unforeseen eventualities, the Central Government and the state governments have been empowered to further apply certain provisions of the Code of Civil Procedure. Rule 24 of the Industrial Disputes (Central) Rules 1957 prescribes the following further matters with respect to which the provisions of the Code of Civil Procedure to the investigation and adjudication of industrial disputes by the authorities mentioned in sub-s (3) will apply, namely:

(i) Discovery and inspection: this power has in fact been given by cl (b) of sub-s (3) as well.

(ii) Granting adjournments.[43]

(iii) Reception of evidence taken on affidavit.[44]

These are the powers under the Code of Civil Procedure which have been invested in the authorities by the Central Rules. The various state governments have made their own rules in this behalf applying certain provisions of the Code of Civil Procedure with respect to the procedure of the authorities mentioned in the sub-section. But in the absence of rules, other provisions of the Code of Civil Procedure are not applicable to the proceedings before these authorities,[45] though in certain cases the general principles of law which have been given legislative form by enacting them in the Code of Civil Procedure, would always apply to the proceedings before the tribunals; for instance the principles relating to pleadings, issues, evidence and hearing etc. The power to bring on record the legal representatives of the deceased workman in a pending industrial dispute is not one of the powers conferred or prescribed under s 11 (3) of the Act.[46]

(v) Tribunal - Not a Court

An industrial tribunal is not a 'court' within the meaning of s 195(1)(b) of the Code of Criminal Procedure 1973, because the award given by the tribunal is not final and binding in nature. Even though sub-s (3) provides that for the purpose of s 193, the proceedings before the tribunal will be considered to be judicial, yet it does not provide that an industrial tribunal will be considered to be a court within the meaning of s 195(1)(b) of the Code of Criminal Procedure. It is, therefore, not necessary, for the tribunal to file a complaint for an offence under s 193 of the Indian Penal Code. The tribunal, therefore cannot take cognisance of a complaint under s 476 of the Code of Criminal Procedure for lodging a complaint.[47]

SUB-SECTION (4): POWERS OF CONCILIATION OFFICER TO ENFORCE ATTENDANCE AND INSPECT DOCUMENTS

Previously a conciliation officer was empowered only to call for and inspect any document which he has grounds for considering to be relevant to the industrial dispute under conciliation, or for other purposes specified in this sub-section. Now, by the Amending Act 46 of 1982,[48] a conciliation officer has been empowered to 'enforce the attendance of any person for the purpose of examination of such person' in addition to the power to inspect any document. For this limited purpose, he is vested with the same powers as are vested in a civil court under the Code of Civil Procedure 1908. But the powers of the conciliation officers even after the amendment are not as wide as those of the authorities mentioned in sub-s (3). In *Ganesan,* the facts were that the special deputy commissioner of labour passed an order to the effect that the dismissal orders passed by the employer against the workmen after conducting enquiry shall be kept in abeyance and that a decision shall be taken only after discussions with him. Single judge of the Madras High Court quashed the said order of the deputy commissioner of labour and held that such an order was not sustainable in law and that there was no provision in the Standing Orders requiring the management to place his decision before the Special Deputy Commissioner of labour. The learned judge further held that when once it had been agreed before the conciliation officer that an inquiry would be conducted, the conciliation officer had no power to impose any restriction on the management from proceeding with the findings of such inquiry and imposing punishment depending upon the seriousness of the offence.[49]

SUB-SECTION (5): ASSESSORS

Sub-section (5) empowers the adjudicatory authorities referred to therein, to appoint assessors to advise them in the proceedings before them. It clearly vests discretion in these tribunals to appoint an assessor or assessors to advise them in such proceedings, which has been made clear beyond doubt by the use of the words 'may, if it so thinks fit'. But every case must depend on its own facts.[50] It is, therefore, open to an adjudicator to consult an expert on any technical questions arising in the case which presents special difficulty relating to engineering or accountancy etc. But the adjudicator who invokes expert assistance must not delegate his own functions or allow his advisor to decide the case. It is the decision of the adjudicator, and not that of the expert, for which the dispute has been referred to adjudication. The expert can only offer an opinion upon the points upon which he is consulted, it is the adjudicator's duty to apply the advice he has received, and to exercise his own judgment, making such use as he may choose of the expert's opinion in deciding the dispute. The function of the 'assessors' is to assist the tribunal, and to be able to perform their functions properly, they must have before them the entire evidence. Hence, unless they have an opportunity to hear and consider the entire evidence which is tendered in a case, they cannot give proper opinion in the matter.[51]

SUB-SECTION (6): PUBLIC SERVANTS

By virtue of this sub-section, all the authorities enumerated therein shall be deemed to be 'public servants' within the meaning of s 21 of the Indian Penal Code.

SUB-SECTION (7): COSTS OF ANY PROCEEDINGS—DISCRETION OF TRIBUNALS, ETC

On a plain reading of this sub-section, it is manifest that:

(i) the expression 'costs of any proceeding' means the costs of the entire proceeding as determined on its conclusion and not costs in a pending proceeding, nor costs to be incurred in future by a party; and

(ii) the expression 'costs incidental to any proceeding' similarly means costs of interlocutory applications, etc—such costs as have been determined therein, at the conclusion of the hearing.

Neither of the two expressions has any reference to costs payable in advance or to be incurred in future by a party. Naturally, such costs cannot refer to halting and travelling expenses to be incurred by a party while attending the court on his own behalf. The provisions of this sub-section are in terms similar to those of s 35 of the Code of Civil Procedure except for the concluding portion of the sub-section which relates to the recovery of costs as arrears of land revenue. The provisions analogous to those contained in sub-ss (2) and (3) of s 35 of the Code of Civil Procedure too do not find place in s 11(7) of the Act. There is no power in the tribunal to direct payment of costs of a party in advance by another party, irrespective of the final result of a proceeding, nor can the principles of natural justice be invoked in aid of an order which penalises one party to a dispute by making it pay for the costs of the other party in advance, irrespective of the result of the proceeding. In the words of SK Das J, such an order is neither natural nor has any element of justice in it.[52]Tribunals have been vested with the discretion to award costs. However, this discretion is subject to any rules made under the Act. The discretion again is to be exercised according to rules of reason and justice, not according to private opinion; according to law and not humour; it to be not arbitrary, vague, and fanciful, but legal and regular.[53] Orders for costs can only be made by tribunals on well-recognised principles and not on any abstract ideas as to what, irrespective of such principles, should be considered desirable in a particular case.[54] A tribunal has no power to pass orders which are not consistent with the recognised principles governing such matters, under s 11 (7) of the Act, which specifically deals with the subject.[55]

On the same principle, the tribunal would have no power under s 11 (7) to direct an employer to treat workmen as on duty when they come to attend a hearing before it, which tantamounts to, in effect, directing the management to pay in advance the costs of a proceeding.[56] In *Bank of India*, the facts were in an application by the union of employees, the tribunal passed an order directing the management to treat the appearance of office-bearers of the union and the workmen concerned in pending reference as on 'duty leave'. A single judge of the Bombay High Court quashed the order of the tribunal, and held that there was no law to support such an order and that even otherwise, granting such an application could have very serious consequences, firstly, because such an order would be without any legal authority and, secondly, because it could give rise to indiscipline and financial implications on the employer.[57] Ordinarily, in industrial adjudication, costs do not follow the event. It is unwise to give costs in labour disputes, unless the conduct of either party has called for it. But where the conduct of party is reprehensible, such as harassing the opposite party or keeping the opposite party out of their legitimate rights, tribunals would be justified in awarding costs.[58] The provisions of s 11(7) are so worded that the authority concerned shall have the power to determine by whom and to what extent and subject to what conditions, if any, the costs awarded shall be payable. The power of awarding costs is not limited to parties to the disputes, like s 35A of the Code of Civil Procedure. Though discretion is conferred on the tribunal to make even a stranger to a proceeding to pay costs, in appropriate cases, such discretion has to be exercised in accordance with well-recognised

principles by a court in making an order for costs against or in favour of a person not a party to a proceeding before it. An order of a tribunal in disregard of such well-recognised principles in awarding costs against or in favour of a person not a party to a proceeding before it, shall be wrong exercise of its discretion and as such would be quashable.[59]

SUB-SECTION (8): ADJUDICATORS - CIVIL COURTS FOR CERTAIN PURPOSES

By virtue of this sub-section, the authorities enumerated therein shall be deemed to be a civil court for the purpose of s s 345, 346 and 348 of the Code of Criminal Procedure 1973.

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* Chapter IV is continued in Volume II of this book, which begins with Section 11A.

1 Subs by Act 36 of 1956, s 9, for sub-s (1) (wef 10-3-1957).

2 Subs by Act 36 of 1956, s 9, for "Court or Tribunal" (wef 10-3-1957).

3 Subs by Act 36 of 1956, s 9, for "and Tribunal" (wef 10-3-1957).

4 Subs by Act 36 of 1956, s 9, for "or Tribunal" (wef 10-3-1957).

5 Subs by Act 46 of 1982, s 9, for "may call for" (wef 21-8-1984).

6 Ins by Act 36 of 1956, s 9 (wef 10-3-1957).

7 Subs by Act 46 of 1982, s 9, for "in respect of compelling the production of documents" (wef 21-8-1984).

8 Subs by Act 36 of 1956, s 9, for sub-ss (5), (6) and (7) (wef 10-3-1957).

9 Ins by Act 48 of 1950, s 34 and Sch.

10 Subs by Act 36 of 1956, s 9, for "Tribunal" (wef 10-3-1957).

11 Subs by Act 46 of 1982, s 9, for " Sections 480, 482 and 484 of the CrPC, 1898 (5 of 1898)" (wef 21-8-1984).

12 Ins by Act 24 of 2010, s 7 (wef 15-9-2010 *vide* S.O. 2278 (E), dated 15-9-2010).

13 *Grindlays Bank Ltd v CGIT* (1978) 2 LLJ 371 (Cal), per Sabyasachi Mukharji J.

14 *Shambu Nath & Sons Ltd v Addl IT* (1957) 2 LLJ 287 (Punj), per Bishan Narayan J.

15 *Mgmt of Dhenkanal Municipality v IT* (1974) 1 LLJ 44, 49 (Ori) (DB), per Misra CJ.

16 *Metal Fabricators (India) v BD Gupta* 1975 Lab IC 1707, 1710 (Del) (DB), per Deshpande J.

17 *ITC Ltd v PO, LC* 1985 Lab IC 637, 646 (Kant), per Rama Jois J.

18 *Metal Fabricators (India) v BD Gupta* 1975 Lab IC 1707, 1710 (Del) (DB), per Deshpande J.

19 *Harchura Tea Estate v Labour Appellate Tribunal* (1961) 1 LLJ 174, 177 (Cal), per Mukharji J.

20 *Bharat Bank Ltd v Employees of Bharat Bank Ltd* (1950) 1 LLJ 921 [LNIND 1950 SC 4], 930 (SC), per Mahajan J.

21 *Cooper v Wilson* [1937] 2 KB 309, per Grear LJ, cited with approval in ibid, p 930, per Mahajan J.

22 *Dalmia Dadri Cement Ltd v Workmen* 1970 Lab IC 350 [LNIND 1960 SC 82] (P&H), per Narula J.

23 *Tin Printers Pvt Ltd v IT* (1967) 2 LLJ 677 [LNIND 1966 PNH 89], 680-81 (P&H), per SK Kapur J.

24 *Shankar Chakravarti v Britannia Biscuit Co Ltd* (1979) 2 LLJ 194 [LNIND 1979 SC 276], 206-08 (SC), per Desai J.

25 *GSeshagiri Rao v PO, LC* 1979 Lab IC 485, 486 (AP) (DB), per Chowdary J.

26 *Rameshwar Prasad v State of Bihar* (1973) 2 LLJ 15 (Pat) (DB), per Untwalia J.

27 *Bharat Bank Ltd v Employees* (1950) 1 LLJ 921 [LNIND 1950 SC 4] (SC), per Mukherjea J.

28 *Bengal Box Mfg Co v Second IT* (1963) 2 LLJ 475 (Cal), per BN Banerjee J.

29 *JK Iron & Steel Co Ltd v I&S Mazdoor Union* (1956) 1 LLJ 227 [LNIND 1955 SC 119], 231 (SC) : AIR 1956 SC 231 [LNIND 1955 SC 119]: [1955] 2 SCR 1315 [LNIND 1955 SC 119], per Bose J.

30 *Hindustan Development Corpn Ltd v LC* (1993) 2 LLJ 356 [LNIND 1992 CAL 324]-57 (Cal), per PK Mukherjee J.

31 *Mgmt of Pheros & Co Pvt Ltd v LC* 1971 Lab IC 600, 603 (Assam & Nagaland) (DB), per Goswami CJ.

32 *Engineering Mazdoor Sabha v DM Anry* (1969) 2 LLJ 296, 299 (Bom) (DB), per Madon J.

33 *Hochtief Gammon v IT* (1964) 2 LLJ 460 [LNIND 1964 SC 118], 462-66 (SC), per Gajendragadkar CJI.

34 *United Bank of India v PO, CGIT-cum-LC* 1988 Lab IC 108 (Del), per Kirpal J.

35 *Shankar Chakravorti v Britannia Biscuit Co Ltd* 1979 Lab IC 1192 [LNIND 1979 SC 276], 1205 (SC), per Desai J.

36 *Mgmt of Beverage & Food Products Pvt Ltd v PO, IT* 1980 Lab IC 894, 895 (Gau), per Lahiri J.

37 *Shankar Chakravorti v Britannia Biscuit Co Ltd* 1979 Lab IC 1192 [LNIND 1979 SC 276], 1204-05 (SC), per Desai J.

38 *Raymond Woollen Mills Ltd v CS Sonawane* 1993 Lab IC 1494, 1496 (Bom), per Kantharia J.

39 *Bombay Mothers and Children's Society v General Labour Union* 1991 Lab IC 1653, 1656 (Bom), per Daud J.

40 *Tin Printers Pvt Ltd v IT* (1967) 2 LLJ 677 [LNIND 1966 PNH 89], 680-81 (Punj), per Kapur J.

41 *Shankar Chakravorti v Britannia Biscuit Co Ltd* 1979 Lab IC 1192 [LNIND 1979 SC 276], 1205 (SC), per Desai J.

42 *Lachman Das v Indian Express Newspapers (B) Pvt Ltd* [1977] IC 823, 825 (Del) (DB), per Deshpande J.

43 *RG Makwana v Gujarat SRTC* (1987) 1 LLJ 172, 174 (Guj) (DB), per Gokulakrishnan CJ.

44 *Jai Jai RM Lal v NBM Supply* AIR 1969 (SC) 1267 [LNIND 1969 SC 129], 1269-70 : (1969) 1 SCC 869 [LNIND 1969 SC 129] : [1970] 1 SCR 22 [LNIND 1969 SC 129], per Shah J.

45 *Mgmt of Borpukhurie Tea Estate v IT* (1978) 1 LLJ 558 [LNIND 1978 SC 85], 562 (SC), per Jaswant Singh J.

46 *Patna Electric Supply Co Ltd v Bali Rai* (1958) 1 LLJ 257 [LNIND 1957 SC 118], 259 (SC) : AIR 1958 SC 204 [LNIND 1957 SC 118]: [1958] 1 SCR 871 [LNIND 1957 SC 118], per Bhagwati J.

47 *Royal Nepal Airlines CE Union v State of WB* 1977 Lab IC (NOC) 83, (Cal), per DK Sen J.

48 *Lipton India Ltd v IT* (1992) 2 LLJ 427 [LNIND 1991 DEL 315]-28 (Del) (DB) : 45 (1991) DLT 452 : [1991 (63) FLR 347, per Wad J.

49 *Shankar Chakravarti v Britannia Biscuit Co* (1979) 2 LLJ 194 [LNIND 1979 SC 276], 207 (SC) : AIR 1979 SC 1652 [LNIND 1979 SC 276]: (1979) 3 SCC 371 [LNIND 1979 SC 276], per Desai J.

50 *Workmen of Straw Board Mfg Co Ltd v Mgmt* (1974) 1 LLJ 499 [LNIND 1974 SC 114], 510 (SC), per Goswami J.

51 *Workmen of Hindustan Lever Ltd v Mgmt* 1984 Lab IC 276 [LNIND 1984 SC 6], 289 (SC), per Desai J.

52 *Mgmt of Chopra Motors Pvt Ltd v PN Thukral* 1973 Lab IC 1025 -28 (P&H), per Suri J.

53 *Kaleswarar Mills Ltd v Sakthivelu* 12 FJR 279 (Mad) (DB).

54 *Dalmia Dadri Cement Ltd v Workmen* [1970] IC 350 (P&H), per Narula J.

55 *Cooper Engineering Ltd v PP Mundhe* (1975) 2 LLJ 379 [LNIND 1975 SC 284], 385-86 (SC), per Goswami J.

56 *T Chowdappa v PO, LC* 1978 Lab IC 1452 (Kant), per Rama Jois J.

57 *Prabhakar Shamrao Marathe v Maharashtra State Electricity Board* 1975 Lab IC 697, 702 (Bom) (DB), per Desai J.

58 *'Presumption and Burden'* [1945]; 1961 LQR 397.

59 *Hill v Baxter* [1958] 1 QB 277, 284, per Delvin J.

60 Cowen and Carter, *Essays on the Law of Evidence*, 1956, p 242.

61 *Pick Up v Tames English Co*, 3 QBD 594, 600.

62 *Shankar Chakravarty v Brittania Biscuit Co Ltd* (1979) 2 LLJ 194 [LNIND 1979 SC 276], 207 (SC), : AIR 1979 SC 1652 [LNIND 1979 SC 276]: (1979) 3 SCC 371 [LNIND 1979 SC 276], per Desai J.

63 *British India Corpn Ltd v PO, IT* 1989 Lab IC 716, 719 (All), per RR Misra J.

64 *Damodar Valley Corpn v Workmen* (1973) 2 LLJ 136 [LNIND 1973 SC 134] (SC) : AIR 1973 SC 2292 [LNIND 1973 SC 134]: 1973 Lab IC 1035 [LNIND 1973 SC 134], per Vaidialingam J.

65 *Ramendra Narayan Deb v Eighth IT* 1975 Lab IC 94, 98 (Cal) (DB), per SK Datta J.

66 *ECP Rathinaswami Nadar v LC* (1964) 2 LLJ 86 [LNIND 1963 MAD 280] (Mad), per Srinivasan J.

67 *Kodaikanal Motor Union v A Nallathambi* (1969) 2 LLJ 141 [LNIND 1968 MAD 125], 144 (Mad) : AIR 1969 Mad 374 [LNIND 1968 MAD 125]: 1969 (18) FLR 151, per Ramakrishnan J.

68 *Dominent Off-set (P) Ltd v IT* 1998 (1) LLN 659 (P&H), per Malte, J.

69 *Delta Engineering Co (P) Ltd v IT* 1998 (2) LLN 493 (All), per Jain J.

70 *Mackinnon Makenzie & Co Ltd v WN Pereira* 1999 (3) LLN 521 (Bom), per Pandya J.

71 *Mitra AB v PO, III IT* [1999 II LLJ 1243(Cal)], per Samaresh Banerjee J.

72 *Northcote Nursing Home (P) Ltd v (Dr) ZH Rahilla* 2001 (3) LLN 550 (Bom), per Kochar J.

73 *Gurbachan Singh v Jagyasu Re-Rolling Mills* 2001 (4) LLN 1157 (P&H), per Sudhalkar J.

74 *Range Forest Officer v ST Hadimani* 2002 (2) LLN 391 (SC).

75 *Mgmt of Hindustan Motors Ltd v Lakshmaiah* 2002 (2) LLN 72 S (Mad) (DB), per Kalifulla J.

76 *Essen Deinki v Rajiv Kumar* 2002 (4) LLN 1176 (SC), per Banerjee J.

77 *KV Kumaran v LC* 1982 Lab IC 1241, 1243 (Ker), per Sukumaran J.

78 *Har Prasad Engg Workshop v State of Uttar Pradesh* (1964) 1 LLJ 607 (All), per GC Mathur J.

79 *Dawood Khan v LC* (1969) 2 LLJ 611 (AP), per Chinnappa Reddi J.

80 *FACT Employees' Assn, Cochin v FACT Ltd* (1977) 1 LLJ 182 [LNIND 1996 MAD 736], 185 (Ker), per Thommen J.

81 *Karnataka SRTC v S Veerabhadrappa* 1988 Lab IC 896 -97 (Kant), per Chandrakantharaj Urs J.

82 *Uttar Pradesh RTC v State of UP* 1990 Lab IC 1444, 1446 (All), per RA Sharma J.

83 *Jagran Prakashan Pvt Ltd, Kanpur v IT* 1992 Lab IC 513, 516 (All), per Trivedi J.

84 *FACT Employees' Assn, Cochin v FACT Ltd* (1977) 1 LLJ 182 [LNIND 1996 MAD 736], 185 (Ker), per Thommen J.

85 *Tamil Nadu Housing Board v II Addl LC* (1997) 1 LLJ 923 [LNIND 1996 MAD 736]-24 (Mad) (DB), per Swami J.

86 *KV Kumaran v LC* 1982 Lab IC 1241, 1243 (Ker), per Sukumaran J.

87 *Sr Divl Mechanical Engineer, Northern Rly, v PO, CGLT* 1992 Lab IC 1586, 1588 (All), per Sahay J.

88 *Grindlays Bank Ltd v CGIT* 1981 Lab IC 155 [LNIND 1980 SC 484], 158 (SC) per AP Sen J.

89 *ND Patel & Co v MK Parmar* 1984 Lab IC 1245 [LNIND 1983 GUJ 243] (Guj) (DB), per Ravani J.

90 *Depot Mgr, APSRTC v Govt of AP* (1991) 1 LLJ 235, 237 (AP) : 1990 (2) APLJ 360, per Radha Krishna Rao J.

91 *Eagle Wood Agencies Pvt Ltd v State of WB* (1991) 1 LLJ 85 (Cal) : 1990 (60) FLR 397, per Kalyanmoy Ganguli J.

92 *Re Jitendra Nath Banerjee* (1966) 1 LLJ 220, 223 (Cal), per Banerjee J.

93 *Grindlays Bank Ltd v CGIT* 1981 Lab IC 155 [LNIND 1980 SC 484], 157-58 (SC), per AP Sen J.

94 *Satnam Verma v Union of India* 1985 Lab IC 738, 740 (SC), per Desai J.

95 *CJThomas v LC* 1991 Lab IC 2481, 2485 (Ker), per KA Nayar J.

96 *Nav Bharat & MPC Group of Newspapers v KS Shrivastava* (1990) 1 LLJ 339, 398 (MP), per TN Singh J.

1 *State of Rajasthan v Bhanwar Lal* 1982 Lab IC 75, 78 (Raj), per Lodha J.

2 *Maharashtra General Kamgar Union v Calico Chemicals* 1983 Lab IC 1456, 1458 (Bom) per Dharmadhikari J.

3 *Vivek Salvi v Second IT* 1981 Lab IC (NOC) 176 (Cal), per GN Ray J.

4 *Indian Metals & FAE Union v State of Orissa* (1992) 1 LLJ 581 -82 (Ori) (DB).

5 *CMD, Tamil Nadu Minerals Ltd v PO, LC* 2000 (3) LLN 1025 (Mad), per Sathasivam J.

6 *Virendra Bhandari v Rajasthan SRTC* 2002 (3) LLN 758 (SC).

7 *R Sarojini v B Laxmana Rao* (1969) 1 LLJ 9 (AP), per Obul Reddi J.

8 *SK Burman (Dr) Dabur Pvt Ltd v Workmen* (1967) 2 LLJ 836 [LNIND 1967 MAD 199] (SC), per Ghargava J.

9 *Pradip Lamp Works v Pradip Lamp Workers Karamchari Sangh* (1971) 1 LLJ 538, per Dim J.

10 *Re Enoch and Zaretz Ky Book & Co* [1910] 1 KB 327.

11 *GC Bezbarua v State of Assam* AIR 1954 Ass 161 (DB), per Sarjoo Prasad CJ.

12 *Bordubi Tea Estate v Workmen* (1954) 2 LLJ 46 (LAT).

13 *Pradip Lamp Works v Prdip Lamp Workers, Karmachari Sangh* CA No 482 of 1967, (SC), per Dua J.

14 *Elite Engineering and General Works v LC* 1969 Lab IC 58, 60-61 (P&H)), per Pandit J.

15 *Technological Institute of Textiles v Workmen* (1972) 1 LLJ 654 [LNIND 1972 SC 141] (SC) : AIR 1972 SC 1933 [LNIND 1972 SC 141]: (1972) 4 SCC 26 [LNIND 1972 SC 141], per Vaidialingam J.

16 *Hindustan Aluminium Corpn Ltd v Murari Singh* 1978 Lab IC (NOC) 96 (All) (DB).

17 *Rallis India Ltd v State of West Bengal* (1983) 2 LLJ 293, 297 (Cal) (DB), per Amitabha Dutta J.

18 *SRamaiah Mudaliar Bros v PO, IT* (1992) 1 LLJ 9, 13 (Mad) (DB), per Srinivasan J.

19 *Electro-Mechanical Industries Ltd v IT* (1950) 1 LLJ 1133 (Mad) (DB), per Rajarnannar CJ.

20 *Raghu Singh v Burrakur Coal Co Ltd* (1967) 1 LLJ 483; 489 (Cal) (DB), per Bose CJ.

21 *Mgmt of WIMCO Ltd v IT* (1958) 2 LLJ 315 [LNIND 1958 MAD 23], 320 (Mad) (DB) : AIR 1958 Mad 398 [LNIND 1958 MAD 23]: (1958) ILR Mad 672, per Rajagopalan J.

22 *Samnuggur Jute Factory Co Ltd v Workmen* 1982 Lab IC 1354 -55 (Cal) (DB), per Banerjee J.

23 *Guest, Keen, Williams Pvt Ltd v PJ Sterling* (1959) 2 LLJ 405 [LNIND 1959 SC 127] (SC) : AIR 1959 SC 1279 [LNIND 1959 SC 127]: [1960] 1 SCR 348 [LNIND 1959 SC 127], per Gajendragadkar J.

24 *Heavy Engineering Corpn Ltd v LC* 1990 Lab IC 1057, 1061 (Pat) per SB Sinha J. .

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

[1][S. 11A. Power of Labour Courts, Tribunals and National Tribunals to give Appropriate Relief in case of Discharge or Dismissal of Workmen.(

Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct re-instatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require:

Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.]

STATEMENT OF OBJECTS AND REASONS[2]

In *Indian Iron and Steel Co*, the Supreme Court, while considering the tribunal's power to interfere with the management's decision to dismiss, discharge or terminate the services of a workman, has observed that in cases of dismissal for misconduct, the tribunal does not act as a court of appeal and substitute its own judgment for that of the management and that the tribunal will interfere only when there is want of good faith, victimisation, unfair labour practice, *etc*, on the part of the management.[3] The International Labour Organisation, in its recommendation (No 119) concerning 'termination of employment at the initiative of the employer' adopted in June, 1963, has recommended that a worker aggrieved by the termination of his employment should be entitled to appeal against the termination, among others, to a neutral body such as an arbitrator, a court, an arbitration committee or a similar body and that the neutral body concerned should be empowered to examine the reasons given in the termination of employment and the other circumstances relating to the case and to render a decision on the justification of the termination. The International Labour Organisation has further recommended that the neutral body should be empowered (if it finds that the termination of employment was unjustified) to order that the worker concerned, unless reinstated with unpaid wages should be paid adequate compensation or afforded some other relief. In accordance with these recommendations, it is considered that the tribunal's power in an adjudication proceedings relating to discharge or dismissal of a workmen should not be limited and that the tribunal should have the power, in cases wherever necessary to set aside the order of discharge or dismissal and direct reinstatement of the workmen on such terms and conditions, if any as it thinks fit or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. For this purpose, a new s 11A has beeninserted in the Industrial Disputes Act 1947 —'ID Act' in short). From this Statement of Objects and reasons, it is dear that this provision was inserted in the Act, not to limit the jurisdiction of the tribunal as evolved by the dicta of the Supreme Court, but it was inserted to confer power on the adjudicators to 'reappraise the evidence adduced in the domestic inquiry and to grant proper relief to workmen, powers which the tribunal did not possess earlier'.[4] The NCL-II observed:

> The appropriate Government may also approach the Labour Relations Commission on any individual or collective dispute in any establishment. All disputes, claims or complaints under the law on labour relations should be raised within one year of the occurrence of the cause of action. Section 11A of the Industrial Disputes Act 1947 may be retained. However, the law may be

amended to the effect that where a worker has been dismissed or removed from service after a proper and fair enquiry on charges of violence, sabotage, theft and/or assault, and if the labour court comes to the conclusion that the grave charges have been proved, then the court will not have the power to order reinstatement of the delinquent worker.[5]

Constitutional Validity of Section 11A

In *Delhi Cloth Mills*, the Rajasthan High Court has upheld the validity of s 11A. Speaking for the court, Verma CJ, held that for the purpose of granting relief under this section, there is a clear indication that relief which is considered fit in the circumstances of the case is to be given after a conclusion is reached that the discharge or dismissal was not justified. Therefore, there are sufficient guidelines for any authority discharging such functions and whenever a challenge is made to the decision of the industrial adjudicator, correctness of the decision can be decided on the touchstone of these guidelines and in case of contravention of such guidelines, the remedies by way of writ petition under Art 226, by way of appeal by special leave under Art 136 to the Supreme Court are available. Hence, it cannot be said that wide powers conferred on the industrial adjudicators by s 11A are arbitrary or violative of Art 14 of the Constitution.[6]

APPLICATION OF THE SECTION

To Pending Reference Cases

In *Firestone*, the Supreme Court held that s 11A applies only to disputes which are referred for adjudication, after this section came into force. The prior disputes are, therefore, to be dealt with in accordance with the law laid down in the earlier decisions of the Supreme Court on this subject.[7] But in cases of the disputes referred to adjudication after the section has come into force, an adjudicator is bound to apply the provisions of this section irrespective of the fact whether the workman has mentioned it in his pleadings and claimed relief thereunder or not.[8]Section 11A of the ID Act was held to be applicable to a proceeding under the UP Industrial Disputes Act 1947, even before the incorporation of s 6(2A) in 1978 therein by the state legislature.[9]

To Punishment of Discharge or Dismissal

The expressions ‘discharge’ and ‘dismissal’ have acquired definite connotations in Industrial jurisprudence. The word ‘dismiss’ as used in the common parlance is unequivocally understood to mean the termination of the services of a workmen as a measure of punishment for an act of misconduct, but the word ‘discharge’ is wider in its connotation and, in the Indian legal context, has acquired a definite meaning to mean termination of the services in terms of the contract of employment or under the standing orders by serving the prescribed notice or paying wages in lieu thereof. Thus it refers to what is generally termed as termination/discharge *simpliciter*. Therefore, when an employer terminates the services of a workman for the reason that he was a temporary employee and his services were no longer required, it is a case of ‘discharge’ simpliciter under the contract and the provisions of s 11A will not be attracted. Hence, in the course of adjudication of a dispute relating to such termination of service, the employer cannot claim the right to justify the termination of service by adducing evidence as if it was an order of dismissal for an act of misconduct committed by the workman.[10] It is only in cases of discharge or dismissal by way of punishment that this section vests the discretionary jurisdiction in the tribunal to direct reinstatement with or without any terms or conditions or to vary the punishment as the circumstances of a case may warrant. Furthermore, the section applies only to the punishment of discharge or dismissal and does not apply to other minor punishments such as warning, fine, withholding increment, demotion or suspension *etc*. Similarly, from the words employed in the opening part of s 11A, it is clear that the jurisdiction under this section is available to a labour court, tribunal and national tribunal, only when a dispute is referred to it for adjudication under s 10. This jurisdiction is not available to the aforestated tribunals while acting under s 33 or s 36A of the Act.

It is not uncommon that the employers dress the punishment of discharge in the cloak of discharge simpliciter by wording the order in innocuous language. Conversely, workmen too challenge the discharge simpliciter as a penal discharge. In such cases, the tribunal can go behind the order to see its substance rather than the form. It is well established law that the language in which the order of termination of service is couched is not conclusive. It is open to the tribunal to lift the veil to see whether the form is a mere camouflage for an order of dismissal or vice versa. If the tribunal finds that the order of discharge simpliciter, by its nature and character in reality, is a measure of punishment for misconduct, it may set aside the order for non-compliance of the procedure required to be followed in a disciplinary action.[11] Where the services of a temporary employee was terminated on the ground that he had concealed the fact of his removal from service under the former employer on the charge of corruption at the time of applying for the post but the order of the employer purported to terminate the service under the contract and no inquiry was held into the matter before termination of the service, such an order of termination had cast stigma on the service career of the employee. It was a camouflaged dismissal, which was liable to be set aside.[12]Where the order of reference was in terms: ‘whether termination of the service of the employees is

justified or legal' and the employer too, in his pleadings sets up a case of discharge simpliciter, he cannot subsequently be permitted to adduce evidence before the tribunal for the first time on the ground that it was not simple discharge, but dismissal for an act of misconduct. Where however, the workman challenges such termination on the ground that it was a mere ruse and it was in fact a case of dismissal for an act of misconduct, it would be open to the employer to plead:

(i) that it was a case of termination simpliciter and not at all a case of punishment and alternatively

(ii) that even if it was a case of punishment for an act of misconduct he should be permitted to justify the same by adducing evidence before the tribunal. [13]

In *MK Ravi*, the reference was 'whether the termination of the service of the workman was justified and proper?', but in his claim statement, the workman pleaded that the termination of his service was not discharge simpliciter but it was a clear case of wrongful dismissal. In view of this pleading, a single judge of the Kerala High Court held that the labour court was justified in treating it to be a case of punitive discharge falling within the purview of s 11A. Likewise in *Anand Cinema*, an innocuous order of 'retrenchment' was found to have been passed for an act of misconduct. the Madhya Pradesh High Court therefore held that in this situation the evidence of the employer under s 11A could not be shut out.[14] Where the services of a person appointed as a probationer were terminated during the period of probation, the labour court directed reinstatement on the ground, *inter alia*, that there was an incident of misconduct or incompetency prior to his discharge from service. A single judge of the Punjab and Haryana High Court had set aside the award on the ground that the employee was on probation, which meant on 'trial', and that the employer was not obliged to suffer an incompetent employee for the full term of probation. In appeal, the Division Bench had set aside the order of the single judge and restored the award of the labour court. Quashing the order of the Division Bench and the labour court, and restoring the order of the single judge, the Supreme Court through Hegde J (for self and Sinha J) observed:

> As noticed above in the instant case, the respondent having been appointed as a probationer and his working having been found not to the satisfaction of the employer, it was open to the management to terminate his services. Assuming that there was an incident of misconduct or incompetencey prior to his discharge from service, the same cannot be ipso facto be termed as misconduct requiring an inquiry. It may be a ground for the employer's assessment of the workman's efficiency and efficacy to retain him in service, unless, of course, the workman is able to satisfy that the management for reasons other than efficiency wanted to remove him from services by exercising its power of discharge.. .. On the facts of this case, we are satisfied that the incident referred to in the evidence of the management's witness does not give rise to a conclusion that the discharge of the respondent was colourable exercise, with a collateral intention of avoiding an inquiry. Nor does the order of discharge carry any stigma. Hence, the. .. Labour Court as well as the Appellate Bench of the High Court have erred in coming to a contra conclusion.[15]

To Arbitrators under Section 10A

The jurisdiction under this section (s 11A) by express language is vested only in 'labour court, tribunal or national tribunal'. An arbitrator under s 10A has not been included. Despite this fact, a majority of a three-judge bench in *Gujarat Steel Tubes*, held that an arbitrator under s 10A is comprehended in the expression 'tribunal' as used in s 11A. Therefore, the arbitrator has the same jurisdiction as a labour court, tribunal or national tribunal while adjudicating upon a dispute relating to disciplinary discharge or dismissal of a workman.[16] On no plausible canons of construction or by ingenuity of 'interpretative technology', one expression can be said to cover the other. Krishna Iyer J, who delivered the majority opinion, has invoked the doctrine of *casus omissus*, in his 'interpretative technology' for bringing the expression 'arbitrator' within the comprehension of the expression 'tribunal' used in s 11A. It amounts to inventing *casus omissus*, where none really exists. According to the rules of interpretation, the court cannot interpret a statute to produce a *casus omissus.*[17] It is a naked usurpation of the legislative function in the guise of interpretation. The learned judge also referred to a number of foreign and indigenous dicta for arriving at his conclusion but there is nothing in those decisions to support his activist conclusion that the expression 'tribunal' comprehends an 'arbitrator'. Lord Denning MR who has been relied on mostly, even in his, provocative heterodoxies has not gone to such an extent. The dissenting judge, Koshal J, rightly observed that the 'court would step beyond the field of interpretation, and enter upon the area of legislation 'if it resorts to guess work'. Where the text of the statute is unambiguous and not susceptible to dual interpretation, in the language of Tulzapurkar J:

> it would not be permissible for a court, by indulging in nuances, semantics and interpretative acrobatics, to reach the opposite conclusion than is warranted by its plain text and make it plausible or justify it by specious references to the object, purpose or scheme of the legislation or in the name of judicial activism.[18]

Krishna Iyer J, has said thus:

> ... the literal latitude of the words in the definition cannot be allowed grotesquely inflationary play but must be read down ...To bend beyond credible limits is to break with facts, unless language leaves no option.[19]

To hold that an 'arbitrator' under s 10A is comprehended in the term 'tribunal' used in s 11A is, to be sure, to bend the definition 'beyond credible limits' by 'grotesquely inflationary play'. It is submitted that 'an ornate, pretentious, grandiose style replete with superfluous frills and rhetorical extravagance' is a poor substitute for logical legal reasoning and is rather an 'undesirable distraction'.[20] Prefaces and exordial exercises, perorations and sermons as also these and philosophies (political or social), whether couched in flowery language or language that needs simplification have ordinarily no proper place in judicial pronouncements.[21] This case strikingly illustrates how far beyond the confines of a case can the court travel when it chooses to 'jettison' the judicial restraint. It also shows, how judiciary is prone to misconceived public good by confounding private notions with constitutional requirements. The majority opinion is prefaced with a sermon on morals of litigation and then proceeds to quote 'the Bible' and 'Gandhi Ji'. The judgment turns into 50 pages of print. It conjures up hyperbolic images; appeals to the Directive Principles in Part-IV of the Constitution, substitutes wholesale dogmatic assertions for a reasoned consideration of the opposing interests. The slightest invasion of interest has been confounded with the worst. The most emotive and instigative sentiments have been evoked by most trivial occasions. The sense of balance, proportion and judicial propriety was completely discarded by Iyer J, while interpreting s 11A. It comes strangely at a time when working class was more and more gravitating towards militancy and violence stoked by extremist leaders of the hue and shade of Datta Samant, Suryanarayana Rao, *etc*., thereby holding the industry and the community to ransom. This decision reflects nothing worthwhile in terms of reason or logic, except a display of dysfunctional judicial activism coupled with gross abuse of judicial power on the part of the learned judge.

MISCONDUCT

The expression 'misconduct' has not been defined either in the Industrial Disputes Act 1947 or in the Industrial Employment (Standing Orders) Act 1946. The dictionary meaning of the word 'misconduct' is 'improper behaviour; intentional wrong doing or deliberate violation of a rule of standard of behaviour'. In *Ram Singh*, after noticing the etymological definition of the expression 'misconduct', K Ramaswsamy J, observed:

> Though this expression is 'not capable of precise definition, its reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, willful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. [22]

Generally speaking, misconduct is a transgression of some established and definite rule of action where no discretion is left except what necessity may demand; it is violation of definite law, a forbidden act.[23] It means intentional wrong doing, it would include unlawful behaviour. A conduct which is blameworthy would be misconduct, if by the commission or omission of the acts of the employee, the employer suffers loss or it generates an atmosphere destructive of discipline, the same is misconduct.[24] An interesting question arose before the Kerala High Court in *Peethambaran.* The superintendent of police invoked Lord Ganapathy's blessings by performing a special worship at the CBI office in Ernakulam on the occasion of shifting his office from one wing to another wing of a building. A small amount needed for the worship was spent by him from his own pocket. A public spirited advocate filed a writ petition in the High Court of Kerala seeking a writ of mandamus to the Union of India to initiate disciplinary proceedings against the officer as the act of offering prayer was an act of misconduct being unsecular in nature. The court observed:

> We have no doubt that secularism is not an anti-religious doctrine inspite of its emphasis on absolvement of politics from religion and theocratic society is not the solitary antonym of secular society. Secularism as enshrined in our Constitution respects a person's right to believe in any faith and to practise any religion so long as such practice does not hinder public order or morality and health and so long as such practice won't interfere with another man's fundamental rights. It enables both religionists as well as nullifidians to maintain their respective view points. Neither shall be intolerant towards the other in a secular society.[25]

In this view of the constitutional concept of secularism, the court held that the conduct of the officer would in no way constitute an act of misconduct for initiating disciplinary proceedings against him, particularly when he had not spent any amount from the state exchequer and he honestly believed that such a worship would better the efficiency of his official

functions. It was a case where a person, despite his public office believed in the blessings of God as necessary for the commencement of his official work when the office was shifted from one room to another building. In so far as the relationship of Industrial employment is concerned, a workman has certain express or implied obligations towards his employer. Any conduct on the part of an employee inconsistent with the faithful discharge of his duties towards his employer would be a misconduct. Any breach of the express or implied duties of an employee towards his employer, therefore, unless it be of trifling nature, would constitute an act of misconduct.

In Industrial law, the word 'misconduct' has acquired a specific connotation. It cannot mean inefficiency or slackness. It is something far more positive and certainly deliberate. The charge of 'misconduct', therefore, is the charge of some positive act or of conduct which would be quite incompatible with the express and implied terms of relationship of the employee to the employer. 'What is misconduct will naturally depend upon the circumstances of each case'.[26] For instance, deliberate disobedience of any order of the superior authority will be one species of misconduct.[27] In *workmen of Shalimar Rope Works*, the labour appellate tribunal laid down the following criteria for determining as to whether the act would be an act of 'misconduct', *viz*, the act :

(i) is inconsistent with the fulfilment of the express or implied conditions of service or

(ii) is directly linked with the general relationship of employer and employee or

(iii) has a direct connection with the contentment or comfort of the men at work or

(iv) has a material bearing on the smooth and efficient working of the concern.[28]

In *Tata Oil Mills*, while approving the above criteria, Gajendragadkar J observed:

> If the answer to any of these criteria is in the affirmative, the act in question would amount to an act of misconduct. In any case, the act of misconduct must have some relation with the employee's duties to the employer. In other words, there must be some rational connection of the employment of the employee with the employer.[29]

If the act complained of is found to have some relationship to the affairs of the establishment, having a tendency to affect or disturb the peace and good order of the establishment or be subversive of discipline in any direct or proximate sense, such act would amount to 'misconduct'. Conversely, if the act complained of has no relation to his duties towards his employer, it would not be an act of misconduct towards his employer.'[30] However, breach of contract or a rule of the employer will not constitute an act of misconduct. For instance, where an employee sub-let a tenement in breach of the undertaking given by her, it was held that this act was not a breach of discipline, but was merely a breach of contract.[31] Likewise, a workman cannot be charged with 'misconduct' merely because other workmen threatened to go on strike if he is not dismissed. the Bombay High Court in *Santosh Nadkarni*, held that it is no part of the business of the employer to take sides in intra-union rivalries or disputes. If this is permitted, it would open a flood gate for abuses. Besides, it would lead to a 'closed-shop policy', it will also suppress all freedom of expression and encourage union bossism. It will then always be open for a majority to remove any employee not only from its fold but from the employment itself.[32] In terms of cl. 14(3) of the Model Standing Orders appended to the Industrial Employment (Standing Orders) Central Rules 1946, the following acts and omissions shall be treated as misconduct:

(a) wilful insubordination or disobedience, whether alone or in combination with others, to any lawful and reasonable order of a superior;

(b) theft, fraud or dishonesty in connection with the employer's business or property;

(c) wilful damage to or loss of employer's goods or property;

(d) taking or giving bribes or any illegal gratification;

(e) habitual absence without leave, or absence without leave for more than 10 days;

(f) habitual late attendance;

(g) habitual breach of any law applicable to the establishment;

(h) riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline;

(i) habitual negligence or neglect of work;

(j) frequent repetition or any act or omission for which a fine may be imposed to a maximum of two per cent of the wages in a month;

(k) striking work or inciting others to strike in contravention of the provisions of any law, or rule having the force of law;

(l) Sexual harassment which includes such unwelcome sexual determined behaviour (whether directly or by implication) as—

(i) physical contact and advances; or

(ii) a demand or request for sexual favours; or

(iii) sexually coloured remarks; or

(iv) showing pornography; or

(v) any other unwelcome physical verbal or non-verbal conduct of sexual nature.

Provided that where there is a complaint of sexual harassment within the meaning of clause (l) of sub-paragraph (3), the Companies Committee constituted under sub-paragraph (3B) in each establishment for inquiring into such complaints, shall, notwithstanding anything contained in paragraph 15, be deemed to be the inquiring authority appointed by the employer for the purpose of these rules.

From the language of this Model Standing Order itself, it is clear that it does not define misconduct or illustrate it, exhaustively. These cases of misconduct are merely illustrative and by no means exhaustive.[33] It is not possible to provide for every type of misconduct in the Standing Orders for justifying disciplinary action against the workman.[34] In *Mahendra Singh Dhantwal*, a three judge bench of the Supreme Court observed that Standing Orders of a company only describe certain cases of misconduct and the same cannot be exhaustive of all the species of misconduct which a workman may commit. Even though a given conduct may not come within the specific terms of misconduct described in the Standing Order, it may still be a misconduct in the special facts of a case, which it may not be possible to condone and for which the employer may take appropriate action. There may be many more acts which may constitute misconduct. The employers may frame their own Standing Orders suited to the peculiar exigencies of their industries and establishments. Ordinarily, the Standing Orders may limit the concept of misconduct but not invariably so.[35]

But in *Glaxo Laboratories*, glossing on the above, Desai J held that these observations cannot be elevated to a proposition of law that some misconduct neither defined nor enumerated and which may be believed by the employer to be misconduct ex post facto would expose the workman to a penalty. The court further pointed out that it cannot be left to the vagaries of management to say *ex post facto* that some acts of omission or commission, nowhere found to be enumerated in the relevant Standing Orders, are nonetheless acts of misconduct not strictly falling within the enumerated misconduct in the relevant Standing Orders but yet misconduct for the purposes of imposing a penalty.[36] The learned judge applied the same lop-sided logic while deciding *Rasiklal Patel*.[37] In this case, the employee was removed from service by the Ahmedabad Municipal Corporation on the ground that he made a false suggestion that he had voluntarily left his earlier service because of transfer while he had actually been removed from service, on the ground of a proved act of misconduct, by his previous employer. The labour court affirmed the punishment holding that the misconduct alleged against the employee was proved. The High Court of Gujarat dismissed the writ petition of the employee against the order and judgment of the labour court with the observation that 'even if the allegation of misconduct does not constitute misconduct amongst those enumerated in the relevant service regulations, yet the employer can attribute what would otherwise per se be a misconduct though not enumerated, and punish him for the same'. Against the judgment of the High Court, the employee filed a petition for special leave to appeal before the Supreme Court which was dismissed for the reason that it did not merit consideration as the petitioner was guilty of suppression of material facts. However, in view of the foregoing observation of the High Court, the court felt that if this statement of law is 'permitted to go uncorrected, some innocent persons may suffer in future'. Justice Desai concluded that it is 'well-settled that unless either in the certified Standing Orders or in the service regulations an act or omission is prescribed as misconduct, it is not open to the employer to fish out some conduct or misconduct and punish the workman even though the alleged misconduct would not be comprehended in any of the enumerated misconduct'. Hence, everything which is required to be prescribed has to be prescribed with precision and no argument can be entertained that something not prescribed can yet be taken into account as varying what is prescribed. Again, in *AL Kalra*, the same bench elaborating the rule in *Glaxo Laboratories* observed:

> Where the misconduct when proved entails penal consequences, it is obligatory on the employer to specify and if necessary define it with precision and accuracy so that any *ex post facto* interpretation of some incident may not be camouflaged as misconduct.[38]

There may be various types of misconduct other than those included in the Standing Orders, which may expose a delinquent employee to penal consequences. These may be acts of misconduct relating to establishments or undertakings to which the Industrial Employment (Standing Orders) Act, 1946 does not apply. These acts would, no doubt, be misconduct

in industrial parlance. On an analysis of the holding of the Supreme Court in *Glaxo* and *Kalra*, a single judge of the Karnataka High Court in *Jyoti Home* Industries, observed that:

> ...it can be safely concluded that any act of an employee which would constitute an offence of penal consequences under the Indian Penal Code or such other analogous legislation is a misconduct. Broadly stated all offences with penal consequences are misconducts but not all misconducts an offence ...[39]

In *Agnani*, it was held that the nature and extent of what constitutes misconduct, will naturally depend upon the circumstances of each case. When there are Standing Orders, there would be no difficulty because they define 'misconduct'. In the absence of the Standing Orders, however, the question will have to be dealt with reasonably and in accordance with commonsense. What acts could be treated as acts of misconduct would depend on the facts and circumstances of each case.45 In the absence of Standing Orders, it would be open to the employer to consider reasonably what conduct can be properly treated as misconduct, it would be difficult to lay down any general rule in respect of the problem. The management, however, has to act in good faith in determining what constitutes major misconduct within the Standing Orders sufficient to merit dismissal of a workman. For this, it must have facts upon which it bases its conclusions and it must act without caprice or discrimination and without motive of vindictiveness or intimidation or resorting to unfair labour practice. There must be infraction of the accepted principles of natural justice. If the act alleged is connected with vital interest of the workman regarding his earnings, the management should not treat it as an act of misconduct.[40]

Whether a particular act of misconduct has been committed or not, even though it may not be described, in so many words in the Standing Orders, will be a matter for the tribunal, to consider. Likewise, whether a particular misconduct will entitle the employer to punish the employee with dismissal will also be a matter, in an appropriate case, for the decision by the tribunal. But the mere omission of a certain type of misconduct in the Standing Orders would not entitle the tribunal to completely shut its eyes to the act of misconduct and to hold the order of dismissal as unjustified for that reason.[41] Generally, disciplinary action is based on one or more of the charges of misconduct enumerated in the Standing Orders or otherwise. The fact that an employee has been erroneously charged under one of the heads of the misconduct, would not preclude the employer from taking action under another if the actual act committed would fall under the other head. For instance, under the Standing Orders workmen were charged for 'wilful insubordination' instead of 'striking work' for going on illegal strike, the fact that the act fell under the latter head would not prevent the employer from taking action under either of the clauses.[42] The expression 'misconduct' covers a large area of human conduct. On the one hand, are the habitual late attendance, habitual negligence and neglect of work, on the other hand, are riotous or disorderly behaviour during working hours at the establishment or acts subversive of discipline, wilful insubordination or disobedience. In the words of Shah J:

> Misconduct spreads over a wide and hazy spectrum of Industrial activity; the most seriously subversive conducts rendering an employee wholly unfit for employment to mere technical default are covered thereby.[43]

The Bombay High Court in *Sharda Prasad*, enumerated broadly the following specific illustrative cases of acts of misconduct, the commission of which would justify dismissal of the delinquent employee:

(i) an act or conduct prejudicial or likely to be prejudicial to the interest or reputation of the master;

(ii) an act or conduct inconsistent or incompatible with the due or faithful discharge of his duty to his master;.

(iii) an act or conduct making it unsafe for the employer to retain him in service;

(iv) an act or conduct of the employee so grossly immoral that all reasonable men may say that he cannot be trusted;

(v) an act or conduct of the employee which may make it difficult for the master to rely on the faithfulness of the employee;

(vi) an act or conduct of the employee opening before him temptations for not discharging his duties properly;

(vii) an abusive act or an act disturbing the peace at the place of his employment;

(viii) insulting or insubordinate behaviour to such a degree as to be incompatible with the continuance of the relation of master and servant;

(ix) habitual negligence in respect of the duties for which the employee is engaged; and

(x) an act of neglect, even though isolated, which tends to cause serious consequences. [44]

The effect of such misconduct on the relation of employment has been stated by Lopes L.J, in the following words:

> If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct which justifies immediate dismissal. That misconduct, according to my view, need not be misconduct in the carrying on of the service or the business. It is sufficient if it is conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master and the master will be justified, not only if he discovered it at the time, but also if he discovers it afterwards, in dismissing that servant. [45]

In the same case, Lord Esher MR observed:

> The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him...What circumstances will put a servant into the position of not being able to perform, in a due manner, his duties, or of not being able to perform his duty in a faithful manner, it is impossible to enumerate. Innumerable circumstances have actually occurred which fall within that proposition and innumerable other circumstances which never have yet occurred, will occur, which also will fall within the proposition. But if a servant is guilty of such a crime outside his service as to make it unsafe for a master to keep him in his employ, the servant may be dismissed by his master; and if the servant's conduct is so grossly immoral that all reasonable men would say that he cannot be trusted, the master may dismiss him.[46]

However, there is no fixed rule of law defining the degree of misconduct which will justify dismissal.[47] Hence each case will depend upon its own facts and circumstances. Whether a particular misconduct is severe or otherwise would depend upon the facts of each particular case. No hard and fast rule can be laid down to gauge the severity or triviality of the misconduct. A misconduct which may not be viewed in certain circumstances to be serious, can be serious in another set of circumstances. A single judge of the Bombay High Court in *Basu Deba Das*, pointed out that a standard of conduct expected of an employee in respect of a roadside dhaba or a country liquor bar will not be the same as expected of it while serving in a five star hotel or in a permit room located in such a hotel. In this case, the punishment of dismissal of the workman for the misconduct of assaulting a co-worker with a kitchen knife was held to be serious enough to justify the punishment of dismissal.[48] But, when management takes the responsibility to level the charge of misconduct', there must be material in support of it, in the absence of which the action taken by the employer would be vitiated by a 'basic error' or 'perversity'. An inference of victimisation also may be plausible.[49] Misconduct in industrial employment can broadly be dealt with under the following headings but these heads are not exhaustive. Nor are they water-tight compartments because many acts of misconduct falling under one head may also dovetail into or fall under the others as well. These heads and sub-heads are, therefore, devised merely for the purpose of convenience of treatment.

Misconduct Relating to Duty

In industrial law, like the contract law, existence of duty is the foundation of the misconduct or non-observance, breach or dereliction of duty. In other words, before an employee can be charged of this type of misconduct, the employer has to show that the employee had a duty to do the act alleged to have been omitted or to refrain from doing the act alleged to have been committed. In other words, an ascertainable duty owed by the employee towards the employer in connection with the employment should have been breached by the employee.[50] Such duties may be express or implied.

Express duties are generally created by a statute or the contract inter se the parties or the collective agreement between the employer and the union, whereas legally enforceable implied duties may be spelt out by the application of common law. Though it may not be possible to comprehend a general rule covering all possible sources of such duties, in practice, most of the sources of duty are discernible with sufficient degree of accuracy. Express duties may be created by statute such as the Factories Act or the Standing Orders framed and certified under the Industrial Employment (Standing Orders) Act.

(i) Non-Observance of Duty

The duties of an employee would include that he would be trustworthy, that his acts would justify the confidence of the employer, that he would not so act as to prejudice or damage the interests of the employer, that he would not act or conduct or behave himself in a way inconsistent or incompatible with the faithful discharge of his duties to the employer, that he would not behave in an insulting or insubordinate manner, that he would not be habitually negligent, *etc*. Every employee is expected to behave himself in such a manner so as not to damage or prejudice the interests or reputation of his master, whatever be the sphere of activity/work of the employee. These principles will be applicable to every employee right from

the beginning of his employment up to the termination of his employment. These are no additional duties. It is impossible to define in writing all the duties of every individual employee in an establishment, because any rigid rule delimiting the several interlinked parts of the technical process of production where labour is employed, that labour cannot be moved from one aspect of the technical process to another closely-related aspect, would practically paralyse the management. However, the matter may be very different where there is a covenant for service of a particular type and the person is called upon to perform some duties totally outside that covenant or is being assigned to some post which is not within the contract at all.[51]

The fact that some employees were employed to work as clerks and some as typists would not necessarily lead to the conclusion that a person who is employed as a clerk can never be employed as a typist or can never be allotted typing duties.[52] It is a general contractual principle, particularly relevant to the industrial employment relationship which takes effect as an implied term in the contract that the employee should facilitate performance of his obligations under the contract and must not put it out of his power to do what he has promised to do.[53]An employee who refuses to carry out an order is usually making it difficult for the employer to perform his side of the contract. An employee is expected to discharge not only express duties allotted to him but also the implied duties incidental to his job and the contract of service. However, the duties which are not allotted to an employee nor are implied or incidental to his job or contract would not be within his competence. In other words, if an employee does any such act as he is not authorised to do, that by itself would be a breach of his implied duties. For instance, where a workman deliberately exhibited an advertisement slide which he was not authorised by the management without the permission of the management during a performance, giving the advertising firm the benefit of the advertisement to the definite loss of the management, the behaviour of the workman was held to amount to misconduct and even a misconduct of grave character justifying dismissal.[54] Likewise, if an employee actively anti-canvasses against the quality of goods where the goods are exposed for sale to the public, he has not served the employer honestly and faithfully and he has not used utmost endeavour to promote the interests of the employer. On the contrary, he can be said to have acted against the interests of the employer. However, such act should be deliberate and not otherwise justified.[55] To justify the disciplinary action, the employer has to prove that the employee contravened the express or implied conditions of service. However, the question whether the breach of duty gives rise to a right to dismiss the workman will depend on a variety of other factors, in particular, the seriousness of the refusal. In other words, not every uncooperative act is necessarily a repudiation of the fundamental terms of the contract.[56]

(ii) Non-Performance of Work

Apart from the statutory duties, the generic covenants contained in the contract of service or the implied duties are incidental to the contract of employment. In practice every employee is entrusted with a specific job in the plant, office or field which he is required to carry out or perform during the working hours depending upon the nature of the job. The refusal of the employee to perform or carry out that job or the matters incidental thereto will constitute misconduct in the absence of any contract, settlement or custom to the contrary. An employee may be guilty of 'non-performance of work' in two ways, *viz*, by deliberately refusing to attend to the job or work or by neglecting to do the work. The cases falling under the second category have been dealt with under the next sub-head, *viz*, 'negligence of duty'.

(iii) Negligence of Duty

A workman owes a duty to his employer to exercise reasonable care in the performance of his duty. In other words, an employee must exercise reasonable care and skill in the performance of his duties. A workman, who deliberately neglects to carry out his work or perform his duty, when required to do that with reasonable care, is guilty of misconduct of negligence. However, in deciding what is reasonable care, 'the standards of men and not those of angels',[57] have to be applied. The concept of negligence has been the subject-matter of great deal of juridical literature. The decided cases on the application of this duty in any particular circumstance are no more than an analogy and cannot be regarded more than an existence of a general duty of care. The precise scope of this implied term in the contract of employment is a matter of controversy. In *Lister*, the House of Lords was unanimous in deciding that there was an implied term in a lorry driver's employment contract that he would exercise reasonable care when going about his employer's business.[58] This part of the decision seems to have been misconstrued in the latter case of *Harvey*, in which it was held that a store keeper was not obliged to indemnify his employer in respect of his negligent driving of his own motor-cycle while fetching some spare parts in the course of his employment.[59] A narrow definition of the 'duty' was applied, *ie*, not to cause damage by his negligence while doing that which he was actually engaged to do, namely store-keeping. It has been suggested that a wide definition, *ie*, to take reasonable care while going about the employer's business, was what the House of Lords intended to lay down in *Lister's* case.[60] A detailed discussion of the subject is beyond the scope of this work. But for practical purposes, the statement of law relating to negligence in *Halsbury's Laws of England*, is instructive:

> Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. In may consist in omitting to do something which ought

> to be done or in doing something which ought to be done either in a different manner or not at all. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The degree of care required in the particular case depends on the surrounding circumstances, and may vary according to the amount of risk to be encountered and to the magnitude of the prospective injury. The duty of care is owed only to those persons who are in the area of foreseeable danger; the fact that the act of the defendant violated his duty of care to a third person does not enable the plaintiff who is also injured by the same act to claim unless he is also within the area of foreseeable danger. The same act or omission may accordingly in some circumstances attract liability for being negligent, although in other circumstances it will not do so. The material considerations are the absence observance of duty which is on the part of the defendant owed to the plaintiff in the circumstances of the case and the damage suffered by the plaintiff, together with a demonstrable relation of cause and effect between the two.[61]

Thus negligence in legal sense is a negative rather than a positive term and, in any given circumstances, is the failure to exercise that care which the circumstances demand.[62]In other words, it is the absence of such care, skill and diligence, which is the duty of the person to bring in the performance of his work. In case of negligence, a man does not intend that consequence. Negligence is characterised subjectively by an attitude of indifference and it is, therefore, opposed to intentional act.[63] Negligence and wrongful intentions are rather mutually exclusive states of mind. Where there is a duty to take care or to exercise certain skill, failure to take care or exercise skill may indicate negligence. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. The omission to perform the duty may consist of a variety of things, for instance, doing nothing or wasting time by loitering, loafing, idling or gossiping or sleeping during the duty hours or the pretence of waiting instructions with a view to shirk work or because of laziness or wilful indolence. In day to day work, an honest mistake may be committed and the mistake may be of such a nature as from its own gravity, it may be indicative of negligence but every error in performing duties can hardly be styled as negligence. A single instance of such act or omission would not constitute the misconduct of habitual negligence.[64] But when these acts are committed or omitted habitually, they would constitute serious misconduct justifying even the extreme penalty of dismissal because such negligence of duty is a good ground for the dismissal of the employee.[65] 'Habitual negligence or neglect of work' has been included in the list of misconducts in the Model Standing Orders framed under the Industrial Employment (Standing Orders) Act, 1946. Generally, industrial employers also include this head of misconduct in the Standing Orders applicable to their establishments.

Habitual negligence or neglect of work on the part of a workman refers to the habit of being negligent or neglectful in the discharge of his duties. Therefore in order to bring a particular act or omission under this head, it is necessary to establish that the workman was negligent or neglectful in the discharge of his duties as a habit or confirmed tendency on his part. Hence isolated or stray incidents of negligence unless attended by serious consequences will not constitute the misconduct to warrant the punishment of discharge or dismissal. But before a person can be said to be guilty of habitual negligence, it has to be shown that he has been guilty of negligence on several occasions so as to show that negligence is his habit.[66] For instance, where the concerned workman was found guilty on the charge of negligence in connection with one single matter, *viz*, the improper arrangement and labelling of stores, which was alleged to have been committed on one single occasion, it was held that it was not a case of habitual negligence despite the fact that such arrangement continued for over several months. Apart from habitual negligence, there may be some acts of gross negligence which may entail serious damage or consequences to the establishment of the employer. Classic examples of such acts of negligence are, for example, a sentry who sleeps at his post and allows enemies to slip through; a compositor carelessly placing a plus sign instead of minus sign in a question paper may cause numerous examinees to fail; a compounder in a hospital or chemist's shop who makes up mixture or other medicines carelessly may cause quite a few deaths; the man at an airport who does not carefully filter the petrol poured into a plane may cause it to crash; the railway employee who does not set the point carefully may cause a head-on collision.[67] In such cases, one act itself would constitute a serious misconduct and it is not necessary to prove the habit of being negligent on the part of the employee. Therefore, the employers usually include gross negligence as a separate head in their Standing Orders.

In *Kalyani*, the facts disclosed that the workman was charge-sheeted for gross dereliction of duty inasmuch as he made mistakes in the preparation of load-sheet on one day and a balance-chart on another day, which mistakes might have led to a serious accident to the aircraft. Before the domestic inquiry the workman admitted the mistakes mentioned in the charge-sheet but contended that he was over-worked and that it was also the duty of the superiors to check the load-sheets and balance-charts prepared by him. After finding him guilty of the gross negligence involving the possibility of serious accident, the employer dismissed him from service. It was held that the mistakes committed were of serious nature and the argument, that other persons were also responsible for checking the work done by the workman, would not mitigate the mistakes committed by him as he was primarily responsible for the load-sheets and the balance-charts. In view of the

serious nature of the mistakes, the plea of the workman that he was over-worked in mitigation of the misconduct was also rejected.[68] Likewise, in *Caltex*, the workman was charge-sheeted for having been caught red-handed while smoking near an aircraft that was being refueled resulting in a serious accident to the aircraft. After holding the inquiry, the workman was dismissed from service, which was upheld by the tribunal and affirmed by the Supreme Court.[69] In *Surendra Kumar Dash*, a sales assistant was discharged from service for misappropriation of funds on the ground that there was short-fall in the balance amount because he sold the goods without being so authorised. The Orissa High Court held that in the facts and circumstances of the case, it was a case of negligence and not a case of misappropriation of funds.[70]The question whether a particular act of negligence constitutes gross misconduct or not, will depend on its own peculiar facts and circumstances and the nature of work performed by an employee as well as the status or position he occupies.[71] Where a driver was dismissed for rash and negligent driving causing the death of a 7-year old boy, the labour court ordered reinstatement. Quashing the award of the labour court, the Madras High Court observed that the direction given by the labour court was not based on proper appreciation of the issues involved.[72]

Habitual sleeping during duty hours would constitute an act of gross negligence,[73] and serious dereliction of duty. The seriousness of the misconduct would be aggravated particularly, when the principal duty of the employee is to keep watch and vigilance on the life and property of the employer as in the case of watch and ward staff.[74] For instance, the importance of the duty of a *durban* was noted by the Supreme Court in *Francis Klein*, where it observed that the post of a *durban* in an industrial concern, where valuable property, both manufactured goods and assets, required to be guarded, was a post where trust and confidence of the company were to be maintained and if a *durban* has failed to give assistance in apprehending a thief, the refusal of the *durban* was certainly an act for which the employer was justified in dismissing him on the ground of loss of confidence.[75] In inflicting the punishment of discharge or dismissal from service, the distinction between mere negligence and wilful or deliberate negligence is also relevant.[76] Mere slackness of work, however, is not sufficient to constitute serious offence of 'habitual negligence' or 'neglect of work' to warrant an order of dismissal.[77] Likewise, the mere loss of identity card on more than one occasion may not behove a workman as he is expected to be vigilant, but it will not constitute the misconduct of habitual negligence or neglect of work. Therefore, for such a lapse, he may be liable for some punishment like a warning, censure or loss of an increment but the punishment of discharge or dismissal for such lapse is not justifiably warranted.[78]

Another misconduct which is usually committed by industrial employees is loitering about during the duty hours by leaving their machines or the seats of work on various pretexts such as chitchatting with others or moving about aimlessly. If a workman is found guilty of the misconduct of habitual loitering about, that would be a good ground for his dismissal and the employer will be justified to dismiss him from service. This point has been illustrated by the decision of the Supreme Court in the case of *Burn & Co.*[79] In this case, inspite of the findings that the workman was always in the habit of loitering outside his place of work without the permission of his departmental head and that he did not care to get any permission for going out and further that the warning by the employer had no effect on him, probably because he was the assistant secretary of the union and he could break discipline with impunity, the tribunal directed the reinstatement of the workman as it took the view that the penalty of dismissal was rather harsh and out of proportion to the misconduct committed by him. In appeal, the Supreme Court set aside the award of the tribunal ordering reinstatement as the misconduct in question was held sufficient to justify the dismissal. Irrespective of whether a right to dismiss a workman exists, the workman is under an implied duty to indemnify the employer in respect of the consequence of his negligent conduct.[80]

(iv) Engaging in Work Similar to that of the Employer

Some employers provide in their Standing Orders that a workman will not engage himself in any work similar in nature to that carried on by the employer or in which he is employed. Such provisions are made where the employers want to prohibit clandestine competition by their own employees. In a suitable case, if an employee is found guilty of such act of misconduct, it may warrant penalty of dismissal. However, the charge has to be specifically alleged and proved. In *Remington Rand*, the Supreme Court held that 'engaging in any work similar in nature' meant continuity of transactions and not a single, casual or solitary transaction. In the circumstances of the case, the act of selling one second-hand typewriter was held not to be a contravention of the relevant standing order.[81] In *T Krishnamoorthy*, the act of borrowing of agricultural loans at low interest in the names of relatives of the employee and utilising the same for personal purposes has been held to be an act of misconduct prejudicial to the interest of the employer bank. In the facts and circumstances of the case, the punishment of reduction in basic pay by one stage for two years has been held not to be excessive.[82]

(v) Absence without Leave

An employee is under an obligation not to absent himself from work without good cause during the time at which he is required to be at work by the terms of his contract of service.[83] Absence without leave is misconduct in industrial employment warranting disciplinary punishment. Even if the workman is not absent from the employer's business

premises, his absence from the specific place of duty where he is required to be, without permission, would also constitute an act of misconduct. Therefore, the absence of an employee from duty, if it amounts to misconduct inconsistent with faithful discharge of his duties, would constitute good cause for his dismissal.[84] Habitual absence from duty without leave has been made a misconduct under the Model Standing Orders framed under the Industrial Employment (Standing Orders) Act, 1946. Likewise, the industrial employers also include the 'absence from duty' without leave in the list of acts of misconduct in their Standing Orders. Sanction of leave will be a good defence to a misconduct of absence without leave. This presupposes that before a workman absents himself, he must have applied for and obtained leave from the employer, whether the leave is of casual nature or earned one.[85] No employee can claim leave of absence as a matter of right and remaining absent without leave will constitute violation of discipline.[86] The mere fact that he had applied for leave would not be a good defence when the leave was refused by the employer in exercise of his discretion, unless it could be shown that the action taken was actuated by the desire to victimise the workman.[87] The fact that the workman was continuously absent from work without leave on account of his detention in jail for an offence, will not give an immunity to the workman to remain absent without leave and the employer will be justified in discharging him from service.[88] In *IISCO*, seven workmen were absent without leave for 14 consecutive days as they were in police custody. From the police custody, they applied for leave which was refused and the company terminated their service under the relevant Standing Order for remaining absent without leave. The Industrial tribunal took the view that the relevant Standing Order was not the inflexible rule and mere application for leave was sufficient to arrest the operation of the Standing Order. In appeal, the Labour Appellate Tribunal held that in view of the circumstance that the workmen were in custody, the company was not justified in refusing leave. Quashing the order, SK Das J, observed:

> It is true that the arrested men were not in a position to come to their work, because they had been arrested by the police. This may be unfortunate for them; but it would be unjust to hold that in such circumstances the company must always give leave when an application for leave is made. If a large number of workmen are arrested by the authorities in charge of law and order by reason of their questionable activities in connection with a labour dispute (as in this case), the work of the company will be paralysed if the company is forced to give leave to all of them for more or less indefinite period. Such a principle will not be just; nor will it restore harmony between labour and capital or ensure normal flow of production. It is immaterial whether the charges on which the workmen are arrested by the police are ultimately proved or not in a court of law. The company must carry on its work and may find it impossible to do so if a large number of workmen are absent. Whether in such circumstances leave should be granted or not must be left to the discretion of the employer. It may be readily accepted that if the workmen are arrested at the instance of the company for the purpose of victimisation and in order to get rid of them on the ostensible pretext of continued absence, the position will be different. It will then be a colourable or mala fide exercise of power under the relevant Standing Order; that, however, is not the case here.[89]

In *TELCO*, the workman absented himself without leave or permission with effect from 19 December, 1970 and the employer issued a memo and charge-sheet on 8 January, 1971 notifying the domestic inquiry to be held against him. Since the workman failed to appear in the domestic inquiry and the inquiry proceeded *ex parte* on the basis of which he was discharged from service, by order dated 5 March 1971. However, on 4 February 1980, the workman informed the management that he was arrested by the police on 9 December 1970 in connection with a murder case and requested the management to allow him to join duty. The refusal of the management to accede to this request led to an industrial dispute. A single judge of the Patna High Court held that the discharge of the workman was valid and justified for continuous absence without permission or leave.[90]Another defence open to an employee against the charge for absence without leave is that the absence was on account of circumstances beyond his control. For instance, where the absence of a workman was on account of his sudden or serious illness or the serious illness of a relation, that would be an extenuating circumstance which the employer will have to take into consideration. However, if a workman malingers, feigns sickness in order to avoid duty by producing a false medical certificate, this would itself be a serious act of misconduct. If the management requires the application for leave on the ground of sickness to be accompanied by a medical certificate, the workman will not be justified in absenting himself without producing the medical certificate and grant of leave.[91] But whether a workman was in fact, ill or not, is a question of fact which has to be considered by the inquiry officer on the basis of the evidence produced before him and cannot obviously be a matter of conjecture or presumption.[92] When an employee goes on applying for extension of leave on the ground of sickness, the employer is not bound to grant him leave for an indefinite period, especially when no leave is due to him. However, the burden of proof would be on the employee to show that this absence was justified.[93] Such absence without leave constitutes a misconduct justifying disciplinary action against the delinquent workman. The punishment can only be imposed either by complying with the procedure prescribed by the Standing Orders of the establishment, if any,[94] or with the rules of natural justice. Normally, the punishment should be inflicted after the workman has been found guilty of the misconduct after holding a domestic inquiry.[95]

The quantum of punishment in cases of misconduct of absence from duty without leave would depend upon the facts of each case.[96] For instance, where the worker absented after the tiffin hour continuously for two days, such temporary

absence would not amount to misconduct justifying the penalty of dismissal.[97] The absence of a workman, belonging to watch and ward staff, on account of his arrest for an offence under the Arms and Excise Act, was held sufficient justification for dismissal in view of the past record of habitual absence without leave on the part of the workman and the gravity of the offence with which he was charged, was considered to be a good ground for his dismissal.[98] On the other hand, in the absence of a provision in the Standing Orders of a company making 'absence without leave' for a short period of time a misconduct justifying dismissal, the absence of the workman without leave for three days for which he offered explanation, the extreme penalty of dismissal was held to be unwarranted.[99]

Absence for mere three occasions in a month, was held not to be sufficient in law to prove the misconduct of habitual absence.[1]Systematically leaving work without permission is another variant of absence without leave. When, therefore, a workman systematically absents himself from work without permission and without making any application for leave, such act is gross violation of discipline. The fact that the workman happens to be an office bearer of the workers union cannot confer immunity upon him from punishment for breach of discipline. Such misconduct when proved would justify the punishment of dismissal.[2] In *Swaraj Tractors*, the facts were: the workman remained absent without leave from 27 March 1991. Three days later, he was arrested by police under s 302 of IPC and kept under detention. A charge-sheet was issued to the workman for unauthorised absence. The workman did not present himself before the enquiry officer despite notice, nor was there any communication from him regarding his inability to participate in the enquiry. The enquiry officer submitted his findings on the basis of which, he was dismissed from service. The said order was challenged by the workman by filing a civil suit which was decreed on 19 April 1995. The ground for holding the order of termination illegal was that there had been denial of principles of natural justice and the respondent was not allowed to participate in the inquiry proceedings. The said order was upheld by the lower appellate Court and the High Court. Quashing the orders of the courts below, a three-judge Bench of the Supreme Court held:

> .. . It was not correct for the Courts below to come to the conclusion that principles of natural justice were violated. Admittedly, wife of the respondent received the notice and there was nothing to prevent her from participating in the inquiry proceedings or for the respondent to appoint some person to represent him. Furthermore, even at this stage, there is nothing on record to show that the respondent made any attempt to communicate with the appellant seeking leave of absence. It is, therefore, quite evident that the report of the Inquiry Officer that the respondent had been absent without leave was factually correct and as per the Standing Orders this tantamounted to a misconduct. According to the respondent, he was, first apprehended on 30th March, 1991 but till the order of dismissal was passed he had not joined duty nor was there any application for grant of leave. In our opinion, therefore, the Courts below could not have come to the conclusion that the principles of natural justice had been violated.. .. We, therefore, allow this appeal and set aside the orders of the Courts below, but in view of the fact that the respondent had put in twelve years of service we direct the appellant to pay to the respondent within four weeks from today an ex-gratia amount of Rs. 3,00,000/-.[3]

In *YP Sarabhai*, the facts disclosed that a bank employee remained continuously absent for a long period without any reasonable cause or justification and inspite of the direction from the management to report for duty and also the permission granted to him from time to time extending the date to join duty. His conduct showed that he was remaining absent on the ground of ailment with a view to avoid transfer, even though he was attending court proceedings on different dates. He was dismissed him from service, which dismissal was upheld by the High Court. Dismissing the appeal filed by the employee, Lakshmanan J (for himself and Panta J) of the Supreme Court awarded a compensation of Rs. 1,50,000/-, which included the provident fund dues of Rs. 75,930/-.[4] In *L&T Komatsu*, the respondent-workman was dismissed, after conducting enquiry, for remaining absent without leave for a total of 105 days in a period of nine months. The labour court directed reinstatement and substituted dismissal with stoppage of increments. A single judge of the High Court modified the award denying continuity of service, while retaining the other part of the award. In writ appeal, the division bench further modified the award by ordering reinstatement without back wages and continuity of service. Allowing the appeal filed by the company, Pasayat J (for self and Sathasivam J) of the Supreme Court held:

> When the factual background is considered in the light of principles indicated above, the inevitable conclusion is that the Labour Court and the High Court were not justified in directing the reinstatement by interference with the order of termination. The orders are accordingly set aside. The order of termination as passed by the concerned authority stands restored.[5]

Where the workman was charged of unauthorised absence, apart from certain other consequential charges, such as, failure to take interest in work and disobedience, and the said absence being only of few days, the punishment of dismissal was disproportion and is liable to be set aside. In the instant case, in view of the fact that he had failed to participate in the enquiry despite notice, he is not entitled to backwages.[6] Even where the enquiry held was fair and proper, the tribunal adjudicating the dispute can go into the question of quantum of punishment and, in the instant case where the employee had put in 30 years of service, the punishment of dismissal for unauthorised absence for a few days and his argumentative

nature is disproportionate. The order of the labour court substituting dismissal with stoppage of increment was proper.[7] Where a workman was dismissed from service on charges of using filthy language and answering superiors insolently, the misconduct is trivial and the punishment is disproportionate. However, considering the bitter relations developed and fact that delinquent was out of employment for several years, a compensation of Rs. 10 lakhs was paid instead of reinstatement.[8] In *Jagdish Singh*, the facts were: the workman employed as a sweeper remained absent without leave on four occasions in two months. Absence without leave for a total of 15 days in a period of two months could not be said to be 'habitual'. The punishment of dismissal is disproportionate, in view of the fact that he had to sort out the domestic problems of his daughter with her in laws.[9]

(vi) Late Attendance

Punctuality in attendance is always an implied condition of service. The management is entitled to demand regular and punctual attendance on the part of the employees and it has a right to take disciplinary action, if necessary, to dismissal, in order to ensure that these requirements are fulfilled. Habitual late attendance is a misconduct and is generally included in the Standing Orders of industrial establishments because late attendance is a species of absence without leave between the time an employee is required to arrive and the time he actually arrives. Though casual or isolated cases of late attendance may not warrant serious punishment, yet if an employee makes late attendance a matter of habit, it can be seriously viewed particularly when the workman has been previously warned to be punctual. The question as to what punishment should be inflicted in a particular case would depend on the facts and circumstances of that case. For instance, where the workman concerned, on more than six occasions within a period of twelve months, came late to the office, was warned thrice and on one occasion was suspended and in spite of that, he continued to persist in his habit of late attendance without any valid excuse, his dismissal for habitual late attendance was held justified. On the other hand, where the workman was charge-sheeted for late coming on one occasion, it was held that the punishment of suspension for 10 days without pay was held to be excessive.[10] Where the relevant Standing Orders of the company provided inter alia that an employee would be discharged for frequent absence without permission and for frequent late or irregular attendance, but this was subject to a proviso that an employee could not be discharged from service until he had previously received at least one warning, one severe warning and one suspension which should be recorded on his service sheet, the discharge of the employee was held invalid for not complying with requirements of the proviso.[11]

(vii) Strikes

It is an accepted principle of industrial adjudication that workmen can resort to strike in order to press their demands without snapping the relationship of employer and employee. It is equally a well-accepted principle that the work of the factory cannot be paralysed and brought to a standstill by an illegal strike, in spite of the legal steps being taken by the management to resolve the conflict. In such circumstances, the employer has the right to take disciplinary action for the misconduct of strike against the delinquent workman and also 'to carry on the work of the factory in furtherance of which it could employ other workmen and justify its action in any industrial adjudication of the dispute arising therefrom.[12] The Model Standing Orders have included 'striking work or inciting others to strike work in contravention of the provisions of any law, or rule having the force of law' as a head under the acts of misconduct. A further limitation on the right to strike, *viz*, the justification 'has been developed by industrial adjudication. Hence apart from 'illegal strikes', the Standing Orders of the industrial employers include 'unjustified strikes' also in the list of acts of misconduct warranting dismissal but the punishment for taking part in an illegal or unjustified strike would depend upon the construction of the Standing Orders and also the facts and circumstances of each case. The law with respect to determination of the quantum of punishment for taking part in an illegal strike has been stated by Sinha CJI, in *IGN Rly*, in the following words:

> The only question of practical importance which may arise in the case of an illegal strike, would be the kind or quantum of punishment, and that, of course, has to be modulated in accordance with the facts and circumstances of each case. Therefore, the tendency to condone what has been declared to be illegal by statute, must be deprecated, and it must be clearly understood by those who take part in an illegal strike that thereby they make themselves liable to be dealt with by their employers. There may be reasons for distinguishing the case of those who may have acted as mere dumb-driven cattle from those who have taken an active part in fomenting the trouble and instigating workmen to join such a strike, or have taken recourse to violence...To determine the question of punishment, a clear distinction has to be made between those workmen who not only joined in such strike, but also took part in obstructing the loyal workmen from carrying on their work, or took part in violent demonstrations, or acted in defiance of law and order, on the one hand, and those workmen who were more or less silent participators in such a strike, on the other hand. It is not in the interest of the industry that there should be a wholesale dismissal of all the workmen who merely participated in such a strike. It is certainly not in the interest of the workmen, themselves. An Industrial tribunal, therefore, has to consider the question of punishment, keeping in view the overriding consideration of the full and efficient working of the industry as a whole. The punishment of dismissal or termination of services, has, therefore, to be imposed on such workmen as had not only participated in the illegal strike, but had fomented it, and had been guilty of violence or doing acts detrimental to the maintenance

> of law and order in the locality where work had to be carried on.[13]

In *Model Mills*, the Standing Orders of the employer-company provided for dismissal for taking part in an illegal strike. Some workmen were dismissed from service in accordance with the relevant Standing Order for taking part in an illegal strike. On the construction of the Standing Order, the dismissal was held as proper and justified.[14] In *Burn & Co*, the court affirmed the award of the tribunal holding that the suspension and dismissal of the workmen for going on illegal strike was unjustified in the circumstances of the case. In this case, after the dismissal of the workmen, the employer company had taken back in service a large number of workmen while leaving out the concerned workman. The court observed that mere participation in the strike would not justify the suspension or dismissal, particularly when no clear distinction could be made between workmen not taken back into service and those taken back, although they had also participated in the strike.[15] In *Caltex*, the court reversed the holding of the labour appellate tribunal that the punishment of dismissal for going on illegal strike was unduly severe with the observation that the labour appellate tribunal appeared to have been influenced by the consideration that mere participation in an illegal strike might not always and in every case deserve dismissal. The court itself noticed that it was shown in the inquiry to the satisfaction of the inquiry officer that the workman was guilty of not merely participating in an illegal strike but also of several other acts of gross indiscipline for which the punishment of dismissal was provided under the Standing Orders.[16] Later, in *Bata Shoe Co*,[17] the court observed that it may be that participation in an illegal strike may not, necessarily and in every case, be punished with dismissal; but where an inquiry has been held and the employer has inflicted the punishment of dismissal upon the employee on finding him guilty of the misconduct of joining an illegal strike, the tribunal should not interfere, unless it finds an unfair labour practice and victimisation against him. In this case, in spite of the clear finding that the strike was illegal and staged in hot haste, a misconduct which merited dismissal under the relevant Standing Orders and that the managerial inquiry was proper, the tribunal had directed the reinstatement of the workmen. The Supreme Court disagreed with the award of the tribunal and held that on these findings, the tribunal should not have interfered with the action of dismissal. In *IMH Press*, the court observed that mere taking part in an illegal strike without anything more would not necessarily justify the dismissal of all the workmen taking part in the strike.[18] In *Oriental Textile*, the Supreme Court observed:

> ...merely because workmen go on strike it does not justify the management in terminating their services. In any case, if allegations of misconduct have been made against them those allegations have to be inquired into by charging them with specific acts of misconduct and giving them an opportunity to defend themselves at the inquiry. Even where a strike is illegal, it does not justify the management from terminating their services merely on that ground though if it can be shown on an inquiry that the conduct of the workmen amounted to misconduct it can do so.. .. .in the case of a domestic inquiry where misconduct is held to be proved, the tribunal can only interfere with that order if there is mala fide or want of good faith, there was victimisation or unfair labour practice or the management has been guilty of basic error or violation of the principles of natural justice or on the materials the finding is completely baseless or perverse. If, however, the management does not hold such an inquiry or the inquiry is due to some omission or deficiency not valid, it can nonetheless support its order of discharge, termination or dismissal when the matter is referred for Industrial adjudication by producing a satisfactory evidence and proving misconduct.[19]

After the insertion of s 11A, the first part of these observations is no longer good law. The jurisdiction of the tribunal by this provision has been enlarged to go into the merits of the case instead of confining itself to the circumstances delineated in *Indian Iron Steel Co*. Furthermore, the jurisdiction of the tribunal to take fresh evidence has on the other hand been curtailed. However, where during an illegal and unjustified strike, the workmen physically obstructed other willing workers from work by sitting down between the tram lines, it was a serious misconduct for which the action of dismissal was justified and no inference of victimisation could be drawn.[20] In *East Asiatic*, in view of the fact that all the workmen who participated in the strike were given the punishment of cut of a day's wage alone and in view of the further fact that the charge of instigation against the concerned workman not having been proved, it was held that the punishment of dismissal inflicted upon him could not be sustained, as the charge of instigation had failed.[21] The mere participation of the workers in the strike either during working hours or beyond working hours will not itself be such a serious misconduct even if such presence constitutes a civil trespass,[22] but where the workmen forcibly entered the premises of the mills in spite of the warnings by the watchman and had entered the workshop, the boiler house and the mill house and continued to stay there, threatening violence towards the property and persons, the action of dismissal was held to be justified.[23] The workmen who staged an illegal strike cannot successfully plead that their action was justified or that the strike was peaceful, and that it would be against the principles of social justice to punish them with dismissal for such action on their part.[24] There can be no distinction between an illegal strike which may be said to be justifiable and one which is not justifiable, as it is not permissible to characterise an illegal strike as justifiable which is not warranted by the Act. Every one participating in an illegal strike is liable to be dealt with departmentally, subject, of course, to the action of the department being questioned before the Industrial adjudicator.[25] Nevertheless, the employer will have the right to dismiss a workman joining an unjustified strike only when:

(i) the strike itself is not bona fide, or

(ii) when it is launched on other extraneous considerations and not solely with a view to better the conditions of labour.[26]

A worker cannot always be dismissed for joining a strike which is not illegal, but is simply unjustified. In such cases, in the absence of any evidence to show that the workmen concerned were guilty of violence during the strike, the action of dismissal cannot be sustained. The question whether a strike is illegal or not is a question of law but the further question whether the strike was justified or not is a question of fact. When, therefore, on consideration of all the facts and circumstances, the tribunal comes to the conclusion that the strike was justified, that finding cannot be interfered with in judicial review even if the tribunal placed undue weight on one or more circumstances.[27]The act of going on strike would not constitute abandonment of employment by a workman.[28] It is not open to the employer to give employment to some of the striking workmen and refuse it to others as that would amount to victimisation and unfair labour practice. [29] In *Amrit Vanaspati*, the facts were: the respondent-workman was dismissed for misconduct involving riotous and disorderly behaviour, throwing of a coolie into the boiler, forcing the workers to stop work, *etc*., after holding enquiry. The labour court accepted the findings of the enquiry officer and upheld the dismissal. The High Court, in exercise of is writ jurisdiction, set aside the order of the labour court and directed reinstatement with back wages. Quashing the orders of the High Court and restoring the award passed by the labour court, Lakshmanan J (for self and Panta J) of the Supreme Court held:

> The Labour Court in the concluding part of its award has held that the charges framed against the workman are charges of misconduct of serious nature and, therefore, *it agreed with the argument of Management that it was not in the interest of Management and industrial peace to retain such a person in service who was guilty of creating indiscipline in the factory which affects the production of the factory adversely*.. .. Hence, the Labour Court held the dismissal of the workman from service from 8.3.76 by the Management as justified, proper and lawful and the concerned workman was held to be not entitled to receive any benefit or relief. However, the High Court, as stated earlier, interfered with the factual and categorical findings of the Labour Court and ordered reinstatement with back wages and other benefits. In our opinion, the High Court while exercising powers under writ jurisdiction cannot deal with aspects like whether the quantum of punishment meted out by the Management to a workman for a particular misconduct is sufficient or not. *This apart, the High Court while exercising powers under the writ jurisdiction cannot interfere with the factual findings of the Labour Court which are based on appreciation of facts adduced before it by leading evidence. In our opinion, the High Court has gravely erred*.. the High Court is not right in interfering with the well considered order passed by the Labour Court confirming the order of dismissal.[30] (para 11) (Italics supplied).

In *Bangalore Hospital*, seven workmen were dismissed for going on an illegal strike causing serious hardships to patients. The labour court, having recorded a finding that the workmen resorted to an illegal strike, nevertheless ordered reinstatement on the ground that no untoward incident happened due to the strike. Quashing the order of the labour court, the Karnataka High Court held that merely because no untoward incident happened, the dismissal could not be held to be disproportionate.[31] Once it is found that the workman was guilty of inciting other workmen to stage an illegal strike, the award of the labour court that the said workman was not entitled to any relief does not call for interference by the High Court.[32] Where the workman was dismissed for instigating and forcing his fellow workmen to go on an illegal strike, the labour court, in the first instance did not record any finding on the merits of the case. On a direction issued by the High Court to give its finding on merits, the labour court held that the dismissal was not justified and accordingly directed reinstatement with 50 per cent back wages. Dealing with the matter in a writ petition filed by the management, Marlapalle J of the Bombay High Court, while quashing the award, castigated the labour court for proceeding with misplaced sympathy and passing a perverse award. The learned judge further observed that it was necessary for the adjudicator to set out reasons before interfering with the punishment ordered by the employer.[33]

In *UB Gadhe*, the facts disclosed that the management charge-sheeted a few workmen on some 12 counts and dismissed them, after enquiry, for leading and instigating their fellow workers to resort to an illegal strike in a public utility service, which continued for about 5-6 months. The labour court directed their reinstatement but without back wages. The High Court quashed the order of the labour court. Upholding the order of the High Court, Pasayat J (for self and Panta J) of the Supreme Court, observed:

> Power and discretion conferred under the Section needless to say have to be exercised judicially and judiciously. The Court exercising such power and finding the misconduct to have been proved has to first advert to the question of necessity or desirability to interfere with the punishment imposed and if the employer does not justify the same on the circumstances, thereafter to consider the relief that can be granted. There must be compelling reason to vary the punishment and it should not be done in a casual

manner.[34]

(viii) Go-slow

Slow-down or go-slow, whether as a concerted action by the workmen or by an individual workman, in reducing production is a breach of duty and has been condemned as misconduct in Industrial adjudication. An employee who deliberately works slowly and thereby curtails production or does not complete a job in proper time, is guilty of intentional omission of duty, which would constitute misconduct. In the words of Das Gupta J:

> 'Go-slow' which is a picturesque description of deliberate delaying of production by workmen pretending to be engaged in the factory is one of the most pernicious practices that discontented or disgruntled workmen some time resort to. It would not be far wrong to call this dishonest. For, while thus delaying production and thereby reducing the output, the workmen claim to have remained employed and thus be entitled to full wages. Apart from this also, 'go-slow' is likely to be much more harmful than total cessation of work by strike. For, while during a strike much of the machinery can be fully turned off, during the 'go-slow' the machinery is kept going on a reduced speed which is often extremely damaging to machinery parts. For all these reasons 'go-slow' has always been considered a serious type of misconduct.[35]

In *SU Motors*, the Supreme Court held that the misconduct of 'go-slow', being of a serious nature would expose the guilty workman to the consequences of dismissal from service. By its very nature, the proof of 'go-slow' particularly when it is disputed involves into various aspects such as nature of the process of production, the stages of production and their relative importance, the role of the workers engaged at each stage of production, the pre-production activities and the facilities for production and the activities of the workmen connected therewith and their effect on production, the factors bearing on the average production *etc*. The 'go-slow', may be further indulged in by an individual workman, either in one section or different sections or in one shift or both the shifts affecting the output in varying degrees and to different extent depending upon the nature of the product and the productive process. Furthermore, even where it is admitted, in some cases, there may be difficulties in determining the 'go-slow' or approximate loss on account of the 'go-slow', as it may have repercussions on production even after the 'go-slow' ceases which may be difficult to estimate. Sawant J, observed:

> There cannot be two opinions that 'go-slow' is a serious misconduct being a covert and a more damaging breach of the contract of employment. It is an insidious method of undermining discipline and at the same time a crude device to defy the norms of work. It has been roundly condemned as an Industrial action and has not been recognised as a legitimate weapon of the workmen to redress their grievances.[36]

'Go-slow' is not like an ordinary strike, which has been recognised as a lawful weapon under certain circumstances. It has also been made a misconduct under the Model Standing Orders, and it is generally included in the Standing Orders of Industrial establishments as an act of misconduct liable to disciplinary action. Workers are under an obligation to procure average production and if they deliberately refuse to give that average, they must be held guilty of the misconduct of 'go-slow'.[37] In other words, 'go-slow' is not a legitimate weapon in the armoury of labour in the process of collective bargaining.[38] In *Sasa Musa Sugar Works*, Wanchoo J observed that 'go-slow' has always been considered as a serious type of misconduct. The misconduct of 'go-slow' may entail two-fold consequences, *viz*, discharge or dismissal from service and deduction of wages. In either case, it is necessary that the factum of 'go-slow' and/or extent of the loss of production on account of it is disputed, there should be a proper inquiry on the charges which furnish particulars of the 'go-slow' and the loss of production on that account. The principles of natural justice require it, and whether they have been followed or not, will depend on the facts of each case. The question of deduction of wages is not as simple as in the case of strike where measure of pro rata deduction from wages may provide a fair and just remedy, the extent of deduction of wages on account of 'go-slow' action may in some cases raise a complex question. Therefore, the simplistic method of deducting uniform percentage of wages from the wages of all workmen calculated on the basis of the percentage fall in production compared to the normal or average production may not always by equitable.[39] On the facts and in the circumstances of the case, the learned judge directed that the employer will not deduct more than 5 per cent of the wages of the workmen for the month in which the workmen indulged in 'go-slow'.

(ix) Gherao

The expression *gherao* in its etymological sense means 'to encircle', but in the field of Industrial relations, it has acquired 'a connotation and meaning' which is entirely new. It is comparatively a new form of demonstration which is being largely

resorted to by labour in this country. The meaning of the word *gherao* and its Industrial implications have been discussed by a special Bench of five judges of the Calcutta High Court in *Jay Engineering Works*, in which Sinha CJ, observed:

> ...we might now define the word 'gherao' as a physical blockade of a target, either by encirclement or forceable occupation. The 'target' may be a place or a person or persons, usually the managerial or supervisory staff of an Industrial establishment. The blockade may be complete or partial and is invariably accompanied by wrongful restraint, and/or wrongful confinement, and occasionally accompanied by assault, criminal trespass, mischief to person and property, unlawful assembly and various other criminal offences. Some of the offences complained of are cruel and inhuman, like confinement in a small space without lights or fans, and for long periods without food or communication with the outside world. The persons confined are beaten, humiliated by abuse and not allowed even to answer calls of nature and subjected to various other forms of torture, and are completely at the mercy of the besiegers. The object is to compel those who control industry to submit to the demands of the workers, without recourse to the machinery provided for by law and in wanton disregard of it. In short to achieve their object, not by peaceful means, but by violence.[40]

In *Krishnakali Tea Estate*, the events disclosed that certain workers came in a mob on the night of 12th-13th of October 1980 to the bungalow of Manager of the Tea Estate, armed with lethal weapons such as lathis, bows and arrows and axes and they gheraoed the Manager and others and by threat demanded bonus at the rate of 20% as against 8.33% offered by the management. The gherao according to the management continued till 3.00 A.M. on 13 October 1980. On being informed, the police, Bilasipara, arrived at the estate, but the mob consisting of the workmen became violent and damaged the bungalow and other property of the estate. During the wrongful confinement of the manager, he was compelled to sign a document, agreeing to pay 20% bonus. On the basis of above allegations, a domestic enquiry was instituted against the concerned workmen and after the enquiry, on the report of the Enquiry Officer, the workmen concerned were dismissed from service. Several events took place post their dismissal including criminal trial and acquittal of the workmen therein. The labour court, based on the material produced before it, upheld the dismissal. A single judge of Gauhati High Court quashed the award and directed reinstatement of the workers, which order was upheld by the Division Bench. Quashing the orders of the High Court and restoring the award of the labour court, Hegde J (for self, Sinha and Mathur JJ) of the Supreme Court, held:

> From the above, it is seen that the approach and the objectives of the criminal proceedings and the disciplinary proceedings are altogether distinct and different. The observations therein indicate that the Labour Court is not bound by the findings of the criminal court.. . the Tribunal has come to the conclusion that the concerned workmen had participated in the gherao armed with deadly weapons and caused damage to the property of the Estate and wrongfully confined the Manager and others for nearly 8 hrs. Therefore, it found all those workmen who took part in the said incident guilty of the misconduct.. .. This leaves us to consider whether the punishment of dismissal awarded to the concerned workmen dehors the allegation of extortion is disproportionate to the misconduct proved against them. From the evidence proved, we find the concerned workmen entered the estate armed with deadly weapons with a view to gherao the Manager and others in that process they caused damage to the property of the estate and wrongfully confined the Manager and others from 8.30 p.m. on 12th of October to 3 a.m. on the next day. These charges, in our opinion, are grave enough to attract the punishment of dismissal even without the aid of the allegation of extortion. The fact that the Management entered into settlement with some of the workmen who were also found guilty of the charge would not, in any manner, reduce the gravity of the misconduct in regard to the workmen concerned in this appeal because these workmen did not agree with the settlement which others are agreed instead chose to question the punishment.. .. For the reasons stated above, this appeal succeeds. The orders of the High Court are set aside that of the Labour Court is restored.[41]

In *Onkar Nath Misra*, the workman was dismissed after conducting enquiry for the misconduct of gheraoing the senior officers for long hours and inflicting injuries on one of them during the gherao. Hegde J (for self, BP Singh and SB Sinha JJ) of the Supreme Court, held that it was improper for the labour court to interfere with the order of dismissal.[42]

Misconduct Relating to Discipline

The word 'discipline' has been defined in *Webster's Third New International Dictionary* to mean—'behaviour in accordance with the rules (as of an organisation)', —'Orderly conduct'—'a rule or system of rules governing conduct or action'—'a body of laws relating to conduct'—'an orderly or regular pattern of behaviour'. The word 'disciplinary', inter alia, has been defined to mean 'relating to discipline'. Discipline in one form or the other is an element of all organised activity. Its function is to maintain order by setting limits to individual behaviour which may jeopardise the interests of the organised establishment. The law of work discipline has three aspects:

> There are first of all the sanctions imposed, external to the employment relationship, by the law of social security upon employees

> seeking some social security benefit in cases where they have been guilty of conduct which social security law seeks to deter or penalise. Secondly, there may be civil or criminal remedies available to the employer in the courts and tribunals as a means of disciplining the work force. Such remedies may arise out of the contract of employment itself, as in the case of a claim for damages against an employee who acts in breach of his contract ...Thirdly, there are the disciplinary rules imposed by employers inside the employment relationship.[43]

It is this third aspect of work discipline with which the Industrial adjudication or Industrial law is concerned. In Industrial service, the norms of behaviour not only prescribed by the contract of service or the Standing Orders, but also expected a workman to conform to the regular pattern of behaviour, working in an organised cross-section of the society *i.e.*, industry, is generally known as Industrial discipline. The action taken by the Industrial employer to enforce such discipline in his establishment by censuring or punishing an employee by dismissing him or otherwise, for acts of wrong behaviour-misconduct, is popularly known as 'disciplinary action'. Industrial discipline is necessary for the well-ordered conduct of the Industrial activity. Apart from the productivity of the industry, discipline is essential for the workers themselves and, in fact, for the entire nation which depends upon the productivity of the Industrial activity in the country. Unfair and wrongful discharge or dismissal of Industrial workmen as a measure of disciplinary action is one of the major causes of Industrial disputes. Industrial adjudication has infused a great degree of legalism into the Industrial employment, though the employers have always regarded the right of disciplinary action as a concomitant to the efficient attainment of the objectives of Industrial activity. On the other hand, the workers and their unions have tended to regard protection from arbitrary or unjustified disciplinary action as one of the most important functions of the trade union activity. Large scale Industrial strife is apt to disturb Industrial peace and harmony and affect not only the production of particular plants or industries, but may also have an adverse effect even on the national economy. The following acts particularly pertain to the discipline in a factory or office: (i) Disobedience and/or Insubordination; (ii) Acts subversive of Discipline; (iii) Riotous or Disorderly Behaviour; and (iv) Damage to Property or Reputation.

(i) Disobedience and/or Insubordination

The word 'insubordination' means unwillingness to submit to authority; disobedience to orders; infraction of rules, or generally disaffected attitude towards authority.[44] The word 'disobedience' means refusal to obey or negligence in obeying a command; violation or disregard of a rule or prohibition. For instance, where an employer orders an employee that he should disclose the names of the members of superior staff who were in fault, it is the duty of the workman to comply with the order and his refusal to comply with the order will constitute the misconduct of disobedience.[45] The *Concise Oxford Dictionary* gives the meaning of 'insubordinate' as 'disobedient, rebellious'. The two meanings given by the dictionary do not mean that only a rebellious conduct would amount to insubordination but even disobedient conduct would amount to insubordination. The *Random House Dictionary* gives the meaning of 'insubordination' as 'not submitting to authority; disobedient, one who is insubordinate'. These meanings would indicate that any person who is 'disobedient' becomes 'insubordinate' and his conduct amounts to 'insubordination'. Therefore, where a workman disobeys a lawful order, he can be said to be guilty of 'insubordination' and it need hardly be stated that a misconduct of disobedience and insubordination would also amount to indiscipline. In *American Words and Phrases*, the word 'insubordination' has been defined to mean 'insubordination in a civil service implies intentional, wilful disobedience. Insubordination can be rightly charged against a police officer only upon refusal to obey some order which a superior officer is entitled to give and have it obeyed. Insubordination of employee imports wilful disregard of express or implied direction and refusal to obey reasonable orders, and when established, warrants his discharge.'[46] An employee must obey all lawful orders given to him by his employer. Whether an order is lawful or not depends first upon whether the terms of the contract enable the employer to give such an order, and secondly, in the absence of any express provision, upon the character of the employment'.[47] It is the duty of the workman to comply with the lawful order of the employer because obedience of superior officers and loyalty to the management are inherent in the jural relationship of master and servant and they need not be prescribed.[48]

There is no doubt that an employee however old and senior in service has no right to defy the orders of his superiors whatever his grievance in that behalf.[49] A subordinate officer is, therefore, duty bound to obey the lawful order of a superior officer. The concept of obedience is implicit in the fact that officer receiving the order is subordinate to the officer giving the order and a lawful order has to be obeyed, unless there is good justification for not complying with such a lawful order. It is this conduct of declining to obey an order which not only results in disobedience but the conduct of workman would also amount to insubordination.[50]Though the concept of insubordination or disobedience do considerably overlap, they have also certain distinguishing features. For instance, deliberate refusal to obey the orders of the authority will also constitute insubordination but the negligence in obeying the order will be an act of disobedience though it may fall within the connotation of the expression 'insubordination'. Likewise, the expression 'insubordination' would include defiance of persons in authority which may also fall within the connotation of disobedience, but it would also include disorderly and riotous conduct which makes it impossible for the higher officers to discharge their duties properly and such conduct may not be strictly disobedience of their order.[51] Even when a workman is an active member or offce bearer of a

union representing the workmen in an Industrial establishment, he is primarily an employee of the establishment. It is therefore, his duty to answer all reasonable queries addressed to him by the management relating to his work. The fact that he is an office bearer of a trade union does not confer immunity upon him from the performance of his duty and he cannot be allowed to adopt a truculent attitude merely because of his holding the capacity of an office bearer of the union. Persistent refusal by a workman to answer the queries addressed to him from his superiors would amount to insubordination and breach of discipline and if the charge of such insubordination is proved, the workman would be liable to disciplinary action.[52] Wilful insubordination or disobedience of the employer's orders, has therefore, been treated as a serious misconduct in industrial law.[53] Such insubordination or disobedience, whether alone or in combination with any other, of a lawful or reasonable order of a superior, constitutes misconduct which may justify dismissal of the delinquent employee.[54] However, 'the refusal to obey an order which does not properly relate to the character or capacity of the service for which the workman is employed,[55] or an order contrary to the contract of service,[56] would not constitute disobedience or insubordination. Hence, the refusal of a workman to do the work which he is not obliged to do, would not constitute disobedience or insubordination.[57]

Similarly, the impossibility, illegality or ambiguity of the orders or mistake in the orders would be valid defence against the charge of insubordination or disobedience of orders. For instance, refusal to obey an order, which involves a reasonable apprehension of danger to the life or person of the workman or is an unlawful order which the workman is justified in refusing to obey, would not justify dismissal for misconduct of insubordination or disobedience.[58] Similarly, the refusal to work on new equipment requiring intensive practical training for its operation would not constitute an act of insubordination or disobedience.[59] And the refusal of the employee to give in writing about certain events too would not constitute the misconduct of insubordination.[60] In *Calcutta Jute* (*supra*), it was held that though the cases of 'disobedience' and 'insubordination' may considerably overlap in certain cases, 'insubordination' and 'disobedience' would constitute different categories of misconduct. In the instant case, the facts disclosed that the Standing Orders of the company contemplated two types of misconduct: one, 'wilful insubordination' and other, 'disobedience of any lawful and reasonable orders' of a superior. On a proper construction of the Standing Orders, the Supreme Court held that 'insubordination' was not the same thing as 'disobedience' of the order of an officer directly under whom the workmen charged with misconduct worked, as was obvious from the two separate heads of the misconduct. 'Insubordination' would include defiance of the person in authority whether such persons were direct superiors of the workman or not and this head of misconduct also would include a riotous conduct which made it impossible for the higher officers to discharge their duties properly. In connection with this misconduct, Sarkar J, observed,

> it was clearly an implied rule of the factory that higher officers would not be thwarted and prevented from bringing to the notice of the management the wastefulness of the workman causing loss to the employer.[61]

In *India Marine Service*, the workman concerned was a clerk in the purchase department of the company and was working under a superior officer. The officer took away from the desk of the concerned workman, the purchase estimate book maintained by him for the purpose of checking the entries made by the workman therein. The workman, thereupon, got infuriated and abused the officer in the presence of the entire staff and threatened him with violence and even after the warning by the manager, the workman again repeated the threat to the superior officer. This conduct was held to be an act of grave insubordination warranting punishment of dismissal.[62] In *Ananda Bazar Patrika*, the militant attitude adopted by the workman that he would assign to himself his duties and would take no orders from his superiors, was held to be an act of insubordination and disobedience.[63] In *Tractors India*, refusal on the part of the workman to receive written orders of the employer was held to be an act of insubordination and a gross misconduct.[64] In *Caltex*, breach of prohibition to smoke while on duty in the vicinity of the place where an aircraft was being refuelled was held to be a misconduct of disobedience of orders and an act subversive of discipline.[65] In *Laxmi Devi Sugar Mills*, refusal by the workman, to answer the questions put to him during the course of a domestic inquiry, was held to be an act of insubordination in breach of discipline. The fact that the workman was an office bearer of the trade union would not confer any immunity on him to breach the discipline, as he had to realise that first and foremost he was an employee and owed duty to answer to all queries which were addressed to him.[66]

However, the question of signing a statement recorded during a domestic inquiry was held to be standing on a different footing and a workman giving evidence in the course of domestic inquiry might, if he chooses, sign the report, but he could not be compelled to do so and his refusal to sign the statement cannot be treated as a misconduct or disobedience of the lawful orders of his employer.[67] Refusal by the compositors in a newspaper office to do the work of 'joining' has been held to be a misconduct of willful disobedience and insubordination.[68] Refusal to disclose the names of the members of the superior staff who were in fault when required by the employer is a misconduct of disobedience.[69] Though the refusal to obey a lawful order of transfer constitutes willful disobedience and insubordination,[70] the refusal to obey an order of transfer contrary to the contract would not constitute disobedience or insubordination.[71] Disobedience of orders which are not enforceable under any rule cannot be the basis of discharge or dismissal.[72] The refusal of a workman to do a particular

kind of new work given to him, which he is not accustomed to do and particularly when the refusal is on account of fear of doing the work wrongly rather than to willfully disobey the order, would not constitute the misconduct of willful disobedience warranting disciplinary action.[73] Giving evidence in an Industrial adjudication which may be disbelieved by the tribunal, cannot constitute misconduct of insubordination or disobedience.[74] Again, in the absence of rules, requiring a workman to appear before a particular doctor for medical examination, and the mere disobedience of the workman to appear before such a doctor would not lead to the inference that he was pretending to be sick.[75]

The refusal of a bus driver to ply an over-crowded bus was held to be justified in view of the provision of the Motor Vehicles Act.[76] A 'solitary and single instance' will not amount to insubordination and 'in order to prove insubordination of this nature, there should be strong, cogent, clear evidence of various instances that the employee was not only in habit of disobeying his superior, but it is his practice to behave towards them in an impertinent manner'. Then, only the charge of insubordination in question can be taken into consideration along with other instances of habitual misbehaviour, insolent, arrogant and impertinent manner.[77] In *Sarabhai Chemicals*, the Bombay High Court distinguished *Vadivelu* on facts and observed that the observations made therein could not be read as laying down a proposition that disciplinary proceedings for misconduct can never be taken against an employee on a charge of 'insubordination' arising out of a solitary instance of disobedience of a lawful order or in order for sustaining a charge of insubordination, there should be several and repeated instances of disobedience. In the circumstances of this case, the refusal of the workman to obey the orders requiring delivery of challans to be typed was an act of insubordination and gross indiscipline; hence the punishment of dismissal was justified.[78] In *Banamali Palei*, the Orissa High Court has upheld the validity of the dismissal of the workman from service for disobedience of the order of transfer made after affording adequate opportunity to participate in the inquiry.[79] It is for the management to establish by relevant evidence that a particular act will constitute misconduct. In the absence of such proof, the action based on such misconduct will not be sustainable. For instance, in *Ram Bilash Goel*, the employer did not elicit information from witnesses as to whether working beyond a particular time constituted overtime, and refusal to work after that time constituted misconduct. The failure to elicit this material information, therefore, resulted in error of law apparent on the face of the record vitiating the inquiry and the finding of misconduct.[80]

In *Biecco Lawrie*, the facts briefly were: The workman was appointed as general mazdoor in the switch gear works of the company and his duty, inter alia, was to bring materials from the shop rack to the working benches and afterwards to take them to their respective racks. On the 04 August 1984, a charge sheet was issued against the respondent on charges of major misconduct, namely, instigation, insubordination and using of abusive and filthy language against his superiors and dilatory tactics, which constitute major misdemeanor in terms of standing orders of the company. After enquiry, he was dismissed, which was affirmed by the industrial tribunal. On remand from the High Court, the tribunal heard the dispute again and passed an order holding that the dismissal was illegal and invalid, thus reversing its own earlier decision. The High Court, having dismissed the writ petition filed by the management, the matter landed in Supreme Court. Quashing the orders of the courts below, Tarun Chatterjee J (for self and Bedi J) of the Supreme Court, cited several decisions of Supreme Court covering this particular aspect, and *made certain significant observations on the limits imposed on tribunals and High Courts on the power to interference with the punishment imposed by the employer, particularly, when it is not harsh and is based on proved misconduct thus*:

> From a perusal of these observations, made in the aforesaid decisions of this Court as noted hereinabove, it is crystal clear that the general trend of judicial decisions is to minimize the interference when the punishment is not harsh and definitely for charges that are levelled against the respondent and in the instant matter, dismissal is absolutely not shocking to the conscience of the court.. .. The learned Single Judge also misused the power vested in him by remanding back the matter to the Industrial Tribunal for reconsideration when the charges were found to be proved. The Tribunal also erred in reversing its own decision on the same evidence for which we fail to see as to how the same Forum can appreciate the same evidence differently. The arguments advanced by the respondent that there was violation of the principles of natural justice does not stand true and if it does it was duly redressed by the fresh inquiry conducted by the Tribunal after its order dated 9th of October, 1990.. .. The argument that the work assigned to the respondent was not a part of his job, even if accepted does not entitle him to abuse his superiors and create an unhealthy atmosphere where the remaining might just take a clue from the unruly behaviour and subsequently use it to the detriment of the company. Further the letter by which he accepted all the charges sets up a strong proof against the respondent beyond which nothing remains to be analyzed.. .. In view of our discussions made hereinabove, we are of the view that the impugned judgment and order of the Division Bench of the High Court as well as of the learned Single Judge are liable to be set aside and the order of dismissal passed against the respondent herein must be restored.[81]

The above observations of the learned judge put the records straight in the context of unabated disturbing awards of trial courts, and even more irresponsible and reckless decisions of several High Courts in cases involving grave acts of indiscipline. These dysfunctional trends on the part of labour courts, tribunals and the High Courts deserve to be squarely

condemned in the strongest possible language and terms.

(ii) Acts Subversive of Discipline

The dictionary meaning of the word 'subversive' is 'tending to subvert' 'having a tendency to overthrow, upset, or destroy'.[82]The acts subversive of discipline are such acts as tend to subvert discipline or have tendency to overthrow, upset or destroy discipline in an establishment. 'An act subversive of discipline is far different from an act of indiscipline on the part of a particular workman, and the expression 'act subversive of discipline' has got a wider impact and connotation, in that the act must be capable of having an impact on or of impairing the discipline of the Industrial establishment as a whole'.[83] Broadly speaking, all acts which tend to destroy discipline would tantamount to 'acts subversive of discipline' which may include misconduct relating to duty, negligence, going on illegal strikes, go-slow, insubordination and disobedience of orders, riotous and disorderly behaviour *etc*. but most of these acts of misconduct constitute separate heads of misconduct by themselves and are treated as such in the Model Standing Order or the Standing Orders of particular Industrial establishments. The expression 'acts subversive of discipline' in the Standing Orders is generally used in a narrower sense, *viz*, such acts of workmen, which have the tendency or effect to disturb the peace and good order have, generally been regarded as acts subversive of discipline.[84] Though, it would be difficult to lay down any general rule as to what acts are subversive of discipline amongst the employees, generally speaking; rowdy conduct in the course of working hours; misbehaviour committed even outside working hours but within the precincts of the concern and directed towards the employees of the said concern; the conduct proved against an employee which would render him not worthy of employment, may constitute acts subversive of discipline tantamounting to misconduct. However, whether an act subversive of discipline constituting misconduct will depend upon the circumstances of each case.[85] The following acts have been treated as acts subversive of discipline:

(a) writing a letter to the director of the company containing offensive remarks against him,[86]

(b) behaviour insulting and insubordinate to such a degree as to be incompatible with the continuance of the relation of employer and employee,[87]

(c) abusing a superior officer by using vulgar and filthy language[88] and use of immoderate language,[89]

(d) preferring a false complaint to police against a superior officer knowing it to be false with a view to bringing the management into humiliation,[90]

(e) the act of wrongfully restraining and confining the manager by workmen with a view to making him concede to their demands,[91]

(f) preventing a superior officer from discharging his duties towards the management,[92]

(g) sleeping in office while on duty,[93]

(h) rowdy conduct in the course of working hours, or in some cases, even outside the working hours but within the precincts of the concern and directed towards the employees of the concern[94] and

(i) constructing a pacca structure in the labour quarters contrary to the directions of the management and subsequent refusal to dismantle the same in disobedience to the order of the management.[95]

In *Rama Kant Misra*, the Supreme Court held that an act of adopting threatening posture though would amount to 'riotous or disorderly behaviour' it would not amount to an act 'subversive of discipline'; 'indiscreet, improper, abusive language may show lack of culture but merely the use of such language on one occasion unconnected with any subsequent positive action and not preceded by any blame-worthy conduct may be an act of misconduct subversive of discipline, but it may not warrant the extreme penalty of dismissal.[1] In *Bharat Fritz Werner*, the court held that the misconduct involving acts of threatening the highest executive, *viz*, the president of the company with dire consequences, wrongly confining him in his room and compelling him to withdraw a notice, constituted acts subversive of discipline on the part of the workmen.[2] In *Ram Kishan*, the court again emphasised:

> When abusive language is used by anybody against a superior, it must be understood in the environment in which that person is situated and the circumstances surrounding the event that led to the use of the abusive language. No strait-jacket formula could be evolved in adjudging whether the abusive language in the given circumstances would warrant dismissal from service. Each case has to be considered on its own facts.[3]

In *Syed Khader Mohiuddin*, the use of intemperate language used by the delinquent in his explanation to the charge-sheet was held to be an act of misconduct but the extreme penalty for the misconduct was held to be unwarranted.[4] In *Nanabhai Parmar*, a single judge of Gujarat High Court upheld the award of the labour court setting aside the order of dismissal and ordering reinstatement without backwages.[5]It is legitimate for workmen to demand the removal of a particular person from a particular post in an establishment on the basis that there are circumstances warranting his removal from that post. Pursuant to this demand, if a workman makes a speech at a meeting held by the union criticising the attitude of an officer and exhorts the workmen to agitate for his removal or passes a resolution demanding his removal, such action would not amount to misconduct or insubordination nor would it be an act subversive of discipline[6] but it would be an act of gross misconduct to make a speech at a meeting of workmen which is inflammatory and tends to undermine the discipline of the workmen or incite them to violence or breach of peace.[7] In *New Shorrock Mills*, the facts were: a *badli* workman entered the office of the Deputy Manager and started abusing him and threatened that the mill officers will not be safe outside the mill and that he did not care if he had to go to jail for murder of four to five officers. A charge-sheet was issued and after conducting enquiry, the management, instead of dismissing, took a lenient view and discharged him from service. The labour court passed an order dated 22 June 1980 and, inter alia, held as follows:

(a) That the charge against the respondent was neither vague nor unclear:

(b) That the finding of the Departmental Enquiry was legal and proper;

(c) That the order of discharge was not passed by way of victimisation;

(d) That the Departmental Enquiry had been conducted legally and properly and the respondent was offered reasonable opportunity of hearing;

(e) That in passing the order of discharge, the appellant management had not acted outside the scope of the enquiry;

(f) That the respondent workman had seriously misbehaved with his superior officers and was thus guilty of misconduct;

(g) That the finding of misconduct reached in the enquiry was neither perverse nor baseless but was proved on the basis of evidence on record.

Having held that the disciplinary action was foolproof, the labour court surprisingly ordered reinstatement on the ground that the discharge from service was *disproportionate*. In appeal, quashing the order of labour court to the extent of reinstatement, Kirpal J (for self and Verma J) of the Supreme Court observed:

> It appears to us that the Labour Court completely misdirected itself in ordering the respondent's reinstatement with forty per cent back wages. The Labour Court was exercising jurisdiction under Section 78 of the Bombay Industrial Relations Act 1946. It had the jurisdiction, inter alia, to decide the disputes regarding the propriety and legality of an order passed by an employer acting or purporting to act under the Standing Orders. The Labour Court, in the present case, having come to the conclusion that the finding of the departmental inquiry was legal, and proper, respondent's order of discharge was not by way of victimisation and that the respondent workman had seriously misbehaved and was thus guilty of misconduct, ought not to have interfered with the punishment which was awarded, in the manner it did. This is not a case where the court could come to the conclusion that the punishment which was awarded was shockingly disproportionate to the employee's conduct and his past record. The Labour Court completely overlooked the fact that even prior to the incident in question the respondent had misconducted himself on several occasions and had been punished. According to the appellant there were at least three other instances where the respondent had misconducted himself and that he had failed to improve his conduct despite his assurances from time to time. Another aspect which was overlooked by the Labour Court was that on the finding of the Inquiry officer that the respondent had misbehaved with his superior officer and was guilty of misconduct, *the appellant could have dismissed the respondent from service. The appellant chose not to do so. Instead it passed on order of discharging the respondent from service. Lesser punishment having been given by the management itself there was, in our opinion, no justifiable reason for the Labour Court to have set aside the punishment so awarded.* We are unable to accept that the punishment imposed by the management was in any way disproportionate to warrant interference by the Labour Court. The direction of the Labour Court ordering reinstatement of the respondent with forty per cent back wages was clearly unwarranted.[8] (Italics supplied)

In *Mahindra & Mahindra*, Hegde J (for self, Chatterjee and Balasubramanian JJ) of the Supreme Court observed:

> It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the Labour Court/Industrial Tribunal in interfering with the quantum of punishment awarded by the management where the workman concerned is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments

> of this Court referred to hereinabove and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised under Section 11-A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the Court, or the existence of any mitigating circumstances which require the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court cannot by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment. As noticed hereinabove at least in two of the cases cited before us *i.e*. Orissa Cement Ltd. and New Shorrock Mills, this Court held : "Punishment of dismissal for using of abusive language cannot be held to be *disproportionate*." In this case all the forums below have held that the language used by the workman was filthy. We too are of the opinion that the language used by the workman is such that it cannot be tolerated by any civilised society. Use of such abusive language against a superior officer, that too not once but twice, in the presence of his subordinates cannot be termed to be an indiscipline calling for lesser punishment in the absence of any extenuating fact or referred to hereinabove.[9]

The act or omission, however, resulting from the disobedience, must have some connection with the affairs of the establishment in that one of the consequences of such act or omission would be to affect the smooth relationship between the labour and management or between the groups of workmen or be generally subversive of discipline or disturb the peace in the establishment.[10]If the act complained of does not relate to the discipline in the employer's establishment, for instance, a private quarrel between an employee of an establishment and another citizen, outside the factory premises, would not fall within the category of misconduct tantamounting to an act 'subversive of discipline,[11]but if the act relates to or subverts the discipline in the establishment even though committed outside, the act would be subversive of the discipline of the establishment. This point is illustrated in the decision of the Supreme Court in *Mulchandani*, in which the relevant Standing Order provided that '*commission of any act subversive of discipline or good behaviour within the premises or precincts of the establishment*' would constitute misconduct. The labour court took the view that alleged assault was not covered by the Standing Order as it had taken place in a railway train outside the premises or precincts of the establishment. Disagreeing with this view, the Supreme Court observed that on a plain reading of the clause the words 'within the premises or precincts of the establishment' referred not to the place where the act, which is subversive of discipline or good-behaviour, is committed but where the consequence of such act manifests itself. The act wherever committed, if it has the effect of subverting the discipline or good-behaviour within the premises or precincts of the establishment, will amount to an act of misconduct subversive of discipline.[12] In *Hindustan Aeronautics*, the relevant standing order made 'gambling and money-lending or doing another private business within the company's premises, a punishable act of misconduct. It was contended that it was only 'money-lending' inside the company's premises and not receiving money already lent outside the premises and, hence, the charge under the Standing Order was not sustainable. Repelling the contention of the workman, the learned judge held that the act of paying money as loan to any other person as also collecting repayment, both fell within the expression 'money-lending'. Since, admittedly, the workman had collected the repayment within the factory premises, it constituted a misconduct within the meaning of the Standing Order. The court rejected the further contention on behalf of the workmen that in order to constitute misconduct, 'money-lending' should be done as a regular business, and held that even a single transaction of money-lending would amount to misconduct.[13]However, the misappropriation of funds or fabrication of accounts of a society, by an employee of a company, which had no financial interest in the society even though it provided certain amenities to the society, was held not to be an act subversive of discipline against the management of the company.[14]

(iii) Riotous and Disorderly Behaviour

Riotous and disorderly behaviour is one of the heads of misconduct under the Model Standing Orders in Sch 1 to the Industrial Employment (Standing Orders) Rules, 1946 framed under the Industrial Employment (Standing Orders) Act, 1946. The Standing Orders framed by the Industrial employers with respect to their establishments also generally include 'riotous and disorderly behaviour' committed on the premises of the establishment or in the vicinity thereof during the working hours or otherwise as a misconduct. The expression 'riotous and disorderly behaviour' is very wide in its scope. It covers acts of committing nuisance on one hand and the acts of assault and riots on the other. Fighting, assaulting, abusing, drunkenness, *etc*, on the premises of an establishment during duty hours are some of common instances of riotous or disorderly behaviour'.[15] In the absence of Standing Orders, it would be open to the employer to consider reasonably what conduct can be properly treated as misconduct and it is difficult to lay down, any general rule in respect of this problem. Acts which are subversive of discipline being of riotous and disorderly nature amongst the employees would constitute misconduct. Rowdy conduct in the course of working hours would constitute misconduct; misbehaviour even outside working hours within the precincts of a concern and directed towards an employee of that concern may, in certain cases, constitute misconduct, if the conduct proved against the employee is of such a character that he would not be regarded as worthy of employment, it may in certain circumstances, be liable to be called misconduct. What constitutes the misconduct or 'riotous or disorderly behaviour' would depend on the circumstances of each case. When there are Standing Orders,

there would be no difficulty because they generally define the misconduct but in the absence of Standing Orders, the question will have to be dealt with reasonably and in accordance with common sense. [16] If the superior officers are assaulted by the workmen, it would be impossible for them to discharge their duties properly.[17] Participating in an assault on an officer of the employer or his manager would constitute misconduct of riotous or disorderly character for which the punishment of discharge or dismissal may be warranted.[18] Likewise, raising of provocative and abusive slogans in the premises of the workshop would constitute misconduct of riotous and disorderly behaviour.[19]

Howsoever wide the scope of the expressions used in a particular Standing Order making *riotous or disorderly behaviour* as a head of misconduct, it must be shown that such behaviour has some rational connection with the employment of the assailant or the victim.[20]Generally, the Standing Orders make 'riotous or disorderly behaviour' committed during office hours in the premises of the establishment as misconduct. In such cases, whether a particular act of 'riotous and disorderly behaviour' would fall within the ambit of the Standing Orders, will depend on the construction of the order. However, in certain cases, particularly where there are no Standing Orders, acts of 'riotous and disorderly behaviour' committed even beyond the working hours and outside the premises of the establishment may also constitute misconduct provided that there is a rational connection of the act with the employment of the assailant and the victim. Even under the pristine law of master and servant, a delinquent workman could not escape the consequences of his misconduct for the only reason that it was committed outside the working premises. For instance, a workman who carries the money of his master to the bank situated outside the factory premises and misappropriates it while outside the boundaries of the factory premises, cannot be heard to say that there was no misconduct at all as the act attributed against him was just outside the factory gate. On the other hand, there can be extreme cases where some act totally unconnected with the employer-employee relationship, but amounting to one of the offences as provided by statutory provisions such as drunken brawl, may not be appropriately constituted as an Industrial misconduct. Actions encroaching into the area of crimes may expose the employee to the process of ordinary criminal law though it may not appropriately fall in the disciplinary jurisdiction of an industry. In between, there may be many cases falling in the grey area where the contours are hazy and consequently, rendering the decision difficult.[21]Therefore, whether any such act will constitute misconduct justifying disciplinary action would depend upon the facts and circumstances of each case.[22]

What constitutes establishment or its vicinity would depend upon the facts and circumstances of each case. In *Central India Coalfields*, the workman was dismissed for the misconduct of 'drunkenness fighting, riotous or disorderly or indecent behaviour in the quarters of the workers attached to a colliery. Though the Industrial tribunal found the workman guilty of the misconduct in terms of the relevant Standing Order, it set aside the order of dismissal in view of the fact that the misconduct had taken place outside the colliery premises where he was discharging his duties and also beyond the working hours. In appeal, the Supreme Court held that normally the Standing Order would apply to the behaviour on the premises where the workman discharged their duties and during the hours of their work and if the quarrel took place between workmen beyond the working hours and away from the colliery premises, that would be a private matter which may not fall within the relevant Standing Order. However, in view of the fact that the incident took place in the quarters at a short distance from the colliery and the fact that the conduct of the workman clearly amounted both to drunkenness and riotous and disorderly behaviour, the court upheld the dismissal and set aside the award of the tribunal.[23] On the other hand, in *Agnani*, the Supreme Court upheld the award of the tribunal setting aside the dismissal of the workman for having indulged in abusive and vulgar language and creating a riotous scene in a provision store in the colony of the tribune trust. The court observed that it was plain from the language of the Standing Order which provided that if an employee causes or threatens to cause mental and/or physical pain or injury to other employees in the trust's estate, it would be an act of misconduct entailing dismissal and that the misconduct proved against the workman did not fall under the Standing Order because the owner of the provision store was not an employee of the tribune. Speaking for the court, Gajendragadkar J observed:

> It may, however, be relevant to observe that it would be imprudent and unreasonable on the part of the employer to attempt to improve the moral or ethical tone of his employees, conduct in relation to strangers not employed in his concern by the use of the coercive process of disciplinary jurisdiction.[24]

In *Tata Oil Mills*, though the court reiterated that it would be unreasonable to include within the relevant Standing Order any riotous behaviour 'outside the factory' which was the result of a purely private and individual dispute, it evolved the rule to bring certain acts of misconduct of riotous and disorderly behaviour within the ambit of the relevant Standing Order, that the management should show that the disorderly or riotous behaviour had some 'rational connection' with the employment of the assailant and the victim. In this case, two workmen were dismissed for the misconduct of way-laying and assaulting the charge-man of the soap plant of the company's factory at Tatapuram while he was returning home after his duty in the second shift. The court held that it was quite clear that the assault committed by the delinquent workman was not a purely private or individual matter as it was committed because the assaulted workman was supporting the plan of the company for more production. The assault, therefore, was committed with the motive to terrorise the workman

against supporting the company's incentive plant for more production, and so was an act subversive of discipline.[25] In *Mulchandani,* the relevant Standing Order provided that the commission of any 'act subversive of discipline or good behaviour within the premises or precincts of the establishment would constitute an act of misconduct. In this case, the delinquent workman was dismissed from service for assaulting his superior officer in the train on his way from the factory to his house after the day's work. On behalf of the workman, it was contended before the Supreme Court that the alleged assault having taken place in the train which was obviously outside the 'premises or precincts' of the establishment was not covered by the relevant Standing Order. The Supreme Court held that on a plain reading, the expression 'within the premises or precincts of the establishment' refers not to the place where the act subversive of discipline of good behaviour is committed but where the consequence of such an act manifests itself. In other words, an act wherever committed, if it has the effect of subverting discipline or good behaviour within the precincts of the establishment, will amount to misconduct. The court rejected the contention that the Standing Order leaves out of its scope an act committed outside though it may result in subversion of discipline or good behaviour within the premises or precincts of the establishment in question as such a construction would be quite unreasonable.[26]

In *Glaxo Laboratories,* Desai J took a diametrically opposite view from the one taken by it in *Tata Oil Mills* case and *Mulchandani's* case. The facts of these cases are more or less similar to this case. In this case, the court set aside the dismissal of the delinquent workman who was dismissed for manhandling some other workmen of the company in a bus chartered by the employer company for the use of the workmen commuting between the factory and the city. The relevant Standing Order of the company, inter alia, made the commission of such acts 'committed within the premises or precincts of the establishment' as misconduct entailing dismissal. In the first instance, the court has sought to draw a distinction between the language of the Standing Order in *Mulchandani's* case which uses the expression '*within the premises or precincts of the establishment*' and that of the Standing Order in *Glaxo Laboratories*, which uses the expression '*within the premises of the establishment or in the vicinity thereof*'. The distinction, if any, is as between *tweedledee* and *tweedledum.* Then, the court, ignored the principles laid down in the earlier dicta and has sought to rest its holding on the principle of strict construction of penal statutes observing that in that case, the court had to put a 'wide construction on a penal measure but did not choose to set out its reasons for departing from the well-established principle that penal statutes generally receive a strict construction'. Justice Desai observed:

> The employer has hardly any extra territorial jurisdiction. He is not the custodian of general law and order situation nor the Guru or mentor of his workman for their well regulated cultural advancement. If the power to regulate the behaviour of the workmen outside the duty hours and at any place wherever they may be was conferred upon the employer, contract of service may be reduced to contract of slavery. [27]

Then, with a view to make it 'abundantly clear and incontrovertible' and in order to avoid any ambiguity being raised in future and a controversial interpretation question being raised, the court stated the principle that 'the casual connection in order to provide linkage between the alleged act of misconduct and employment must be real and substantial, immediate and proximate and not remote and tenuous'. The principle stated by the court is ambivalent. Its application to the fact-situation of the case is far from being correct. This decision does not lay down correct law. The consensus of judicial dicta has been correctly summed up by the court in *Mulchandani*. *Glaxo* case is in direct conflict with *Mulchandani*. The consequences of *Glaxo* may be that any officer or worker of an employer can by way-laid, man-handled, assaulted and even murdered by the disgruntled workmen with impunity as soon as he goes out of the premises, precincts or vicinity of the establishment. It is with a view to avoid situations like this that *Mulchandani's* case had correctly adumbrated the principle that the expression 'within the premises or precincts of the establishment' refers not only to the actual place where the act of misconduct is committed but also to the place where the consequences of such an act manifests itself. In *Kalyani Steel,* the Bombay High Court rejected the contention on behalf of the workman that the *Glaxo Laboratories* case overruled *Mulchandani*, therefore to fall within the ambit of the relevant Standing Order, the act subversive of discipline must necessarily be committed within the premises of the establishment, and observed that there was no conflict between the two judgments of the Supreme Court and that a proper reading of *Glaxo* case, would show that the ratio in the case of Mulchandani was emphatically reiterated.[28] A similar view has been taken by the Kerala High Court in *BPL Systems.*[29]

Where it was established that the workmen concerned formed themselves into an unlawful assembly, armed with deadly weapons, assaulted managing staff, the sole fact that the General Manager, even after suffering head injury caused by a lathi, did not die could not be said to be a mitigating circumstance justifying the reduction of the punishment of dismissal. Assault of such a nature is gross misconduct and in the given situation demoralises managing officials. The order of the tribunal substituting the order of dismissal with stoppage of one increment, and directing reinstatement without backwages is untenable and is liable to be set aside.[30] In a case involving riotous and disorderly behaviour, wherein the enquiry officer had, after appreciating evidence available on record, come to the conclusion that the charges were proved, the labour court set aside the order of dismissal on the ground that the enquiry officer had not examined independent witnesses. The High Court too upheld the order of the labour court. Quashing the orders of the courts below, the Supreme Court Ashok Bhan J

held that the labour court fell into a factual and legal error in setting aside the findings recorded by the domestic tribunal and so also the High Court, and restored the dismissal ordered by the employer.[31] In *T Sreekantan*, the facts were: the respondent workman, who was working as a typist-cum-clerk in the petitioner-bank, behaved in a riotous, disorderly and indecent manner towards a co-worker and threatened him of dire consequences including to his life in the presence of higher officials, colleagues and customers. He was charge-sheeted and eventually dismissed after conducting domestic enquiry. The labour court, while recording a finding that the disciplinary action was in order and that the misconduct alleged and proved against the workman was a major misconduct, reduced the punishment on the ground that dismissal was '*shockingly disproportionate*'. Quashing the order of the labour court and restoring the dismissal ordered by the bank, Ramachandra Menon J, of the Kerala High Court observed:

> It is true that the power under Section 11-A enables the Labour Court or Industrial Tribunal to vary, alter or modify the punishment imposed by the Management even after sustaining the validity of the enquiry, if the punishment imposed is shockingly disproportionate. Referring to the scope of judicial review exercisable by the High Court, it has been made clear by the Apex Court on many an occasion that such power shall not be read and misunderstood as a power of appeal and that, it is exercisable only when the course adopted by the Management would not have been pursued by any person of reasonable prudence and conscience so as to make it 'shockingly disproportionate'.. .. It has been observed in paragraph No.10 [of the award] that that the charge was for 'major misconduct' and that the disciplinary authority is definitely justified in imposing a 'major punishment'. On the next breath, the second respondent states that the misconduct in the present case cannot however be termed as a grave one as there was no misappropriation of money or fraud, which shows that the second respondent is having some misconceived idea that unless and until a misconduct involving misappropriation of funds or any fraud is involved, nobody can be inflicted with the punishment of dismissal.. .. The specific circumstance for interference contemplated under Section 11-A of the Act is that the punishment should be 'shockingly disproportionate'; *i.e*., it should evoke some sense of 'shock' to the conscience in relation to the gravity of the proven misconduct. Considering the same, no such inference could be drawn in view of the observation of the second respondent in the previous sentence that the charge was for 'major misconduct' and that the disciplinary authority was definitely justified in imposing major punishment. The second respondent also arrived at a finding that the conduct on the part of the worker made him to be sent out from the service and that he was no longer liable to be continued in the service of the Bank. It is after justifying the said extent of the finding arrived at by the Management, that the second respondent sought to substitute the punishment of 'dismissal' with that of 'discharge' with all superannuation benefits; thus enabling the worker to simply go away with all service benefits including pension. The course pursued by the second respondent [labour court, here] appears to be rather puerile by extending misplaced sympathy which cannot be held as correct or sustainable.. .[32]

In *Madhavsinh Solanki*, the brief facts were: a daily wager was dismissed after conducting enquiry for a misconduct involving unruly behaviour, interrupting enquiry proceedings, burning official documents, *etc*. The labour court ordered reinstatement despite recording a finding that the disciplinary action was in order. Setting aside the order of labour court, Sahai J (for self and Shah J) of the Gujarat High Court observed that while exercising jurisdiction, the labour court could not act as an appellate body, and that the discretion exercised by it should be judicious and not whimsical. The learned judge further held that past record of service could not be a ground to condone serious misconduct of the kind that was established in the case.[33] Where the charge-sheet did not disclose that the workman used filthy language against the superior, but only mention that he used inappropriate language, the punishment of dismissal was disproportionate to the misconduct.[34]

(iv) Damage to Property and Reputation

Willful damage to the employer's property, goods or reputation is therefore, usually made misconduct under the Standing Orders of Industrial establishments. The word 'willful' means 'deliberate', 'full of desire to see one's own wishes or plans fulfilled'. The conduct of a workman, in handling his employer's property which indicates that he is unfit for a position of trust and confidence may justify the employer in dismissing him.[35]Hence, a willful act is such an act as is done for a purpose. It is done intentionally and not by accident. It is deliberately done; so compulsion, ignorance or accident is not an excuse.[36] If, therefore, an employee either deliberately or negligently damages the employer's property or reputation, he will expose himself to disciplinary action for the misconduct. Deliberate infliction of harm or damage to the employer's business with the intent to cause him loss is also known by the name of 'sabotage', which is included in the list of misconducts in the Standing Orders. It may consist of deliberately disrupting the production by tampering with or damaging machinery or turning off electric current required for operation of the plant and machinery though a break-down in machinery may by itself not prove that the operator is guilty of sabotage.[37]Deliberate spoiling of products to cause harm is also sabotage. Likewise, deliberate disturbance in supply of power to the works by switching off electric power during the working hours without permission or order of a superior is a misconduct of sabotage deserving the punishment of dismissal unless the act is shown to have been done due to an error of judgment.[38] The order of a superior to switch off power or error of judgment in doing so would be a good defence to the charge of damage to property on account of

switching off the electrical power. Making grave allegations against his employer which are false and which the workman knows to be false or when he gives evidence against the employer which he knows to be untrue,[39] will be damage to the reputation of the employer.

The fact that the workman is an office bearer of the union of workers does not give him any immunity, as an office-bearer of the union gets no better or higher right than its constituents.[40] However, in such cases the employer has to establish that the false charges were intentionally made and false evidence was intentionally given by the workman and the mere fact that the evidence given by the employee has not been accepted by the authority is not a good ground for taking disciplinary action against him.[41] Imputing dishonesty or misuse of public funds by the management of a public concern amounts to misconduct of subversion and damage to the reputation of the employer.[42] In *Hindustan GEC*, the facts were: the workman made a complaint in writing to the police that the assistant manager and the labour welfare officer of the company along with others had broken open the lock of the room of a worker and thrown away his belongings when he was actually on duty. After making investigations, the police reported that the workman had deliberately brought a false complaint and consequently the complaint was dismissed by the sub-divisional officer. The management dismissed the workman from service after finding him guilty of the act subversive of discipline in making serious and defamatory allegations against the officers of the company, who had been put to great harassment and humiliation at the investigation by the police. The dismissal was upheld as there was no justification for the workman to complain against the officers company's officers. It was further held that the workman's action was subversive of discipline in undermining the authority of the officers and thereby affecting the maintenance of peace and good order in that factory.[43]

Misconduct Relating to Morality

'Morality' means particular moral principles or rules of conduct, good and uprighteous behaviour and conduct conforming to customs or accepted standard of a particular culture or group.[44] Any behaviour of an Industrial employee which does not conform to good and uprighteous conduct of a human being or the customs and accepted standards of a civilised society, such as justice, honesty, modesty *etc*, may, apart from being a criminal offence, constitute an act of Industrial misconduct. Acts involving moral turpitude are such acts which involve grave infringement of moral sentiments of the community or are acts of base vileness and depravity in the private and social duties which a man owes to fellowmen for a society in general, contrary to the accepted customary rule or right and duty between man and man. Devotion to duty is faithful service which requires confirmation to the moral principles. Modern approaches to life have changed many ideals which used to be held sacred and such approaches have also worked a change in our sense of the sublime but even then, the idea of right and wrong has not been forgotten and the difference between honesty and dishonesty, fidelity and unfaithfulness has not been wholly lost. Considerations of expediency may be irresistible at times but their evils may have merely to be put up with and not to be extolled or prescribed as standards of life and work.[45] A term will be implied in every contract of Industrial employment that the employee will serve honestly and faithfully. This duty may be amplified and extended by express agreement. However, it would be imprudent and unreasonable on the part of the employer to attempt to improve the moral or ethical tone of his employee's conduct in relation to strangers not employed in his concern by use of the coercive process of disciplinary jurisdiction.[46]In other words, the act complained of must have some rational connection or bearing on the contract of employment between the employer and the employee.

In Industrial law, the acts of theft, fraud and dishonesty, have been treated as acts of misconduct justifying dismissal apart from being exposed to the penal liability under criminal law.[47] The Model Standing Orders include 'an act or conduct inconsistent or incompatible with due or faithful discharge of his duty to the master and an 'act of conduct of the employee so grossly immoral that all reasonable men may say that he cannot be trusted' in the scope of the expression 'misconduct'. The Standing Orders of Industrial employers also make such acts and conduct as 'misconduct' by including them in their Standing Orders. There is, however, a distinction between such acts committed by an employee towards his employer and towards others. In the former case, the misconduct will justify the disciplinary action of dismissal or discharge of a workman by his employer, but in the latter case, a further consideration arises, whether the act is committed towards an utter stranger or towards other persons employed by the employer. Criminal law makes special provisions for dealing with delinquent servants who steal or embezzle the property of the employer or commit fraudulent or dishonest acts, such as criminal breach of trust, misappropriation, falsification of accounts, *etc*. Some of the acts which will constitute misconduct against morality have been discussed under the following sub-heads:

(i) Theft

The acts of theft, fraud and dishonesty committed towards utter strangers may not make a workman guilty of Industrial misconduct unless he is convicted by a criminal court in which case the employer will have the justification to dismiss him on the basis of the conviction itself, but in a case, where such an act is committed by a workman against his co-employees, the employer may have the justification of treating it as an act of misconduct and discharge or dismiss him from service for loss of confidence. In *Kushal Bhan*,[48] the dismissal of a workman for stealing a bicycle of a co-workman was held

justified. The offence of theft, committed by an employee, shows that he is dishonest and his suitability and reliability to continue in service may be affected by that reason and will have a bearing on the contract of service. It will therefore be good ground for dismissing him from service.[49] It may, however, be noted that in inflicting the punishment for the misconduct of theft, the nature of the theft is an important factor. In cases of minor or trifling acts of theft, the punishment of dismissal from service may be unwarranted and unsustainable. For instance, in *P Orr & Sons*, the workman was dismissed for theft of an empty oil tin worth thirty paise only. The employee had put in 24 years of service with no warning or black-mark. The dismissal was set aside as the punishment was held to be too harsh and shockingly disproportionate having regard to the nature of the offence.[50] On the other hand, in *Ruston & Hornsby*, the Supreme Court held that even an attempt to steal the employer's property on the part of the workman who was a watchman was a serious charge and deserved nothing short of the dismissal and the labour court was not justified in interfering with the punishment in the circumstances of the case.[51] Likewise, the Calcutta High Court in *Wimco Sramik Union*, held that the order of dismissal passed against the workman for the proved misconduct of theft of the property valued at Rs 150 was not unjustified as to warrant interference by tribunal under s 11A of the Act. It was observed that the offence of theft which was committed by the employee concerned showed that he was dishonest and his suitability and reliability to continue in service might be affected by that reason and would have a bearing on his contract of service and as such, the said offence was a good ground for dismissing other workman from service. The fact that the workman had rendered a long period of unblemished service and property stolen was worth Rs 150 did not justify lesser punishment. Furthermore, an attempt to steal the employer's property by the workman was a serious charge and deserved nothing short of dismissal. If he was allowed to get away with lesser punishment, it would be very difficult for the employer to maintain discipline in the organisation. After finding that the inquiry was fair and proper, there is no justification for interference with the order of dismissal.[52]

(ii) Dishonesty and Fraud

Section 24 of the Indian Penal Code 1860 —'Code' in short) lays down the definition of the term 'Dishonestly' as 'whoever does anything with the intention of causing a wrongful gain to one person or wrongful loss to another person is said to do that thing 'dishonestly''. Section 25 of the Code lays down the definition of the term 'fraudulently' as 'person is said to do a thing fraudulently if he does that thing with the intent to defraud but not otherwise.' 'Dishonesty' and 'fraud' have distinct meanings in law in contradistinction to their meanings in the ordinary parlance. Dishonesty requires an intention to cause wrongful loss or wrongful gain of property, but it does not require deception or concealment as a constituent element. On the other hand, fraud does not require an intention to cause a wrongful loss or wrongful gain to somebody as there can be fraud even where there is no intention to cause pecuniary loss or damage to the person deceived. Fraud, however, does require concealment or deception. The element of deception is an essential ingredient of fraud and it is not necessary for dishonesty. In the words of Subba Rao J:

> ...the expression 'defraud' involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss, ie, deprivation of property, whether movable or immovable, or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. [53]

Dishonesty by lying idle is as much a misconduct as making any record or document which intentionally makes a false statement. For instance, the case of making false entries in the official records, certifying receipt of more than what has, in fact, been received or certifying receipt of goods which never were received at all, will constitute acts of dishonesty or fraud. To forge or present a forged document, therefore, would also fall in this category of misconduct. For instance, making an alteration or change in a document or paper so that it no longer reflects the truth, will constitute an act of fraud or dishonesty. Likewise, malingering *i.e*, obtaining leave on false pretence of being ill, will constitute a misconduct. Any other fraud, such as attempt to obtain wages for work done by others or wages for the period for which the employee did not work at all, would constitute misconduct under this head. To obtain the employer's property through a false statement would also constitute an act of fraud warranting disciplinary action irrespective of the fact that such conduct is sufficient to amount to a criminal—offence or not. Likewise, obtaining money through false book entries, a false travelling allowance report, a wage taken for a fictitious worker or a receipt in the name of a fictitious person, would constitute fraudulent acts warranting disciplinary action of dismissal. Intentional retention of the money of an employer by a workman which does not belong to him even for a temporary period will tantamount to misappropriation of such money.[54] Acts of dishonesty or fraud constitute misconduct of a serious nature warranting the penalty of dismissal.[55] It is, therefore, a grave misconduct on the part of the employee holding responsible position whose duty is to supervise over the work of the others to deliberately allow an outsider to impersonate as a permanent workman on the rolls of the employer and claim the benefit to which a permanent workman is entitled.[56]

To warrant the punishment of dismissal, the act must be of a grave nature as casual or minor acts which may technically constitute fraud or dishonesty will not warrant severe punishment. Furthermore, such acts must have a rational connection with the employment of the employee with his employer. The acts of theft or dishonesty which have no relation with employment of the employee with his employer or which relate to outsiders, will generally not constitute misconduct for the purposes of Industrial discipline as an employer is not the general custodian of the morals of his employees.[57] In a case where a bus conductor was dismissed from service for possessing an amount of Rs. 93/- in excess of the sale of tickets, which was proved in the course of enquiry, the labour court set aside the order on the ground that the evidence of passengers in the bus was not adduced and their statements not recorded to verify matter of either non-issuance of tickets or issuance of tickets of lesser denomination, a single judge and the Division Bench of Karnataka High Court upheld the award of the labour court. Quashing the orders of the courts below, Hegde J (for self and Sinha J) of the Supreme Court, held that the interference with the order of dismissal was erroneous.[58] In *Hoti Lal*, the facts disclosed that a conductor was dismissed for carrying ticketless passengers and was also found in possession of old and used tickets. A division Bench had set aside the termination on the ground that the amount involved was only Rs. 16/- and the loss suffered by the state was not heavy. Quashing the order of the Division Bench, Pasayat J (for self and Patil J) of the Supreme Court observed:

> It is not only the amount involved but the mental set up, the type of duty performed and similar relevant circumstances which go into the decision-making process while considering whether the punishment is proportionate or disproportionate. If the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of functioning, it would not be proper to deal with the matter leniently. Misconduct in such cases has to be dealt with iron hands. Where the person deals with public money or is engaged in financial transactions or acts in a fiduciary capacity, highest degree of integrity and trust-worthiness is must and unexceptionable. Judged in that background, conclusions of the Division Bench of the High Court do not appear to be proper. We set aside the same and restore order of learned single Judge upholding order of dismissal.[59]

In *Bank of India*, an employee obtained employment in a public sector bank by furnishing a false caste certificate claiming that he belonged to a Scheduled Caste. The High Court, in exercise of its writ jurisdiction, ordered his reinstatement on the ground that the proceedings for the verification of caste certificate were not initiated within a reasonable period. Quashing the order of the High Court, the Supreme Court held:

> The order of termination does not suffer from any infirmity and the High Court should not have interfered with it. By giving protection for even a limited period, the result would be that a person who has a legitimate claim shall be deprived of the benefits. On the other hand, a person who has obtained it by illegitimate means would continue to enjoy it notwithstanding the clear finding that he does not even have a shadow of right even to be considered for appointment.[60] (para 13)

In *V Ramana*, where the facts disclosed that the bus conductor was guilty of professional misconduct in so far as he did not issue tickets to the passengers at the boarding point nor did he collect the fare at the alighting point, and was further guilty of not maintaining the records of tickets and fare, the order of dismissal could not be said to be disproportionate and the action of management did not call for interference.[61] In a case where the services of a bank employee of Regional Rural Bank were terminated on ground that he had unauthorisedly withdrawn amount from bank, the High Court without recording any reason as to how and why it found that the punishment shockingly disproportionate, ordered reinstatement of the workman. In its order, it was found that there was no discussion on this aspect. Quashing the order of the High Court, Pasayat J, of the Supreme Court held that the very discipline of an organization more particularly a bank is dependent upon each of its officers and officers acting and operating within their allotted sphere. Acting beyond one's authority is by itself a breach of discipline and is a misconduct. The charges against the employee were not casual in nature and were serious. These aspects do not appear to have been kept in view by the High Court. Mere expression that the punishment is shockingly disproportionate would not meet the requirement of law. Even in respect of administrative orders.[62] In *Pallappa Rao*, the workman was charge-sheeted for accepting illegal gratification of Rs 950/- and cheating a consumer, and was dismissed after conducting enquiry. The labour court directed his reinstatement. Quashing the order of the labour court, NV Ramana J, of AP High Court observed that the charge against the workman was serious reflecting moral turpitude and that the labour court did not assign any reason to show how the dismissal ordered by the employer was disproportionate. The learned judge further observed that the discretion of labour court to interfere with the punishment, though wide, cannot be exercised arbitrarily or fancifully.[63] In *Suresh R Bhokare*, the employee was charge-sheeted for fraudulently obtaining recommendation for appointment from social welfare department and was dismissed. The labour court upheld the dismissal, which order was reversed by industrial court in a revision petition filed by the workman. The writ petition filed by the management having been dismissed, the matter landed in the Supreme Court. On the basis of the conclusions reached by the industrial court to the effect that, in the show cause notice, no basis was laid to show what was the nature of fraud that was being attributed to the workman; that no particulars of the alleged fraud were given; and that the said

pleadings did not even contain any allegation as to how the appellant was responsible for sending the so called fraudulent proposal or what role did he play in such proposal being sent, the Supreme Court restored the order of the industrial court and High Court directing reinstatement of the workman.[64] In *Bharat Heavy Electricals*, a workman, having mortgaged the title deeds of his property with the employer as a security, fraudulently took away the same and attempted to sell the mortgaged property. In the course of the enquiry, the workman attempted to justify the removal of the documents by producing fabricated documents. After enquiry, the workman was dismissed. The labour court, as is the usual practice with most of them, gave an irresponsible verdict to the effect that the punishment was harsh in view of the fact that his past record was clean and, on this view of the matter, directed reinstatement. Both the tiers of High Court approved the decision of the labour court. Quashing the orders of the courts below, Hegde J (for self and Sinha J) of the Supreme Court held:

> .. . the reasons given by the Labour Court to reduce the penalty are reasons which are not sufficient for the purpose of reducing the sentence by using its discretionary power. The fact that the misconduct now alleged is the first misconduct again is no ground to condone the misconduct. On the facts of this case as recorded by the Labour Court the loss of confidence is imminent, no finding has been given by the courts below including Labour Court that either the fact of loss of confidence or the quantum of punishment is so harsh as to be vindictive or shockingly disproportionate. Without such finding based on records interference with the award of punishment in a domestic inquiry is impermissible. (para26). .. For the reasons stated above the appeals succeed. The impugned orders to the extent they direct the reinstatement of the respondent is set aside. The order of dismissal of the respondent made by the appellant pursuant to the inquiry is upheld.[65] (para 27).

In *H Amaresh*, the respondent-workman was employed as a conductor. He was found to be under influence of alcohol while on duty, apart from not issuing tickets to the passengers and indulging in misappropriation of the money of the corporation. He was charge-sheeted and finally dismissed after holding disciplinary enquiry. The misconduct of pilferage was also proved. The labour court taking a lenient view of the misconduct, including pilferage on the ground that the amount pilfered was petty, directed reinstatement with back wages. Having lost the case at both the tiers of the High Court, the Corporation approached the Supreme Court. Quashing the orders of the courts below, Lakshmanan J (for self and Panta J) of the Supreme Court held:

> In our view, even short remittance amounts to misconduct and, therefore, applying the rulings of this Court, the impugned order ought not to have been passed by the Division Bench ordering reinstatement. We, therefore, have no hesitation to set aside the order passed by the learned Judges of the Division Bench and restore the order of dismissal of the respondent from service. It is stated that pursuant to the order of the Labour Court the respondent was reinstated in service. *Since there was no stay granted by this Court the respondent had continued in service of the Corporation. In view of the law laid down by this Court and of the facts and circumstances of this case, the respondent, in our opinion, has no legal right to continue in service any further. We, therefore, direct the appellant-Corporation to immediately discharge the respondent from service.* However, we make it clear that the salary paid to the respondent and other emoluments during this period shall not be recovered from the respondent. We also make it further clear that in view of the order of dismissal the respondent shall not be entitled to any further emoluments.. .. For the foregoing reasons, *we allow the appeal filed by the appellant-Corporation and set aside the orders passed by the Labour Court, learned single Judge and also of the Division Bench as perverse and are against the proved facts and circumstances of the case.*[66] (Paras 23 & 24)

Although the charges in a departmental proceedings are not required to be proved like in a criminal trial *i.e.*, beyond all reasonable doubts, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with.[67] In *APSRTC*, the facts were: an employee of the Corporation was found involved in committing theft of property of the Corporation. The employee admitted his guilt. The act of theft, being a serious misconduct, there was nothing wrong in the Corporation losing confidence in such an employee and the awarding punishment of removal from service. The labour court too held that the removal from service was proper after taking into consideration entire facts and circumstances of case. The AP High Court took a sympathetic view and ordered reinstatement with continuity of service, after considering the past services of workman. Quashing the order of the High Court, the Supreme Court held that the interference of the High Court with the order of labour court was improper and observed that past conduct of workman is not relevant in departmental proceedings.[68] In *Roop Singh Negi*, quashing the dismissal, Sinha J (for self and Joseph J) of the Supreme Court held that suspicion, however high may be, can under no circumstances be held to be a substitute for legal proof. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence

Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the Enquiry Officer was based on mere *ipse dixit* as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the Enquiry Officer apparently were not supported by any evidence. If the Enquiry Officer had relied upon the confession made by the appellant, there was no reason as to why the order of discharge passed by the Criminal Court on the basis of self-same evidence should not have been taken into consideration. Since the orders passed by the disciplinary authority and appellate authority have severe civil consequences, appropriate reasons should be assigned.[69]

In *Chauhan Vajesinh*, the facts disclosed that a conductor was dismissed, after enquiry, for not issuing tickets to 8 passengers though he had collected the fare from them, Rathod J of Gujarat High Court observed that the order passed by the tribunal upholding dismissal need no interference in a writ proceeding. The learned judge discountenanced the contention of the workman that the passengers were not examined in the domestic enquiry, and held that in a case involving dishonesty and misappropriation, dismissal was the only punishment which could be imposed on the workman.[70] Where the witnesses deposed that the delinquent workman had confessed to the commission of theft, and the delinquent workman did not cross-examine the witnesses coupled with the further fact that the no plea was raised by the workman that the said confession was made by him under duress, it is improper for the labour court to interfere with the findings of the Inquiry Officer. The order of the labour court directing reinstatement is liable to be set aside.[71] In *Sarva UP Gramin Bank*, the Supreme Court held that the punishment imposed, reducing the salary of the employee in six stages permanently, cannot be said to be disproportionate to the gravity of the charges proved against the respondent. The charges related to the conduct of the respondent in a financial institution whereby, taking advantage of the official position, he attempted to procure unlawful pecuniary benefits for himself. The charges related to misappropriation, fraud and irregularities with regard to the maintenance of accounts. He had been siphoning off money belonging to the account holders. He was holding a position of trust in the Bank, which he betrayed. The court further took notice of the fact that that the Bank had already been sympathetic and lenient enough.[72]

(iii) Disloyalty

One of the basic requirements of what an employer would expect to be satisfied from an employee is loyalty towards him. In other words, the employee is expected to promote the employer's interest in connection with which he has been employed and a necessary implication which must be engrafted on such a contract is that the servant undertook to serve his master with 'good faith' and 'fidelity'.[73] The acts of making defamatory and false statements against the employer would apart from being subversive of discipline, also constitute the misconduct of disloyalty towards the employer as the offence constitutes willful harm to the employer.[74] Likewise, to reveal an employer's confidential information to unauthorised persons, particularly when such persons are competitors or otherwise averse to the interests of the employer, who might use it against him, would constitute a misconduct of disloyalty warranting disciplinary action as such an act by its very nature would be dishonest. However, the loyalty that law expects of an employee is in connection with his employment. An employee is not, however, expected to be loyal to all whims, vagaries, creeds or ideologies of the employer because such things will have no connection with the contract of employment. The question whether a particular act of disloyalty constitutes misconduct would depend upon the facts and circumstances of each case.

(iv) Corruption

Accepting bribes or illegal gratifications is a criminal offence against government employees. Accepting such gratifications or bribes, by commercial or Industrial employees, though may not constitute a criminal offence, would constitute a misconduct, 'for gifts blind the eyes of the wise and change the words of the just'. The act of receiving bribes or illegal gratifications constitute a sale by the employee of the information or discretion confided in him by the employer for his benefit. Industrial employers, therefore, generally include acts of corruption, bribery and undue gratification as acts of misconduct in their Standing Orders. Demanding bribe, accepting bribe as well as giving bribe are all acts of misconduct.

(v) 'Moral Turpitude'

'Moral turpitude' is an expression which is used in legal as also societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity.[75] In fact, in the modern world, there are innumerable offences for instance, relating to traffic rules, with which any person employed may become guilty of at any time. Such offences do not involve 'moral turpitude'. The expression 'moral turpitude' used in a statute, therefore, is not to receive the narrow construction. Wherever conduct of the delinquent is contrary to honesty or is opposed to good morals, or is unethical, it may safely be held that it involves 'moral turpitude,.[76] 'That is why the law-makers have carefully circumscribed the nature of the offence, the conviction therefore would have implication in the matter of employment and

the only category of offences are those which invite shame on the person who became guilty, which shame will irradiate on the institution which employs'.[77]

The term 'moral turpitude' by its very nature is somewhat nebulous because it involves an examination of an action in the light of the prevailing moral norms. Unlike legal norms, moral norms are somewhat nebulous. They can vary from time to time, from society to society and even from individual to individual. It is possible that an act which may be violative of moral norms in one society, may be acceptable to another society. Therefore, in a given case, the act has to be judged in the light of what one considers to be prevailing moral norms of the society in which such an act has been committed. Hence, the act should not only be contrary to moral norms, it should also involve violation of the moral code in such a manner that it indicates baseness or depravity of character.[78] The Industrial employers generally include acts of moral turpitude in the list of misconducts warranting disciplinary action. The expression 'moral turpitude' implies depravity and wickedness of character or disposition of the person charged with the misconduct of moral turpitude.[79]Broadly speaking, acts of baseness, vileness or depravity in private or social duties which a man owes to his fellowmen or to the society in general, contrary to the accepted customary norms or right and duty between man and man, would constitute moral turpitude. The Allahabad High Court, has laid down the following tests for determining as to whether a particular act involves moral turpitude:

> (i) whether the act leading to a conviction was such as could shock the moral conscience of society in general,
>
> (ii) whether the motive which led to the act was a base one, and
>
> (iii) whether on account of the act having been committed the perpetrator could be considered to be of a depraved character or a person who was to be looked down upon by the society? [80]

As to whether a person has committed an offence involving moral turpitude; there are two ways of looking at the matter—one is of considering the nature of the act done and the other of considering the nature of the offence punished under the statutory provision.[81] The question whether a particular act involves 'moral turpitude' or not would depend upon its own facts and circumstances in which the offence was committed. In *Pawan Kumar*, the Government of Haryana while considering the question of rehabilitation of ex-convicts took a policy decision, accepting the recommendations of the Government of India that ex-convicts who were convicted for offences involving 'moral turpitude' should not be taken in government service. A list of offences involving 'moral turpitude' which was prepared for information and guidance of the authorities did not include the offence under s 294 IPC which deals with 'obscene acts and songs'. This section makes any person who does any obscene act in any public place or sings, recites or utters any obscene songs, ballad or words, in or near any public place, is liable to imprisonment for a term extending up to 3 months or with fine or with both. In this case, a fine of Rs 20 was imposed on the employee but from the records of the Chief Judicial Magistrate who had imposed the fine it was not discernible as to whether the conviction was validly or legally recorded. The Supreme Court, deprecated the action of the Government in having proceeded to adversely certify the character and antecedents of the employee on the basis of the conviction per se to the effect that he was guilty of an act involving 'moral turpitude'. Even assuming that the conviction was not open to challenge at that stage, the court held that the courts below had failed to see that the act complained of did not satisfy the tests laid down in the policy decision of the Government. Speaking for the court, Punchhi J expressed his anguish thus:

> We are rather unhappy to note that all the three courts below, even when invited to judge the matter in the said perspective, went on to hold that the act/acts involved in conviction under s 294 IPC per se established 'moral turpitude'. They should have been sensitive to the changing perspectives and concepts of morality to appreciate the effect of s 294 on today's society and its standards, and its changing view of obscenity. The matter unfortunately was dealt with casually at all levels.[82]

Not content with that, the learned judge suggested law reform to the Parliament to take immediate remedial measures in raising toleration limits with regard to petty offences especially when tried summarily and to make a provision that punishment of fine up to a certain limit, say upto Rs 2000/- or so, on a summary/ordinary conviction, shall not be treated as conviction at all for any purpose and all the more for entry into and retention in government service. This can brook no delay, whatsoever. One wonders whether the law officers of the Government have drawn the attention of the Parliament at all to this judicial recommendation. A person convicted for the offence of consuming liquor without a permit in violation of the Prohibition Act cannot be said to have been convicted of an offence involving moral turpitude.[83] the Kerala High Court, in *Saseendran Nair*, observed that the question whether the act of issuing a cheque without sufficient funds will involve element of 'moral turpitude' has to be considered de hors the element of cheating. Since, issuance of a cheque without sufficient funds is not an offence unless it falls under s 415, IPC and also not generally regarded as morally wrong or corrupt, it can be said that offence under s 138 of the Negotiable Instruments Act 1881 will not normally involve moral turpitude.[84] In this view of law, the court held that the discharge order passed against the employees under s 10 of the

Banking Regulation Act 1949 on the ground of conviction for offence of issuing cheque without sufficient funds in the account was improper. Similarly, the discharge of the workman, in *Noor Ahmed*, was held to be unjustified and invalid by a single judge of the Andhra Pradesh High Court for the reason that it was not based on an offence involving moral turpitude. In this case, before entering the services of the bank, the workman had been convicted under s 304A of IPC which involves 'moral turpitude' and sentenced to one year's rigorous imprisonment but the sentence was suspended under s 4 of the Probation of Offenders Act 1958 and the sentence was not executed on account of good behaviour of the workman. This fact was suppressed by the workman in the declaration made by him at the time of entering into the service. The High Court held that since the sentence was not executed, the workman was not guilty of an offence involving moral turpitude.[85]The correctness of this decision is not free from doubt. The suppression of the information relating to his conviction under s 304A amounted to obtaining employment by a deceitful declaration. This was surely an act of misconduct involving moral turpitude. The fact that the sentence on conviction under s 304A was not executed under the Probation of Offenders Act 1958 was not a relevant consideration. In *PGIMER v LC* , the Punjab & Haryana High Court upheld the dismissal of a *Chowkidar* in the Lady Doctor's Hostel of PGI, Chandigarh, for the misconduct of creating nuisance under the influence of liquor by undressing himself at the canteen of the Lady Doctor's Hostel beyond the duty hours because an employee is required to possess better norms with regard to the morality and was expected not to behave in an unbecoming manner to the extent of vulgarity.[86]

PROCEDURE OF DISCIPLINARY ACTION

There is no procedure prescribed for disciplinary action, either in the Industrial Disputes Act 1947 or in the rules made thereunder, which should be complied with before inflicting disciplinary punishment upon an industrial employee. Neither the requirements of procedure which a trial court adopts nor the procedural safeguards crystallised under Art 311 of the Constitution of India can be said to be strictly binding on the employer for his taking disciplinary action against an industrial worker.[87]Nevertheless, the infusion of legal formalism into the law of work-discipline by industrial adjudication has made the industrial employers aware of the restriction of law on their common law right to 'hire and fire'. This has also encouraged the workmen to challenge any unlawful act on the part of an employer in imposing a disciplinary action. The rule that the case should be 'heard in a judicial spirit and in accordance with the principles of substantial justice',[88] has been infused as an essential concomitant of disciplinary procedure, even though there is no obligation to adopt the regular forms of legal procedure. In all cases of detrimental action taken against a worker for misconduct, the employer has to establish whether the action was taken for 'just and sufficient reasons'. An industrial worker is always entitled to question the propriety and justice of a punitive or detrimental action taken against him, in spite of any contract between the employer and the worker, or the worker's consent to suffer the said action.[89] In *Sur Enamel*, Das Gupta J, observed that an inquiry cannot be said to have been properly held unless:

(1) the employee proceeded against has been informed clearly of the charges levelled against him;

(2) the witnesses are examined—ordinarily in the presence of the employee—in respect of the charge;

(3) the employee is given a fair opportunity to cross-examine witnesses;

(4) he is given a fair opportunity to examine witnesses including himself in his defence if he so wishes on any relevant matter; and

(5) the inquiry officer records his findings with reasons for the same in his report. [90]

In *Jai Bhagwan*, the Supreme Court quashed the award of the tribunal which had upheld the termination of the service of the workman without giving him the charge-sheet or holding any inquiry against him.[91] But disciplinary proceedings can be commenced or continued only against an employee as long as he is in the service of the employer. For instance, after the retirement of the workman, there cannot be any disciplinary control over him. To allow employers to commence or continue disciplinary proceedings against an employee after his retirement, would be destructive of the principles of social and economic justice which the Constitution of India is designed to secure to all citizens. This will also be destructive of the concept of relationship of employer and employee which does not exist after retirement of the employee.[92]

Preliminary Inquiry

Before framing the charges, the disciplinary authorities occasionally make a preliminary investigation or fact-finding inquiry with a view to satisfy themselves whether any disciplinary action against the workman should be launched or not. Such investigations are also loosely called 'Preliminary Inquiries'. In such investigations there may be *ex parte* examination or investigation and *ex parte* reports but these investigations do not form a part of the procedure of the domestic inquiries. The depositions of the witnesses in such investigations, if any, or the reports of the investigators are

meant merely for ascertaining whether there is any *prima facie* case justifying disciplinary proceedings. However, if the reports of the preliminary inquiry are used against the delinquent workman, they must be properly proved in the course of the domestic inquiry. In *Shivabasappa* (a case under Art 311), the Supreme Court held that if the deposition of a witness recorded in the absence of a public servant in the course of the preliminary investigation is taken on record of the departmental inquiry against such public servant and after supplying him with a copy of such deposition an opportunity is given to him to cross-examine the witness who affirms, the truth of his statement already recorded, in a general way, that would conform to the requirements of natural justice.[93] In *Kesoram Cotton* Wanchoo J, observed:

> The minimum that we shall expect where witnesses are not examined from the very beginning at the inquiry in the presence of the person charged is that the person charged should be given a copy of the statements made by the witnesses which are to be used at the inquiry well in advance before the inquiry begins and when we say that the copy of the statements should be given well in advance, we mean that it should be given at least two days before the inquiry is to begin.[94]

In *Khardah & Co,* Gajendragadkar J emphasized:

> unless there are compelling reasons to do so, the normal procedure should be followed and all evidence should be recorded in the presence of the workman who stands charged with the commission of acts constituting misconduct. [1]

Bhargava J, summed up the position thus:

> The evidence, as indicated in these cases, should consist of statements made in the presence of the workman charged. An exception was envisaged where the previous statement could be used after giving copies of that statement well in advance to the workman charged, but with the further qualification that the previous statement must be affirmed as truthful in a general way when the witness is actually examined in the presence of the workman. [2]

However, if the preliminary reports do not form part of the evidence before the inquiry officer and are not relied on for arriving at the findings of the domestic inquiry, it is not obligatory on the employer to disclose them and the omission to disclose them would not be a non observance of the rules of natural justice in the course of the domestic inquiry.[3] For the purpose of starting the inquiry, the law does not require that the delinquent workman has to be supplied with the copies of the reports made to the authorities or the management before the charge-sheet has been issued.[4] Another interesting facet of the preliminary inquiry was examined by the Supreme Court in *Firestone*, in which the workman complained that the domestic inquiry was held immediately after the preliminary investigation and without taking his explanation in such investigation and he was thus put at a disadvantage. Hidayatullah J, observed:

> ...although it may be desirable to call for such an explanation before serving a charge-sheet, there is no principle which compels such a course. The calling for an explanation can only be with a view to making an inquiry unnecessary, where the explanation is good, but in many cases it would be open to the criticism that the defence of the workman was being fished out. If after a preliminary inquiry, there is *prima facie* reason to think that the workman was at fault, a charge-sheet setting out the details of the allegations and the likely evidence may be issued without offending against any principle of justice and fair-play.[5]

In *Atlas Copco,* a single judge of the Bombay High Court observed:

> .. . it may be open to the employer to make discreet inquiries behind the back of the employee as regards various aspects of his mode of working in the company, but if any adverse order is to result from such inquiry, a due and necessary proceeding has got to be held in which the employee concerned has got to be given appropriate opportunity to defend himself.[6]

The law with respect to preliminary inquiries can be stated thus: If the employer makes preliminary inquiry or investigation for seeing a *prima facie* case in the allegations made against an industrial workman, it is not incumbent upon him to call for the explanation of the workman in such preliminary inquiry or before serving the charge-sheet. On the other hand, calling such an explanation in a preliminary inquiry stands the risk of criticism that the defence of the workman is being fished out. It may, however, be desirable to hold such a preliminary inquiry for seeing whether there is a *prima facie* reason to think that the workman is at fault. If as a result of such inquiry, the employer had reason to think that the workman is at fault, charge-sheet setting out the details of allegations and the likely evidence, without offending against any principles of justice and fair-play, may be served on-the workman but unless there are compelling reasons to do so,

evidence recorded at the back of the workman in such a preliminary inquiry should not be used against him.

Charge-sheet

(i) Requirements of Charge-sheet

Charge-sheet is the charter of disciplinary action. The domestic inquiry commences with the service of the charge-sheet.[7] In other words, before proceeding with the domestic inquiry against an offending employee, he must be informed clearly, precisely and accurately of the charges levelled against him.[8] It is the duty of the employer to indicate to the delinquent employee not only the precise nature of the charges, but also the documents, if any, upon which the charges are based. This is all the more necessary where the charges are of a general nature and pertain to accounts maintained over a period of time.[9] The charge-sheet should specifically set out all charges which the workman is called upon to show-cause against and should also state all relevant particulars without which he cannot defend himself.[10] The object of this requirement is that the delinquent workman must know what he is charged with and have the amplest opportunity to meet the charge.[11] Fair hearing presupposes a precise and definite catalogue of charges, so that the person charged may understand and effectively meet them. If the charges are imprecise or indefinite, the person charged would not be able to understand them and defend himself, effectively, and the resulting inquiry would not be a fair and just inquiry.[12] The charge-sheet must be in writing and should not be vague.[13] After serving the charge-sheet, the delinquent workman should further be given sufficient opportunity enabling him to give a proper explanation and defend himself.[14] The employer cannot justify his action on any grounds other than those contained in the charge-sheet.[15] If the charges are vague and the workman has no opportunity to reply to them, and the particulars of such charges are also not disclosed to the workman, the inquiry will not be in conformity with the rules of natural justice.[16] Any amount of evidence led in the inquiry is no substitute for a charge-sheet clearly setting forth allegations, with sufficient precision, so as to enable the employee to defend himself. Any charge-sheet which fails to comply with this requirement of the principles of natural justice is no charge-sheet at all.[17]

Where the charge is quite clear even though the misconduct is not mentioned by a specific name, the order will not be invalid. For instance, where though the charge-sheet did not specifically use the words 'go-slow', the workmen understood the charge and the facts on record clearly showed that the charge against them was of 'go-slow' right from the beginning, the Supreme Court set aside the award of the tribunal ordering reinstatement, and held that the order of dismissal could not be interfered with merely because the words 'go-slow' were not mentioned in the charge-sheet.[18] A charge-sheet, however, is not expected to be a record of evidence. When it gives the necessary particulars of the misconduct alleged, it cannot be characterised imprecise. It is not necessary to give the statements recorded in the preliminary inquiry with the charge-sheet. Nor is it necessary to state in the charge-sheet, the particulars of the statements made by witnesses in a preliminary inquiry.[19] When the charge mentions specific instances giving such details as : (i) the time and place of occurrence; (ii) the names of the complainants; (iii) the acts alleged against the workman; and (iv) the statements of allegation on each count, the charge would not be defective.[20] For instance, where the precise abusive slogans were not incorporated in the charge, the charge was not held to be defective because the actual slogans would be a matter of evidence, which need not be incorporated in the charge. Some charges, such as the charge of behaving rudely, do not require specification of the words actually used. The rude behaviour can be inferred from the gestures, tone, actions as well as the use of various expressions.[21] In *Remington Rand*, the workman was dismissed from the service for having sold one repaired second hand typewriter to a customer in contravention of an undertaking given by him to the management that he would not sell any repaired typewriter to any customer for a period of one year; but since the charge referred only to the sale of the machine, and not to its repair, the action of dismissal was held to be unsustainable.[22]

In *Burn & Co*, the facts disclosed that no charge-sheet was formally drawn against the delinquent workman before dismissing him from service for an act of misconduct. In the circumstances of the case, the Supreme Court held that this would not vitiate the order of dismissal as the workman knew what the charge against him was and had an opportunity of giving his explanation. However, this is an extreme view based on the peculiar facts of that case and cannot be treated as a general principle, in this case, a number of employees participated in an assault on the works manager and the company dismissed 14 of them including the concerned workman. From the record, it appeared that subsequent to the order of dismissal, there were conciliation proceedings and an inquiry by the labour minister as a result of which, he recommended the reinstatement of seven out of the 14 workmen who had been dismissed, leaving the order of dismissal in operation as regards the other seven. The LAT took the view that since no charge was framed against the concerned workman and no inquiry was held, the dismissal of the workman was in violation of the principles of natural justice. Quashing the award, the Supreme Court held that it would be idle for the workman to contend that he had been dismissed without hearing or inquiry.[23] The person signing the charge-sheet is not the accuser and does not make himself responsible for the truth of facts stated therein. The charge-sheet merely tells the workman what he is supposed or alleged to have done.[24] The mere fact that the charge-sheet was signed by a person who was not competent to dismiss the delinquent employee would not vitiate the inquiry and the punishment. In *Indian Aluminum*, the Karnataka High Court raised the following questions: (i) has the workman suffered any prejudice? (ii) was he in a position to understand the nature and scope of the charges? (iii)

was he in a position to meet the charges and, therefore, was he in a position to furnish proper explanation, and held that, if the answer to these questions was in the affirmative, it could not be successfully contended that the initiation of disciplinary proceedings was bad. The court finally observed thus:

> The disciplinary inquiry is only for the purpose of establishing the guilt of a particular workman or the delinquent officer as the case may be. Beyond that there is no logic that the charge memo must be issued by the competent officer...it cannot be contended that the initiation of the disciplinary inquiry lead on ultimately to the order of dismissal and where, therefore, the foundation has not been properly laid, the edifice cannot remain. [25]

In *Bharat Heavy Electricals*, the charge sheet was neither signed by the competent person nor served by the employer, though it was subsequently approved by the competent authority. A single judge of the Allahabad High Court held that such approval would not mean compliance of the requirement of the relevant Standing Order regarding service of the charge sheet.[26] Normally, a reviewing court, cannot issue a writ to quash the memo of charge-sheet unless there is a total want of jurisdiction or the action is motivated by mala fide intention.[27] Disciplinary authority may drop certain charges or frame fresh charges, which, on a further consideration, might become appropriate or preferable to the charges originally framed.[28] The tribunal also cannot suggest what would have been proper charges but it is incumbent upon the tribunal to adjudicate on the basis of the charges as framed by the management.[29] Generally, the order of dismissal has always a reference to one or more charges against the workman. In a case, where no domestic inquiry has been held or the domestic inquiry has been found to be defective, the management would be entitled to adduce evidence in support of those charges. Even in a case where a valid domestic inquiry has been held in respect of certain charges, the tribunal has to confine itself to the charges levelled against the concerned workman both in the domestic inquiry and in the order imposing the penalty. However, where few charges are framed against the workman but the order imposing the penalty is based on certain other charges, the management was not justified in imposing penalty on the basis of those charges in respect of which the workman had no opportunity to defend himself. In such a case, it is open to the workman to contend before the tribunal that:

(i) the domestic inquiry conducted in respect of a few charges is vitiated on account of illegality committed in the conduct of the inquiry and also,

(ii) he is punished on the charges in respect of which no inquiry was held.

The tribunal has to confine itself to the charges levelled against the workman in the charge-sheet on the basis of which the penalty was imposed. It is not open to the management to level new charges against the workman before the tribunal which did not figure or form the basis of the order of punishment or did not figure in the domestic inquiry. Hence, the management-cannot be allowed to lead evidence on such new charges nor the tribunal has the jurisdiction to record findings on such new charges and justify the imposing of penalty. If the tribunal, comes to the conclusion on a preliminary issue that the domestic inquiry is invalid, it may hold an inquiry itself on the charges on which the penalty was imposed giving full opportunity to the management and the workman concerned. The charges, mentioned in the charge-sheet and also in the order of dismissal, do not cease to be charges merely because they were not investigated in the domestic inquiry. Such charges cannot be considered as new charges.[30]

(ii) Service

Normally, the Standing Orders of industrial establishments provide for the mode of service of notice of disciplinary proceedings in addition to postal communication. There are generally rules providing for service of the charge-sheet by affixing the same on the company's notice board. In *G Mckenzie*, the employer affixed the notice of inquiry against the concerned workmen both inside and outside the company's premises and also sent registered notices to the concerned workmen out of which some came back unserved. The employer's request to the union for supplying the addresses of the concerned workmen also did not elicit any reply. In these circumstances, the Supreme Court held that the resulting inquiry was valid and proper.[31] However, in *Bata Shoe*, the facts disclosed that the charge-sheets sent to the residential addressed were returned unserved, whereafter the management displayed the said notices on the notice board. The Supreme Court held that in such an event the proper course was to publish the notices in a vernacular newspaper having circulation in the area. In these cases, there was no provision in the standing orders of the company for displaying charge-sheets on the notice boards of the company. Hence, the resulting order of dismissal was held to be invalid for want of proper service of charge-sheets.[32]

Suspension pending Inquiry

After the service of the charge-sheets, where the charges are of serious nature, the employer may suspend the delinquent

workman pending the inquiry but there is no hard and fast rule that the service of charge-sheet must precede the suspension order. If the misconduct alleged is of very grave nature and the workman is apprehended at the spot of the commission of the offence, the employer, in such circumstances may forthwith suspend the workman and then serve him with the charge-sheet. In *DESU*, Khanna J, of the Delhi High Court observed that the power of suspension has to be exercised with circumspection, care and after application of mind. The disciplinary authority must make a fair and proper assessment of the matter in the given circumstances and carefully scrutinise that *prima facie* there exists grave and compelling circumstances which are likely to lead to the dismissal of the employee. A proper judgment exercised by the management would prevent unnecessary harassment and humiliation of suspension.[33] Though the right of an employer to suspend a delinquent employee pending domestic inquiry is well-recognised in Industrial law, it has to be exercised in accordance with the procedure laid down by the rules of service or the Standing Orders. Furthermore, such suspension should be secured by an order on the part of the authority empowered to suspend the person according to law, to debar the employee temporarily from attending the office and performing his functions.[34] 'Suspension' connotes temporary cessation of the right to work or labour,[35] or temporary deprivation of office, position or privilege.[36] Lord Goddard, in *English Electric*, described suspension as dismissal initiated at the discretion of the employer by a promise to re-employ.[37] It merely amounts to a postponement of the actual performance of the contract, and in the case of a continuing contract like the contract of service between master and servant suspension means that the relationship of master and servant remains in abeyance for a certain period. If the terms of the contract between the two contracting parties permits, suspension may be partial but where suspension was not in contemplation of the contract of service, no suspension can take place. The master is obliged to give a subsistence allowance to the servant, though he may not be obliged to pay him the full wages which are to be paid for the specific work done by the servant. [38]

The legal position as regards the master's right to place his servant under suspension is now well settled. In *Hotel Imperial*, Wanchoo J observed that, under ordinary law of master and servant, the power to suspend the servant without pay is not an implied term of contract of service, but must arise either from an express term in the contract itself or a statutory provision governing such contract. It was, therefore, held that ordinarily the absence of such a power would mean that the master cannot suspend a workman, and if he does so in the sense that he forbids the employee to work, he will have to pay the wages during the so-called period of suspension.[39] Where there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the suspension has the effect of temporarily suspending the relationship of master and servant with the consequences that the servant is not bound to render service and the master is not bound to pay.[40] In *Balvantrai Patel*, Ramaswami J stated the general principles in the following words:

> It is now well settled that the power to suspend, in the sense of a right to forbid a servant to work, is not an implied term in an ordinary contract between master and servant, and that such a power can only be the creature either of a statute governing the contract, or of an express term in the contract itself. Ordinarily, therefore, the absence of such power either as an express term in the contract or in the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so in the sense that he forbids the employee to work, he will have to pay wages during the period of suspension. Where, however, there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the order of suspension has the effect of temporarily suspending the relationship of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay. This principle of law of master and servant is well established.. .. It is equally well settled that an order of interim suspension can be passed against the employee while an inquiry is pending into his conduct even though there is no such term in the contract of appointment or in the rules, but then in such a case the employee would be entitled to his remuneration for the period of suspension if there is no statute or rule under which it could be withheld. In this connection, it is important to notice the distinction between suspending the contract of service of an officer and suspending an officer from performing the duties of his office on the basis that the contract is subsisting. The suspension in the latter sense is always an implied term in every contract of service. When an officer is suspended in this sense, it means that the Government merely issues a direction to the officer that so long as the contract is subsisting and till the time the officer is legally dismissed he must not do anything in the discharge of the duties of his office. In other words, the employer is regarded as issuing an order to the employee which, because the contract is subsisting, the employee must obey.[41]

The expression 'pending inquiry' generally used in the Standing Orders in relation to such suspension, means only the inquiry by the employer and not the inquiry pending before any authority under the Industrial Disputes Act. In *Ranipur Colliery*, the Standing Orders of the colliery inter alia provided suspension without pay for a period of ten days 'pending inquiry'. Dealing with the question whether the expression 'pending inquiry' in the relevant Standing Orders of the company included inquiry by the Industrial tribunal under s 33 of the Act, the Supreme Court said that, 'Standing Orders are concerned with employers and employees and not with tribunals'. Hence, in the context of the relevant Standing Order, the 'inquiry' meant only the inquiry by the employer and not by the authority under s 33.[42]

Subsistence Allowance during the Period of Suspension

In government service, there are rules providing for an allowance generally known as 'subsistence allowance' during the pendency of departmental proceedings.[43] Occasionally, there are provisions in the rules or bye-laws of the governmental bodies or state institutions vesting discretionary powers in the relevant authorities to grant subsistence allowance to the suspended workman or not, but this discretion coupled as it is with a benefit has to be exercised in every case reasonably and according to law and justice and not whimsically or arbitrarily. It is only for stated reasons that the authority suspending an employee pending inquiry can deny subsistence allowance. The seriousness of the charge levelled against a delinquent workman can be a valid ground for declining to grant subsistence allowance.[44] In *Hira Sugar*, the Karnataka High Court set aside an order of the labour court directing payment of subsistence allowance to the employee at the rate of 75 per cent of the wages last drawn by him without affording an opportunity of hearing to the employer. The court observed that the order was passed without application of mind and as such was arbitrary *per se* and even mala fide in law.[45] The Standing Orders of Industrial establishments make provision for payment of such 'subsistence allowance' to Industrial employees during the pendency of disciplinary proceedings against them. In the model Standing Orders, in Sch 1, under the Industrial Employment (Standing Orders) Central Rules 1946, framed under the Standing Employment (Standing Orders) Act 1946, r 14(4) makes the provision for payment of subsistence allowance to Industrial employees to whom the provisions of that Act apply during the period of suspension, pending a domestic inquiry into the misconduct alleged against them.

The same principle will apply to the suspension of an Industrial worker. If there is a provision regarding payment of an allowance for the period of suspension pending disciplinary proceedings against a workman, payment will be made to him according to that provision. Non-payment of the subsistence allowance to the workman during the pendency of the domestic inquiry would vitiate the inquiry proceedings,[46] but if there is no such provision in the contract of employment or the Standing Orders or the Standing Orders are not applicable to the establishment, the workman will be entitled to full wages for the period of interim suspension. An Industrial workman may be suspended pending a domestic inquiry. If such inquiry results in punishment to the workman, he will not be entitled to any wages (other than the subsistence allowance) for the period of suspension, because the punishment will be effective from the date of suspension. On the other hand, If the inquiry does not result in dismissal or the dismissal is found to be bad and the workman is reinstated by Industrial adjudication, he will be entitled to full wages for the period of suspension, on the footing that he was never legally dismissed and continued in service. In *National Insurance*, the court observed:

> Suspension pending an inquiry being not a suspension of the contract of employment but only preventing, during the interim period, the employee from discharging his duties, the employee would be entitled to his wages unless he is ultimately validly dismissed and dismissal dates back from the date when suspension was ordered. Subsistence allowance during the period of suspension is generally allowed to government servants under the rules framed in that regard and which have statutory force. No such rules are ordinarily found in Industrial establishments. To accede to such demand is more or less equating Industrial employees with civil servants for which there appears to be no justification.[47]

Since this case was dealing with a commercial establishment to which the Industrial Employment (Standing Orders) Act 1946 did not apply, these observations did not take note of the Industrial establishments where the Standing Orders provide for payment of 'subsistence allowance' for the period of suspension pending disciplinary proceedings. In such cases, the 'subsistence allowance' paid would not be recoverable if the workman is dismissed, nor would the workman be entitled to anything more if he is reinstated, unless the tribunal expressly directs otherwise.[48] It is well settled that if there is a term in this respect in the contract of employment or the service rules providing for the scale of payment during the suspension, the payment will be made in accordance therewith.[49] Where the employer has the power, to suspend an employee while the domestic inquiry is pending, under a statute or rules or Standing Orders governing the employment or an express term in the contract of employment,[50] and he places a workman under suspension, then, for the period of suspension, mutual rights and duties, including the right to wages would be suspended as a rule, *ie*, the wages and allowances, *etc*, of the workman would be withheld for the time being.[51] Even if the employer inflicts the lesser punishment of suspension, the workman still will not be entitled to any wages as in such a case, suspension and withholding the wages for the period of suspension is by itself punishment.[52] In such a situation, the employee will not be entitled to the benefit of increments during the period of suspension.[53] But where the suspension is not permitted by any statute or rules, Standing Orders, it will be no suspension in the eyes of law and the workman will be entitled to full wages for the period of the so-called suspension because he would be deemed to be in service for that period. The denial of wages to the workman in such a case merely because no work was assigned to him or no work was done by him, would not be sustainable.[54]

The suspension of the workman solely for the reason that a criminal case was pending against him would be invalid but after the punishment of dismissal has been inflicted on the workman, he will not be entitled to subsistence allowance. The only possibility of the workman getting the full wages, in accordance with the Standing Orders is when no penal action is taken against him pursuant to the inquiry during the pendency of which he was suspended.[55] Where the employer

terminated the services of a bus conductor for allowing passengers without ticket, without holding any inquiry, the labour court adjudicating the said dispute would be justified in directing the employer to pay subsistence allowance.[56] Refusal of payment of subsistence allowance would certainly result in denial of opportunity to the workman to defend himself, such denial amounts to a violation of principles of natural justice.[57] Non-payment of subsistence allowance could be linked to slow poisoning the employee, and he would gradually starve himself to death.[58] A bank employee can be suspended before serving charge sheet and there is nothing illegal in such an action in view of the bipartite settlement arrived at under s 18(1) between the State Bank of India and the All India SBI Staff Federation, by which para 521(10(b) of the Sastri Award was modified providing for suspension pending enquiry or 'initiation of such enquiry'.[59] The NCL-II recommended that if any worker is placed under suspension pending completion of domestic enquiry, he should be entitled to 50 per cent of his wages as subsistence allowance, and at 75 per cent of wages for the period beyond 90 days if the period of suspension exceeds 90 days for no fault of the worker, however, the total period of suspension shall not, exceed one year in any case. If, as a result of continued absence of the worker at the domestic inquiry or if the inquiry and disciplinary action cannot be completed in time for reasons attributable wholly to the worker's default or intransigence, the employer will be free to conduct the inquiry *ex parte* and complete the disciplinary proceedings based on such *ex parte* inquiry and further, there would be no increase in subsistence allowance beyond 50% for the period exceeding 90 days in such cases.[60]

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1 * Chapter IV is continued from Volume I of this book, which contains Sections 1 - 11.

Ins. by Act 45 of 1971, s 3 (wef 15-12-1971).

2 *The Gazette of India, Extraordinary, dated 9 December 1971, Pt 2, S 1, 589.*

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4 *Indian Aluminium Co Ltd v LC* (1991) I LLJ 328, 333 (Pat) (DB) : 1990 (2) BLJR 1368, per G Sohani CJ.

5 Government of India (2002), Report of the NCL-II, Chapter 13, p 46, para 6.96.

6 *Delhi Cloth & General Mills Co Ltd v Shriram FK Union* 1989 Lab IC 490, 492 (Raj) (DB) : (1993) 3 LLJ 567 (Raj), per Verma CJ.

7 *The Workmen of Firestone Tyre and Rubber Co of India (Pvt) Ltd v Mgmt* (1973) 1 LLJ 278 [LNIND 1972 SC 133], 300-03 (SC) : AIR 1973 SC 1227 [LNIND 1973 SC 430], per Vaidialingam J.

8 *Workmen of Engine Valves Ltd v Engine Valves Ltd* (1983) 2 LLJ 232 [LNIND 1983 MAD 110] (Mad) (DB), per Sathiadev J.

9 *Satya Narain Singh v IT* (1999) 2 LLN 108 (All) : 1999 1 AWC 611 All, per Aloke Chakrabarty J.

10 *Digambar Swain v PO, LC* 1988 Lab IC 1123 -24 (Ori) (DB) : (1994) 3 LLJ 219 (Ori), per Patnaik J.

11 *Ramprasad Ambaram Verma v President, Industrial Court* (1991) 2 LLJ 488, 490 (MP) (DB) : 1989 MPLJ 797, per SK Dubey J.

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15 *Municipal Committee, Sirsa v Munshi Ram* AIR 2005 SC 792 [LNIND 2005 SC 116]: (2005) 1 LLJ 1077 [LNIND 2005 SC 116] (SC), per Hegde J.

16 *Gujarat Steel Tubes Ltd v GST Mazdoor Sabha* (1980) 1 LLJ 137 [LNIND 1979 SC 464] (SC) : AIR 1980 SC 1896 [LNIND 1979 SC 464], per Krishna Iyer J.

17 *Mersey Docks and Harbour Board v Henderson Bros* [1888] 13 AC 595, 600.

18 *Manohar Nathusao Samarth v Marotrao* AlR 1979 SC 1084, 1090 : [1979] 3 SCR 1078, per Tulzapurkar J.

19 *Bangalore Water Supply & Sewerage Board v Rajappa* 1978 Lab IC 467 [LNIND 1963 SC 89]-68 (SC) : AIR 1978 SC 548 [LNIND 1978 SC 70], per Krishna Iyer J.

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21 *Manohar Nathusao Samarth v Marotrao* AlR 1979 SC 1084, 1095 : [1979] 3 SCR 1078, per Tulzapurkar J.

22 *State of Punjab v Ram Singh* 1992 Lab IC 2391, 2394 (SC) : AIR 1992 SC 2188 [LNIND 1992 SC 452], per K Ramaswamy J.

23 *Workmen of Tanganagaon Tea Estate v Mgmt* (1987) 2 LLJ 491, 494 (Gau) (DB), per Saikia J.

24 *Jyoti Home Industries v Addl LC* 1996 Lab IC 1211, 1214 (Kant), per Mohan Kumar J.

25 *CP Peethambaran v Superintendent of Police* 1996 Lab IC 1520 -21 (Ker) (DB), per Thomas Ag CJ.

26 *WM Agnani v Badri Das* (1963) 1 LLJ 684 [LNIND 1963 SC 74], 691 (SC), per Gajendragadkar J.

27 *Presidency Talkies v NS Natarajan* (1968) 2 LLJ 801 [LNIND 1967 MAD 205]-02 (Mad) : (1968) 2 MLJ 221 [LNIND 1967 MAD 38], per Anantanarayanan CJ.

28 *Shalimar Rope Works Mazdoor Union v Shalimar Rope Works Ltd*, [1953] LAC 584 (LAT) : 1953 2 LLJ 876.

29 *Tata Oil Mills Co Ltd v Workmen* (1964) 2 LLJ 113 [LNIND 1964 SC 111], 116 (SC) : AIR 1965 SC 155 [LNIND 1964 SC 111], per Gajendragadkar J.

30 *Lomdhar Tanti v Manager, Murmuria Tea Estate* 1975 Lab IC 194 -95 (Gau) (DB) : (1975) 2 LLJ 157 (Gau), per Sen J.

31 *Nandita B Palekar v YS Kasbekar* (1985) 2 LLJ 336 (Bom) (DB) : 1985 (87) BOMLR 135, per Madhava Reddy CJ.

32 *Santosh Dattaram Nadkarni v New India Industries Ltd*, (1988) 2 LLJ 392 [LNIND 1988 BOM 109], 394-5 (Bom) (DB), per Sawant J.

33 Cf *New Victoria Mills Co Ltd v LC* 1970 Lab IC 428, 431 (All) : AIR 1970 All 210 [LNIND 1968 ALL 89], per Beg J.

34 *Express Newpapers Pvt Ltd v IT* AIR 1961 Mad 362 [LNIND 1960 MAD 252]: (1961) 1 MLJ 100 [LNIND 1960 MAD 252], per Jagadeesan J.

35 *Mahendra Singh Dhantwal v Hindustan Motors Ltd* (1976) 2 LLJ 259 [LNIND 1976 SC 222] (SC) : AIR 1976 SC 2062 [LNIND 1976 SC 222], per Goswami J.

36 *Glaxo Laboratories (I) Ltd v PO, LC* 1983 Lab IC 1909, 1919-20 (SC) : AIR 1984 SC 505 [LNIND 1983 SC 289], per Desai J.

37 *Rasiklal Vaghajibhai Patel v Ahmedabad Municipal Corpn* 1985 Lab IC 729, 731 (SC) : AIR 1985 SC 504 [LNIND 1985 SC 5], per Desai J.

38 *AL Kalra v Project & Equipment Corpn of India Ltd* (1984) 2 LLJ 186 [LNIND 1984 SC 136], 193 (SC) : (1984) 3 SCC 316 [LNIND 1984 SC 136], per Desai J.

39 *Jyoti Home Industries v Addl LC* 1996 Lab IC 1211. 1214 (Kant), per Mohan Kumar J.

40 *Workmen of Tanganagaon Tea Estate v Mgmt* (1987) 2 LLJ 491, 495 (Gau) (DB), per Saikia J.

41 *Mgmt of Kasojan Tea Estate v LC* 1974 Lab IC 372 -73 (Ass&Nag) (DB), per Goswami CJ.

42 *Mill Mazdoor Sabha v JA Baxi* (1962) 2 LLJ 326 (Bom) (DB), per Chainani CJ.

43 *Delhi Cloth & General Mills Co Ltd v Workmen* (1969) 2 LLJ 755 [LNIND 1968 SC 298], 772 (SC) : AIR 1970 SC 919 [LNIND 1968 SC 298], per Shah J.

44 *Sharda Prasad Onkarprasad Tiwari v Central Rly* (1960) 1 LLJ 167, 170 (Bom) (DB) : AIR 1961 Bom 150 [LNIND 1959 BOM 83], per Raju J.

45 *Pearce v Foster* (1886) 17 QB D 536, 542, per Lopes LJ.

46 Ibid.

47 *Bell v Lever Bros* [1932] AC 161 (HL), per Lord Balnesburgh.

48 *Basu Deba Das v MR Bhope* (1993) 2 LLJ 1022,1035 (Bom) : 1993 (2) Bomcr 90 [LNIND 1992 BOM 639], per Ashok Agarwal J.

49 *Presidency Talkies v NS Natarajan* (1968) 2 LLJ 801 [LNIND 1967 MAD 205]-3 (Mad) : (1968) 2 MLJ 221 [LNIND 1967 MAD 38], per Anantanarayanan CJ.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

[S. 11A. Power of Labour Courts, Tribunals and National Tribunals to give Appropriate Relief in case of Discharge or Dismissal of Workmen.(

Domestic Inquiry *Proper*

Domestic inquiry in Industrial law has acquired great significance and Industrial adjudication attaches considerable importance to such inquiry.[61] In a number of cases, the Supreme Court held that an inquiry is not an empty formality but an essential condition to the legality of the disciplinary order. In other words, before the delinquent workmen can be dismissed for misconduct, the employer should hold a fair and regular inquiry in to the misconduct and dismissal without holding a regular inquiry would be an illegality.[62]It is well-settled that disciplinary inquiry has to be a quasi-judicial inquiry held according to principles of natural justice and the inquiry officer has a duty to act judicially,[63] because the charges of misconduct, if proved, will result not only in deprivation of livelihood of the workman but will also attach stigma to his character. Industrial adjudication, therefore, insists on a proper inquiry being held and that nothing should happen in the inquiry either when it is held or after it is concluded and before the order of dismissal is passed, which would expose the inquiry to the criticism that it was undertaken as an empty formality.[64] However, in a case where the workman, in answer to the charge levelled against him, admits his guilt, there will be nothing more for the management to inquire into and in such a case holding of an inquiry would be a mere empty formality.[65] A misconduct owned and admitted by the delinquent workman is the antithesis of the violation of the principles of natural justice or victimisation, as the question of prejudice does not arise under such circumstances,[66] but in such a case, there must be an admission of guilt by the delinquent workman in clear terms. Normally, therefore, in the absence of clear or unambiguous admission of guilt, failure to hold domestic inquiry would constitute serious infirmity in the order of dismissal.[67] In *JS Khadgawat,* the Rajasthan High Court held that it is not a hard and fast rule that where the facts are indisputable or that they are admitted, it is not necessary to observe the principles of natural justice. The so called admission of guilt by the employee may not be conclusive evidence against him, and the employee is not bound to disclose his defence and give any explanation during the course of preliminary inquiry. Therefore, where it was concluded that the employee was guilty of offence solely on the basis of admissions made by him in the preliminary inquiry, the termination of his service without holding a regular inquiry would be invalid.[68] In *Madikal Service Co-op Bank,* in view of an alleged inculpatory statement, the employee was dismissed from service without holding a full fledged domestic inquiry but the inquiry officer ignored the written statement of defence in which the employee had denied all the charges and had also challenged the alleged inculpatory statement said to have been given by him to the audit party as not a voluntary statement. Furthermore, the statement itself did not specifically admit the facts mentioned in the charges and it contained only a general statement that he had committed mistakes and was, therefore, guilty. In the circumstances, the perfunctory inquiry in which no witness was examined on behalf of the employee, nor was he allowed to cross-examine the witnesses of the management, was held to be invalid.[69]

But in *Mangal Sen,* a single judge of Allahabad High Court held that the mere fact that the employee had asked to be excused did not mean that he pleaded guilty, particularly when his explanation contained a clear assertion that he was not guilty. Therefore, the apology of the workman must be read in the context in which it was tendered. In the absence of proper inquiry, the court held that the dismissal was void and ordered reinstatement of the workman with full backwages and all attendant benefits.[70] In the other hand, in a parallel line of cases,[71] the Supreme Court has stated that in cases where

the inquiry has been found to be invalid or where no inquiry at all was held, 'the tribunal may give an opportunity to the employer to prove his case and in doing so the tribunal tries the merits of the case itself. The ratio of these cases is that where the domestic inquiry held by the employer is found to be invalid by the Industrial tribunal or no inquiry at all has been held by the employer, the action of dismissal may still be sustained by the employer by justifying it before the tribunal by adducing relevant evidence. In *Motipur Sugar Factory*, the defective-inquiry-cases were equated with no-inquiry-cases. In such cases, the tribunal would have jurisdiction to go into the facts and the employer would have to satisfy it that the order of dismissal was proper on facts.[72] In *RK Jain*, Vaidialingam J elaborated that it is open to the management to rely on the domestic inquiry conducted by it and satisfy the tribunal that there is no infirmity attached to the same and the management has also got a right to justify on facts as well that its order of dismissal was proper.[73] This principle was reaffirmed in *Ludh Budh Singh.*[74] In *Firestone*, the Supreme Court reiterated the law that in both the cases of 'no inquiry' and 'defective inquiry', the employer can still justify his action by adducing evidence before the tribunal. Faced with this situation, the court tried to clarify that it should not be understood as laying down that there is no obligation whatsoever on the part of an employer to hold an inquiry before passing an order of discharge or dismissal. The court enumerated four advantages of a domestic enquiry held by the employer:

(i) in spite of its wider powers of adjudication now, the tribunal will have to give cogent reasons for not accepting the conclusions of the inquiry officer in a case where a proper inquiry has been held and a correct finding is arrived at regarding the misconduct of the workman;

(ii) it will also enable the employer to persuade the tribunal to accept the inquiry as proper and the finding as correct;

(iii) by holding a proper inquiry, the employer will escape the charge of having acted arbitrarily and mala fide; and

(iv) the holding of a proper and valid inquiry will conduce to the harmonious and healthy relations between the employer and the workmen and it will serve the cause of Industrial peace.[75]

In *Makhan Singh*, Venkataramiah J, held that, on a consideration of the whole material placed before the court, the decision of the management to terminate the services of the appellant without holding any domestic inquiry was not a bona fide one. The court noticed that the labour court upheld the dismissal on the basis of the evidence led by the employer before it in order to justify the dismissal of the workman. Then, on its own appraisal of the evidence, the Supreme Court held that the order of the labour court was not sustainable as 'the approach adopted by it to the whole case was highly casual and superficial.[76] Upto this extent, the holding of the court is correct but the further observation that the termination of the service of the workman was not bonafide, on the sole ground that no domestic inquiry was held, is misconceived. The mere fact that the employer has not held the domestic inquiry cannot lead to the inference that the termination of service was not bona fide. The law relating to the requirement of holding domestic inquiries in disciplinary action against Industrial workmen, as enunciated by the Supreme Court in its pronouncements bristles with contradictions and requires complete restatement. In the absence of judicial guidelines, the legislature must clarify the position so that the parties know about the right course to be followed. The decision rendered by Venkataramaiah J in *Makhan Singh* was itself wrong and misconceived, being wholly inconsistent with the law laid down in *Delhi Cloth Mills*, *Motipur Sugar Factory* and *Firestone*, which are authorities for the proposition that, even in the rarest of rare cases where the employer did not conduct an enquiry before dismissing a workman, his right to adduce evidence before the labour court in support of the action of dismissal remains unscathed. In *Khichrolia*, a single judge of Madhya Pradesh High Court held that in the absence of any provision in the rules for continuance of departmental enquiry after superannuation, the employer had no legal authority to continue with disciplinary inquiry and to take any consequential action by way of punishment or recovery.[77]

(i) Inquiry (Enquiry) Officer

After service of charge-sheet on the delinquent employee, the management has to appoint an inquiry officer for holding inquiry into the charges levelled against him. In the absence of any statutory provision or contractual postulate, holding of disciplinary proceedings is purely a managerial function. Therefore, even if an order appointing an inquiry officer has been made on behalf of the management by an authority who is not competent under the rules which have no statutory force, the same cannot be regarded as invalid, but where the Standing Orders provide the mode of appointment of an inquiry officer, the inquiry will be illegal if the inquiry officer is not appointed in accordance with such Standing Orders.[78] In *Capstan Meters*, the relevant Standing Order provided that in case of a major misdemeanour, the inquiry against the delinquent workman, shall be held by 'an officer or officers' of the company appointed for the purpose, before taking any disciplinary action but the impugned inquiry was held by an advocate instead of 'an officer' of the company. A single judge of the Rajasthan High Court held that the inquiry held by the advocate was invalid because the Standing Orders were binding on the employer as well as on the employee.[79] In *Bernard*, in terms of a settlement, the employer bank appointed a special officer of the bank to hold inquiry into the alleged acts of misconduct against the delinquent employee but during the

pendency of the inquiry, the inquiry officer retired from the service on superannuation. However, the inquiry officer completed the inquiry after his retirement, in which the employee participated throughout even after the retirement of the inquiry officer, without raising any objection. The Bombay High Court in a writ petition filed by the employee held that on retirement, the inquiry officer had no authority to proceed further with inquiry. Hence, the order imposing punishment based on such inquiry, was incompetent and without jurisdiction. The court, therefore, quashed the order of punishment and directed that the workman be paid 'all consequential benefits'. In appeal by special leave against the order of the High Court, the Supreme Court upheld the order of the High Court quashing the impugned order of punishment but having regard to the special facts and circumstances of the case, it held that the High Court should not have ordered payment of 'all consequential benefits', and modified the order of the High Court to the extent that the employee will be paid only 50 per cent of the consequential benefits.[80]

Though domestic inquiries need not be conducted in accordance with the technical requirements of criminal trials, they must be fairly conducted and in holding them, considerations of fair-play and natural justice must govern the conduct of the inquiry officer.[81] A domestic inquiry must be held by an unbiased person. The inquiry officer should not be biased in favour of or against either of the parties.[82] In other words, the delinquent is entitled to have the disciplinary proceedings dealt with by an unbiased person, who is wholly unconnected with the incident in question.[83] 'If it's a goose that's on trial there must be no fox in the jury'. The principle that justice must not only be done but must manifestly and undoubtedly be done applies with equal force to domestic inquiries just as it applies to the quasi-judicial, administrative and judicial tribunals. If the employer appoints a person as an inquiry officer who has directly dealt with the charge or guilt complained of, such an inquiry will be nothing but a mockery and idle ceremony because there will be real likelihood of bias on the part of the inquiry officer.[84] A person with a bias against anyone of the parties interested in the disputed misconduct shall not be a proper person to hold the inquiry, and the inquiry held by such a person would be improper. Any person who sits in judgment over the rights of others should be free from any kind of bias and must be able to bear an impartial and objective mind to the questions in controversy. Where a person who discharges a quasi-judicial function has shown by his conduct, that he is interested in either of the parties, that will disentitle him from acting in that capacity.[85] If, therefore, from the record of a domestic inquiry, it is patent that there was a likelihood of bias in the person who conducted the inquiry, the inquiry would be vitiated.[86] The point of bias has been illustrated in the decision of the Supreme Court in *Kalyani*.[87] The workman objected to the inquiry being held by a particular officer on the ground that the officer was biased against him on account of the fact that he had given evidence against him in a case which had resulted in infliction of a fine on that officer. The conclusion of the labour court that the inquiry was vitiated as it suffered from a serious defect of bias, was affirmed by the Supreme Court.

However, the bias of the inquiry officer has to be specifically pleaded and proved before the adjudicator. In the absence of any particulars of bias, the inquiry cannot be held to be vitiated.[88] For instance, where the workman takes part in the inquiry without raising any objection and then makes imputation against the inquiry officer of bias, the inference of bias should not easily be drawn because otherwise the delinquent workman will be able to make the holding of an inquiry against him impossible by making imputations against every inquiry officer whenever he finds the trend of the inquiry going against him.[89] However, if from the records of the domestic inquiry itself it is patent that there was likelihood of bias in the person who conducted the inquiry, the fact that the question of bias was not specifically raised may be immaterial.[90] However, if the workman not only does not take any objection to the inquiry being held by a particular person but also categorically states that he has no objection to the inquiry being held by that person and does not make any allegation against the inquiry officer in his pleadings, he cannot be permitted to raise the question of the bias of inquiry officer.[91] The mere fact that the delinquent applied for change of inquiry officer which was not conceded would not give rise to inference of bias particularly when the delinquent is exonerated of some charges while he is found guilty of some others. Bias on the part of the inquiry officer, in such circumstances, cannot be said to have been proved.[92] The prevalent view is that the mere fact that the inquiry officer is an employee of the management cannot lead to the assumption that he was bound to decide the case in favour of the management.[93] Likewise, the fact that the inquiry officer was subordinate to the disciplinary authority would be no ground for holding that he acted mala fide or had bias against the delinquent employee.[94] Similarly, the fact that the inquiry was held by an employee of the company who had talks with the management about fixing the time and date of the inquiry would not vitiate the inquiry.[95] Nor does the mere fact that a person received remuneration from the employer for his services disqualify him from holding a domestic inquiry as a biased person.[96] The fact that the inquiry officer happened to be a shareholder of the company will not lead to the inference of bias.[97] It is well-known that inquiries of this type are generally conducted by officers of the employer companies and in the absence of any special bias attributable to a particular officer, it has never been held that the inquiry is bad just because it is conducted by an officer of the employer. For the same reason, a person who had been engaged as a lawyer by the employer in some other prior case and was subsequently engaged to hold a domestic inquiry against a workman, would not be incompetent on the ground of bias to conduct the domestic inquiry. It cannot, therefore, be said that the inquiry officer has a bias in favour of the employer merely because he is the employer's lawyer and was previously engaged by the employer in Industrial matters.[98] A lawyer must normally be presumed to be a man who can act with a sense of detachment and without bias or prejudice as he is trained in law and an inquiry, therefore cannot be said to be vitiated by the mere fact that the employer's lawyer

conducted it,[99] but it would be a different matter if the lawyer has given advice to the employer in connection with the disciplinary proceedings against a workman for an act of misconduct and then was appointed inquiry officer to inquire into the same act of misconduct against the workman. Further, the fact that the examination of some of the witnesses was detailed or persistent, would also not warrant a finding that the inquiry officer was biased against the concerned workman.[1] Nor does the fact that the inquiry officer attested the statements of the witness lead to the inference that he was biased.[2]

Contrary to the settled law, a few High Courts took the view that the appointment of an outsider, an advocate, as inquiry officer would vitiate the proceedings, if there were a provision for appointment of inquiry officer from among the employees of the company only, and not otherwise.[3] This view seems to be ill-founded and incorrect. The mere fact that there is a provision in the Standing Orders for appointment of the inquiry officer from within the company does not operate as a bar to engage an advocate as the inquiry officer. It may be that in some cases of alleged misconduct directed against the supervisory or managerial personnel or those involving inter-group and inter-union clashes, it is to the distinct advantage of the workmen to have the enquiry conducted by an impartial outsider than by a company official. The fact that the outsider has no personal knowledge of the background of the workman against whom the charges were framed, itself is a factor which works out to the advantage of the charge-sheeted workman. Entrusting the domestic inquiry to an outsider, in such circumstances, would also absolve the management of the charge of infusing bias or importing personal knowledge into the inquiry process. An inquiry cannot be said to be held properly when the person holding it begins to rely on his own knowledge or statements.[4] In *Associated Cement Companies*, the Supreme Court observed that in deciding the question as to whether the explanation given by the workman was true or not, the inquiry officer should not have imparted his personal knowledge and the knowledge of his colleagues and should also not have relied on reports received from other witnesses.[5] Similarly in *Doomur Dullang Tea Estate*, the inquiry was held to be vitiated as the inquiry officer had imparted personal knowledge of the incident and also had earlier complained in the criminal cases arising out of the same incident against the workmen. In a case, where the inquiry officer claims to have seen the misconduct having been committed by the workman, in all fairness the inquiry should be entrusted to some other person. This is based on the salutary rule that justice must not only be rendered, but must also appear to be rendered.[6] Likewise, where the charges levelled against an employee were inquired into by the board of directors, two of whom had already made statements in support of the charges, copies of which statements were not furnished to the employee, the inquiry was held to be vitiated for violation of the principles of natural justice.[7]

Andhra Scientific Co, illustrates the principle that where the inquiry officer takes on the role of a witness in addition to his own, the inquiry would be vitiated as being a clear violation of the canons of fair play and natural justice. The workman, in this case, was charged with recklessness and inefficiency in the conduct of his work as the store's manager. The inquiry was commenced by the general manager himself and after five witnesses had been examined, the general manager stepped down and the inquiry was taken over by another officer who was till then incharge of securing evidence in the case to establish charges against the workman concerned. The general manager then gave evidence as a witness in the case but the decision that the workman was guilty of the charges of the alleged misconduct was reached by the other officer. On the basis of these findings reached in the inquiry, the workman was dismissed. Affirming the conclusion of the labour court that the inquiry was vitiated for violation of the principles of natural justice, the Supreme Court held that the inquiry suffered from two grave infirmities; firstly, the person who had presided over the inquiry at the initial stages, stepped down and came into the witness box in the later stage which was quite incongruous; secondly, the very person who was in charge of the prosecution at the earlier stage and was actively concerned in securing the evidence against the workman, took over the inquiry and after finding the workman guilty of the misconduct, passed the order of punishment. Speaking for the Supreme Court, Das Gupta J observed:

> One can see that in the facts of this case the general manager and Ramanatha Babu formed practically one entity, with two bodies. At one stage, the first acts as a judge; at a later stage, he steps down as a witness; and the second becomes a judge. There is the further fact here that the person who gave the actual decision had actively been procuring the evidence, with the avowed motive of securing a conclusion against the workman. These being the facts, the manner in which the inquiry was conducted in this case can hardly be said to have ensured fairplay which rules of natural justice require.[8]

In *Meenglas Tea Estate*, the inquiry into the alleged misconduct of assault against the delinquent workman was held by two officers who themselves were the victims of the alleged assault. Affirming the award of the tribunal, that the inquiry was vitiated, the Supreme Court observed 'that the inquiry officers were not only in the position of judges, but also the prosecutors and witnesses and there was no opportunity to the persons charged to cross-examine them and indeed they had drawn upon their own knowledge of the incident and instead cross-examined the person charged, which was a travesty of the principles of natural justice.[9] In *Lambabari Tea Estate*, in which the domestic inquiry was presided over by the manager himself and was conducted in the presence of the assistant manager and two others, the manager recorded the statements, cross-examined the labourers who were the offenders, made and recorded his own statement of facts and questioned the offending labourers about the truth of his own statements recorded by himself. Hidayatullah J observed:

> The manager did not keep his function as the inquiring officer distinct but became witness, prosecutor and manager in turns. The record of the inquiry as a result is staccato and unsatisfactory. [10]

In other words, inquiry should always be entrusted to a person who is not a witness or biased against the workmen because an inquiry cannot be said to be properly held when the person holding the inquiry is biased and begins to rely on his own statements. If it is not possible to find such a person, some officer from another establishment should be asked to help in the matter. Likewise, a person who has witnessed the event which is the subject-matter of the charge-sheet and held the domestic inquiry in the charges. For instance, where an officer himself had seen the stolen property recovered from the delinquent workman, was held not to be an unbiased inquiry officer against the workman[11] but the mere fact, that the inquiry officer accompanied the assaulted person to the police station on the day following the day of occurrence, would not make the inquiry officer an eye-witness of the occurrence and incompetent to hold the inquiry.[12] It is desirable that the inquiry should be left to be held by some other persons, who are not likely to import their personal knowledge into the proceedings which they are holding as inquiry officers because where the inquiry is held by a person, who has himself witnessed the alleged incident, injustice is likely to result.[13] It is open to the employer to entrust an inquiry against a delinquent workman in an act of misconduct to an outsider. There is no rule that in every case an inquiry must be held by an officer of the employer company and it cannot be said that a domestic inquiry is illegal or void merely because the person who held the inquiry was an outsider and not an officer of the employer.[14] Likewise, if an employer company, appoints a person from another establishment at another place who could be expected to take more detached and impartial view of things instead of appointing a local officer as inquiry officer, in the absence of any provision in the Standing Orders to the contrary, no prejudice can be said to have been caused to the workman, particularly when he does not take objection to the appointment of such an officer in the initial stages and appears before him and submits to his jurisdiction, he cannot later be heard to be saying that he was, in any way, prejudiced on account of the appointment of the inquiry officer.[15]

In *Buckingham & Carnatic*, the relevant Standing Order required that in dismissal cases, the 'manager' of the mills should hold the inquiry. The mill manager asked the senior labour officer of the mills to record evidence of the witnesses after issuing the charge-sheet to the concerned workman. After considering the evidence recorded by the senior labour officer, the mill manager found the workman guilty of the charges and dismissed him from service. The order of dismissal was challenged, before the labour court on the ground that it was only the mill manager who could validly hold the inquiry and since the evidence was recorded by the senior labour officer, it was bad for non-compliance with the requirements of the relevant Standing Orders. Affirming the decision of the labour court, the Supreme Court held that the senior labour officer had confined himself to merely collecting evidence and it was the mill manager who had found him guilty of the charge after giving fair and full opportunity to the workman, and consequently, passed the order of dismissal and there was no Standing Order prohibiting the mill manager from asking the senior labour officer from collecting the evidence.[16] In *TELCO*, speaking for the court, Shelat J observed that an inquiry officer is not entitled to bring the facts which do not form part of the evidence in his report and doing so would vitiate the inquiry. However, from the report of the inquiry officer, it was clear that no extraneous matter was relied on by him in holding any of the workman guilty of the charges against him and the observations regarding such matters were merely incidental. The court stated the general rule in the following words:

> Industrial tribunals, while considering the findings of domestic inquiries, must bear in mind that persons appointed to hold such inquiries are not lawyers and that such inquiries are of a simple nature where technical rules as to evidence and procedure do not prevail. Such findings are not to be lightly brushed aside merely because the inquiry officers, while writing their reports, have mentioned facts which are not strictly borne out by the evidence before them. Of course, if the inquiry officer were to transgress the rules of natural justice by relying on matters which the workman had no opportunity to meet, the validity of his findings would be affected. [17]

In *Pravin Dudhara*, the management appointed an inquiry officer, but it did not appoint any presenting officer to represent its case before the inquiry officer. In this situation, during the course of the evidence, the inquiry officer asked some clarificatory questions of the witnesses. The inquiry was challenged on the ground that the inquiry officer combined the role of the judge and the prosecutor by asking the questions of the witnesses. A single judge of the Bombay High Court held on the facts and in the circumstances of the case, that the questions asked by the inquiry officer, were not in the nature of cross-examination but were merely of clarificatory nature. Furthermore, the inquiry officer had given full opportunity to the delinquent to cross-examine all the witnesses of the management. It was not obligatory on the part of the management to appoint a presiding officer. In this situation, it was held that the inquiry was not vitiated for violation of the principles of natural justice.[18] In *Shyam Bahadur Tripathi*, the domestic inquiry into the charges against the delinquent employee was transferred to the departmental officer from impartial officers in violation of the departmental instructions which directed

that the inquiry should be held by independent agencies like retired judicial officers. The Supreme Court held that the instructions were only guidelines for the authorities. It was, therefore, an appropriate case where the power of the corporation to entrust the inquiry to its own officer was validly exercised. The conduct of the inquiry officer in the circumstances of the case was not vitiated.[19]

(ii) Procedure of Domestic Inquiry

Neither the Industrial Disputes Act 1947 nor the rules thereunder prescribe any procedure to be followed by employers in domestic inquiries for investigating the misconduct of delinquent industrial employees.[20] An inquiry officer has limited powers, unlike a regular court where oath can be administered and attendance of witnesses can be compelled and where counsel can represent the parties, because domestic inquiries are not governed by strict rules of evidence. Therefore, while judging the evidence led before such a domestic inquiry, it is not open to apply strict standards.[21] It is well-settled that the domestic inquiries do not stand on the same pedestal with the trials of actions or cases in a court; they are not governed by technical rules or procedural law.[22] In the absence of any statutory provisions relating to procedure, the domestic inquiries held by employers in dealing with cases of misconduct alleged against their employees, though need not conform to all the requirements of judicial proceedings, they must, however, satisfy the essentials of natural justice.[23] The guiding principle, therefore, is that the inquiry should be conducted with scrupulous regard for the requirements of the rules of natural justice, that is, without bias, and by giving the delinquent employee, an opportunity for adequately representing his case, as the question of action taken by the employer is at issue. Apart from compliance with the requirement of the rules of natural justice, the inquiry must be held honestly and bona fide with a view to determine whether the charge against a particular employee is proved or not and care must be taken to see that these inquiries do not become empty formalities.[24]

The basic postulate of a domestic inquiry is that it must be fair in all respects and should not be conducted with 'evil eye and uneven hand'. Fairness, particularly requires that it must be conducted as expeditiously as possible without brooking any unnecessary delay. Normally, disciplinary proceedings must commence at an early date and should be completed without much delay. There is no period of limitation for initiating the disciplinary proceedings but it must be held within 'a reasonable time and the length of the reasonable time must be determined by the facts of the case and the nature of the order' passed in such proceedings.[25] The mere fact that there was some delay in initiating the disciplinary proceedings will not be sufficient to vitiate the inquiry. If the delay causes prejudice to the workman, normally courts will take serious note of it,[26] but initiation of disciplinary proceedings, itself may lead to the inference of mala fide on the part of the employer. In *Jagdishmal Bhansali*,[27] the employee was exonerated of the charges levelled against him on the basis of a preliminary inquiry and thereafter he was even promoted to the next rank but nine years after that, in the preliminary inquiry, a regular inquiry was initiated against him without assigning any reasons for revocation of the earlier decision. The Rajasthan High Court held that the initiation of the disciplinary proceeding culminating in dismissal of the employee was not only violative of the rules of natural justice but the entire exercise was mala fide and motivated to punish the workman. The steps generally taken in holding a domestic inquiry are: (a) Notice of Inquiry; (b) Pleadings; (c) Representation of Parties; (d) Evidence and Rules of Natural Justice.

(a) Notice of Inquiry

In order to be able to take part in the inquiry, the charged workmen must have notice of the day, time and place of inquiry. The charge-sheet cannot be equated to the notice of inquiry. Even if the workman fails to submit his reply to the charge-sheet, the inquiry officer is not absolved from his duty to send the notice to the delinquent employee informing him about the date, time and place of inquiry which would enable him to produce his witnesses and cross-examine the witnesses produced against him. Non-compliance of this requirement, would be violative of rules of natural justice.[28] Fairness demands that the workman should be told sufficiently in advance as to when and where the inquiry is going to be held so that he has an opportunity to prepare himself to make his defence at the inquiry and to collect such evidence as he wishes to lead in support of his defence. It would not be proper that the workman should be called on any day without previous intimation and the inquiry should begin straight-away. It may be that failure to intimate the workman concerned about the date of the inquiry may, by itself, not constitute an infirmity in the inquiry, but such a course should ordinarily be avoided in holding domestic inquiries in industrial matters.[29] A single judge of the Punjab and Haryana High Court held:

> It is the function of the management to serve notice and to inform the employee verbally in the presence of a witness the date and time at which the inquiry into his alleged misconduct is to be held. The Standing Orders do not require that the inquiry officer has to initiate the preliminary proceedings regarding giving of notice and informing the employee concerned of the date and time when the matter would be taken up and of the allegations against him. [30]

In this view of law, the High Court discountenanced the view taken by the tribunal that the inquiry officer assumed the functions of a judge and it is for him to fix a date and time for the inquiry and to inform both parties about the same,

because the duty is cast upon the employer under the Standing Orders and the tribunal has to see whether the procedure laid down in the Standing Orders has been observed or not. If an inquiry is held without informing the workman of the specific time of the inquiry,[31] or if he is informed in the forenoon to attend the domestic inquiry in the same evening,[32] it will not be sufficient notice of inquiry and would be a denial of reasonable opportunity but there is no statutory provision requiring that a delinquent workman should be given an opportunity to explain why an inquiry in respect of a charge should not be conducted against him. All that he is entitled to have is that he should be given a notice of the charges against him and of the allegations on which the charges are based, and a fair and reasonable opportunity to meet the charges and establish his defence, if any, before the inquiring authority.[33] Though the principles of natural justice require that a notice of proposed domestic inquiry to be held should be given to the concerned workman, they do not require that even if after giving the notice the concerned person remains absent, the inquiry should not be held in his absence. In other words, a domestic inquiry, held *ex parte* after giving the concerned workman due notice, would not be violative of the principles of natural justice.[34]

The mode of giving the notice of the domestic inquiry may be provided by the Standing Orders of an establishment. If the notice is given in compliance with the requirements of the Standing Orders, it will be sufficient notice. In *McKenzie,* before commencing the inquiry, the management sent notices of the inquiry to the concerned workmen by registered post at their addresses registered with the company and also affixed the notices on the company's notice board, both inside the premises and outside the gate of the factory and these notices had remained so affixed for a month and a half. Some of the notices sent by registered post were returned unserved. The company had also written to the union asking for the addresses of the workmen who had not been served, but no reply was received. Subsequently, the inquiry proceeded *ex parte* against those workmen who were absent as a result of which some of the workmen were found guilty of the acts of misconduct alleged against them and their services were terminated. While upholding the action of the management, the Supreme Court observed that the company had made every effort, under the circumstances, to serve the notice on the workmen concerned in the inquiry and it could not be said that the workmen did not have a proper notice of the charges or were not given a proper opportunity to meet the case against them.[35] In *Bata Shoe Co,* the Standing Orders of the company provided that the workman charged with any misconduct shall receive a copy of the charge against him and there was no provision in the Standing Orders for affixing the charges on the notice board of the company. The company dismissed 60 of its workmen for having participated in an illegal strike and in the case of 13 of these workmen, it was proved that they had not been served with the charge-sheet and the notice of inquiry and the inquiry took place in their absence. The company had posted the notices and the charge-sheets on its notice board and also published the notices and charge-sheets in the local papers, when the charge-sheets sent by registered post had been returned unserved. However,*the notice of inquiry published in the local papers did not contain the names of the 13 workmen*. In these circumstances, it was held that these workmen did not have notice of the inquiry. The court observed that the mere display of the notices on the notice board or their publication in the newspaper *without specifying the names of the persons charged* would not meet the requirements of communication adequately. In view of this basic lapse, the order of dismissal was held invalid on the ground that principles of natural justice were violated.[36] Likewise, where the delinquent workman was not aware of the inquiry held against him and there was no allegation or proof adduced by the employer that the workman deliberately evaded service of the notice intimating him about the date of the inquiry, the inquiry was held to be vitiated for want of proper notice.[37]

(b) Pleadings

In industrial adjudication, for instance, the fact that all aspects of the question in reference to the charter of a worker's employment were not set out in the written statement, would not affect the credibility of the evidence led by him at the trial.[38]However, the pleadings of the parties before an inquiry officer must state their respective cases, though they may not strictly conform to the technical procedural requirements. Since, after the insertion of s 11A in the Industrial Disputes Act, the tribunals will have to confine themselves to the 'materials on record', the pleadings of the parties, before the inquiry officer, have become all the more of vital importance. The tribunals will not permit the parties to go beyond these pleadings while adjudicating upon the industrial disputes falling within the purview of s 11A.

(c) Representation of Parties

The traditional judicial approach to the representation of the parties before the domestic tribunals is that a domestic inquiry is a managerial function and as such, it is best left to the management without the intervention of outsiders and persons belonging to legal profession. This approach is based on the view that inquiries before the domestic tribunal are of simple nature where technical rules as to evidence and procedure do not prevail and the persons appointed to hold such inquiries are generally not lawyers.[39] In other words, inquiry officers holding inquiry without being unduly influenced by strict rules of evidence and the procedural juggernaut should hear the delinquent employee in person and in such an informal inquiry, the delinquent officer would best be able to defend himself.[40] There is no provision of law entitling the charged workman to be represented by anybody else before the domestic inquiries. The rules of natural justice do not postulate that in domestic inquiries into the charges of misconduct against an industrial employee, he should be represented by a member of

his union.[41] In *N Kalindi*, the Supreme Court observed that a workman had no right to be represented in the domestic inquiry by a representative of his union though the inquiry officer in his discretion, may allow an employee to avail himself of such assistance. In the facts and circumstances of the case, the court held that the inquiry was not vitiated by the fact that the delinquent workmen were not allowed to be represented in the domestic inquiry by a representative of their union.[42] In *Brooke Bond*, the court held that the refusal by the inquiry officer to allow a workman to be represented by a lawyer or by an outsider, did not vitiate the inquiry.[43] In the absence of any provision in the Standing Orders, the general practice adopted by the domestic tribunals is that the accused person himself conducts his case but generally, the Standing Orders of large industrial establishments make provisions for representation of parties through outsiders in domestic inquiries. In other words, the refusal by the inquiry officer to a party to be represented by another person permitted by the Standing Orders would vitiate the inquiry.[44] In *Dunlop*, the Standing Orders of the company provided that only a representative of the union which was registered under the Indian Trade Unions Act 1926 and was recognised by the Government could represent a workman in the domestic inquiry. The Supreme Court held that the refusal by the inquiry officer to allow the workman to be assisted by the workman's own union which was not registered or recognised did not vitiate the inquiry. The court observed:

> In holding domestic inquiries, reasonable opportunity should be given to the delinquent employees to meet the charge framed against them and it is desirable that at such inquiry the employees should be given liberty to represent their case by persons of their choice if there is no Standing Order against such a course being adopted and if there is nothing otherwise objectionable in the said request.[45]

It was held that there is no right to representation as such, unless the employer by his Standing Orders recognised such a right and the refusal to allow representation by any union, unless Standing Orders confer that right, would not vitiate the proceedings. In the circumstances of the case, refusal of the inquiry officer to accede to the request made by the workman did not introduce any serious defect in the inquiry itself. However, the latest trend is in the direction of permitting a person who is likely to suffer serious civil or pecuniary consequences as a result of the inquiry, to enable him to defend himself adequately by outsiders or legal practitioners.[46] In England, speaking for the Court of Appeal in *Greyhound Racing*, Lord Denning, MR, observed that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth but has also the right to speak by counsel or solicitor.[47] This view of Lord Denning was not followed by the Indian courts earlier, but they gradually started recognising that the denial of assistance to a delinquent workman who is an illiterate person, would amount to denial of fair opportunity.[48] In the last edition of this book at p 820, it was stated thus:

> But the observations of Lord MR Denning, in *Pett's* case are worthy of a serious consideration. In this connection, it may not be irrelevant to point out that in a domestic inquiry in a disciplinary matter, verily the reputation and the livelihood of a workman are at stake. In a number of decisions, the Supreme Court has noted that industrial workmen in India are illiterate persons.[49]

These days, generally, the persons who are appointed to hold inquiries are well trained persons and occasionally even lawyers are appointed for this purpose. The employers also have highly trained persons who represent them in such inquiries. If a workman is not properly represented, he may be seriously prejudiced in his defence. Apart from illiteracy, it is not every man who has the ability to defend himself on his own as he may not be able to bring out the points in his own favour or the weakness of the other side as successfully as a skilled man in this behalf may be able to do. The workman may be nervous, tongue-tied, confused or wanting in intelligence and thus lack the ability to examine or cross-examine witnesses.[50] Desai J, observed:

> In the absence of embargo on the right of the delinquent employee to be represented by a legal practitioner, the matter would be in the discretion of the inquiry officer whether looking to the nature of the charges, the type of evidence and complex or simple issues that may arise in the course of inquiry, the delinquent employee in order to afford reasonable opportunity to defend himself should be permitted to appear through a legal practitioner .. In our view we have reached a stage in our onward march to fair play in action that where in an inquiry before a domestic tribunal the delinquent officer is pitted against a legally trained mind, if he seeks permission to appear through a legal practitioner refusal to grant his request would amount to denial of a reasonable request to defend himself and the essential principles of natural justice would be violated. [51]

The Calcutta High Court in *Director General, P&T*, held that the refusal to allow a public servant to be represented by a legal practitioner in a domestic inquiry was violative of the statutory rule as well as Art 311 (2) of the Constitution.[52] Another Division Bench of that High Court, dealing with an industrial matter in *India Photographic*, has enunciated the principle that though the court should discourage the involvement of legal practitioners in simple domestic inquiries like disciplinary inquiries for avoiding complication and delay, yet the court cannot ignore the necessity of such representation

in exceptional circumstances where refusal of such a representation would constitute failure of the inquiry itself, the principles of natural justice demand conceding of such a claim. However, the court pointed out that no general rule could be laid down in this respect but the issue must be left for consideration in the light of the facts of each individual case. In this case, the delinquent workman was charged with the offences of misconduct of forgery and misappropriation, which if established would not only affect his reputation and livelihood but would also totally ruin his life. In the circumstances, it was held that the court rightly exercised its discretion when it directed that the workman be permitted to be represented by a lawyer in this domestic inquiry.[53]

On the other hand, a single-judge of the Madras High Court in *A Veeman*, held that the facts of the case did not warrant permitting engagement of a lawyer in the domestic inquiry. The court observed that in a domestic inquiry, the workman cannot insist on taking the assistance of the legal practitioner as an inherent right though it is to be ensured that he does not stand at a disadvantage and there is no breach of the rule of fair play.[54] In *Harinarayan Srivastav*, the Supreme Court held that where the allegations were very simple and were not complicated, the denial of permission to be represented by an advocate would not violate the principles of natural justice, even though the bipartite settlement provides for such representation with the permission of the management.[55] ln *Bharat Petroleum*, the Supreme Court held that the basic principle is that an employee has no right of representation in the departmental proceedings by any other person or lawyer unless the service rules specifically provided for the same.[56] Where the Standing Orders provided that a workman can be defended in a domestic inquiry by a lawyer only with the permission of the management, it was held that the workman had no absolute right to be defended by an advocate in the enquiry, and it could not be said that there was violation of principles of natural justice merely because he was denied permission to be defended by an advocate.[57] As against this, a single judge of the Madras High Court held that where the rules applicable to domestic inquiry do not provide for assistance of lawyer for both the employer and the employee, if the employer had chosen a person who is legally trained, the principles of natural justice require that the employee's request for assistance of a lawyer should be accepted by the management.[58] Merely because the word 'fraud' was used in the charge-sheet, it does not make the charges 'serious' in order to entitle the workman to be represented by a lawyer, as provided in the bipartite settlement, and the denial of representation by a lawyer could not be said to have vitiated the inquiry. The tribunal acted in excess of its jurisdiction in interfering with the inquiry on that count.[59]

There is no principle of natural justice that a person who had lodged a complaint cannot present his case and be a prosecutor in a domestic inquiry. A domestic inquiry, therefore, in which the complainant himself was the prosecutor would not be vitiated for violation of the principles of natural justice.[60] Likewise, where a person who complains about the misconduct of the delinquent workman and in that capacity, gives evidence before the domestic inquiry and also represents the management in the course of the inquiry, there is no violation of the principles of natural justice,[61] as in no sense does he acts as a prosecutor and judge simultaneously. If any inquiry is not fair on the ground of denial of proper representation, it is open to the aggrieved workman to challenge its validity in the course of adjudication of the industrial dispute before the tribunal.[62] If the workman is not represented by a legal practitioner before an inquiry officer, the management cannot validly insist that it must be represented through a lawyer. If a workman is permitted to be represented through a lawyer before an inquiry officer in the facts and circumstances of a particular case, the management too cannot be denied the same facility. Normally, large industrial establishments have highly trained officers who are engaged to represent the management in the domestic inquiries. However, it is not incumbent on the management that it must appoint a representing officer before the domestic inquiry. It may leave to the inquiry officer himself to elicit relevant information from the witnesses presented before him by the management and the workman. Such procedure is permissible as long as the inquiry officer does not play the role of the representing officer.

In *K Kasi*, a single judge of the Karnataka High Court held that there was no legal compulsion that a presenting officer should be appointed. The mere fact that the presenting officer is not appointed by the management is no ground to invalidate an inquiry. If, however, the inquiry officer plays the role of a prosecutor and cross-examines the defence witnesses or puts leading questions to the prosecuting witnesses thus, clearly exposing a biased state of mind, the inquiry would be opposed to the principles of natural justice. However, if the questions put by the inquiry officer to the witnesses are merely for clarification wherever it becomes necessary, the inquiry cannot be impeached as unfair so long as the delinquent workman is permitted to cross-examine the witnesses after the inquiry officer has put the questions to the witnesses. In this case, the tribunal had not pointed out any particular question put by the inquiry officer to the witnesses, which could be regarded objectionable and exposing a state of mind on the part of the inquiry officer. It was, therefore, held that an inference that the inquiry officer had played the role of prosecutor was not permissible. Therefore, the inquiry could not be held to be unfair.[63] In *Venkateshwara Reddy*, on review of the earlier dicta, a single judge of the Karnataka High Court has stated the following principles regarding the employee's right to be defended by a legal practitioner in a domestic inquiry:

(a) The right to be represented by a legal practitioner is not an element of principle of natural justice.

(b) A delinquent employee will have the right to claim to be defended by a legal practitioner, where the rules or regulations permit the employee to be represented by a legal practitioner.

(c) Where the rules or regulations are silent about representation by a lawyer or vest discretion in the disciplinary authority or the inquiring authority, to permit the employee to be represented by a legal practitioner or other agent of his choice, denial of such permission on a request made by the employee, would violate the principles of natural justice—

(i) if the presenting officer is a legal practitioner or a person legally trained or experienced; or

(ii) if the charges are of a serious and complex nature.

(d) Where the rules or regulations specifically prohibit the employee from engaging the service of a legal practitioner, such rules or regulations will be read down as vesting a discretion in the disciplinary authority to permit the employee to engage a legal practitioner, where—

(i) the presenting officer is a legal practitioner or legally trained person; or

(ii) the charges are of a serious and complex nature. If it is not so read down, the rule itself may have to be held to be invalid as violating Art 14 of the Constitution. [64]

Where the employer granted the request of the delinquent to be represented by a legal practitioner in the domestic inquiry, the employer can also avail the services of a legally trained person to be the presenting officer, and the mere appointment of a legal practitioner as the presenting officer would not *ipso facto* violate the principles of natural justice.[65] Mere refusal by the inquiry officer to permit the delinquent employee to take the assistance of a co-worker at the domestic inquiry, as provided for in the Punjab Civil Services Rules, does not result in the invalidation of the inquiry proceedings and the order of punishment. The court has to examine whether violation of principles of natural justice has caused prejudice to the delinquent employee in such cases.[66]

(d) Evidence and Rules of Natural Justice

The strict technical rules of procedure of the Indian Evidence Act 1872 do not apply even to the adjudicatory proceedings before the adjudicatory authorities under the Industrial Disputes Act 1947 much less would they 'apply to domestic inquiries'.[67] In *TR Varma*, Venkatarama Ayyar J, observed:

> The law requires that such tribunals should observe rules of natural justice in the conduct of the inquiry, and if they do so, their decision is not liable to the impeached on the ground that the procedure followed was not in accordance with that, which obtained in a court of law,...the inquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed.[68]

In *Rattan Singh*, Krishna Iyer J held:

> It is well-settled that in a domestic inquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided ithas reasonable nexus and credibility. It is true that departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence Act...The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fair play is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding, even though of a domestic tribunal, cannot be held good.[69]

Merely because the rules of evidence and procedure do not apply to domestic inquiries and the employer and workmen are subject to rules laid down in the Standing Orders, it does not mean that the rules of natural justice and fair play are to be ignored. The rules of natural justice are matters not of form but of substance. The effect of the violation of the rules of natural justice must result in some sort of sufferance, handicap or prejudice to the delinquent. The alleged prejudice caused to the delinquent, resulting from the alleged violation of the rules of natural justice must be pleaded and proved before the tribunal.[70] However, mere breach of bare technicalities cannot be equated with violation of the rules of natural justice. Nor is it the duty of the inquiry officer to explain various aspects of law or natural justice as to what sort of representations he might have in law in case he chooses to ask for the same. The delinquent must assert his own right. If, however, the inquiry is proceeded with in a slip-shod way or in a manner which might indicate that the inquiry officer was proceeding on the basis of standard of proof which is wrong in law and not consistent with the principles of natural justice then in that event,

the inquiry proceedings might be vitiated.[71] If the inquiry officer does not comply with the rules of natural justice, that is to say, does not give reasonable opportunity to the employee of being heard and to lead evidence and cross-examine the witnesses of the opposite party or he himself is biased against the employee, the inquiry will be invalid.[72] In other words, a domestic inquiry into the misconduct of an employee would be proper only if it is held in accordance with the rules of natural justice. The quintessence of the rules of natural justice was stated by B N Banerjee J of the Calcutta High Court in the following words:

> The principle of natural justice in its journey through the centuries, has shed much of its glories and is now crystallised into four principle of justice, namely:
>
> (i) opportunity for both the contesting parties to be heard;
>
> (ii) hearing before an impartial tribunal so that no man can be a judge of his own cause;
>
> (iii) decision made in good faith; and
>
> (iv) an orderly course of procedure.[73]

Apart from this, no other principle of natural justice is known in modern Jurisprudence. 'Principles of natural justice are not codified rules. Their greatest virtue is adaptability to changing situations. Once the principles of natural justice are reduced to formalistic straight jackets fettering administrative discretion, the principles cease to be natural.[74] The principle that before a workman can be found guilty for inflicting the punishment of dismissal, he must have been recognised, implicated and named by more than one witness, cannot be invoked in domestic inquiries or industrial adjudication.[75] In a domestic inquiry, guilt need not be established beyond reasonable doubt; proof of misconduct may be sufficient.[76]The inquiry officer can take into consideration the evidence of an accomplice which undoubtedly will be legal evidence. If the evidence of a co-accused would constitute legal evidence on which the inquiry officer could act, even though retracted from, would not in any way render finding of guilt in respect of the delinquent workman, incorrect.[77] The provisions of s 162 of the Code of Criminal Procedure 1973 too have no application to departmental inquiries.[78]

Before commencing to record the evidence of the parties, it would be but fair that the inquiry officer should explain to the delinquent workman the charges levelled against him.[79]Legal evidence may be direct evidence or indirect evidence. Direct evidence is what has been defined in s 60 of the Indian Evidence Act 1872 vis-a-vis oral evidence. As against direct evidence, (s s 60, 62 and 63 of the Indian Evidence Act 1872), there is another type of evidence which is known as circumstantial evidence. Direct evidence as well as circumstantial evidence is legal evidence but the concept of hearsay evidence is entirely different. In criminal law, hearsay evidence is inadmissible to prove the fact which is deposed to on hearsay. However, it does not necessarily preclude evidence as to a statement having been made upon which certain action was taken or certain results followed. In so far as domestic inquiries in disciplinary proceedings are concerned, the hearsay evidence may be admissible provided it has reasonable nexus and credibility. The word 'hearsay' is used in various senses. Sometimes, it means whatever a person is heard to say; sometimes it means whatever a person declares on information given by someone else. The evidence of a statement made to a witness who is not called as a witness may or may not be 'hearsay'. It is 'hearsay' and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not 'hearsay' and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. The fact that it was made quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or some other persons in whose presence such a statement is made.[80] In the language of Krishna Iyer J in *Rattan Singh* (supra) 'there is no allergy to hearsay evidence provided it has reasonable nexus and credibility'.

Generally, industrial employers may provide the procedure for holding domestic inquiries in their Standing Orders, if applicable, or the service rules. If there are any rules regarding holding of domestic inquiries prescribed either by the Standing Orders, rules or by any other provision of law, then those Standing Orders, rules or the law must be followed. A domestic inquiry against a charge-sheeted workman, without complying with the procedure laid down in the Standing Orders would be invalid as held by the Supreme Court in *Imperial Tobacco*.[81] In cases, where the Standing Orders or the service rules do not prescribe any procedure or there are no Standing Orders or service rules, though the domestic inquiries need not confirm to all requirements of judicial proceedings, they must, however, satisfy the essential requirements of natural justice.[82] The purpose of the rules of natural justice is to safeguard the position of the person against whom an inquiry is being conducted, so that he is able to meet the charges levelled against him, properly. Though the rules of natural justice do not change from tribunal to tribunal, even so the nature of inquiry and the status of person against whom inquiry is held will have some bearing on what should be the minimum requirements of the rules of natural justice. Where, for example, lawyers are permitted before a domestic tribunal holding an inquiry and the party against whom the inquiry is being held, is represented by a lawyer, mere reading of the material to be used in the inquiry may sometimes, be sufficient but where in a domestic inquiry against industrial workers, most of whom are illiterate, and lawyers are not permitted to

defend them and sometimes even the representatives of the labour unions are also not present to defend them, something more than a mere reading of statements to be used against them will have to be required in order to safeguard their interest.[83] The ambit of the principles of natural justice which must be followed by the inquiry officers in such inquiries is well settled by judicial pronouncements.[84] Such inquiries, therefore, have to be held with scrupulous regard for the requirements of rules of natural justice as questions of bona fides or mala fides of employer are at issue.[85] The requirements of natural justice broadly are that:

(i) the inquiry must be held by a person who is not biased in favour or against either of the parties; and

(ii) the delinquent employee should be given a fair opportunity of adequately representing his case by hearing the evidence in support of the charge, and to cross-examine the witnesses produced against him and also be allowed to rebut the evidence led against him by examining witnesses including himself if he so wishes on any relevant matter.[86]

Bias

The principles of bias have been discussed in detail under the caption 'Rules of natural justice' under s 17(2) (infra). The law relating to the bias of the inquiry officers has been discussed under the topic 'Inquiry officer' (supra). However, it may be relevant to note here that a remote apprehension in the mind of the workman that the inquiry officer would be biased against him is not sufficient to vitiate the disciplinary proceedings on the ground of bias. Likewise, the mere fact that the inquiry officer was a superior to the delinquent workman, is not sufficient to hold that he was biased against the workman. It is only in cases where the court has acceptable materials to infer bias that the court will lean in favour of a delinquent, when a charge of bias is made against the enquiry officer. Otherwise, it will always be easy for a delinquent workman to defeat the domestic inquiry by making aspersions against the officer conducting the domestic inquiry or by making false imputations.[87] Particularly, where a man categorically says that he has no objection to a particular person holding the inquiry and also makes no allegation against him; he cannot be allowed to raise the question of bias of inquiry officer later.[88] There is no principle of natural justice that a person who has lodged a complaint cannot be a presenting officer and prosecutor in a domestic inquiry. That itself will not vitiate a domestic inquiry if no other question of prejudice is there.[89]

Reasonable Opportunity

Before imposing the punishment of discharge or dismissal, fair play requires that the delinquent workman is given a reasonable opportunity to put forth his defence before the inquiry officer in the inquiry proceedings in accordance with the rules of natural justice.[90] Natural justice ordains that the inquiry should be held impartially, objectively and after giving an opportunity of hearing to the delinquent workman.[91] Fair opportunity and fair trial are elements of the principles of natural justice which are always applied to the facts and circumstances of a case and not understood in the abstract.[92] The two elements of a reasonable opportunity of being heard are that firstly, an opportunity to be heard must be given; and secondly, this opportunity must be reasonable. Both these matters are justifiable and it is for the tribunal to decide whether an opportunity has been given and whether that opportunity has been reasonable.[93] There can be no invariable standard for 'reasonableness' in such matters except that the adjudicator's conscience must be satisfied, that the workman against whom disciplinary action is proposed has had a fair chance of convincing the inquiry officer that the grounds on which the action is proposed are either non-existent or even if they exist they do not justify the proposed action. The decision of this question will necessarily depend upon the peculiar facts and circumstances of each case, including the nature of the action proposed, grounds on which the action is proposed, the material on which the charges are based, the attitude of the workman against whom the action is proposed in defending himself in the inquiry, the nature of the pleas raised by him in reply, the request for further opportunity that may be made, his admission by conduct or otherwise of some or all the charges and all other relevant matters which help the mind in coming to a fair conclusion on the question.[94] What is 'reasonable opportunity' will depend on the facts of each case, depending particularly on the nature of the allegation, the witnesses and their availability and the time and assistance required for preparation to appear at the inquiry.[95]

In *Thejvir Singh*, where the inquiry officer gave the workman only one day's notice to face the inquiry, refused the request for adjournment, asked him to cross-examine witnesses with non-familiar matters and to present his defence in an hour, the Supreme Court held that the inquiry was conducted in gross violation of the principles of natural justice, without giving real and fair opportunity to the workman to participate in the proceedings.[96] Similarly, in *Anglo American Direct Tea Trading*, the charge-sheet did not show on what evidence the management would rely for the purpose of supporting the charge and the witnesses that the management wanted to examine were not disclosed and the workman was asked to send his list of witnesses within 24 hours, a single judge of the Madras High Court held that it could not be said that the workman was given a 'fair opportunity' to defend himself and establish his innocence with reference to the charge framed against him.[1] On the other hand in *Ram Bilash Goel*, where the delinquent was given 72 hours to submit explanation for refusing to work over-time, considering the nature of the charge and witnesses proposed to be cross-examined, the time allowed was not considered to be inadequate.[2] In *TR Varma*, Venkatarama Ayyar J observed:

> Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them.[3]

The basic requirement of a fair opportunity is that inquiry must be conducted honestly and in a bona fide manner with a view to determining whether the charge framed against a particular employee is proved or not, and therefore, care must be taken to see that the inquiry does not become empty formality.[4] 'Reasonable opportunity' means not only framing charges and asking for explanation but much more. The employee must be apprised of the material on which the charges were framed, so that he could have a proper opportunity of testing or challenging that material so far as would be possible for him.[5] Though the technical rules of procedure and evidence do not apply to domestic inquiries, the rules of natural justice require that when a fact is sought to be proved before a tribunal, it must be supported by statements made in the presence of the person against whom the inquiry is held and if a statement is made at his back, it ought not to be treated as substantive evidence.[6] Therefore, all the evidence against the person concerned should be taken in his presence and he should be given an adequate opportunity of cross-examining the witnesses giving evidence against him, and that no material should be relied on against him, without his being given an opportunity of explaining it. The delinquent workman should further be given the opportunity of questioning the witnesses after knowing in full what they have to state against him. The witnesses on whom the employer relies, should generally be examined in the presence of the delinquent workman and he must also be informed of the material sought to be used against him and give an opportunity to explain it.[7] In *Meenglass*, Hidayatullah J, observed:

> It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an inquiry of this character and this requirement must be substantially fulfilled before the result of the inquiry can be accepted. A departure from this requirement in effect throws the burden upon the person charged to repel the charge without first making it out against him.[8]

The basic concept is fair play in action—administrative, judicial or quasi-judicial but the concept of fair play in action must depend on the particular lis, if there be any, between the parties. When on the question of facts there is no dispute, no real prejudice has been caused to a party aggrieved by an order, absence of any formal opportunity of cross-examination per se does not invalidate or vitiate the decision arrived at fairly, particularly more so when the party against whom an order has been passed does not dispute the facts and does not demand to test the veracity of the version or the credibility of the statement. In *KL Tripathi*, Sabyasachi Mukharji J, observed:

> If the credibility of a person who has testified or given some information is in doubt, or if the version or the statement of the person who has testified, is in dispute, right of cross-examination must inevitably form part of fair play in action but where there is no *lis* regarding the facts but certain explanation of the circumstances there is no requirement of cross-examination to be fulfilled to justify the fair play in action...The party who does not want to controvert the veracity of the evidence from or testimony gathered behind his back cannot expect to succeed in any subsequent demand that there was no opportunity of cross-examination specially when it was not asked for and there was no dispute about the veracity of the statements. When there is no dispute as to the facts or the weight to be attached on disputed facts but only an explanation of the facts, absence of opportunity to cross-examination does not create any prejudice in such cases.[9]

In dealing with domestic inquiries held in industrial matters, the fact that in a large majority of cases employees are likely to be illiterate and ignorant, should be borne in mind.[10] The inquiry officer has to take care in the facts and circumstances of each case that the defence of the workman is not prejudiced in any manner. The rules of natural justice require that the workman proceeded against should be informed clearly of the charges levelled against him; witnesses should be normally examined in his presence in respect of the charges; if statements taken previously and given by witnesses are relied on, they should be made available to the workman concerned; the workman should be given a fair opportunity to examine witnesses, including himself, in support of his defence; and the inquiry officer should record his findings based on the evidence so adduced.[11] In other words, before a person is punished, he should be told fairly and clearly what is the offence charged against him and he should be given reasonable opportunity to adduce such evidence as he chooses in his defence and to cross-examine the employer's witnesses or demolish the evidence that is produced against him. All the materials relied against the delinquent workman in coming to the conclusion by the inquiring authority should be made known to the

workman concerned.[12] A single-judge of the Karnataka High Court in *Venkateshwara Reddy*, has laid down the following requirements of reasonable procedure subject to any special provisions relating to procedure in the relevant rules, regulations, Standing Orders or a statute:

(a) the employee shall be informed of the exact charges which he is called upon to meet;

(b) he should be given an opportunity to explain any material relied on by the management to prove the charges;

(c) the evidence of the management witnesses should be recorded in the presence of the delinquent employee and he should be given an opportunity to cross-examine such witnesses;

(d) the delinquent employee shall either be furnished with copies of the documents relied on by the management or be permitted to have adequate inspection of the documents relied on by the management;

(e) the delinquent employee should be given the opportunity to produce relevant evidence—both documentary and oral which include the right to examine self and other witnesses; and to call for relevant and material documents in the custody of the employer;

(f) whenever the inquiring authority is different from disciplinary authority, the delinquent employee shall be furnished with a copy of the inquiry report and be permitted to make a presentation to the disciplinary authority against the findings recorded in the inquiry report.[13]

A single judge of Calcutta High Court, while quashing the award of tribunal directing reinstatement on the ground that the workman was not given reasonable opportunity because the inquiry was conducted *ex parte*, held that the principle of affording reasonable opportunity was not a one-way traffic. It was for the person who was on the receiving end to avail of such opportunity. If he did not avail of this opportunity upon his own misconduct then in that case the inquiry officer would be well within his right to proceed in his absence.[14] The following sub-heads deal with some important aspects of the manner in which a fair and reasonable opportunity can effectively be given to a delinquent workman:

Supply of Relevant Material:

It is settled law that in the charge sheet, specific averments in respect of the charge shall be made. If the management seeks to rely on any document in proof of the charge, the principles of natural justice require that such copies of those documents need to be supplied to the delinquent. If the documents are voluminous and cannot be supplied to him, an opportunity has got to be given to him for inspection of the documents. Failure of the management to supply the copies of such documents or to give inspection of the documents to him would violate the principles of natural justice. Furthermore, if the delinquent seeks to support his defence at the inquiry with reference to any of the documents in the custody of the management, then the documents either may be summoned or copies thereof may be given at the request and cost of the delinquent.[15] The rules of natural justice are not embodied rules. Therefore, before coming to the conclusion that any particular procedure adopted by the inquiry officer is violative of the rules of natural justice, the tribunal must be satisfied that the procedure adopted was not conducive to reach a just decision. A party is not entitled, as of right, to have his attention called to any material that may come before a quasi-judicial tribunal unless the material in question is likely to prejudice his case either directly or indirectly.[16]

Inquiry officers are not courts and, therefore, they are not bound to follow the procedure prescribed by the trial courts nor are they bound by strict rules of evidence. On the other hand, unlike courts, they can obtain all information of material for the points under inquiry from all sources, and through all channels without being fettered by rules of procedure, which govern proceedings in a court. The only obligation which the law casts on them is that they should not act on any information which they receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it.[17] However, the principle that a fact sought to be proved must be supported by statements made in the presence of the person against whom the inquiry is held and that statements made behind the back of the person charged are not to be treated as substantive evidence is one of the basic principles which cannot be ignored on the mere ground that the domestic tribunals are not bound by the technical rules contained in the Evidence Act.[18] In *PC Thomas*, in the domestic inquiry held by the employer, there was no examination of the witnesses nor were there any exhibits on the record. No inquiry in the proper legal sense of the term at all was held. All that happened was that even when the delinquent workman replied to the charge, he was given notice to produce his evidence and documents, if any, in support of his evidence. Even in the notice, there was no indication of the gist or the substance of the evidence that was proposed to be adduced at the inquiry in support of the charge. In pursuance to the notice, the matter was posted for hearing when certain questions were put to the workman, at the end of which the order of dismissal followed. In the circumstances, the inquiry was held to be vitiated.[19] In a case where the enquiry officer allowed certain documents produced by the management as evidence without supplying copies of the same to the charge-sheeted workman, a single Judge of Calcutta High Court held that, in the

circumstances, the findings of the enquiry officer that the workman had forged the signature of the Deputy General Manager was without evidence. On this view of the matter, the learned judge set aside the dismissal and ordered reinstatement, but with 50% of back wages.[20] Once the court sets aside an order of punishment on the ground that the enquiry was not properly conducted, the court should not severely preclude the employer from holding the inquiry in accordance with the law. It must remit the concerned case to the disciplinary authority to conduct the enquiry from the point that it stood vitiated and to conclude the same in accordance with law. However, resorting to such a course depends upon the gravity of delinquency involved. Thus, the court must examine the magnitude of misconduct alleged against the delinquent employee. It is in view of this, that courts/tribunals, are not competent to quash the charge-sheet and related disciplinary proceedings, before the same are concluded on the aforementioned grounds.[21]

Prima facie, when an employee who is facing an inquiry for misconduct requiring certain materials in the possession of the company to be produced and they are not made available, the workman may be prejudiced in properly placing his defence.[22] For instance, the refusal of the employer to supply to the workman the documents relating to the previous two inquiries started and dropped against him was held to be denial of the rules of natural justice.[23] An inquiry officer would be acting contrary to the rules of natural justice, if he acted upon information collected by him which has not been disclosed to the workman and in respect of which full opportunity of meeting the inferences which arise out of it has not been given.[24] It is highly improper for an inquiry officer to attempt to collect material from outside sources during the conduct of an inquiry, and not make the information so collected, available to the delinquent workman, and further make use of the same in the inquiry proceedings. There may also be cases where a very clever and astute inquiry officer may collect outside information behind the back of the delinquent workman and without any apparent reference to the information so collected may be influenced in the conclusion recorded by him against the workman. If it is established that the material was collected behind the back of the workman, collected during the inquiry and such material has been relied on by the inquiry officer without its having been disclosed to the workman, it can be stated that the inquiry proceedings would be vitiated.[25] A workman, who is to answer to a charge must not only know the accusation but also the testimony by which the accusation is supported.[26]

In *Ashwani Kumar Suman*, the Allahabad High Court quashed the order of dismissal passed against the employee as the order was founded on incriminating material which the employee was not aware of. Not only such material was not made available to the employee but he was not even given an opportunity to lead evidence in rebuttal. Furthermore, the previous record of the employee was taken into consideration while passing the order, without giving him an opportunity to make representation in regard to that consideration. It was apparent from the order that even the defence of the employee was not considered and no findings were recorded in spite of the fact that the employee had asserted that he was not afforded a reasonable opportunity to explain and the copies of the material documents were not furnished to him.[27] If a document is relied upon by a witness and also by the inquiry officer in his findings, it must be made available to the workman before he is called upon to cross-examine such witness.[28] Therefore, when the delinquent wants copies of certain documents which, according to him, are relevant to prove that the charges levelled against him are not true, failure to furnish the said documents even on the ground that they are not available will vitiate the inquiry unless proper explanation is given to the court as to how the documents sought for became unavailable. In the absence of such explanation, the delinquent employee can successfully contend that he has been denied the opportunity of meeting the charges.[29] In other words, if a delinquent is entitled to a copy of a particular document then he should be supplied with that document because non-supply of that document prejudices his defence.[30] If the documents mentioned in the memo of charge were neither relevant to the charge nor relied upon by authorities, the non-supply of such documents would not vitiate the proceedings.[31] However, if some document is not traceable and by non-production of such document, the delinquent will not gain while the management stands to gain, there would be no denial of the rules of natural justice.[32] In *MN Mardikar*, the original note book and the log book could not be supplied as they were missing and their transcripts prepared by the witnesses earlier were supplied to the delinquent officer. It was held by the Supreme Court that the employer could not be accused of deliberately suppressing evidence. Speaking for the court, Ahmadi J said:

> In such a situation, the evidence has to be evaluated bearing in mind the fact that the original notebook and the logbook of the jeep are missing. The non-supply of the original notebook and the logbook cannot, in the circumstances, efface the overwhelming evidence, both direct and circumstantial, tendered during the departmental inquiry. We are of the view that there is sufficient evidence on record to return a finding of guilt against the respondent. [33]

If a workman is not given copies of statements made by the witnesses before he is called upon to cross-examine the witnesses on such statements, the inquiry will not be fair even if the statements are read over in the presence of the workman and marked as evidence in examination-in-chief of the management's witness because fairness requires that the workman should have sufficient time to study the statements for preparing his defence.[34] Where the copies of letters marked as exhibits in the inquiry proceedings are not furnished to the delinquent employee even on demand, it is a serious infringement of the principles of natural justice.[35] Similarly, where the findings of the inquiry are based on reports given by

the superior officers and such reports are not made available to the concerned workman nor are the officers made available for cross-examination, the inquiry would not be fair and proper.[36] Where the statements of witnesses deposing against the delinquent workman are recorded in his presence and at the time of the domestic inquiry, copies of statements so marked are not supplied to the workman nor are the statements read over to him before he is asked to cross-examine the witnesses who have given the statements, the inquiry would be vitiated for want of fair opportunity.[37] On the other hand, where domestic inquiry is conducted by the employer in an elaborate manner, but a copy of the report submitted by a witness is not furnished to the concerned workman before he is called upon to cross-examine the witness, it cannot be said that any prejudice is caused to the workman by such failure to furnish the copy and that there was denial of fair opportunity to him.[38] Likewise, failure to read out statements of witnesses to the delinquent workman will not vitiate the inquiry in the absence of any prejudice caused to him.[39] Where the conduct of the delinquent workman reveals a guilty mind in asking for the production of certain materials, no prejudice can be said to be caused to him. This point is illustrated by the holding in *Awadesh Bhatnagar*.[40] However, if the inquiry is to be impugned on the ground that the workman was not supplied with any document, it must be clearly stated by the workman as to which particular documents were not supplied which he had asked for and which caused prejudice to his case resulting in injustice.[41] Where certain documents were mentioned in the memo of charges, but were neither relevant to the charge nor referred to or relied upon by the authorities nor were necessary for cross-examination, the non-supply of such documents would not violate the proceedings and there would be no violation of the principles of natural justice.[42]

Production of Witnesses:

Section 11(3)(a) of the Industrial Disputes Act 1947 empowers the adjudicatory authorities under the Act to compel attendance and examination of witnesses as a civil court under the Code of Civil Procedure 1908 but there is no provision of law, under which the inquiring officers holding domestic inquiries can compel the attendance of witnesses as under the Code of Civil Procedure 1908 or Code of Criminal Procedure 1973. The purpose of a domestic inquiry is to find out whether the misconduct alleged against the delinquent workman has in fact been committed by him before a disciplinary punishment could be inflicted upon him. Therefore, the employer has to establish that the misconduct has been committed by leading all the relevant evidence before the inquiry officer. Likewise, the workman has to show that he has not committed the alleged act. He may do this either by picking holes in the evidence led by the employer by cross-examination or by leading his own evidence to rebut the evidence of the employer. It is open to the parties to summon such evidence, oral or documentary, which they consider necessary, and if one or the other party has omitted to summon a witness or a document, the inquiry officer cannot be blamed for it, nor is the inquiry rendered defective or unfair on that account.[43] The failure of a party to produce the relevant oral or documentary evidence may be prejudicial to his case. In *Rashid Ahmad*, the conductor of a bus was dismissed from service for having charged excess fare from the passengers. In the course of the domestic inquiry, at the outset the workman made a request for producing the passengers and the way-bill. In the circumstances of the case, the court held that the evidence of the passengers was relevant. Non-production of the passengers or the way-bill was tantamount to refusal of reasonable opportunity to the workman.[44] In a domestic inquiry, the officer holding the inquiry, however, can take no valid or effective steps to compel the attendance of any witnesses, just as a court can summon witnesses.[45]

In *Tata Oil Mills*, the charge-sheeted workman wanted to examine certain witnesses before the inquiry officer and, therefore, requested the inquiry officer to call these witnesses to give evidence. Though the inquiry officer told the workman that it was not a part of his duty to call the witnesses and he should in fact have kept them ready himself, yet he wrote letters to those witnesses in order to assist the workman. One of the witnesses wrote back to the inquiry officer expressing his inability to be present while the other sent an unsigned reply asking for a few days time on which the inquiry officer took no action. Consequently, the inquiry had to proceed without examining these witnesses. The tribunal took the view that the basis of the inquiry was unfair but in appeal, the Supreme Court held that if the workman did not take steps to produce his witnesses before the inquiry officer, it could not be said that the inquiry officer did not conduct the inquiry in accordance with the principles of natural justice. The inquiry, therefore, was held to be fair as the inquiry officer had given ample opportunity to the workman to lead his evidence. The court also rejected the further plea that since he was unable to lead his evidence for no fault of his own, he should be given an opportunity to prove his case before the tribunal, with the observations that merely because the witness did not appear to give evidence in support of the workman's case, it could not be held that he should be allowed to lead such evidence before the tribunal and if this plea was to be upheld, then no domestic inquiry would be effective and in every ease, the matter would have to be tried afresh by the industrial tribunal.[46] In *Kameshwar Singh*, the cashier of a bank was charged with coercing borrowers into paying him illegal gratification. The substantive evidence was available only with such borrowers whom the cashier threatened. Thus, the bank was not able to compel the appearance of the borrowers. It was able only to produce the statements of the borrowers recorded earlier before the inquiry officer. In the circumstances, a single judge of the Patna High Court held that the inquiry was not invalid even though the borrowers were not examined.[47]

A single judge of the Calcutta High Court in *Golam Rasul*, took the view that if a witness cited by a person facing

disciplinary inquiry is under the control of the disciplinary authority and if the evidence of the witness is material for the purposes of the inquiry, then the authority should arrange for the production of that witness at the inquiry. In this case, a particular person was cited as a witness by the employee who was not unwilling to depose, if the inquiring officer found his examination necessary. The inquiry officer did not come to any conclusion that the examination of that witness was necessary or not but escaped to examine the witness on the pretext that he had not been cited as a witness at all. It was, therefore, held that the grievance of the employee, that at the inquiry he was not afforded proper opportunity to defend himself, in the sense that a witness cited by him was not examined, was justified and the inquiry was vitiated.[48] On the facts of the case, the decision of the High Court is correct, but the principle of law enunciated does not appear to be consistent with the principle laid down in *TELCO*,[49] where the Supreme Court held that the tribunal was in error in thinking that the inquiry officer was under any obligation in law to produce the witnesses required by the workman particularly not as his witnesses but for his cross-examination. Hence, there was no failure on the part of the inquiry officer when he told the workman that he could neither produce nor compel the company to produce those witnesses. In *RK Jain*, the court affirmed the principle that normally, it is the duty of the workman to have his witnesses produced before the inquiry officer but in the peculiar circumstances of the case, the position was held to be entirely different.[50] In *Ruston & Hornsby*, it was held that it is not the duty of the inquiry officer to seek the permission of the superiors of a witness to allow him to give evidence for a workman and it is the duty of the workman himself to summon his witnesses properly.[51]

In *Anshuman Das Gupta*, a single judge of the Gauhati High Court held that 'reasonable opportunity' envisaged in Art 311(1) of the Constitution includes an opportunity to the delinquent officer to defend himself not only by cross examining the witness produced against him but also by examining himself or any other witness in support of his defence. The inquiry would be vitiated if this opportunity were not made available to the delinquent. In this case, N G Das J, of the Gauhati High Court came to the conclusion that the inquiry was vitiated on the ground that the inquiry officer had not exhausted his powers in securing the attendance of one of the defence witnesses, who declined to give evidence. [52] This part of the decision runs counter to the nature of domestic inquiry and the scope and powers of the inquiry officer. *What is meant by the observation 'the inquiry officer did not exhaust his powers to ensure attendance' and what powers does an inquiry officer in a domestic inquiry admittedly enjoy in the matter of enforcing attendance of witnesses? Is it possible that the learned judge was unaware of the legal position that an inquiry officer is not vested with any judicial power unlike a court to issue summons or to enforce the attendance of witnesses?* The responsibility of producing witnesses in a domestic inquiry rests with the parties concerned and not with the inquiry officer. Further, this case was squarely covered by *Tata Oil Mills*, in which Gajendragadkar CJI, held that it was the responsibility of the parties to produce their witnesses and that if the workman did not take steps to produce his witnesses before the inquiry officer, it could not be said that the inquiry officer did not conduct the inquiry in accordance with the principles of natural justice.[53] In the face of a binding decision and well-settled law, to hold that the inquiry stood vitiated because the inquiry officer did not exhaust his powers to ensure the attendance of witnesses, revolts against common sense not to speak of legal sense or sound judicial process.

Examination of Witnesses

The barest requirement of a domestic inquiry is that the charged workman must be given a fair chance to hear the evidence in support of the charge and put such relevant questions by way of cross-examination as he desires and then must be given a chance to rebut the evidence led against him. If the allegations in the charge-sheet are denied by the workman, it is needless to state that the burden of proving the truth of those allegations will be on the management, and the witnesses called by the management must be allowed to be cross-examined by the workman and the latter must also be given an opportunity to examine himself and adduce any other evidence that he might choose in support of his plea.[54] The mere form of inquiry would not satisfy the requirements of the rules of natural justice in industrial law and would not protect the disciplinary action taken by the employers from challenge. Fair opportunity cannot be said to have been given unless the witnesses are examined, ordinarily in the presence of the employee in respect of the charges; the employee is given a fair opportunity to cross-examine the witnesses and he is given a fair opportunity to examine his own witnesses including himself in his defence if he so wishes, on any relevant matter.[55] It would be improper for the inquiry officer to hold a domestic inquiry while a person is on leave which has not been cancelled and the workman has not been recalled to duty.[56]Though the inquiry officer in a domestic inquiry is not bound by the technical rules or the procedure contained in the Indian Evidence Act 1872, he cannot ignore the substantive rules which form part of natural justice. 'The principle that the facts sought to be proved must be supported by the statements made in the presence of the person against whom the inquiry is held and that statements behind the back of a person charged are not to be treated as substantive evidence, is one of the basic principles which cannot be ignored on theground that the domestic tribunals are not bound by the technical rules or procedures contained in the Indian Evidence Act 1872'. Therefore, mere admission in evidence of a prior statement without putting the same to the witness would not be in consonance with the principles of natural justice.[57]

Not only the witnesses should be examined in the presence of the charge-sheeted workman but he must also be informed about the material sought to be used against him and then given an opportunity to explain it, because recording evidence in the presence of the workman concerned serves a very important purpose. The witness knows that he is giving evidence

against a particular individual who is present before him and, therefore, he is cautious in making his statement.[58] When evidence is recorded in the presence of the accused, there is no room for persuading the witness to make convenient statements and it is always easier for an accused to cross-examine the witness if his evidence is recorded in his presence.[59] The proper course for the inquiry officer, therefore, is to examine the witnesses from the beginning to the end in the presence of the workman at the inquiry itself. Oral examination always takes much longer than a mere reading of a prepared statement of the same length and brings home the evidence more clearly to the person against whom the inquiry is being held.[60] The position is the same, when a witness is called, the statement given previously by him behind the back of the party is put to him, and admitted in evidence, a copy thereof is given to the party and he is given an opportunity to cross-examine him.[61] The conclusion of an inquiry based on a report given by other employees behind the back of the concerned workman without making them available for cross-examination would be vitiated for violation of the rules of natural justice.[62] Likewise, the statement made by a witness who is not examined in the presence of the charge-sheeted workman or is not produced for cross-examination at the inquiry, if taken into account in arriving at the finding of guilt or inflicting punishment would vitiate the action.[63] Any person can give evidence about what he heard but if it is to be used for proving the truth of that statement, then it would be hearsay and not admissible for that purpose.[64]

Evidence of statement made to a witness who himself has not been called as a witness may or may not be hearsay depending on the fact-situation of the case. It is not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement but the fact that it was made. The fact that it was made, quite apart from truth itself, is frequently relevant for considering the mental state and conduct of a witness subsequently or some other person in whose presence the statement was made but such statement is hearsay and is inadmissible when the object of the evidence is to establish the truth of what is contained in the statement, in the absence of any other substantive evidence, hearsay or indirect evidence cannot take the place of conclusive evidence. Therefore, in regard to the charge against the delinquent, the proof of truthfulness of the hearsay evidence cannot be dispensed with in a domestic inquiry. In *Chandrakumar Deshmukh* (supra), the Bombay High Court further observed:

> The basic rule governing domestic inquiries requires that no order entailing penal consequences can be made on the basis of *ex parte* statements of witnesses or hearsay evidence. It must be adhered to particularly when facts are disputed and credibility of a person who has given testimony or some information, is in doubt or is challenged.[65]

Therefore, the basic rule, that if any document is relied on, the author of it should be examined so that he can be cross-examined to discover the truth of what is stated in the document. In this case, there was no direct or substantive evidence, against the delinquent, as regards the date and time of commission of the offence of theft. The finding of the inquiry officer was based on the evidence of four witnesses who had no personal knowledge regarding the commission of theft on the particular day. The source of their information was the statements of two other persons who were not available for cross-examination. The disciplinary punishment based on the domestic inquiry, therefore, was quashed. In a domestic inquiry as in a regular trial, the burden of proof of establishing the guilt on a charge is always on the accuser and not on the accused. This burden must be discharged fully.[66] If the delinquent seeks to cross-examine the witnesses examined in proof of the charge, he should be given the opportunity to cross-examine them, in case he is to examine his witnesses for himself to rebut the charge, that opportunity should be given. Failure to do that will violate the principles of natural justice.[67] Normally, in domestic inquiries, it is not fair at the very outset to closely cross-examine the delinquent employee, before any other evidence is led against him as it is necessary not to expose an illiterate and ignorant person to the risk of cross-examination. The employer should take steps first to lead evidence against the workman charged, give him an opportunity to cross-examine the said evidence and should then ask the concerned workman whether he wants to give any explanation about the evidence led against him.[68] Where two separate inquiries were held against two workmen, witnesses examined in one inquiry and the evidence recorded in that inquiry were used for finding the other worker guilty of misconduct, the findings against such other workman would be vitiated for violation of rules of natural justice which require that the findings should be based on evidence led in each inquiry. The fact that the other worker assisted another inquiry held against the other workman and cross-examined witnesses as legal assistant, does not mean that evidence recorded in that inquiry automatically becomes evidence recorded in the disciplinary inquiry against the other worker.[69] Similarly, where no evidence is tendered at the domestic inquiry in support of the charges made against the concerned workman and certain questions are put to him by way of cross-examination, the inquiry would be vitiated for want of fair opportunity.[70] There is an exception to this general rule. In certain circumstances as, for instance, where the workman admits his guilt, it will be open to the management to examine the workman, even in the first instance, so as to enable him to offer any explanation for his conduct or to place before the management any circumstances which will go to mitigate the gravity of the offence. The fact that in the domestic inquiry, the workman was questioned first to find out if there were extenuating circumstances before the formal evidence was allowed to complete the picture of his guilt, the inquiry would not be vitiated for want of fair opportunity. If after the examination of the workman, the management chooses to examine any witnesses, the workman must be given a reasonable opportunity to cross-examine those witnesses and also to adduce any other evidence he may choose.[71]

In certain other cases, it may even be fair to the delinquent workman to take his version first, so that the inquiry may cover the point of difference and the witnesses may be questioned properly on the aspect of the case suggested by him but even then, the examination of the workman should not 'savour of an inquisition', 'it is all a question of justice and fairplay'. If the second procedure leads to a just decision of the disputed points and is fairer to the delinquent than the ordinary procedure of examining evidence against him first, no exception can be taken to it. It is, however, wise to ask the delinquent whether he would like to make a statement first or wait till the evidence is over but the failure to question the workman in this way does not *ipso facto* vitiate the inquiry unless prejudice is caused to him. If, however, 'the person inquired against seems to have been held at a disadvantage or has objected to such a course, then the inquiry may be said to be vitiated'.[72] For instance, where the inquiry officer firmly based his conclusion as to proof of guilt of the delinquent workman on the evidence of certain witnesses by treating admission of the delinquent workman and his accomplice as corroborative evidence, but failed to recall the witness for cross-examination, it was held to be a case of absence of proper opportunity to the workman.[73] Where witnesses are not examined from the very beginning at an inquiry in the presence of the person charged, he should be given a copy of the statements made by the witnesses which are to be used at the inquiry well in advance, before the inquiry begins. If this is not done and the concerned workman is asked to cross-examine the witnesses then and there, a fair and adequate opportunity to the workman cannot be said to have been afforded. The court can take judicial notice of the fact that many of the industrial workers are illiterate and sometimes, even the representatives of labour unions may not be present to defend them. In such cases, in order to safeguard the interests of the worker, the opportunity to cross-examine the witnesses should be effective and to read over a prepared statement in few minutes and then ask the workman to cross-examine the witness making the statement, would make a mockery of the opportunity that the rules of natural justice require.[74] The purpose of cross-examination is set at naught if all the witnesses are present at the spot of the inquiry during the entire period that the inquiry takes place. Holding of an inquiry in such a manner would result in the miscarriage of justice.[75]

In *Anand Joshi*, the management witness was not orally examined and his written disposition was admitted in evidence and the delinquent was asked to cross-examine him. A single judge of the Bombay High Court held that the inquiry was not conducted fairly and properly. [76] In *Kalu Ram*, the Supreme Court took the view that the tribunal had gone wrong in holding that the inquiry officer had conducted the inquiry unfairly in that the workman was not given an opportunity to cross-examine the expert of the employer with the help of an expert of his own. In the domestic inquiry, the expert of the employer produced by the workman was allowed to be cross-examined by the expert previously examined on behalf of the employer but the expert produced by the employer was only cross-examined by the workman himself. The court noted that the tribunal had not found that the workman had ever demanded that he should be permitted to cross-examine the expert produced on behalf of the employer with the help of an expert of his own and that there had been no refusal of any such request. The court observed that if the respondent did not ask for any opportunity to cross-examine the employer's expert with the help of an expert, that default on his part cannot mean that the inquiry officer violated the principles of natural justice nor the fact, that the cross-examination by the workman could not be of the same quality as the cross-examination with the aid of an expert, would mean that the inquiry officer was guilty of breach of the principles of natural justice.[77]

In *Binny*, on the question of affording opportunity of cross-examination to a delinquent workman, the Supreme Court appears to have gone to the extreme of technical limits. In this case, at the end of the examination-in-chief of each witness, the workman was asked whether he had any question to put to the witness. At the end of the examination of the witnesses for the management, the inquiry officer called one of them to further give the remarks about the workman's conduct and ability and any other relevant information in respect of the workman. When that witness stated that the workman had been absent without leave or permission on a number of occasions and that about a month back he had behaved in a manner similar to the one with which he was charged, but no disciplinary action was taken against him on account of the intercession of another workman, but when the witness was making this statement, the workman intervened and said that that was on account of a misunderstanding as it was his habit to speak in a loud voice. However, at this stage, the inquiry officer did not specifically ask the workman, whether he wanted to put any question to the witness on the further testimony given by him or whether he had any explanation to offer. Though the labour court accepted the finding of the domestic inquiry that the workman was guilty of the misconduct alleged against him and that the inquiry was fair and proper, it set aside the order of dismissal of the workman on the ground that he was not given an opportunity to challenge the further statement of the witness regarding his past record of service nor was he given any opportunity to say whether the witness's statement was true or false or reasonably explainable. In appeal, the Supreme Court affirmed the award of the labour court holding that the record made by the inquiry officer amply demonstrated that the workman was not given a chance to cross-examine that witness on his further statement nor was he asked to state anything by way of explanation.[78] This appears to be a hyper-technical view of law applied to the simple facts of the case. At no stage, the workman appears to have been denied the opportunity to cross-examine the witnesses. Nor was he stopped from asking any question. Intervention by the workman on the face of it appears to be in the nature of cross-examination. The view of the court appears to be based on the mere fact that the inquiry officer did not ask the workman 'whether he had any question to put on the further evidence given and whether he had anything to show for himself in respect of what was alleged?' But when the workman had

already explained the statement of the witness by his intervention, there hardly was any need of asking him to put any further question. The domestic inquiries are of a simple nature and the inquiry officers are not lawyers.[79] To import such highly technical refinements of law into domestic inquiries would perhaps lead to anomalous situations and rob them of all unconventional norms.

It is open to an inquiry officer to refuse to examine a particular witness, if he bona fide comes to the conclusion that such witness would be irrelevant or immaterial but if refusal to examine a witness or to allow other evidence to be led appears to be the result of the desire on the part of the inquiry officer to deprive the person charged, of an opportunity to establish his innocence, that of course, would be a very serious matter.[80] For instance, in *Shyam SL Gupta*, the charge against the workman was that he had taken leave on a false pretext of illness. In the course of the inquiry proceedings, the workman requested the inquiry officer to have the evidence of the doctor who treated him, recorded. The refusal of the inquiry officer was held to be a breach of rules of the natural justice vitiating the inquiry. It is open to an inquiry officer to disallow trivial, irrelevant or frivolous questions asked in cross-examination.[81] In *Balmer Lawrie,* the inquiry officer disallowed a few questions which were of a trivial nature and were not really germane to the main controversy. The Bombay High Court held that the inquiry was not vitiated, particularly so as no prejudice had been caused in any manner to the delinquent employee by disallowing such questions during the course of cross-examination. The court, took further note of the fact that the inquiry officer gave maximum latitude to the representative of the workman in cross examination of the management witnesses but if the workman was not allowed to properly cross-examine the officer whom he was alleged to have assaulted, and the witnesses were tutored, the inquiry would be vitiated and the order of dismissal based on that will be liable to be quashed.[82] In *Phulbari Tea Estate,* it was clear from the record that the witnesses had not been examined in the presence of the workman charged and even their statements previously recorded in his absence were not furnished or read over to him. All that happened at the inquiry was that the witnesses were present and the workman was asked to put questions to them to which the workman replied that he had not committed the alleged act of misconduct and that he had no questions to put to those witnesses. Thereupon, the inquiry officer brought the previously taken statements of witnesses on record and on the basis of those statements, the workman was found guilty of the charge. In these circumstances, the Supreme Court held that the inquiry was vitiated as the basic principles of natural justice were not complied with.[83]

In *IGN Rly*, several witnesses had been examined in the absence of the chargesheeted workmen and thus they had been denied the opportunity to cross-examine those witnesses. Furthermore, even the statements of those witnesses recorded in the absence of the chargesheeted workmen had not been furnished to them, hence they did not know what had been deposed against them at the time when their own statements were called for. It was held that the inquiry was vitiated for violation of the rules of natural justice as it was not a fair and proper inquiry.[84] In *Bharat Sugar Mills*, the inquiry officer did not examine any witness of the inquiry but contented himself only by recording the statements of the workmen against whom the inquiry was held and placed on record the written reports made by officers of the employer company against the workmen without reading out their contents or explaining them to the workmen and without giving them an opportunity to cross-examine any of the officers who made the reports, for the purpose of testing the correctness of the allegations made against them in those reports. The inquiry officer took those reports into consideration in finding the workmen guilty of various acts of misconduct alleged against them. In these circumstances, it was held that the inquiry was not fair and proper.[85] In *Associated Cement Cos*, the inquiry officer started the inquiry with the examination of the workman himself and elaborately questioned him about the allegations contained in the report against him by the officers of the company. After the workman had been subjected to close cross-examination on the charges against him, five witnesses were examined in support of the charge. It was held that the procedure adopted in the inquiry constituted a grave violation of the rules of natural justice which vitiated the inquiry and rendered the order of dismissal based on the conclusions reached at the inquiry, illegal.[86] In *Firestone*, the court clarified that in the absence of any prejudice caused to the workman, the mere fact that he was cross-examined even before the evidence against him was recorded, the inquiry would not be vitiated. After analysing all the facts, the court found that no prejudice, had been in fact, caused to the delinquent workman by the procedure adopted by the inquiry officer, the inquiry, therefore, was not invalid.[87] In *GAnandam*, on the facts and in the circumstances of the case, a single judge of the Madras High Court held that the examination of delinquent in the first instance is only a procedural irregularity. If he does not object to such examination at the proper time, the inquiry will not be vitiated because the only requirement of the domestic inquiry is that it must be fair and the court is satisfied that the inquiry is fair on the whole. Minor defects need not be viewed seriously.[88] Similarly, in *CI Poulose*, at the very beginning of the inquiry the delinquent was cross examined by the inquiry officer and questions were asked with respect to admitted facts to find our whether there was any satisfactory explanation from him. Therefore, no prejudice was caused to the employee, hence the inquiry was not invalid.[89] In *British Bank*, the Bombay High Court held that non-examination of the handwriting expert, and placing reliance on an expert's opinion by the inquiry officer, does not constitute an infirmity in the disciplinary action.[90]

In *Sur Enamel,* the inquiry officer did not examine any witness in support of the charge framed against the delinquent workman and the reports previously made by the officers of the company were read out to him without keeping those officers present at the inquiry and without giving him any opportunity to cross-examine those witnesses. These reports of

the company's officers were then taken on record and the workman was simply asked to explain why those reports should not be accepted. These reports were taken into account in finding the workman guilty of the alleged misconduct. It was held that the procedure adopted in the inquiry was in gross violation of the principles of natural justice and the inquiry was vitiated.[91] In *Meenglas Tea Estate*, not a single witness was examined by the inquiry officer in support of the charge, nor was any statement previously made by a witness tendered in evidence. The inquiry, in substance, consisted only of putting questions to each workman in turn about the charge against him after reading out the charge to him. It was held that the inquiry was vitiated as it was not held in accordance with the principles of natural justice.[92] In *Kesoram Cotton*, the employer dismissed some workmen after holding an inquiry into the charges of misconduct against them. In the inquiry copies of the statements of witnesses previously recorded which had not been supplied to the workmen concerned were read over to the witnesses when they were produced at the inquiry and after reading these statements over and explaining them to the workmen they were put on the record and the workmen were asked to cross-examine the witnesses. It was held that the workmen did not get a fair opportunity to defend themselves as the previously recorded statements were not given to them well within time. It was suggested that the minimum time for such purpose should be two days before the date when the inquiry is to begin. In the circumstances of the case, it was held that the principles of natural justice regarding an adequate opportunity being given to the workmen to defend themselves, were not duly complied with.[93] In *Ananda Bazar Patrika*, the workman pressed for the examination of only one witness, *viz*, the editor of the newspaper, which was rejected by the inquiry officer as he felt that the examination of the editor would not be of any assistance to the workman. Further, the inquiry officer disallowed certain questions put to witnesses in their cross-examination as he thought those questions to be irrelevant. The labour court held that the inquiry was not fair but the Supreme Court, while recognizing he right of inquiry officer to refuse to examine a witness or to disallow questions, which he considers irrelevant, observed that if such refusal on the part of the inquiry officer is found to be based on his desire to deprive the person charged of an opportunity to establish his innocence, that would be a very serious matter. In view of the fact that the inquiry had been conducted elaborately and the workman had been allowed fullest latitude for the cross-examination of the witnesses against him, it could not be said that refusal to allow the workman to examine the editor could not be held to be unjustified or unfair. On the second point also, the court observed that the disallowed questions were all recorded, and a look at the record showed that most of the questions which were disallowed had been properly disallowed. In these circumstances, it was held that the labour court was not justified in its finding that the enquiry was vitiated.[94]

In *Firestone*, the inquiry officer afforded every opportunity to the workman to controvert the case of the management and prove his case and he was informed of the charge very clearly. Witnesses were examined in his presence and he was allowed to cross-examine them fully. He was also given an opportunity to lead his evidence and the inquiry officer and the manager gave him a full chance to explain after appraising him in detail of the finding tentatively reached. A true record of the inquiry was kept. The inquiry was, therefore, held to be fair and proper.[95] In *Karunamoy Banerjee*, the workman had admitted the truth of the allegations made against him. Even when the inquiry proceedings began, in which he stated that he had nothing more to add in respect of the charges framed against him. The inquiry officer put the questions to the workman only for giving him an opportunity to explain his conduct or to refer to circumstances, if any, which could be taken into account in the extenuation of his conduct. The workman was also permitted to put questions to the witnesses examined in the inquiry in support of the charge. The tribunal held the inquiry to be violative of the principles of natural justice, inter alia, for the reasons:

(i) that the workman had been examined, even in the first instance and he was cross-examined to elicit points in support of the charges; and

(ii) he was not allowed to cross-examine the witness.

In appeal, the Supreme Court held that: (i) once the workman himself had admitted his guilt, there would be nothing more for the management to inquire into and the labour court was not justified in holding that it could still be stated that there was violation of the principles of natural justice merely because of the fact that the workman was examined in the first instance; and (ii) the workman was specifically asked by the inquiry officer as to whether he wanted to examine or cross-examine the witnesses, but the workman categorically stated that he did not want to examine or cross-examine any of those persons. On this view of matter, the Court held that the order passed by the labour court was erroneous, and upheld the dismissal.[96] In *Langharajan Tea Estate*, the previously recorded statements of the witnesses were read over to the delinquent in the presence of the said witnesses and he was asked for his comments. The enquiry officer thereafter took the statements on record as they were read out in the course of the enquiry and were affirmed by them. In the cross-examination, the workman himself admitted that those two witnesses had told the manager that they saw the facts deposed to by them from a particular place. The labour court held that the inquiry was not proper because the inquiry officer relied on the reports of these two witnesses but did not examine them in the presence of the charged workman and that he was not allowed to put questions to them by way of cross-examination. In appeal, the Supreme Court observed that if these two grounds found by the labour court really existed, it would have been fully justified in ignoring the findings recorded by the officer which were based on statements of the persons recorded behind the back of the charged workman.[97]

Occasionally, for seeking clarification, the inquiry officer may ask certain questions from the witnesses. That would not vitiate the inquiry if the opposite side has opportunity to test those by cross-examination. In *Buckingham and Carnatic*, the senior labour officer of the company held the inquiry into the misconduct of the delinquent worker. No other officer separately conducted the prosecution on the side of the management. He put questions to the witnesses to elicit answers and allowed the workman to cross-examine those witnesses. He also took down the statements of the concerned worker and asked for clarifications from him wherever necessary. In these circumstances, the inquiry was held to be fair and impartial. The criticism that the inquiry officer had acted both as a prosecutor and the judge was held to be unwarranted.[98] In *Mulchandani*, two witnesses who had signed the memorandum earlier, stated before the inquiry officer that they had not signed any such memorandum. No one represented the management at the inquiry. The inquiry officer made a note that those two witnesses 'turned hostile' and put a number of questions to those witnesses during which they admitted their writings as well as signatures on the memorandum. Those witnesses were cross-examined at length on behalf of the workman after the inquiry officer had put questions to them. The labour court held that the inquiry was vitiated because the inquiry officer 'had no business to treat the company's witnesses as hostile witnesses on his own' and 'to ask questions for proving the misconduct alleged against the delinquent employee'. In appeal, the Supreme Court observed that it was not only reasonable but also necessary to look for some explanation for the contradiction of statements made by the workmen in the memorandum and before the inquiry officer and if the inquiry officer had put certain questions to those witnesses by way of clarification, it could not be said that he had done something that was not fair and proper, particularly when the witnesses were allowed to be cross-examined by the union after they had answered the questions asked by the inquiry officer. The note made by the inquiry officer that the witnesses had 'turned hostile', in the opinion of the court, meant only that what they had stated before him was inconsistent with what appeared in the memorandum signed by them. It was, therefore, held that the mere fact that the inquiry officer had put some questions to the witnesses by way of clarification, in the circumstances of the case, would not vitiate the inquiry.[99]

In *KL Tripathi*, the delinquent employee had admitted the factual basis of allegations against him and had not questioned the veracity of the witnesses or the facts or the credibility of the witnesses or of the entries on record. The Supreme Court held that there was no violation of the principles of natural justice merely because the evidence was not recorded in his presence or that the materials gathered, the gist of which was communicated to him, were not gathered in his presence. In the premises, the absence of formal opportunity of cross-examination did not constitute infraction of any principle of natural justice. It was further observed that neither cross-examination nor opportunity to lead evidence by the delinquent was an integral part of quasi-judicial adjudication.[1] In *Indian Explosives*, it was held that the fact that the inquiry officer asked lengthy questions and recorded them in a detailed manner instead of recording the evidence in a summary manner, would not vitiate the inquiry because no prejudice was caused to the workmen in recording the evidence in a detailed manner though the converse might have prejudiced them. It was also observed that the fact that the inquiry officer had put a number of questions including some leading questions to elicit answers from the witness both for and against the employer, he cannot be said to have played the role of prosecutor or to have been biased against the workmen especially when he allowed such witnesses to be thoroughly cross-examined by the workmen and also exonerated some of the workmen. The inquiry officer can also accept the evidence of a witness in so far as it is correct and reject the other part of it which is untrue.[2]

Leading Questions:

On the question whether adducing evidence before the inquiry officer in a domestic inquiry by putting leading questions to a witness in the examination-in-chief would violate the principles of natural justice, the Madras High Court has taken the view that it would, and the inquiry would not be fair.[3] On the other hand, the Calcutta High Court[4]held that putting leading questions to a witness in the examination-in-chief would not vitiate the inquiry. As the technicalities and the strict rules of procedure under the Indian Evidence Act 1872 do not apply to domestic inquiries, the view of the Calcutta High Court appears to be preferable to the view of the Madras High Court. In *Firestone*, in which some leading questions were put to a witness, the Supreme Court observed that too much legalism could not be expected from a domestic inquiry of this character.[5]

Inquiry Pending Criminal Proceedings:

The criminal proceedings and disciplinary proceedings are altogether distinct and have different jurisdictional areas. In disciplinary proceedings, the question is whether the delinquent is guilty of such conduct as would merit his discharge or dismissal from service or a lesser punishment, as the case may be, whereas in criminal proceedings the question is whether any offence under criminal law such as Indian Penal Code, Prevention of Corruption Act or any other penal statute is established, and if established, what sentence should be imposed upon him.[6] The conviction in a criminal case requires a higher standard of proof than required in a disciplinary inquiry.[7] The charges levelled in the disciplinary proceedings have to be tested keeping in mind the enforcement of discipline and the level of integrity amongst the staff in the administration of the employer while that is not necessarily a relevant factor to be taken note of in criminal proceedings. Therefore, it is

neither possible nor advisable to evolve a hard and fast straight-jacket formula that where disciplinary proceedings and criminal proceedings are based on the same set of facts, there should be an interdiction of the disciplinary proceedings awaiting the decision in the criminal proceedings.[8] Furthermore, in a criminal prosecution, the standard of proof is one of beyond all reasonable doubt while in a domestic inquiry, it is one of the preponderance of probabilities.[9] Therefore, even if there is an acquittal in criminal proceedings, the disciplinary proceedings will still not be barred because such proceedings have got an independent angle for testing the charges.[10] In *Bimal Kanta Mukherjee,* the labour appellate tribunal took the view that the principles of natural justice do not require that an employer must wait for the result of the criminal trial before taking action against an employee.[11] This view was affirmed by the Supreme Court in *Kushal Bhan*.[12] In *Tata Oil Mills*, Gajendragadkar CJI observed:

> ...it is desirable that if the incident giving rise to a charge framed against a workman in a domestic inquiry is being tried in a criminal court, the employer should stay the domestic inquiry pending the final disposal of the criminal case. It would be particularly appropriate to adopt such a course where the charge against the workman is of a grave character, because in such a case, it would be unfair to compel the workman to disclose the defence which he may take before the criminal court. But to say that domestic inquiries may be stayed pending criminal trial is very different from saying that if an employer proceeds with the domestic inquiry in spite of the fact that the criminal trial is pending, the inquiry for that reason alone is vitiated and the conclusion reached in such an inquiry is either bad in law or mala fide.[13]

However, in cases of a simple nature, the inquiry should continue, particularly if the inquiry has proceeded a long way, it would not be proper to stop the same for an indefinite period especially when the inquiry would not prejudice the criminal trial of the delinquents. In judging the gravity of the offence, the nature of the allegation has to be taken into account and not the person or persons who are actually involved in the offence.[14] In cases where the charges in both proceedings are the same and they are of a serious nature, the holding of domestic inquiry may compel the accused person to disclose his defence, causing serious prejudice to him, it is advisable to stay the domestic inquiry till the completion of the criminal trial.[15] In *JK Cotton*, the question was, whether the employer should withhold the inquiry pending the appeal of the workman in case he is convicted by the trial court in the criminal offence. The court observed that the principles of natural justice do not require that the employer must wait for the decision of a criminal case or an appeal before proceeding with a domestic inquiry.[16] In *Anglo-American Direct Tea*, a single judge of Madras High Court stated:

> If a domestic tribunal had concluded its inquiry and came to a conclusion even before the criminal court had passed judgment, the domestic tribunal's conclusion is not vitiated by the fact that, on the same facts, the criminal court has subsequently acquitted the worker either on a technical ground or on merits. Similarly, if after conviction by the criminal court, there is a finding of the domestic tribunal holding the employee guilty on evidence which is independently assessed by it, the fact that subsequently on appeal, the worker was acquitted does not mean that the domestic tribunal's conclusion is in any way vitiated but if the criminal court's judgment, either of a trial court or of an appellate court, is earlier than the domestic tribunal's inquiry, the domestic tribunal is bound to take the judgment of the original court into consideration. If after taking the judgment into consideration, the domestic tribunal takes a different view, the labour court cannot interfere if it is found that principles of natural justice have been complied with and there is evidence which could support the finding of the domestic tribunal. But, if the domestic tribunal does not apply its mind to the judgment of the criminal court, it may show mala fides and, therefore, its order may be liable to be struck down.[17]

In *Jang Bahadur Singh*, the Supreme Court rejected the contention of the employee that initiation of disciplinary proceedings during the pendency of criminal proceedings on the same facts amounts to contempt of court.[18] In *Kusheshwar Dubey*, the court observed:

> The view expressed in the three cases of this court seem to support the position that while there could be no legal bar for simultaneous proceedings being taken, yet, there may be cases where it would be appropriate to defer disciplinary proceedings awaiting disposal of the criminal case. In the latter class of cases, it would be open to the delinquent employee to seek such an order of stay or injunction from the court. Whether in the facts and circumstances of a particular case there should or should not be such simultaneity of the proceedings would then receive judicial consideration and the court will decide in the given circumstances of a particular case as to whether the disciplinary proceedings should be interdicted, pending criminal trial. As we have already stated, it is neither possible nor advisable to evolve a hard and fast straight-jacket formula valid for all cases and of general application without regard to the particularities of the individual situation. For the disposal of the present case, we do not intend to lay down any general guideline. [19]

In *BK Meena*, the facts disclosed that the Central Administrative Tribunal (CAT) stayed the disciplinary proceedings against the delinquent employee, pending criminal proceedings, in view of the fact that the charge-sheet in the criminal

case and the memo of charges in the disciplinary proceedings were based on the same set of facts and allegations. In appeal, the court held that the tribunal was in error in staying the disciplinary proceedings against the delinquent employee pending the criminal proceedings against him. The court observed: 'Stay of disciplinary proceedings may not be, and should not be a matter of course. All relevant factors for and against should be weighed and a decision taken in view of the various principles laid down in the decisions referred to above'.[20] In *Collegiate Education*, the Supreme Court discountenanced the suggestion that after the employee has been convicted of a criminal charge the disciplinary authority should wait till the appeal, revision or other remedies are over because it would not be advisable as it would mean continuing in service of a person who has been convicted of a serious offence by a criminal court.[21] It is now well-established that the acquittal of a delinquent in criminal proceedings does not bar the disciplinary action against him. In *Md. Moosa*, the management dismissed a workman pending criminal proceedings against him after holding a fair and proper domestic inquiry and without reference to the criminal proceedings. Subsequently, the workman was acquitted by the criminal court. On a reference at the instance of the employee, the tribunal held that the domestic inquiry had been fair and proper but it set aside the order of dismissal, for the reason that the workman had been acquitted by the criminal court on coming to the conclusion that the charge levelled against him had not been made out. The tribunal relied on the criminal court's judgment. A single judge of the Madras High Court held that the tribunal had no jurisdiction to sit in appeal on the inquiry and it was not permissible for the tribunal to take into account the evidence in the criminal court which was not materially available at the domestic inquiry.[22]

In *Ramachandra Modak*, the question before the Supreme Court was whether the departmental inquiry pending against the employee involved in the criminal case could be continued even after his acquittal in the criminal case. The Supreme Court held that it was a matter which should be decided by the department after considering the nature of the findings given by the criminal court. The court further observed that normally where the accused was acquitted honourably and completely exonerated of the charges, it was not expedient to continue a departmental inquiry on the very same charges or grounds of evidence. However, merely because the accused was acquitted, the power or the authority to continue the departmental inquiry would not be taken away nor its discretion in any way fettered.[23] In *Nelson Moris*, the Supreme Court held that the nature and scope of a criminal case were very different from those of a departmental disciplinary proceedings and an order of acquittal, therefore, could not conclude the departmental proceedings.[24] In the absence of any prohibition in law or any order of a court of law staying the departmental inquiry, the employer was not justified in waiting for an unreasonably long period of 13 years, during which period the employee was kept under suspension, for the conclusion of the criminal trial. The disciplinary inquiry commenced against the employee is quashed.[25] In *Mannalal*, a single judge of the Bombay High Court held that the fact that a criminal trial under s s 353 and 292 of the Indian Penal Code 1860 was pending against the workman would not bar the holding of a domestic inquiry, which was initiated not only for the said offence of assaulting a superior officer but also for certain other offences. The criminal proceedings and departmental proceedings could not be said to be for identical offences and accordingly, the domestic inquiry was permissible. Acquittal by a criminal court did not mean automatic exoneration of the delinquent.[26] Even after acquittal of an accused from a criminal proceeding, domestic inquiry can be completed and punishment imposed. The dismissal of the workman for theft of mercury belonging to the company is not barred by his acquittal in the criminal case.[27] The factum of conviction by the criminal court is not washed out merely by the release of the offender on probation under the Probation of Offenders Act 1958. The stigma continues and the finding of the misconduct resulting in conviction has to be treated as the conclusive proof. The disciplinary authority can pass an appropriate order upon issue of show cause notice.[28]

In *Bank of Baroda*, the facts were, a clerk was dismissed by the bank for giving false statement while submitting his application for appointment about the pendency of a criminal case against him. The labour court directed the Bank to reinstate him with full backwages. The Supreme Court ordered that in view of the fact that the pending criminal proceedings did not relate to an offence involving cheating or misappropriation which would have had a direct impact on the decision of the appointing bank, the impugned award be maintained subject to the condition that the employee be treated as a fresh recruit from the date when he was exonerated by the High Court. The court further observed that the order was rendered on the peculiar facts and circumstances of the case and would not be treated as a precedent in future.[29] In *Terrace Estate*, the Madras High Court held that where the workmen were dismissed after holding the domestic inquiry into the charges of riotous and disorderly behaviour, their acquittal by the High Court for the offence punishable under s 302 of the Indian Penal Code 1860 would not vitiate the domestic inquiry as the criminal case and the domestic inquiry were on different charges.[30] Acquittal in a criminal trial on benefit of doubt is not a bar to impose penalty in the departmental proceedings.[31] Where the workman challenged the award of labour court confirming the dismissal of a workman who was dismissed for misappropriation of paddy on the ground that he was acquitted by the criminal court on the same charge, the Madras High Court, while dismissing the appeal held that there was neither a whisper before the labour court or before the single judge of the High Court, about the said acquittal nor were the findings of the inquiry officer challenged before the labour court as wrong.[32]

Where the workman was dismissed for throwing acid on the face of a co-worker, his acquittal in the criminal proceedings initiated against him is not a bar against departmental proceedings.[33] Where it was found that, in spite of the fact that the

workman was honourably acquitted by the criminal court, the disciplinary authority has not considered the said fact and differed therefrom for sound reasons, nor has he issued a show-cause notice before imposing the punishment, the action of the management amounted to violation of principles of natural justice and hence deserves to be set aside.[34] A single judge of the Madras High Court quashed the order of reinstatement passed by the labour court in a case of dismissal for a misconduct involving shortage of goods entrusted to him and in the face of conviction by a criminal court for the same offence, and held that the labour court arrived at a conclusion contrary to the evidence on record.[35] Where a workman, whose services were terminated on conviction in a criminal case lodged by the management for demanding illegal gratification, was reinstated on being acquitted subsequently by the appellate court on benefit of doubt, the High Court held that he was not entitled to backwages as his acquittal could not be called a clean acquittal.[36] Where the workman charged for theft was acquitted by the criminal court on the same set of facts as in the domestic inquiry, the dismissal of the workman on the basis of a statement made by him in the criminal case, which was found to be more in the nature of an explanation and not confession, is illegal and the workman is entitled to reinstatement.[37] In *Bharat Gold Mines,* the Supreme Court deduced the following principles on the issue:

(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge sheet.

(iv) The factors mentioned in (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with, so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, the administration may get rid of him at the earliest[38].

In *Dhanna Ram*, the facts were: a workman was removed from service on being convicted by the trial court. Subsequently, he was acquitted by the appellate court. Despite this, the management opted for establishing the charges before the labour court, but eventually failed to prove the case against the workman, with the result that the labour court directed the reinstatement of the workman. The Rajasthan High Court, while upholding the order of the labour court, held that the employer was not entitled to a third opportunity to come to a different finding from what had been reached by two courts, where he had the fullest opportunity to lead evidence to sustain the allegation against the workman.[39] The labour court cannot interfere with the order of dismissal on the ground that when the criminal court has not relied upon the evidence of the eye-witnesses to prove negligence on the part of driver, the employer could not have come to the conclusion of negligence on the part of the driver.[40] Acquittal in a criminal trial on benefit of doubt is not a bar to impose penalty in the departmental proceedings.[41] Quashing the order of reinstatement passed by the labour court on the ground that the film stolen by the workman was only 70 feet and that he was acquitted by the criminal court, it was held that the value of property stolen was not the criterion, and that the labour court failed to analyse the gravity of offence.[42]Where the workman, who was charged for theft but acquitted in the criminal proceeding, did not report for duty thereafter and was absent unauthorisedly, yet filed a criminal complaint against the management for non-settlement of his terminal benefits, it was held that the criminal complaint was an abuse of the process of law and was not maintainable, and that the employee should approach the machinery provided under the ID Act.[43] In *Uranium Corporation*, the facts disclosed that a workman was charge-sheeted for assaulting the Chief Medical Officer, apart from filing a criminal case against him. While the criminal proceedings were pending, the management conducted the enquiry and dismissed the workman. Subsequently, he was acquitted by the criminal court. The Jharkhand High Court upheld the award passed by the tribunal directing reinstatement of the workman with a lesser punishment of stoppage of two increments, but without any back wages.[44] Mere acquittal in a criminal case does not have the effect of nullifying the decision taken in departmental proceedings.[45]

Adjournments

Even before the domestic tribunals, the parties have no right to go on asking for as many adjournments as they like.[46] To grant or refuse adjournment is in the discretion of the inquiry officer in the circumstances of a case. The mere fact that the inquiry officer refused to adjourn the case would not vitiate the inquiry.[47] The question whether by refusing adjournment, the inquiry officer denied a reasonable opportunity to a party would depend upon the facts and circumstances of each case.

The discretion is to be judicially exercised bearing in mind that a party is not denied reasonable opportunity to present his case in the inquiry. If it appears that by refusing to adjourn the hearing at the instance of the charge-sheeted workman, the inquiry officer failed to give the said workman a reasonable opportunity to lead evidence, that might, in a proper case, be considered to introduce an element of infirmity in the inquiry.[48] For instance in *Tejvir Singh*, the workman was given just a day's time to face the domestic inquiry. On the request of the workman to postpone the inquiry for two or three days to enable him to make arrangements for his representation in the inquiry and also to bring his witnesses was rejected. In the inquiry, the management examined as many as three witnesses the same day and also produced a number of documents with which the workman was not familiar at all and was not in a position to effectively cross-examine those witnesses. After completing the evidence of these three witnesses, the workman was immediately called upon to enter his defence. Even at this stage, his request for adjournment to enable him to produce his witnesses was rejected and he was given only one hour's time to get his evidence. The workman was able to get only one witness. In these circumstances, the Supreme Court deprecated the attitude adopted by the inquiry officer and held that the inquiry had been conducted in gross violation of the principles of natural justice without giving a real and fair opportunity to the workman to participate in the proceedings.[49] In *Baldev Lal*, in a different set of facts and circumstances, the Supreme Court held that the refusal of the inquiry officer to grant further adjournment of the inquiry proceedings was justified.[50]

Ex Parte Inquiry

Industrial adjudication, normally, discourages the practice of a workman refusing to participate in domestic inquiries or to withdraw from inquiries without any reasonable ground or taking unreasonable and undesirable attitude. In other words, when there is no valid reason for the delinquent employee not to appear before the inquiry officer, no complaint for want of opportunity is tenable.[51] In *Northern Rly CCS*, the workman refused to participate in the inquiry taking a very unreasonable and undesirable attitude in persistently demanding representation by a stranger which was not permissible. The Supreme Court observed that such attitude deserved to be condemned.[52] However, even in a case, where a workman refuses to participate in an inquiry or withdraws from the inquiry in the course of the proceedings, it is incumbent on the inquiry officer to complete the inquiry by taking all evidence *ex parte* to find out whether or not the charge has been proved. In the event he finds that the charge is proved he would submit his report to the disciplinary authority. The disciplinary authority, then should communicate a copy of the inquiry report to the delinquent and seek his explanation for the proposed action. If the workman submits any explanation, the same has to be taken into consideration and then an appropriate order should be passed in accordance with law.[53] In *Imperial Tobacco*, at a particular stage of the inquiry proceedings, the workman withdrew from the inquiry. The employer dismissed the workman without even completing the inquiry proceedings in the manner prescribed by the Standing Orders. Holding the order of dismissal to be invalid, the Supreme Court observed that even though the workman had withdrawn from the inquiry-whether rightly or wrongly—'the inquiry should have been completed and all evidence should have been taken *ex parte*'. The fact that the workman withdrew from the inquiry at an early stage 'did not absolve the inquiry officer from conducting the inquiry by taking evidence *ex parte*'. Furthermore, it also did not absolve the punishing authority from following the procedure prescribed in the relevant Standing Order in inflicting the punishment, but once the *ex parte* inquiry is completed on taking all evidence in compliance with the requirements of the relevant Standing Orders or the principles of natural justice, the action based on such inquiry normally will not be invalidated.[54] In *Harinagar Sugar*, the delinquent workman refused to participate in the domestic inquiry initiated against him, unless he was permitted to be represented by an office-bearer of the trade union of which he was a member. The inquiry officer, therefore, proceeded with the domestic inquiry *ex parte*. The further opportunity given to the workman to participate in the inquiry was also not availed of by him. On the basis of the evidence on record of the *ex parte* domestic inquiry, the workman was found guilty of the charges levelled against him and was dismissed from service. The Patna High Court held that the inquiry was not contrary to the principles of natural justice merely because the workman was not allowed to be represented by a member of his union. The court observed that 'the workman who was given an opportunity to take part in the domestic inquiry refused to avail himself of the same and deliberately absented himself, he could not be allowed to say that the action of the management in proceeding with the inquiry *ex parte* was not fair or proper. It is, therefore, not open to him to contend that the inquiry was not bona fide on that account.[55] In a somewhat similar situation, in *Lakshmi Devi Sugar Mills*, Bhagwati J, observed:

> If full and free opportunity was given to the respondents to present themselves at the inquiry and defend themselves, it could not be said that the inquiry was anything but fair. No principles of natural justice were violated and the management was at liberty to come to its conclusions in regard to the culpability of the respondents and also to determine what punishment should be meted out to the respondents for the misconduct and insubordination proved against them.[56]

The principles of natural justice require that notice of the proposed inquiry should be given to the concerned person. They do not require that even after giving the notice, if the concerned workman remains absent, the inquiry should not be held in his absence.[57] Thus, where in the midst of a domestic inquiry, the workman withdrew from it for some reason or other and the inquiry officer thereafter concluded such inquiry *ex parte*, and held the workmen guilty of the charge levelled against

them, the validity of the inquiry was upheld.[58] Likewise, where the workmen when asked to express their desire to state whether they would like to have an oral hearing, persisted that the management should negotiate with the union, and the management, in these circumstances, passed an order dismissing the workmen from service, on the basis of the material on record, it was held that, in such a situation, the rules of fair hearing or fair opportunity were not violated in any way.[59] Where the delinquent workman does not choose to participate in the domestic inquiry to substantiate his case and an adverse inference for not examining himself would be justified as he would be the best witness for his case and many features which are within his special and personal knowledge could be appropriately placed before the tribunal.[60] In *Baldev Lal* (supra), the workman appeared before the inquiry officer and after a shortwhile, he left the room under the pretext of consulting somebody outside and took more than an hour to return. On resuming the inquiry, when he was asked to sign the first page of the inquiry proceedings, he refused to do so and again left the inquiry saying that he was to consult his companions outside. As one of the witnesses of the management was about to give his evidence, the workman's brother entered the inquiry room and started interfering with the inquiry proceedings which resulted in a serious scuffle. In the circumstances, the inquiry was adjourned to another date and a telegram was sent to the workman apprising him of the date of the inquiry. On the date of the resumed inquiry, a telegram was received from the workman's wife saying that he was out of station and requested for postponement of the inquiry. The inquiry officer, however, proceeded with the inquiry *ex parte* as a result of which the workman was dismissed. The Supreme Court disagreed with the holding of the tribunal that the inquiry was in violation of the rules of natural justice, and observed that 'it would be difficult to say that if the inquiry officer took the view that the telegram sent by the respondent's wife was merely another incidence of unwillingness of the respondent to take part in the inquiry and was an attempt to avoid it and, therefore, the inquiry sought to be held even in the absence of the respondent, it is an unreasonable view.[61]

If the delinquent workman does not attend the inquiry on the fixed date and an order of *ex parte* proceedings is made, proceedings can be held on subsequent dates without giving any notice to him.[62] In case, a workman is prevented from participating in a domestic inquiry on account of the conduct of the management, there is no doubt that the inquiry if held *ex parte* will be vitiated for violation of the principles of natural justice, but if the workman could not participate in the domestic inquiry for reasons for which the management cannot be held responsible, holding the *ex parte* inquiry against them may not necessarily be in violation of the principles of natural justice. In *TELCO*, the Patna High Court held that the ex parte inquiry against the delinquent workmen who were arrested by the police not at the instance of the management was not vitiated for violation of the principles of natural justice. It was further held that since these workmen were held under criminal charges, it could not be said that their absence was for reasons beyond their control.[63]

In *Mohd Shahid*, it was held that the delinquent employee having refused to participate in inquiry, could not turn around and complain that his dismissal was against principles of natural justice. However, withdrawal from inquiry by the delinquent would not absolve the inquiry officer from holding an *ex parte* inquiry according to law. To put it differently, it does not mean that a finding against the delinquent can be given by an inquiry officer without further investigation. It is still necessary for the inquiry officer to record the evidence although in the absence of the employee. It is of utmost necessity that the disciplinary authority examines the case with great care before any decision is taken about the guilt of the person. The person proceeded against has a right at different stages of proceedings and if he defaulted at one stage then it will not take away his right to defend himself altogether at a different stage.[64] Where the chargesheeted employee has not submitted his reply to the chargesheet despite repeated reminders nor has appeared before the inquiry officer, and did not inspect the relevant record, though he was asked to do so, it could not be said that the conclusion of the inquiry officer, on the basis of the material available, that the charges were proved, was a negation of the principles of natural justice.[65] Where the delinquent workman was served with notice and he filed his reply and also appeared before the enquiry officer, but remained absent thereafter despite notices, it could not be said that he was not given opportunity to participate in the enquiry. It was a case of not availing the opportunity given to him. If the enquiry officer proceeds with the enquiry *ex parte* in these circumstances, it could not be said that the enquiry was vitiated.[66] In *CMD, VSP*, the facts were: the workman, a habitual absentee, did not submit his explanation on the ground that his mother was ill, and he did not present himself before the enquiry officer, despite several opportunities given to him with the result the enquiry was held *ex parte*. And a subsequent explanation given to another authority of the company was not pleaded in the enquiry proceedings. It was held by the Supreme Court that the High Court, in exercise of its writ jurisdiction under Art 226, cannot overturn a legal order on the ground of sympathy and sentiment.[67]

In *Hemant Kumar*, the facts briefly were: the respondent-workman was employed in the appellant-Bank as a cashier-cum-clerk. In January, 1994 it was discovered that the respondent had been indulging in misappropriation of money by making fictitious entries and manipulations in the bank's ledgers. On his malfeasance coming to light, the respondent not only admitted his guilt in writing vide memo dated 3 March 1994 but also deposited the amount of Rs.14,000/- to make good the amount earlier defalcated by him. He was given a charge-sheet detailing his various acts of omission and commission to which he did not give any reply. Nevertheless, before the Enquiry Officer in course of the preliminary enquiry he expressed the intent to defend himself in the enquiry. The enquiry was first fixed on 15 November 1994 but on that date the respondent did not appear without giving any intimation to the Enquiry Officer. Due to his non-appearance the enquiry

was adjourned to 28 November 1994. On that date, once again, he did not come to participate in the enquiry proceedings but sent a request for adjournment on the ground that his mother-in-law was seriously ill at Agra. The enquiry was once again adjourned and it was fixed for 14 December 1994. He was intimated about the next date fixed in the enquiry through registered post as well as hand delivery letters dated 15 November 1994 and 28 November 1994 respectively. On 14 December 1994 the respondent was once again absent and there was no intimation from him. In those circumstances and having regard to the fact that the witness intended to be examined by the management in support of the charge had come in connection with that enquiry from Delhi to Dehradun for the third time, the Enquiry Officer decided to proceed with the enquiry and examine him ex parte. The said witness happened to be the Branch Manager where the respondent was posted at the material time and where the misappropriation was committed by him. On the basis of the enquiry, the respondent was dismissed. The tribunal directed reinstatement on the ground that the enquiry was violative of principles of natural justice, which award was affirmed by the High Court of Uttarkhand. Quashing the orders of the tribunal and the High Court, Aftab Alam J (for self and Lodha J) of the Supreme Court observed:

> We are of the view that both the reasons assigned by the Tribunal for condemning the departmental enquiry as defective are completely untenable. The *principles of natural justice cannot be stretched to a point where they would render the in-house proceedings unworkable.* Admittedly, the respondent had not appeared for the enquiry on two earlier dates. On the third date too he was absent and there was no intimation from him before the Enquiry Officer, yet the Tribunal insists that it was the duty of the Enquiry Officer to find out from the concerned department of the bank whether any intimation or application was received from the respondent.. .. The Tribunal's observation that it was only the third date of hearing and hence, it could not be said that the respondent had adopted dilatory tactics can only be described as unfortunate. *We completely reject the notion that three barren dates in an in-house proceeding do not amount to delay*.. .. The second reason assigned by the Tribunal that the Enquiry Officer should have allowed the respondent the opportunity to lead evidence in rebuttal is also without substance in the overall facts of the case. The respondent had already tendered two admissions of guilt in writing. .. and there was hardly anything that could be said on his behalf to repel the charges.. .. the Tribunal's findings are wholly unreasonable and perverse and fit to be set aside. The High Court, unfortunately, did not consider the matter as it should have, in light of the discussions made above. The High Court's order is equally unsustainable.[68] (Paras 10-12).

(iii) Report of Inquiry Officer

(a) General Principles

The inquiry report is a document of vital importance in the course of disciplinary proceedings against a delinquent workman. If the inquiry officer finds that the charges levelled against the workman are proved it will result not only in the deprivation of the livelihood but also attaches a stigma to the character of the workman. The inquiry report, therefore, should reflect the application of mind by the inquiry officer to the pleadings and the evidence adduced before him by the parties. 'An inquiry report in a quasi-judicial inquiry must show the reasons for the conclusion. It cannot be an *ipse dixit of* the inquiry officer'.[69] In the words of Subba Rao J, '*Reasoned order is a desirable condition of judicial disposal ...A speaking order will at its best be a reasonable and at its worst be at least a plausible one*'.[70] Satisfactory decision of a disputed claim may be reached only if it be supported by the most cogent reasons that appealed to the authority. Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency.[71] The whole object of holding a domestic inquiry against a delinquent workman is to enable the inquiry officer to decide upon the merits of the dispute before him,[72] and such inquiries must conform to the basic requirements of natural justice and one of the essential requisites of a proceeding of this character is that when the inquiry is over, the officer must consider the evidence and record his conclusions and reasons therefore.[73] A mere form of inquiry would not satisfy the requirements of industrial law and protect the disciplinary action taken by the employer against challenge.[74] It would, therefore, be wholly misconceived to think that once evidence is recorded, all that the employer is expected to do is to pass an order of dismissal which impliedly indicates that the employer accepts the view that the charges framed against the employee have been proved.[75] In *Kharda & Co.*, it was held that one of the tests which the industrial tribunal is entitled to apply in dealing with industrial disputes of this character is, whether the conclusions of the inquiry officer was perverse or whether there was any basic error in the approach adopted by him. In the absence of the findings or conclusions recorded by the inquiry officer, it would be impossible for the adjudicator to know as to how he approached the question and what conclusions he reached before taking the disciplinary action against the delinquent workman and it would, therefore, be difficult for the adjudicator to decide whether the approach adopted by the inquiry officer was basically erroneous or whether his conclusions were perverse. The failure of the inquiry officer to record his findings and conclusions at the end of the inquiry would, therefore, constitute a serious infirmity in the inquiry itself which would render the inquiry invalid and the tribunal would be justified in ignoring the inquiry. In this case, the inquiry was held to be vitiated by a serious infirmity for the reason that at the end of the inquiry, the manager who held the inquiry did not record any findings and straightaway passed

the order of dismissal taking the view that it was not necessary to make a formal report because he himself was the punishing authority. Gajendragadkar J observed:

> If industrial adjudication attaches importance to domestic inquiries and the conclusions reached at the end of such inquiries, that necessarily postulates that the inquiry would be followed by a statement containing the conclusions of the inquiry officer.[76]

The inquiry officer, therefore, after taking the evidence adduced by the parties has to record his findings and conclusions as to whether the misconduct is proved or not which are of vital importance for the adjudication of the dispute arising out of the disciplinary action. It is, therefore, essential that the officer should makes a brief report indicating clearly his conclusions and reasons in support thereof. The fact that the inquiry officer himself is the ultimate punishing authority, cannot help to dispense with the making of the report recording the findings holding the charge-sheeted workman guilty of the charges levelled against him. It is, of course, not necessary that the report should be elaborate. Howsoever brief the report is, it should indicate in a broad way the conclusions of the officer and his reasons. The inquiry report is a document which will have to be closely examined by the Industrial Tribunal when a dispute pertaining to disciplinary action against the employee is brought before it for its adjudication. In other words, when the legality or propriety of the disciplinary action, which follows the inquiry report is put in issue before an industrial tribunal, it would be impossible for the tribunal to consider whether the conclusions reached by the inquiry officer were perverse or not.[77] A cryptic report, for instance, without stating any reasons will be of little value.[78]

The standard of proof required in a domestic inquiry is only preponderance of probabilities. It is not necessary that there should be direct evidence. Circumstantial evidence satisfying the test of preponderance of probabilities will be sufficient.[79] In *Northern Dooars Tea*, the inquiry officer did not record any proper finding for his conclusions at the end of his inquiry but merely drew some notes in that behalf. The Supreme Court did not treat such notes as a finding recorded in the inquiry and held the inquiry to be invalid.[80] In *Samnuggur*, the report of the inquiry officer was not produced before the tribunal and, in fact, there was no evidence to show that such a report had at all been made. The tribunal, therefore, took the view that either the report was not made or was not produced before it and therefore, held that the inquiry was invalid.[81] This holding was affirmed by the Supreme Court in *Saran Motors*, in which it was held that the mere failure on the part of the inquiry officer to make notes of his inspection of the spot of the incident could not invalidate the whole domestic inquiry, when there was other evidence before him to support his findings, his conclusion could not be rejected on that ground.[82] In *Howrah Trading*, the report of the inquiry officer was considered to be of 'little value' because he had failed to give reasons and submitted a cryptic report ending with the statement that 'all other relevant points from the proceedings will be explained personally.[83] In *Anil Kumar*, the evidence was annexed to the report and no correlation was established between the two, showing application of mind. The court held that there was no inquiry worth the name and the order of termination based on such proceeding disclosing non-application of mind, was unsustainable.[84] The findings of an inquiry officer must be supported by legal evidence.[85] If, after the scrutiny of the report of the inquiry officer, the tribunal comes to the conclusion that the findings are based on irrelevant and extraneous matters, the inquiry will be liable to be set aside, but the findings of an inquiry officer are not to be lightly brushed aside merely because an inquiry officer, while writing his report, has mentioned some facts which are not strictly borne out by the evidence before him.[86]

In *SC Prasad*, the inquiry officer had made certain remarks in his report which were not based on any evidence on record but were based on his personal knowledge. Since, from the inquiry report, it was clear that these remarks were made incidentally and had not been relied on in holding any of the workmen guilty of the charges, the inquiry was not invalid. Strictly speaking, an inquiry officer is not entitled to bring in those facts in his report which do not form part of the evidence. If, therefore, those remarks had been relied on in finding any of the workmen guilty, then undoubtedly, the inquiry would have been vitiated on the ground that it did not form part of the evidence, because 'if the inquiry officer were to transgress the rules of natural justice by relying on matters which the workman had no opportunity to meet, the validity of his findings would be effected'. The tribunal had held that the inquiry was vitiated on account of delay between the service of the chargesheet and the report of the inquiry officer but there was no allegation of any tampering of evidence of any of the witnesses and the delay between the service of the chargesheet and the report of the inquiry officer was not considerable by any measure and the lapse of time between the recording of the evidence and the taking of the signature thereon of the witnesses was explained by the inquiry officer. In these circumstances, the counsel for the workmen himself did not support the view taken by the tribunal but inordinate delay in submitting the inquiry report is likely to vitiate the findings of the inquiry. However, the question whether an inquiry is vitiated on account of delay in submitting the report will depend on the facts of each case.[87]

(b) Minor Discrepancies

No doubt, the report of the inquiry officer will be vitiated where the inquiry officer acts mala fide, *ie*, ignores or excludes from consideration, a vital and material piece of evidence or takes into consideration any irrelevant or extraneous

materials, or where he transgresses the principles of natural justice by being biased against the workman or denies to him a reasonable opportunity to defend himself or where his report is perverse, *ie*, the findings are not supported by any evidence or are entirely opposed to the evidence on record. It has also to be borne in mind that it is not every factual inaccuracy, however slight or insignificant, that would justify the quashing of the report.[88] The fact that statements of certain witnesses were recorded in shorthand in the course of domestic inquiry but were signed later on, when they were transcribed in long hand and typed, would not make the inquiry mala fide, irregular or improper.[89] The fact that the record of the domestic inquiry was not signed by the inquiring officer but was signed only by the two witnesses and the concerned workman, would not lead to the conclusion that, in fact, no inquiry was held.[90] Likewise, the mere fact that the inquiry officer had failed to make notes of inspection of the site of the incident, would not be a sufficient ground to reject his findings when there was other evidence before him to support his findings.[91] In *National Carbon*, minor discrepancies regarding the signatures of the witnesses on their statements before the inquiry officer and the signature of the manager on the endorsement of the inquiry report, were not held to be vitiating the inquiry report, as the workmen could have got them cleared before the tribunal by cross-examination which was not done.[92] In *Kalindi*, the examination of the inquiry officer's report showed that a certain clerical error in the concluding portion of the report had crept in, ie, the name of one person was accidentally mentioned instead of another person's but in view of the fact that the actual allegation against the delinquent workman was found to have been proved by the inquiry officer, it was held that the conclusion and not the wrong statement weighed with the punishing authority in determining the punishment and the inquiry was, therefore, not vitiated.[93]

(c) Perversity

Perversity vitiates disciplinary proceedings. There is a two-fold test of perversity of a finding. The first test is that the finding is not supported by any legal evidence at all and the second is that on the basis of the material on the record, no reasonable person could have arrived at the finding complained of.[94] In each of these cases, the findings would be treated as perverse. A finding recorded in a domestic inquiry can be characterised as perverse only if it is shown that such a finding is not supported by any evidence at all or is entirely opposed to the whole evidence adduced before it or no reasonable person could have come to the finding on the basis of the evidence on the record.[95] In other words, an industrial tribunal would not be justified in characterising the finding recorded in the domestic inquiry as perverse unless it can be shown that such finding is not supported by any evidence or is entirely opposed to the whole body of evidence adduced before it. A broad dichotomy is always maintained between a decision which is perverse and the one which is not perverse. If the decision is arrived at on no evidence or evidence which is thoroughly unreliable and unacceptable and if a reasonable and well-instructed person would not act upon such evidence and decide, then it is to be characterised as a perverse order; but, if there is evidence on record, however, compendious it may be, if it is acceptable and if it could be relied upon, then a conclusion arrived at in such a situation cannot be termed as a perverse. If otherwise the conclusion of the inquiry officer is reasonable, then the labour court ought not normally interfere with such a decision on a mere abstruse and abstract basis.[1]

It is, therefore, essential to bear in mind the difference between a finding which is not supported by any legal evidence and a finding which may appear to be not supported by sufficient evidence or may be based on inadequate or unsatisfactory evidence.[2] A wrong finding is not necessarily a perverse finding, and a finding cannot be described to be perverse merely because it is possible to take a different view on the evidence.[3] Nor can a finding be called perverse, because in certain matters, the line of reasoning adopted by the inquiry officer is not very cogent or logical. When it appears to the tribunal that no person properly instructed in law and acting judicially could have reached the particular decision, it might proceed on the assumption that misconception of law has been responsible for the wrong decision.[4] However, the line of demarcation between a wrong finding and a perverse finding is hardly perceptible. In *Ludh Budh Singh*, the Supreme Court pointed out that a finding recorded by an inquiry officer ignoring the material admissions made by the party in favour of the workman is not a question of mere appreciation of the evidence, but really recording a finding contrary to the evidence adduced before him. Therefore, in a case where the findings of fact are based on no legal evidence and the conclusion is one to which no reasonable man would come, it would be a case of perversity and not of reappraisal of evidence.[5] In *Rajinder Kindra*, the Supreme Court held that where the findings are based on no legal evidence and are either *ipse dixit* or based on conjectures and surmises unrelated to evidence and they disclose non-application of the mind, such findings and conclusions, are perverse.[6] In *Saudi Arabian Airlines*, Srikrishna J of Bombay High Court observed that the perversity of findings could arise only if:

(a) there was no evidence whatsoever to support the finding, or

(b) the conclusions recorded were diametrically contrary to the evidence on record, or

(c) the conclusions were such that no reasonable person would have arrived at.[7]

In deciding the question as to whether a particular conclusion of fact was perverse or not, the industrial tribunal would not be justified in weighing the evidence for itself and determining the question of the perversity of the view arrived at by the inquiry officer in the light of his own findings on the question of fact.[8] The findings of the domestic tribunal cannot merely be brushed aside unless they are shown to be based on no evidence.[9] In a domestic inquiry, once a conclusion is deduced from the evidence, it is not permissible to assail that conclusion even though it is possible for some other authority to arrive at a different conclusion on the same evidence. This point is illustrated in the decision of the Supreme Court in *Banaras Electric*.[10]In spite of the finding that there was no mala fide intention on the part of the employer and that the inquiry was not defective, the labour court held that the finding of the inquiry officer was perverse and that there was victimisation as the inquiry officer should not have placed implicit reliance on the statement of a solitary witness but he must have subjected his statement to a careful scrutiny in the light of the defence evidence and the surrounding circumstances which could be of great help in ascertaining the truth, and in the circumstances it was difficult to arrive at the conclusion that the guilt had been brought home to the workman concerned, the finding of the inquiry officer was not justified from the evidence on record. This holding was not ultimately sustained in appeal by the Supreme Court as the evidence on record clearly justified the finding of the inquiry officer that the charged act of misconduct was proved against the workman, and the employer was justified in finding the workman guilty of disobedience of the order and the finding of victimisation was based on no evidence and was, therefore, wholly unwarranted in law.

In *ASO, RPF*, the employee was found guilty of the misconduct for consuming alcohol while on duty on the basis of medical report of district medical officer who was not examined in the domestic inquiry but the inquiry officer relied on the report of the Tamil Nadu forensic laboratory which was not marked in the inquiry proceedings. The finding that the employee was guilty was held to be perverse and unreasonable as it resulted in miscarriage of justice.[11] Similarly, in *Anand Chandra Prusty*, the burden of proof to establish the charge was on the management, but the inquiry officer instead of placing the burden of proof to establish the charge on the management, threw it on the delinquent being under the impression that it was for the workman to establish his denial of the charge and on his failure to do so, the charge should be taken to have been proved. This illegal casting of burden of proof on the workman resulted in arriving at a wrong conclusion that in the absence of evidence in support of the defence the charge was proved. The Orissa High Court quashed the finding of guilt against the employee as being perverse.[12] In *Chandrakumar Deshmukh*, out of two statements of witnesses, the inquiry officer accepted one in favour of the prosecution and rejected the other in favour of the delinquents without giving reasons and without examination of those witnesses. A single judge of the Bombay High Court held that the inquiry was perverse and in violation of the principles of natural justice. The question whether the finding of the inquiry officer in a domestic inquiry is vitiated or perverse is a pure question of law. Such a question can for the first time be raised before a writ court or the appellate court. The same principle will apply both to a suit and a writ proceeding.[13] Any action of discharge or dismissal based on the findings of the inquiry officer which are vitiated or perverse will not be sustainable.[14]

Show-Cause Notice

Neither the ordinary law of the land nor the industrial law requires an employer to give a show-cause notice to the workman before imposing disciplinary punishment on him. The only class of cases where such a notice is necessary are those arising under Art 311 of the Constitution and even that has now been removed by the amendment of that Article. Such requirement would unnecessarily prolong disciplinary inquiries which in the interest of industrial peace should be disposed of in as short a time as possible.[15] Rules of natural justice do not make it necessary for the employer to give an opportunity to meet the punishing authority before imposing the punishment and all that is necessary is that a fair inquiry should be held.[16] Nor is there any requirement to give a second show-cause notice to the workman after the employer forms a provisional opinion that punishment of dismissal or discharge should be awarded as under Art 311 of the Constitution.[17] In *TC Srivastava*, the court pointed out that no doubt that in industrial law it is not necessary to give second opportunity, to show cause to the workman against the proposed punishment, but this does not mean that the requirement of such opportunity cannot be provided in the service rules, regulations or Standing Orders of an undertaking but such requirement should be discernible from the express language or necessary implication of the Standing Order. In this case, the relevant Standing Order provided: 'All dismissal orders shall be passed by the manager...after giving the accused an opportunity to offer an explanation'. The court observed that these words were wholly inappropriate to convey the idea of a second hearing or opportunity on the question of punishment but they were appropriate only in the context of seeking an explanation in regard to the alleged misconduct charged against a worker. Therefore, it is the alleged misconduct that has to be explained by the workman and not the proposed punishment.[18] Likewise in *Engine Valves*, the relevant Standing Order provided that 'no order of dismissal shall be made unless the workman concerned is informed in writing of the alleged misconduct and is given an opportunity to explain the circumstances alleged against him', the Madras High Court held that this Standing Order did not contemplate the requirement of a second show-cause notice.[19]

If a provision for a show-cause notice has been made in the Standing Orders which have been certified under the Industrial Employment (Standing Orders) Act 1946, the requirement of show-cause notice against the punishment, in such a case,

would be statutory and would not be a 'mere idle formality'. Non-compliance of such requirement of the notice would vitiate the punishment of dismissal. For instance, in *Lakshmiratan Cotton,* the relevant Standing Order required the employer to give notice, in writing, to the concerned workman to show-cause within a specified period of time as to why the proposed punishment be not awarded, where it proposed to inflict the punishment of dismissal for any misconduct. It further required that the copies of the findings of the inquiry officer and the charge or charges should also be furnished to the workman along with the show-cause notice. Evidently, this Standing Order was intended to provide an opportunity to the workman to show that the findings of the inquiry officer were not justified on the evidence on record and even if the findings were justified, the extreme penalty of dismissal was not justified, having regard to the nature or gravity of the misconduct and his past record and any other extenuating circumstances. This condition was thus a condition precedent before an order of dismissal could validly be passed by the employer. The order of dismissal made without complying with the requirements of the Standing Order was, therefore, held to be invalid. If an opportunity is not given to the workman to show-cause against the proposed punishment, it will constitute breach of the mandatory provisions of the Standing Order as it will amount to depriving him of a reasonable opportunity to defend himself by showing that the findings of the inquiry officer were not sustainable or at any rate, the proposed punishment was excessive.[20]

In cases, where a Standing Order, service rule or regulation provides for a show-cause notice, apart from the show-cause notice, the rules of natural justice require that the report of the inquiry officer along with the record of the inquiry proceedings and any other relevant material must be furnished to the workman. In the absence of such material, it may not be possible for the workman to show that the inquiry was not fair or valid and even if the inquiry was fair and valid, the punishment of dismissal was not commensurate with the gravity of the misconduct for various reasons such as that his past record should not have been taken into account or that the past record was not so bad as to merit the maximum punishment of dismissal. Thus, the requirements of Art 311 of the Constitution can be engrafted in the procedure of disciplinary action under the industrial law by making a provision, in the service rules or the Standing Order applicable to an undertaking, to that effect. Then, the judicial dicta dealing with the cases under Art 311 (2) of the Constitution would become relevant in connection with the requirement of show-cause notice for disciplinary action under the industrial law. In *Bashyan*, a two-judge bench of the court took the view that the non-supply of a copy of the report would constitute violation of the rules of natural justice as it will tantamount to denial of the reasonable opportunity as required by Art 311 (2) of the Constitution as well as the rules of natural justice. The court also pointed out that requirement of supplying a copy of the inquiry report to the delinquent to enable him to point out anomaly, if any, before the punishment of dismissal is imposed by the disciplinary authority, is different from serving a second show-cause notice against the penalty to be imposed which has been dispensed with by the forty-second amendment of the Constitution.[21] However, in *Ramzan Khan,* Mishra CJI held:

> Deletion of the second opportunity from the scheme of Art 311(2) of the Constitution has nothing to do with providing a copy of the report to the delinquent in the matter of making his representation. Even though, the second stage of the inquiry in Art 311(2) has been abolished by the amendment, the delinquent is still entitled to represent against the conclusion of the inquiry officer holding that the delinquent is guilty of the charge or charges alleged against him.[22]

He further stated that the delinquent was entitled to a copy of the report of the inquiry officer and will also be entitled to make a representation against it, if he so desires, and non-furnishing of the report would amount to the violation of the rules of natural justice and make the final order liable to challenge hereafter. In *Karunakar,* a Constitution Bench affirmed the earlier dicta to the extent that the right of the employee to receive the report of the inquiry officer is a part of the 'reasonable opportunity' of defending himself and if this is denied to him, he is in effect, denied the right to defend himself and to prove his innocence in the disciplinary proceedings. It further noted that upon receipt of the report, two further rights of the employee arose *viz*: (i) the right to show-cause against the findings in the report; and (ii) the right to show-cause against the proposed penalty, which are independent of one another. The former is the right to prove that the inquiry is unfair or invalid and the workman is not guilty of the alleged misconduct while the latter is the right to show that no penalty or lesser penalty should be imposed even if he is held to be guilty. If after considering the inquiry officer's report the disciplinary authority decides to drop the proceedings or imposes a penalty other than dismissal or discharge, there is no occasion to issue the notice to show-cause against the proposed penalty. *The right to show-cause against the proposed penalty arises at the stage when the disciplinary authority after considering the findings in the inquiry report comes to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. This right has now been dispensed with by the forty-second amendment of the Constitution. The right to receive the inquiry report is an essential part of the reasonable opportunity under Art 311(2) as well as the rules of natural justice as the findings recorded by the inquiry officer form an important material fact before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions.* After the amendment of Art 311(2), the disciplinary authority has to consider the representation of the employee against the report before it arrives at the conclusion with regard to his guilt or innocence of the employee. Speaking for the court, Sawant J, said:

> The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist

> the individual to vindicate his just rights. They are not incantations to be invoked nor rights to be performed on all and sundry occasions.[23]

The question, whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an 'unnatural expansion of natural justice' which in itself is antithetical to justice.

Evaluation of *Ramzan Khan* and *ECIL* Cases

As a general rule, the Supreme Court had always viewed employment relationship in the industrial realm on a footing totally different from that of public service, in the light of the fact that the nature, objects and purpose of the two classes of service differ widely. While the procedure for termination of contract of employment in respect of industrial employees is prescribed by the ID Act read with the Industrial Employment (Standing Orders) Act 1946, that of public servants is laid down under Art 311 of the Constitution. Even the remedies and relief in case of wrongful dismissal are different for the public servants as compared to industrial employees. This distinction was clearly highlighted by the Supreme Court of India through Hidayatullah J, in the *Firestone*, wherein the learned judge observed, 'The tribunal equated the domestic inquiry to enquiries under Art 311 of the Constitution which was hardly proper.' (at p 718). Over years, this fundamental distinction between industrial employment and public employment suffered gradual erosion.[24] In *Karunakar*, a Constitution Bench of the Supreme Court reviewed the law relating to dismissal for misconduct with special reference to the three judge Bench decision rendered in *Ramzan Khan*.[25] Article 311(2) as amended by the Forty-second Amendment came in for detailed interpretation. A few extracts of the majority decision of the Supreme Court delivered by Sawant J, for himself, Mohan, Jeevan Reddy JJ, and Venkatachaliah CJI, (Ramaswamy J dissenting) in *Karunakar* are reproduced hereunder:

> ... Article 311 (2), however, underwent change with the Constitution (15th Amendment) Act of 1963. It explained and expanded the scope of 'reasonable opportunity'. For the original expression 'until he has been given reasonable opportunity of showing cause against the action proposed to be taken in regard to him', the provision 'except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and were it is proposed after such inquiry, to impose on him any such penalty, until he has been given reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry' was substituted...The Amendment also provided for a second opportunity to the employee to show-cause against the penalty if it was proposed as a result of the inquiry. The courts held that while exercising his second opportunity of showing cause against the penalty, against the findings on charges, as well. What is necessary to note for our present purpose is that in spite of this change, the stage at which the employee was held to be entitled to a copy of the report, was the stage at which the penalty was proposed, as was the case prior to the said Amendment. (para 4) ...The provisions of clause (2) of Art 311 were further amended by the Constitution (42nd Amendment) Act of 1976. It came into force from January 1, 1977. It expressly stated that '*it shall not be necessary to give such person any opportunity of making representation on the penalty proposed*'. The words 'such person' of course meant the person who was to be dismissed or removed or reduced in rank. In other words, the 42nd Amendment of the Constitution while retaining the expanded scope of the reasonable opportunity at the first stage, *viz*, during the inquiry as introduced by the 15th Amendment of the Constitution, did away with the opportunity of making representation against the penalty proposed after the inquiry. It is this Amendment to Art 311 (2) which has given rise to the controversy as to whether when the inquiry officer is other than the disciplinary authority, *the employer is entitled to a copy of the findings recorded by him, before the disciplinary authority applies its mind to the findings and the evidence recorded, or whether the employee is entitled to the copy of the findings of the inquiry officer only at the second stage, as its conclusions and proposed the penalty*. Upon answer to this question depends the answer to the other questions flowing from it, *viz*, whether the employee was entitled to make representation against such finding before the penalty was proposed even when Art 311 (2) stood as it was prior to the 15th Amendment of the Constitution.[26] (para 5). (Italics supplied).

Sawant J, cited the following passage from the decision rendered in *Khem Chand*, in respect of the three stages of a departmental proceeding at which reasonable opportunity should be given under the original Art 311 (2) as follows:

> (a) an opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and, finally,

(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the inquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant, tentatively proposes to inflict one of the three punishments and communicates the same to the government servant.[27] (para 6).

Having cited the above passage, Sawant J proceeded to hold thus:

> While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry, *viz*, before the disciplinary authority takes into consideration the findings in the report, the right to show-cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposed to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right, exercisable at the second stage, which was taken away by the 42nd Amendment. (para 25)...Where the Inquiry Officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, inquiry officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis for its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second stage is not even reached. The employee's right to receive the report is thus, a part of the reasonable opportunity of defending himself in the first stage of the inquiry. If this right is denied to him, he is in effect denied the right to defend himself and to prove his innocence in the disciplinary proceedings. (para 27)

Admittedly, the Bench not only followed, *rather blindly*, the earlier decision rendered in *Ramzan Khan*,[28] without applying its mind to the glaring inconsistencies surfaced therein, but also proceeded to enlarge the scope of the said Article to pastures which manifestly fall outside the pale of Art 311. The over-emphasis laid by the learned judges in *Ramzan Khan* and *ECIL* on the scope and application of the principles of natural justice is clearly misconceived and wholly misplaced. It is a settled proposition that the principles of natural justice do not supplant the law of the land, but only supplement it,[29] and that they should be applied only in the unoccupied interstices of the statute unless there is a clear mandate to the contrary.[30] That being the settled position, to hold that the 42nd amendment did not take away the right of the employee to receive a copy of the findings, is repugnant to all canons of statutory construction. The Article, as amended, stipulates: '*it shall not be necessary to give such person any opportunity of making representation on the penalty proposed'*. For a complete understanding of the extent of misconstruction placed on amended Art 311, it is necessary to deal with both the cases in some detail. In *Ramzan Khan*, Misra CJI observed:

> Deletion of the second opportunity from the scheme of Article 311(2) of the Constitution has nothing to do with providing of a copy of the report to the delinquent in the matter of making his representation. Even though the second stage of the inquiry in Article 311(2) has been abolished by amendment, the delinquent is still entitled to represent against the conclusion of Inquiry Officer holding that the charges or some of the charges are established and holding the delinquent guilty of such charges. For doing away with the effect of the enquiry report or to meet the recommendations of the Inquiry Officer in the matter of imposition of punishment, furnishing a copy of the report becomes necessary and to have the proceeding completed by using some material behind the back of the delinquent is a position not countenanced by the procedure. (at p 34)

On the issue '*what would be position in a case where the disciplinary authority himself held the inquiry, and hence no separate report was made out by him*', the learned Chief Justice held:

> ...where the disciplinary authority is the Inquiry Officer there is no report. He becomes the first assessing authority to consider the evidence directly for finding out whether the delinquent is guilty and liable to be punished. Even otherwise, the inquiries which are directly handled by the disciplinary authority and those which are allowed to be handled by the Inquiry Officer can easily be classified into two separate groups... That itself would be a reasonable classification keeping away of the application of Article 14 of the Constitution. (at p 34).

The above observations of Misra CJI give rise to the following questions:

(i) What was the legal effect sought to be achieved by the 42nd amendment by which the old phrase in the proviso, ie, '*...until he has been given a reasonable opportunity of making representation on the penalty proposed ...*' was deleted and substituted it with the phrase, ie, '*...it shall not be necessary to give such a person any opportunity of making representation on the penalty proposed'*? Did they mean the same thing or different things?

(ii) If the said constitutional amendment was held to be valid-and obviously so, since the court had not struck it down-then, what ostensible purpose would the furnishing of a copy of the inquiry report serve? Can the delinquent make a representation either on the findings of the inquiry or on the penalty proposed?

(iii) What would be the position, if, for instance, the disciplinary authority chooses to merely send a communication to the delinquent enclosing a copy of the inquiry report without disclosing the proposed punishment, in view of the fact that the court in Ramzan Khan upheld the 42nd amendment and confined its ruling to mere furnishing of a copy of the inquiry report, and nothing more? Would such a mechanical course pursued by the disciplinary authority, satisfy the requirements prescribed in Ramzan Khan?

(iv) Going by the observations of Misra CJI, to the effect—'where the disciplinary authority is the Inquiry Officer there is no report. He becomes the first assessing authority to consider the evidence directly for finding out whether the delinquent is guilty and liable to be punished (at p 34)'—what would be the position with regard to the right of delinquent to receive a copy of the report vis-`a-vis principles of natural justice, given the fact that there is no report at all in a situation where the disciplinary authority himself has conducted the inquiry?

(v) What quality of 'reasonability' can one look for in an invidious distinction drawn between an inquiry conducted by the disciplinary authority himself on the one hand, and the one conducted by someone other than the disciplinary authority on the other? How would it satisfy the requirement of 'equality' enshrined in Art 14, *if two employees of the same department dismissed in two different modes—one by an inquiry officer-cum-disciplinary authority, and the other by a disciplinary authority who is not the inquiry officer—knock at the doors of the court for justice?* How would the dynamics of the ratio propounded in *Ramzan Khan* operate to ensure the constitutional mandate of equality before law, in such an eventuality?

(vi) In the face of several authorities to the effect that the principles of natural justice do not supplant, but only supplement the law of the land, and that they could be applied only in the unoccupied interstices of law, what place could 'natural justice' possibly claim in the light of an express provision enshrined in Art. 311(2) ? Would the ratio of *Ramzan Khan* supplement Art 311 (2) or supplant it?

Answers to the above questions are too obvious to need a detailed discussion, which unfold the defective approach of Misra CJI. Once the right to 'show cause' is taken away, the supply of a copy, that too only, in cases where the enquiry was held by a person other than the disciplinary authority, renders the whole exercise otiose and reduces it to an '*empty and useless formality*'. To say the least, *the over-subtle distinction drawn by the learned Chief Justice, between an enquiry held by the disciplinary authority and the one held by someone else, is trite and obnoxious*. If the intention of the legislature were not to effect a fundamental change in Art 311(2) (as observed by him at p 34), then why should it go through the complex process of amending the Constitution? *It is wholly improper to presume that the Parliament was indulging in a futile and unproductive exercise while amending the Constitution in substantial terms by which, the requirement of issuing a show-cause notice was manifestly dispensed with*. The line of reasoning adopted by Misra CJI, in support of his conclusion that the '*deletion of second opportunity from the scheme of Article 311(2) of the Constitution has nothing to do with providing of a copy of the report to the delinquent in the matter of making his representation'* (at p 34) is unsound, perverse and without susbtance. *What was the 'representation' that the learned Chief Justice was referring to, and against what?* Is it against the proposed punishment!? Given the fact that the court limited its interpretation of the amended Article to the extent of furnishing a copy of the findings, and nothing more, *how can delinquent show cause, if the employer merely supplies a copy of the report with a one-line covering letter, without disclosing the proposed punishment?* That was the degree of absurdity that the learned Chief Justice had invented and imported into the decision-making process!

Turning to *ECIL*, the company, not being a statutory corporation, was not covered by the *ratio* of *Sukhdev Singh*,[31] notwithstanding the fact that the decision in *Sukhdev Singh* itself was replete with half-tones and lack of any judicial conviction on the part of Ray CJI and was wholly misconceived. Be that as it may, the facts of *ECIL* disclose that the respondent was working as a Senior Technical Officer, which *prima facie* implies that he was not a 'workman' u/s. 2(s) of IDA, and therefore the remedies provided under industrial law were not available to him. Secondly, assuming that he was a 'workman' for the sake of argument, whatever might be the view taken in *Ramzan Khan*, neither Art 311 nor the consequences of the said ruling could apply to it, for the reason that industrial employment is governed by a separate set of laws and regulations, which apply with as much vigour and force to industrial employees as do the Constitutional

provisions to public servants. This implies that the employee was required to invoke the machinery provided in IDA only. On the contrary, if the respondent fell outside the pale of the definition of 'workman', the only remedy available to him was to file a suit in the civil court. Article 311 and IDA operate in different fields with different schemes and objects in view, and address different classes of employees. To draw a foundational distinction between the two classes of employment, *if the workmen employed in an industry resort to strike, the employer can declare a lockout under s 24(3) of the ID Act in retaliation. While the public servants can also resort to a strike, can the Government even conceive of a 'lockout', not to speak of declaring it as a retaliatory measure?* Any attempt to mix up one with the other produces an absurd result of rendering a particular set of laws nugatory and *non est*. In *ECIL*, Sawant J, went on to state:

> ...it is only appropriate that the law laid down in *Mohd Ramzan Khan's* case (supra) should apply to employees in all establishments whether Government or non-Government, public or private. This will be the case whether there are rules governing the disciplinary proceeding or not and whether they expressly prohibit the furnishing of the copy of the report or are silent on the subject. Whatever the nature of punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the Inquiry Officer before the disciplinary authority records its findings on the charges levelled against him... (at p 178)

With great respect for the eminent judge, the exercise undertaken by him to extend Constitutional provisions meant for public servants to industrial employees is misplaced, uncalled for and is clearly wrong. *In the first place*, the interpretation placed on the amended Art 311(2) in *Ramzan Khan* is itself wholly misconceived, apart from disclosing an unnecessary trend on the part of the judiciary to undermine the constituent power of the Parliament, not to speak of the legislative power. *Secondly*, it is well settled that the principles of natural justice operate in areas not covered by law; and that they do not supplant the law of the land, but only supplement it;[32] that natural justice is not an unruly horse, no lurking landmine, not a judicial cure-all;[33] and that the principles of natural justice could only be applied in the unoccupied interstices of the statute unless there is a clear mandate to the contrary.[34] And, *lastly*, in the face of the above rulings coupled with an unambiguous phrase in the proviso to Art 311(2) to the effect: '*...it shall not be necessary to give such person any opportunity of making representation on the penalty proposed*', to hold that the 42nd amendment did not take away the right to receive a copy of the findings, militates against judicial decorum and decency, apart from constituting a patent transgression of the legitimate boundaries within which the Apex Court is mandated to operate. It was time and again pointed out by the Supreme Court in a series of decisions that industrial adjudication does not adopt a doctrinaire approach while dealing with industrial matters and adopts a realistic and pragmatic approach;[35] it is one thing to settle a dispute by agreement, which affects only the interest of the parties to the agreement; it is quite a different thing to lay down a rule which will have a wider application.[36]It is difficult to comprehend as to what the provocation was for the learned judge to adopt a cast-iron approach in a matter that was sharply focused rather than broadly based and, in the second, for laying down inflexible rules of universal application. With great deference, it is submitted that industrial law has its own set of norms under IE(SO) Central Rules and ID Act, and provide for a different set of remedies and reliefs; and that Art 311 has no application, whatsoever, to industrial employment. Both the decisions in *Ramzan Khan* and *ECIL* require review by a larger Bench and the correct law has to be laid down consistent with settled legal principles.[37]

In *SK Singh*, though the copy of the inquiry report was not supplied to the employee, he was asked by the High Court as to what prejudice he suffered on account of non-supply of the report to which he did not give any satisfactory reply. It was, therefore, held that prejudice caused to the delinquent by non-supply of the inquiry report must be specified and the order of punishment cannot be interfered with merely for non-supply of copy of inquiry report if no prejudice is caused due to such non-supply. Having stated the law, the court provided procedural guidelines to the tribunals and the courts. In all cases, where the inquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the tribunals or courts should cause the copy of the report to be furnished to him if he has not already secured it before coming to the tribunal or the court and then, the opportunity should be given to him to show how his case was prejudiced for non-supply of the report. If, after hearing the parties, the tribunal or the court comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, it should not interfere with the order of punishment and mechanically set aside the order of punishment merely because the report was not furnished to the employee. The tribunal or the court must apply their judicial mind to the question of quashing or upholding the order of punishment and state the reasons for its conclusion. If the court takes the view that furnishing of the report would have made a difference to the result in the case, then only should it set aside the order of punishment. The proper relief in such a case should be the direct reinstatement of the employee with liberty to the employer to proceed with the inquiry by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report.[38] In *VB Hiregowdar*, a two-judge bench of the court reiterated the holding of the Constitution Bench in *ECIL* cases that the decision in *Ramzan Khan's* case is of prospective application. In this case, the order of the disciplinary authority punishing the delinquent was passed on 10 April 1990 much before the judgment in *Ramzan Khan's* case. The law laid down in *Ramzan Khan's* case, therefore, had no application in this case.[39] In *Ram Kishan*, the Supreme Court observed:

> The purpose of the show-cause notice, in case of disagreement with the findings of the inquiry officer, is to enable the delinquent to show that the disciplinary authority is persuaded not to disagree with the conclusions reached by the inquiry officer for the reasons given in the inquiry report or he may offer additional reasons in support of the findings by the inquiry officer. In that situation, unless the disciplinary authority gives specific reasons in the show-cause notice on the basis of which the findings of the inquiry officer in that behalf is based, it would be difficult for the delinquent to satisfactorily give reasons to persuade the disciplinary authority to agree with the conclusions reached by the inquiry officer. In the absence of any ground or reason in the show-cause notice it amounts to an empty formality which would cause grave prejudice to the delinquent officer and would result in injustice to him. The mere fact that in the final order some reasons have been given to disagree with the conclusions reached by the disciplinary authority cannot cure the defect. [40]

In *PM Raju*, a single judge of the Madras High Court held that second show-cause notice was not necessary if there is no such provision in the standing orders.[41] Where the High Court ordered reinstatement of an employee, who was dismissed for securing employment on the basis of a forged certificate on the ground of non-furnishing of inquiry report before passing of the final order, the Supreme Court quashed the order of High Court and restored the punishment and held that the non-furnishing of inquiry report did not prejudice the workman in any way.[42] Failure to supply a copy of inquiry report to the delinquent does not by itself render the dismissal invalid. The labour court / tribunal should not mechanically set aside the order of punishment on that sole ground. It should be pleaded and shown by the delinquent as to how the non-supply of the report has prejudiced his case.[43] In *NTC (WBAB & O) Ltd*., Dharmadhikari J (for self and Pasayat J) of the Supreme Court held:

> We fail to appreciate the reasoning of the High Court in the instant case that in addition to the procedural infirmity of non-supply of enquiry report, there being non-compliance of clause 14 (4) (c) of Standing Order requiring grant of opportunity of hearing against proposed penalty, the employee has to be granted relief of reinstatement with full back wages and the employer can be given liberty to hold a de novo enquiry. (para 9). .. As stated by the High Court, we do not find that the language of clause 14(4)(c) is mandatory. In any case, non-compliance thereof cannot be held to be a more vitiating factor than non-supply of enquiry report. If the Constitution Bench of this Court in cases of non-supply of enquiry report directs the procedure to be adopted by allowing the employer to re-start the enquiry from the stage of supply of enquiry report without reinstating the employee, why such a course should not be directed to be adopted where the other grievance of the employee is denial of opportunity to show cause against proposed penalty. When the Court can direct a fresh enquiry from the stage of supply of enquiry report the next step in the enquiry of giving opportunity against the proposed penalty can also be directed to be taken. After the fresh enquiry is over from the stage of supply of enquiry report, the employee can be granted opportunity against proposed penalty in terms of clause 14(4)(c) of the Model Standing Order Rules. Consequential order, if any passed, shall abide the final result of the proceedings. As held in the case of *B. Karunakar and Ors*. (*supra*), if the employee is cleared of the charges and is reinstated, the disciplinary authority would be at liberty to decide according to law how it will treat the period from the date of dismissal till the period of reinstatement and the consequential benefits.[44] (para 10)

In *Plantation Division*, the issue was whether the non-supply of the copy of the findings of the Enquiry Officer constituted a violation of the principles of natural justice. Turning to facts, this was not a case falling within the ambit of Art 309 and the employees engaged in the Plantation Division were not public servants. Rejecting the contention that there was violation of the principles of natural justice on that count, Sinha J (for self and Hegde J) of the Supreme Court observed:

> In law, the concerned workmen do not enjoy any status as they are not the employees of Union of India and furthermore, their conditions of service, were not governed by any rule made under Article 309 of the Constitution. Services of the workmen were also not protected under Article 311 thereof. It has been contended before us that in terms of the extant rules governing the conditions of service of the workmen, a departmental appeal was maintainable against an order of the Disciplinary Authority. Presumably, such a remedy was provided with a view to enable the workmen to prefer an effective departmental appeal and only in that view of the matter, a copy of the enquiry report was supplied by the Appellant along with the order of the dismissal. (para 15). .. The workmen evidently did not avail the benefit of filing any departmental appeal. In such an appeal they could have shown as to how and in what manner and to what extent they were prejudiced by non-supply of a copy of the enquiry report. Had the workmen filed such an appeal, they could have furthermore demonstrated before the Appellate Authority that in terms of the rules and regulations governing their conditions of service, they were, as a matter of right, entitled to a copy of the enquiry report before an order of punishment is imposed upon them. (para 16). .. The principles of natural justice cannot be put in a strait-jacket formula. It must be viewed with flexibility. In a given case, where a deviation takes place as regard compliance of the principles of natural justice, the Court may insist upon proof of prejudice before setting aside the order impugned before it.[45] (para 17)

The above decision is a master-piece in so far as it places the legal position in proper perspective. This judicial correction was long overdue in the wake of the legal confusion created by the expansive approach of Sawant J in *Karunakar*, not to speak of the bankrupt decision rendered by RN Mishra CJI in *Ramzan Khan*, both which had contributed their own share to the judicial mess and ruled the roost for more than two decades. As rightly pointed out by Sinha J, the second show-cause notice coupled with the supply of a copy of the enquiry report serves two purposes, *i.e*., first, to point out whether the report was in order or whether it is baseless or perverse; and, second, whether the punishment proposed by the disciplinary authority is disproportionate. The delinquent employee can, on receipt of the show-cause notice along with the enquiry report, organise his defence before making an appeal to the appellate authority. But that facility of an internal appellate authority is expressly provided in the Fundamental and Supplementary Rules and/or Classification, Control and Appeal Rules, applicable to government employees governed by Arts 309 - 311 of the Constitution. Even a few public sector undertakings and public sector banks have a similar provision for internal appeal, before the employee can raise a dispute. But, as a general rule, neither the Model Standing Orders nor the Certified Standing Orders applicable to industrial undertakings, in general, and those in private sector, in particular, contemplate an appeal to an internal authority. The second most important point of difference is that, in the case of a public servant, even "reduction in grade", *i.e.*, reversion, is attracted by Art 311, whereas under the industrial law, the labour court or tribunal has no jurisdiction to entertain a dispute relating to any punishment short of dismissal. For example, s 11A clearly stipulates in terms "in the event of discharge or dismissal" and is silent on other punishments such as stoppage of increment, reversion to the next lower grade, *etc*. Viewed thus, Sawant J proceeded in a cavalier fashion in *Karunakar* and extended the scope of Art 311 so as to bring industrial undertakings, which are governed by the Standing Orders Act, into the fold of Art 311, though indirectly. Justice Sinha deserves full compliments for putting the record straight and clarifying the differential legal position as applicable to *public servants* versus *industrial workmen*.

In *Haryana SFC*, the issue of the non-supply of the report of the Enquiry Officer and its consequences had once again come up for the consideration of Supreme Court in the context of the Constitution Bench decision rendered in *ECIL v B Karunakar* (*supra*). Citing the observation made in that case to the effect that "*Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case*", Thakkar J (for self and Jain J) of the Supreme Court, cited several cases - Indian and foreign - and observed:

> It is settled law that principles of natural justice have to be complied with. One of the principles of natural justice is audi alteram partem ("Hear the other side"). But it is equally well settled that the concept `natural justice' is not a fixed one. It has meant many things to many writers, lawyers, jurists and systems of law. It has many colours, shades, shapes and forms. Rules of natural justice are not embodied rules and they cannot be imprisoned within the strait-jacket of a rigid formula.. .. it is clear that though supply of report of Inquiry Officer is part and parcel of natural justice and must be furnished to the delinquent- employee, failure to do so would not automatically result in quashing or setting aside of the order or the order being declared null and void. For that, the delinquent employee has to show `prejudice'. Unless he is able to show that non-supply of report of the Inquiry Officer has resulted in prejudice or miscarriage of justice, an order of punishment cannot be held to be vitiated. And whether prejudice had been caused to the delinquent- employee depends upon the facts and circumstances of each case and no rule of universal application can be laid down.[46] (Paras 25 & 47)

In *Ganga Yamuna Grameen Bank*, it was held that the issuance of a second show-cause notice to the delinquent workman, before imposing the punishment, is not part of common law principles of natural justice. Such a provision could be laid down by reason of a statute.[47] In *Sarva UP Gramin Bank*, the facts briefly were: The employee was charge-sheeted for fraud, misappropriation and irregularities in maintaining the records, *etc.*, and after enquiry followed by a personal hearing by the Chairman of the bank, imposed the punishment of reduction of his salary in six stages permanently. The employee challenged the action on the ground, inter alia, that the Bank committed a violation of the principles of natural justice in so far as he was not given the copy of the findings of the enquiry officer, which was upheld by the High Court. Quashing the order of the High Court, SS Nijjar J (for self and Sudershan Reddy J) of the Supreme Court cited the above passage from *Haryana State Financial Corporation*, and observed:

> We have examined the factual situation in this case elaborately to see as to whether any prejudice has been caused to the respondent. We are unable to accept the submissions of the learned counsel for the respondent that any prejudice has been actually caused. We are of the considered opinion that there has been no failure of justice in the facts and circumstances of this case by non-supply of the enquiry report to the respondent.[48]

Punishment and/or Final Disposal of the Case

Imposing punishment is the last stage in the disciplinary action proceedings against a delinquent workman. This stage

commences after the disciplinary authority has received the report of the inquiry officer, issued a show-cause notice to the delinquent workman, if any, and has received his response to such notice. Upon considering the gravity of the misconduct and the extenuating circumstances, if any, and also any other factor that may be relevant in the facts and circumstances of the case, the disciplinary authority has to decide the quantum of punishment that may be imposed on the delinquent.

(i) Types of Punishment

Broadly, in the area of industrial law, the punishments which an employer can impose, as a measure of a disciplinary action for an act of misconduct, on a workman are:

(a) Warning

(b) Fine

(c) Stoppage of or Withholding increment

(d) Demotion

(e) Suspension

(f) Discharge

(g) Dismissal from service

(a) Warning

Warning is a minor punishment which is administered to a workman in writing by the employer for some blameworthy act or omission. Though not identical, warning is analogous to 'censure' as administered to civil servants.[49]Since warning is a punishment, it is to be administered to a workman after giving him an opportunity to explain the act or omission alleged against him and after considering his explanation. However, as this punishment is of a minor nature, the procedure to be adopted for administering a warning need not be as elaborate as in the case of major punishments of 'discharge' and 'dismissal'. Though the penalty of warning does not materially affect the concerned workman, it can be a material factor to be taken into consideration in future disciplinary action against him. The past record or the previous punishment suffered by the delinquent employee though would be irrelevant and ought not to be used for finding him guilty of the charges levelled against him.[50] Yet it may be taken into consideration for deciding the quantum of punishment to be inflicted upon him.[51] If, however, the past record of a delinquent workman is to be taken into consideration, he would be entitled to offer his explanation concerning it.[52]

(b) Fine

Fine is a pecuniary punishment that may be inflicted by the employer against the workman for some blameworthy act or omission. The Standing Orders of some establishments provide for the imposition of fines in case of certain acts of misconduct. This power under the Standing Orders, however, is subject to s 8 of the Payment of Wages Act 1936 which reads:

(1) No fines shall be imposed on any employed person save in respect of such acts and omissions on his part as the employer, with the previous approval of the appropriate government or of the prescribed authority, may have specified by notice under sub-section (2).

(2) A notice specifying such acts and omissions shall be exhibited in the prescribed manner on the premises in which the employment is carried on or in the case of persons employed upon a railway (otherwise than a factory), at the prescribed place or places.

(3) No fine shall be imposed on any employed person until he has been given an opportunity of showing cause against the fine, or otherwise than in accordance with such procedure as may be prescribed for imposition of fines.

(4) The total amount of fine which may be imposed in anyone wage-period on any employed person shall not exceed an amount equal to three per cent. of the wages payable to him.in respect of that wage-period.

(5) No fine shall be imposed on any employed person who is under the age of fifteen years.

(6) No fine imposed on any employed person shall be recovered from him by instalments or after the expiry of ninety days from the day on which it was imposed.

(7) Every fine shall be deemed to have been imposed on the day of the act or omission in respect of which it was imposed.

(8) All fines and all realizations thereof shall be recorded in the register to be kept by the person responsible for the payment of wages under section 3 in such form as may be prescribed; and all such realizations shall be applied only to such purposes beneficial to the persons employed in the factory or establishment as are approved by the prescribed authority.

Explanation—When the persons employed upon or in any railway, factory or industrial or other establishment are part only of a staff employed under the same management, all such realizations may be credited to a common fund maintained for the staff as a whole, provided that the fund shall be applied only to such purposes as are approved by the prescribed authority.

(c) Stoppage of, or Withholding, Increments

In case of graded scales, increments are automatic till the efficiency bar or the maximum of a scale is reached. Withholding increments in such a case is a punishment.[53] This punishment materially affects the workman concerned in his earning. Hence, this punishment can be inflicted only for proved inefficiency or acts of misconduct, such as insubordination or habitual negligence *etc.* after giving him a fair opportunity to explain his conduct. In *State Bank of India,* the Madras High Court held that in terms of the Shastra and Desai awards increment is earned by an employee as a matter of course. The punishment of stopping increment can only be inflicted after the workman has been found guilty of the act of misconduct alleged against him. Unless a workman is found guilty he cannot be said to be guilty of proved misconduct. Therefore, the increment can be stopped only when it falls due after the workman has been found guilty in a proper departmental inquiry.[54]

(d) Reversion / Demotion

Reversion or Demotion is the negative of promotion whereby not only the delinquent employee is not promoted to the next job, but he is also downgraded from the present job and is reduced to a lower cadre of service. This punishment is somewhat analogous to 'reduction in rank' as envisaged by Art 311 of the Constitution. It is severer in degree than the foregoing punishments. This punishment may be inflicted in accordance with the degree of gravity of the misconduct proved against the delinquent workman. The procedure to be followed for administering this punishment is the same as in the case of 'discharge' and 'dismissal'. In *RN Kulkarni*, the facts were: the employer terminated the services of an employee from the date of the order, but having regard to his prior career gave him an option of serving as a mechanic in the garage department on the same salary, provided he exercised the option by a particular date. The employee did not resume his duties. The labour court held that the order of termination, in fact, amounted to an order of demotion and not an order of discharge. The labour court ordered further inquiry into the question as to whether the order was mala fide. In the proceedings in a writ petition challenging the award of the labour court on the ground that the order was not an order of demotion as found by the labour court, the High Court observed that no doubt the impugned order contained an option that if the workman so desired he could be reappointed as a mechanic in the garage department provided the option was exercised by the specified date and if the option, in fact, had been exercised by the workman and had become effective, it could have been possible to argue that, from a practical point of view, it amounted to an order of demotion, but it was clear from the record that the workman did not report for accepting the re-appointment. It was, therefore, held that the actual effect of the order was that the services of the workman had been ended either because he did not avail himself of the option or he went after the appointed date and time and was not allowed to avail of the option. Hence, the order was not an order of demotion but was of the actual termination of service. Reverting an employee on probation to his original post, for unsatisfactory work will not constitute demotion because keeping an employee on probation is only to find out whether he is suitable for the post or not.[55] It is submitted that this case was rightly decided.

(e) Suspension

Suspension in industrial law is ordinarily of two kinds, *via*, (a) suspension as an interim measure pending a domestic inquiry; and (b) suspension as a substantive punishment. *Suspension 'pending inquiry'* has already been discussed under the head 'procedure of disciplinary action'. *Suspension 'as a punishment'* can be inflicted on a workman for a specified period as permissible under the contract of service or the Standing Orders after finding him guilty of the misconduct committed by him. Suspension by way of punishment under the relevant Standing Order would not alter the character of suspension as a temporary action as distinct from the permanent measure of termination of employment.[56]The punishment of suspension would not tantamount to lockout as defined in s 2(1) of the Act. The effect of the punishment of suspension is that the relationship of the master and servant is temporarily suspended with the consequence that the servant is not bound to render service and the master is not bound to pay.[57]In other words, the workman will not be entitled to wages for the period of suspension. The Madras High Court held that suspension amounts to non-employment of a worker and in

relation to such non-employment when alleged to be devoid of valid reasons, an industrial dispute can be raised. However, before a dispute can be raised, it should not have remained an individual dispute; it should have acquired the character of an industrial dispute by being sponsored by a sufficient number of workmen, as suspension not being 'discharge, dismissal, retrenchment or otherwise termination of service' of the employee, would not fall within the purview of s 2A of Industrial Disputes Act.[58]

Retrospective suspension:

In the language of Chakravarti CJ of the Calcutta High Court, 'there can be no meaning in suspending a man from working during a period when the period has passed and he has already worked, or suspending a man from occupying a position or holding a privilege in the past when he has already occupied or held it'.[59] Nevertheless, where an order of suspension can be split into two periods of time, one retrospective and the other prospective, and the retrospective part can be severed from the prospective part, though the retrospective part would be invalid, the prospective part would be perfectly valid and shall operate upon its own strength.[60] The question, however, has to be decided on the facts of each case. Suspension, like the other punishments, *i.e.*, dismissal or discharge from service with retrospective effect has always been condemned by courts as illegal and invalid.[61]

(f) Discharge

The punishments discussed earlier are inflicted as punishment for an act of misconduct while the workman continues in the employment of the employer. These punishments are generally known as 'minor punishments' in the parlance of industrial law. 'Discharge' and 'dismissal' of a workman from service as punishment are known as 'major punishments'. In these punishments, the contract of employment is determined and the employer-employee relationship ceases to exist. Discharge as punishment is milder than the extreme punishment of dismissal though like dismissal, it also puts the contract of service to an end. In case of dismissal, the employee loses a number of benefits whereas in case of discharge only the contract of service is terminated from a particular date and the employee is not deprived of the benefits accruing to him up to that date.[62] The expressions 'dismissal' and 'discharge' as measures of punishment for misconduct, in industrial law have acquired different connotations and one cannot be equated the one with the other,[63] though to a certain extent they overlap. (For further discussion see next topic ("Dismissal")

(g) Dismissal

The dictionary meaning of the word 'dismissal' is 'to let go; to relieve from duty'. In ordinary parlance, it means nothing more or less than termination of a person's office. Dismissal is the ultimate and most drastic disciplinary sanction which may be inflicted by an employer for an act of misconduct against an industrial workman. Hence, if there is no misconduct, there can be no punishment. Termination of service therefore, which is not by way of punishment would not tantamount to dismissal. In the words of Gajendragadkar J:

> Punishment is, therefore, correlated to misconduct, both in its positive and negative aspects. That is to say, punishment could be sustained if there was misconduct and could not be meted out if there was no misconduct.[64]

In *London Chronicle*, the facts disclosed that the employee obeyed her immediate departmental head instead of the managing director of the company. In view of the fact that there were conflicting orders, only one of which could be obeyed, the disobedience of the managing director's order in the circumstance of the case was held to be excusable and the dismissal of the employee was held to be unjustified.[65] The breach of an important term now-a-days will not, however, necessarily justify the action of dismissal if it occurs in such circumstances that the employee has a reasonable excuse or justification for his conduct. However, the breach of certain terms *prima facie* will justify the order of dismissal, *eg*, the obligation not to steal one's employer's property; the obligation not to deal with his property dishonestly; not to damage the property or the reputation of the employer deliberately; the obligation to obey reasonable and lawful orders *etc* but single and isolated acts of misconduct are somewhat less likely to justify dismissal of a workman than is a persistent pattern of misconduct.[66]In case of single or isolated act of misconduct a record of unsatisfactory behaviour may tip the balance justifying the dismissal,[67] but what is to be regarded as an important term will depend upon the nature of the business or nature and the position of the workman,[68] and the test to be applied, therefore, must vary with the nature of the business and the position held by the employee. Misconduct inside the premises of the establishment is likely to give rise to breach of an obligation entitling the employer to dismiss the workman than the misconduct outside the work-place or outside working hours; but dependent on the terms of the contract and sometimes on the position of the employee, misconduct outside the work-place or working hours may exceptionally justify the action of dismissal.[69]

Likewise, though a private quarrel between an employee and a stranger may not constitute a misconduct justifying the dismissal, it cannot be reasonably disputed that acts which are subversive of discipline amongst employees or misconduct

or misbehaviour by an employee which is directed against another employee of the concern may, in certain circumstances, constitute misconduct so as to form the basis of an order of dismissal or discharge. It is not necessary that the victim employee and the delinquent workman should be engaged in the performance of their official duties when the act which is the subject matter of misconduct is stated to have been committed. It is sufficient that both are employees of the same concern and the misconduct is directed against the former while he is acting in the discharge of the duties imposed on him by virtue of his office.[70]The question whether an act of misconduct is sufficient to justify dismissal is not dependent upon the proof that such misconduct has in fact serious consequences; the test is the nature of the misconduct itself.[71] In deciding whether in a particular case, an act of misconduct is serious enough to justify dismissal, the matter needs to be examined in the light of all the surrounding circumstances.[72] The tribunal has to consider whether in the background of the circumstances that transpired, the misconduct committed by the concerned workman is so grave as to justify extreme penalty of discharge or dismissal if imposed on him.[73] It is usually only possible to guess the answer to the question, 'Does the misconduct in this case, justify dismissal?' The more serious the misconduct, the more likely it is that an adjudicator will regard it as justifying dismissal, the more trivial the misconduct, the less likely is an adjudicator to uphold the right of dismissal.[74]

The employer has a right recognised in law to dismiss his servant for an act of misconduct committed by him but he is not bound to dismiss him. That right to dismiss is recognised in law in order to protect the interests of the master. The master himself is the best judge of the circumstances under which he may choose or elect to exercise or refrain from exercising that power or right of dismissal. He can waive that right after condoning the misconduct but he cannot exercise that right after condoning the misconduct. The choice, election, condonation as well as the waiver may either be express or implied, depending upon the particular circumstances of each case but they must be unequivocal, unqualified and unconditional to be effective, operative and valid.[75] The mere acceptance of terminal benefits such as provident fund and gratuity cannot be considered as acquiescence on the part of a dismissed workman.[76] It is well settled that there can be no dismissal or discharge made with retrospective effect.[77] Such dismissal cannot be sustained in law, but this principle is subject to the condition that if such a dismissal be made according to the terms of service, either contractual or statutory; for instance, contained in the Standing Orders, such a dismissal is within the competence of the employer. Where the Standing Orders of a company provide that a workman found guilty of misconduct might be dismissed with effect from the date of suspension, an order of dismissal so made must be held to be valid.[78] However, whether the retrospective dismissal is justified or not would depend upon the peculiar circumstances of a case.[79] The Gujarat High Court in *RM Parmar*, has laid down the following guidelines in the matter of inflicting punishment particularly the punishment of discharge and dismissal:

1. In a disciplinary proceeding for an alleged fault of an employee, punishment is imposed not in order to seek retribution or to give vent to feelings of wrath.
2. The main purpose of a punishment is to correct the fault of the employee concerned by making him more alert in the future and to hold out of warning to the other employees to be careful in the discharge of their duties so that they do not expose themselves to similar punishment. And the approach to be made is the approach parents make towards an erring or misguided child.
3. It is not expedient in the interest of the administration to visit every employee against whom a fault is established with the penalty of dismissal and to get rid of him. It would be counter-productive to do so for it would be futile to expect to recruit employees who are so perfect that they would never commit any fault.
4. In order not to attract the charge of arbitrariness it has to be ensured that the penalty imposed is commensurate with the magnitude of the fault. Surely one cannot rationally or justly impose the same penalty for giving a slap as one would impose for homicide.
5. When different categories of penalties can be imposed in respect of the alleged fault, one of which is dismissal from service, the disciplinary authority perforce is required to consult himself for selecting the most appropriate penalty from out of the range of penalties available that can be imposed, having regard to the nature, content and gravity of the default. Unless the disciplinary authority reaches the conclusion that having regard to the nature, content and magnitude of the fault committed by the employee concerned, it would be absolutely unsafe to retain him in service, the maximum penalty of dismissal cannot be imposed. If a lesser penalty can be imposed without seriously jeopardising the interest of the employer the disciplinary authority cannot impose the maximum penalty of dismissal from service. He is bound to ask the inner voice and rational faculty why a lesser penalty cannot be imposed.
6. It cannot be overlooked that by and large it is because the maximum penalty is imposed and total ruination stares one in the eyes that the employee concerned is obliged to approach the court and avail of the costly and time-consuming machinery to challenge in desperation the order passed by the disciplinary authority. If a lesser penalty was imposed, he

might not have been obliged to take recourse to costly legal proceedings which result in loss of public time and also result in considerable hardship and misery to the employee concerned.

7. When the disciplinary proceedings end in favour of the employee the employer has often to pay backwages say for about five years without being able to take work from the employee concerned. On the other hand, the employee concerned would have had to suffer economic misery and mental torture for all these years. Even the misery of being obliged to remain idle without work would constitute an unbearable burden. And when the curtain drops everyone is left with a bitter taste in the mouth. All because the extreme penalty of dismissal or removal is imposed instead of a lighter one.

8. Every harsh order or removal from service creates bitterness and arouses feeling of antagonism in the collective mind of the workers and gives rise to a feeling of class conflict. It does more harm than good to the employer as also to the society.

9. Taking of a petty article by a worker in a moment of weakness when he yields to a temptation does not call for an extreme penalty of dismissal from service. More particularly, when he does not hold a sensitive post of trust (pilferage by a cashier or by a store-keeper from the stores in his charge, for instance, may be viewed with seriousness). A worker brought up and living in an atmosphere of poverty and want when faced with temptation, ought not to, but may, yield to it in a moment of weakness. It cannot be approved, but it can certainly be understood particularly in an age when even the rich commit economic offences to get richer and do so by and large with impunity (and even tax evasion or possession of black money is not considered to be dishonourable by and large). A penalty of removal from service is therefore not called for when a poor worker yields to a momentary temptation and commits an offence which often passes under the name of kleptomania when committed by the rich.[80]

Later, in *Jamnadas Becharbhai*, the High Court has referred to the rider added by it in proposition no 9 to the effect that when an employee holding a sensitive post of trust has been dismissed from service, the matter may have to be viewed in a different light, for instance, pilferage by a cashier or a store-keeper from the stores in his charge. But the rider is not to be found in the report of the case. In this case, the court sought to elaborate that rider by adding a case of misappropriation by a bus conductor who has collected fare from passengers but has failed to issue tickets to them. In such a situation the adjudicator can direct that the offender should be absorbed in some other post which does not involve daily handling of money etc depending upon the facts and circumstances of the case. The adjudicator can exercise his jurisdiction in deciding the issue having regard to the facts and circumstances of each case and the demands of the situation in the context of each matter. In the facts and circumstances of this case, the court held that the reinstatement of the bus conductor who had collected fare from the passengers and pocketed the same, was not justified by the labour court to order the reinstatement of the workman and, remanded the case to the labour court for a fresh decision.[81] Another Division Bench of the same High Court in *Hussainmiya Chandmiya*, observed that in cases of gross misconduct, the most appropriate punishment would be termination of service and it would be a mockery of justice to brand such an order as not justified and substitute it by an order under s 11A. In this case, the workman who was a watchman working in the municipal corporation was convicted under s 420 of the Indian Penal Code for having swindled a substantial amount aggregating to about Rs 25,000 from poor and innocent citizens by duping them on the pretext that by virtue of his employment, he was in a position to secure for them residential accommodation belonging to the corporation at a subsidised rent. After his conviction, he was dismissed from service as a measure of disciplinary action. The court held that in this fact situation the order could not be said to be 'unjustified' and the order of the labour court reinstating him was set aside being arbitrary and whimsical.[82]

In *T Seeralan*, a store attender in the canteen of the employer company, who had put in 17 years of unblemished service, was dismissed from service for the proved misconduct of theft of canteen coupons of the value of Rs. 24.48/-. The labourcourt modified the punishment of dismissal to termination of service and further directed the management to pay one month's salary to the workman. In a writ petition against the award of the tribunal, a single judge of the Madras High Court held that the plea for reinstatement of the workman was untenable and the punishment imposed was on the concessional side because instead of prosecuting the workman under the Indian Penal Code, the company contented itself only by taking disciplinary action by holding a domestic inquiry against him. In this situation, the court felt that there was little scope for generosity to be shown, or to bring into existence minor punishment for such derelictions. The learned judge observed that for the misconduct which is a penal offence, it would be against the interest of the other workmen and industrial development, if adequate punishment is not imposed when the offence is established. Furthermore, there is very little scope for any generosity to be shown or to bring into existence minor punishments for such derelictions. Committing theft had been considered as penal offence in the interest of society to maintain law and order in the country and to strike out standards, when they occur in industries, would be detrimental to the interests of the nation, if a different approach is made mainly because he is a workman under ID Act.[83]

61 *Powari Tea Estate vMK Barkataki* (1965) 2 LLJ 102 [LNIND 1964 SC 299] (SC), per Gajendragadkar J.

62 *Rohtas Industries Ltd v Ali Hasan* (1963) 1 LLJ 253 [LNIND 1962 SC 266] (SC), per Gajendragadkar J.

63 *Anil Kumar v Presiding Officer, LC, Punjab* (1986) 1 LLJ 101 [LNIND 1985 SC 191]-02 (SC), per Desai J.

64 *Khardah & Co Ltd v Workmen* (1963) 2 LLJ 452 [LNIND 1963 SC 138], 457 (SC), per Gajendragadkar J.

65 *Central Bank of India v Karunamoy Banerjee* (1967) 2 LLJ 739 [LNIND 1967 SC 235], 744 (SC), per Vaidialingam J.

66 *Biosahabi Tea Estate v PO, LC*, 1981 Lab IC 557, 566 (Gau) (DB), per Lahiri J.

67 *Andhra Handloom WCS Ltd v LC* 1976 Lab IC 932, 934 (AP), per Venkatarama Sastry J.

68 *State Bank of Bikaner & Jaipur v JS Khadgawat* 1987 Lab IC 112, 116-17 (Raj) (DB), per Lodha J.

69 *Madikal Service Co-op Bank Ltd v LC* (1988) 2 LLJ 49, 53 (Ker), per Bhat J.

70 *Mangal Sen v State of Uttar Pradesh*, (1992) 1 LLJ 179, 181 (All), per BN Misra J.

71 *Sasa Musa Sugar Works Pvt Ltd v Shobrati Khan* (1959) 2 LLJ 388 [LNIND 1959 SC 79], 393 (SC) : AIR 1959 SC 923 [LNIND 1959 SC 79], per Wanchoo J.

72 *Workmen of Motipur Sugar Factory v Mgmt* (1965) 2 LLJ 162 [LNIND 1965 SC 109] (SC) : AIR 1965 SC 1803 [LNIND 1965 SC 109]. per Wanchoo J.

73 *State Bank of India v RK Jain* (1971) 2 LLJ 599 [LNIND 1971 SC 481]. 613 (SC) : AIR 1972 SC 136 [LNIND 1971 SC 481]: 1972 Lab IC 13 [LNIND 1971 SC 481] : (1972) 4 SCC 304 [LNIND 1971 SC 481], per Vaidialingam J.

74 *Delhi Cloth & General Mills Co Ltd v Ludh Budh Singh* (1972) 1 LLJ 180 [LNIND 1972 SC 17], 194-96 (SC), per Vaidialingam J.

75 *Workmen of Firestone TRCI Ltd v Mgmt* (1973) 1 LLJ 278 [LNIND 1972 SC 133] (SC) : AIR 1973 SC 1227 [LNIND 1973 SC 430]: [1973] (26) FLR 359 : (1973) 1 SCC 813 [LNIND 1973 SC 430] per Vaidialingam J.

76 *Makhan Singh v Narainpura CASS Ltd* 1987 Lab IC 1631 [LNIND 1987 SC 497] (SC), per Venkatramiah J.

77 *R Khichrolia v MPSCM Federation Ltd* (2002) 4 LLN 705 (MP), per Mishra J.

78 *Bharath Electronics Ltd v K Kasi* (1987) 2 LLJ 203 (Kant), per Rama Jois J.

79 *Capstan Meters (India) Ltd v Judge, LC* (1991) 2 LLJ 290 (Raj), per Sharma J.

80 *Central Bank of India v* C *Bernard* [1991] 78 FJR (BC), per Ahmadi J.

81 *Associated Cement Co Ltd v Workmen* (1963) 2 LLJ 396 [LNIND 1963 SC 151], 399 (SC), per Gajendragadkar J.

82 *Meenglas Tea Estate v Workmen* (1963) 2 LLJ 392 [LNIND 1963 SC 50] (SC), per Hidayatullah J.

83 *DJ Warkari v KV Karanjkar* (1980) 2 LLJ 270 (Bom) (DB), per Chandurkar J.

84 *Philips India Ltd v Fifth IT* 1978 Lab IC (NOC) 115 (Cal) (DB).

85 *Manak Lal v Prem Chand* AIR 1957 SC 425 [LNIND 1957 SC 154], per Gajendragadkar J.

86 *Workmen of Madura Co Ltd v LC* (1966) 1 LLJ 498 (Ker), per KK Mathew J.

87 *PH Kalyani v Air France* (1963) 1 LLJ 679 [LNIND 1963 SC 45] (SC) : AIR 1963 SC 1756 [LNIND 1963 SC 45], per Wanchoo J.

88 *Golam Rasul v Public Service Commission* (1963) 2 LLJ 174, 176 (Cal), per BN Banerjee J.

89 *Superintendent, Kaliyar Estate v* O *Kuriakko* (1971) 1 LLJ 83, 85 (Ker), per Issac J.

90 *Workman of Madura Co Ltd v LC* (1966) 1 LLJ 498, 501 (Ker), per Mathew J.

91 *Ram Bilash Goel v Mgmt of Lakwa Tea Estate* 1981 Lab IC 1640, 1644 (Gau), per Saikia J.

92 *Workmen, Indian Airlines Corpn v Union of India* 1984 Lab IC NOC 123 (Cal), per MN Roy J.

93 *Delhi Cloth and General Mills Co Ltd v LC* (1970) 1 LLJ 23 [LNIND 1969 SC 247],26 (SC), per Shah J.

94 *Ajit Singh v Kirpal Singh* 1973 Lab IC 376, 380 (Del), per VD Misra J.

95 *Jessop & Co Ltd v Fifth IT* 1974 Lab IC 522,526 (Cal) (DB), per Sabyasachi Mukharji J.

96 *Sridharan Motor Service v IT* (1959) 1 LLJ 380 (Mad), per Balakrishna Ayyar J.

97 *Shankar S. Ambedkar v Shakti Insulated Wires Pvt Ltd* (I 988) 2 LLJ 416-17 (Bom) (DB), per Vaze J.

98 *Saran Motors Pvt Ltd v Vishwanath* (1964) 2 LLJ 139 [LNIND 1964 SC 113] (SC), per Gajendragakar J.

99 *N Rarichan v RK Venu Nair* 1973 Lab IC 536, 538 (Ker), per Govindan Nair J.

1 *Statesman Pvt Ltd v HR Deb* (1962) 1 LLJ 733, 736 (Cal), per BN Banerjee J.

2 *Mgmt. of Dhanalakshmi Mills Pvt Ltd v TV Balakrishnan* 1977 Lab IC 1469 -70 (Mad), per Mohan J.

3 *PM Raju v PO, Le* (2001) 4 LLN 903 (Mad), per Raviraja Pandian J.

4 *Workmen of Lambabari Tea Estate v Mgmt* (1966) 2 LLJ 315 [LNIND 1965 SC 295], 317 (SC), per Hidayatullah J.

5 *Associated Cement Companies Ltd v Workmen* (1963) 2 LLJ 396 [LNIND 1963 SC 151] (SC), per Gajendragadkar J.

6 *Doomur Dullang Tea Estate v Workmen* CA No 516 of 1966 (SC), per Vaidialingam J.

7 *SRangarajan v Srirangamjanopakara Bank Ltd* (1962) 2 LLJ 482 [LNIND 1962 MAD 142] (Mad), per Veeraswami J.

8 *Andhra Scientific Co Ltd v A Seshagiri Rao* (1961) 2 LLJ 117 [LNIND 1960 SC 340] (SC), per Das Gupta J.

9 *Meenglas Tea Estate v Workmen* (1963) 2 LLJ 392 [LNIND 1963 SC 50] (SC) : AIR 1963 SC 1719 [LNIND 1963 SC 50], per Hidayatullah J.

10 *Workmen of Lambabari Tea Estate v Mgmt*, (1966) 2 LLJ 315 [LNIND 1965 SC 295], 317 (SC) : AIR 1987 SC 670 [LNIND 1987 SC 44]: [1987] (1) SCALE 53 : (1987) 1 SCC 542 [LNIND 1987 SC 44], per Hidayatullah J.

11 *DJ Warkari v KV Karanjkar* (1980) 2 LLJ 270 (Bom) (DB), per Chandurkar J.

12 *Associated EIM Co P Ltd v Second LC* 1969 Lab IC 1262 (Cal), per Acun K Mukherjea J.

13 *Associated Cement Co Ltd v Workmen* (1963) 2 LLJ 396 [LNIND 1963 SC 151], 400 (SC), per Gajendragadkar J.

14 *Ananda Bazar Patrika Pvt Ltd v Employees* (1963) 2 LLJ 429 [LNIND 1963 SC 147] (SC), per Gajendragadkar J.

15 *Sheo Sampat Lal v State of UP* 1983 Lab IC 324, 326 (All), per TS Misra J.

16 *Workmen in Buckingham & Carnatic Mills v Mgmt* (1970) 1 LLJ 26 [LNIND 1969 SC 238], 28 (SC) : 1969 (1) UJ 494, er Vaidialingam J.

17 *Tata Engineering and Locomotive Co Ltd v SC Prasad* (1969) 2 LLJ 799 [LNIND 1969 SC 114], 809 (SC) : (1969) 3 SCC 372 [LNIND 1969 SC 114], per Shelat J.

18 *Pravin Rati Lal Dudhara v Municipal Corpn of Gtr. Bombay* (1996) 2 LLJ 529 [LNIND 1995 SC 1115], 533 (Born), per Dhanuka J.

19 *Shyam Bahadur Tripathi v UP Public Service Tribunal* (1997) 2 LLJ 920 -21 (SC) : (1997) 2 SCC 251.

20 *Woodbriar & Sussex Estates v Workers* (1960) 2 LLJ 673 (Mad), per Ramachandra Ayyar J.

21 *Tannery & Footwear Corpn of India Ltd v State of UP* 1979 Lab IC 1434, 1436 (All), per BD Agrawala J.

22 *Boisahabi Tea Estate v PO, LC* 1981 Lab IC 557, 563 (Gau) (DB), per Lahiri J.

23 *Powari Tea Estate v MK Barkataki* (1965) 2 LLJ 102 [LNIND 1964 SC 299], 104 (SC), per Gajendragakar CJI.

24 *Khardah & Co Ltd v Workmen* (1963) 2 LLJ 452 [LNIND 1963 SC 138] (SC), per Gajendragadkar J.

25 Cf, *State of Gujarat v Patel Ranghavnatha* AIR 1969 SC 1297 [LNIND 1969 SC 177], 1301, per Sikri J.

26 *GAnandam v Tamil Nadu Electricity Board* (1996) 2 LLJ 1198 [LNIND 1996 MAD 623], 1200 (Mad), per Wahab J.

27 *Jagdishmal Bhansali v UIL Co Ltd* (1995) 2 LLJ 209, per Chopra J.

28 *Uma Shankar Yadav v Registrar of Coop Societies* (1993) 1 LLJ 424 [LNIND 1992 ALL 204]-25 (All), per Katju J.

29 *Associated Cement Companies Ltd v Workmen* (1963) 2 LLJ 396 [LNIND 1963 SC 151], 400-01 (SC), per Gajendragadkar J.

30 *Goodyear India Ltd v IT* 1968 Lab IC 1599, 1603-04 (P&H), per Tek Chand J.

31 *Associated Cement Companies Ltd v Workmen* (1963) 2 LLJ 396 [LNIND 1963 SC 151], 400-01 (SC), per Gajendragadkar J.

32 *S Rangarajan v Srirangam Janopakara Bank Ltd* (1962) 2 LLJ 482 [LNIND 1962 MAD 142] (Mad), per Veeraswami J.

33 *Superintendent, Kaliyar Estate v O Kuriakko* (1971) 1 LLJ 83, 85 (Ker), per Issac J.

34 *Motor Industries Co Ltd v Shaikh Mohammed* 1978 Lab I C 1335(Kant), per Rama Jois J.

35 *GMcKenzie & Co Ltd v Workmen* (1959) 1 LLJ 285 [LNIND 1958 SC 131] (SC) : AIR 1959 SC 389 [LNIND 1958 SC 131], per Kapur J.

36 *Bata Shoe Co Pvt Ltd v DN Ganguly* (1961) 1 LLJ 303 [LNIND 1960 SC 345] (SC) : AIR 1961 SC 1158 [LNIND 1960 SC 345], per Wanchoo J.

37 *Royal Printing Works v IT* (1959) 2 LLJ 619 (Mad), per Balakrishan Ayyar J.

38 *Tandur and Navandgi SQ Pvt Ltd v Workmen* (1964) 1 LLJ 737 [LNIND 1963 SC 249], 740 (SC), per Gajendragadkar J.

39 *Tata Engineering & Locomotive Co Ltd v SC Prasad* (1969) 2 LLJ 799 [LNIND 1969 SC 114], 809 (SC), per Shelat J.

40 *Board of Trustees of Port of Bombay v Dilipkumar R Nadkarni* (1983) 1 LLJ 1 [LNIND 1982 SC 167], 4 (SC), per Desai J.

41 *Standard Pottery Works v Standard PWE Union* (1981) 2 LLJ 280 (Ker), per Vadakkal J.

42 *N Kalindi v Tata Locomotive & Engineering Co. Ltd.* (1960) 2 LLJ 228 [LNIND 1960 SC 95] (SC) : AIR 1960 SC 914 [LNIND 1960 SC 95], per Das Gupta J.

43 *Brooke Bond (I) Ltd v Subba Raman* (1961) 2 LLJ 417 [LNIND 1961 SC 419] (SC), per Wanchoo J.

44 *Abdul Khader v LC* 1988 Lab IC 785 -86 (AP), per PA Choudhury J.

45 *Dunlop Rubber Co (I) Ltd v Workmen* (1965) 1 LLJ 426 [LNIND 1964 SC 318], 430-31 (SC) : AIR 1965 SC 1392 [LNIND 1964 SC 318], per Hidayatullah J.

46 *Board of Trustees of Port of Bombay v Dilipkumar R Nadkarni* (I983) 1 LLJ 1, 4 (SC), per Desai J.

47 *Pett v Greyhound Racing Assn Ltd* [1968] 2 All ER 545, 549 (CA), per Lord MR Denning.

48 Workmen *of Madura Co Ltd v LC* (1966) 1 LLJ 498, 501 (Ker), per Mathew J.

49 *Kesoram Cotton Milts Ltd v Gangadhar* (1963) 2 LLJ 371 [LNIND 1963 SC 95], 380 (SC), per Wanchoo J.

50 Cf *Pett v Greyhound Racing Assn Ltd* [1968] 2 All ER 545,549 (CA), per Lord MR Denning.

51 *Board of Trustees of Port of Bombay v DR Nadkarni* (1983) 1 LLJ 1 [LNIND 1982 SC 167],4-6 (SC) : AIR 1983 SC 109 [LNIND 1982 SC 167]: 1983 (2) Bom CR 334 : 1983 MPLJ 1 (SC) : 1982 (2) SCALE 1097 [LNIND 1982 SC 167] : (1983) 1 SCC 124 [LNIND 1982 SC 167] : [1983] 1 SCR 828 [LNIND 1982 SC 167], per Desai J.

52 *Director General of Post & Telegraphs v NG Majumdar* (1974) 2 LLJ 44 (Cal) (DB), per AK Sinha J.

53 *India Photographic Co Ltd v Saumitra Mohan Kumar* 1984 Lab IC 42,46 (Cal) (DB), per Anil K Sen J.

54 *A Veeman v Paramakudi Coop Urban Bank Ltd* (1990) 1 LLJ 395, 397 (Mad), per Nainar Sundaram J.

55 *Harinarayan Srivastav v United Commercial Bank* (1997) 3 LLN 56 (SC).

56 *Bharat Petroleum Corpn Ltd v MGK Union* (1999) 1 LLN 654 (SC).

57 *BV Nagarajachar v PO, CGIT* (2001) 1 LLN 583 (Kant), per Datta J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

[S. 11A. Power of Labour Courts, Tribunals and National Tribunals to give Appropriate Relief in case of Discharge or Dismissal of Workmen.(

(ii) Disciplinary Authority

The power to discharge or dismiss a workman from service, vests in the person who has the power to appoint workmen as a measure of disciplinary punishment. In other words, such person is the competent disciplinary authority in that behalf but the general principle that the service of a workman can be terminated only by the person who is the appointing authority does not mean that the same person should have been in existence on the date of termination of service. What has to be seen is as to who is the appointing authority for the particular post in question at the relevant time.[84] An order passed by an authority superior to the appointing authority, in view of the fact that the person who was the appointing authority was a witness in the inquiry proceedings, would be perfectly valid.[85] For instance, in *Balbir Chand*, the Supreme Court rejected the contention of the employee that the order of dismissal passed against him by the managing director who was the highest authority in the hierarchy of the corporation was invalid because such order could only be passed by the zonal manager, who was the appointing and disciplinary authority. The court observed: 'It is now a well-settled legal position that an authority lower than the appointing authority cannot take any decision in the matter of disciplinary action. But there is no prohibition in law that the higher authority should not take decision or impose the penalty as the primary authority in the matter of disciplinary action.' It is relevant to note that though an inquiry officer need not necessarily be an officer of the company and it is permissible even to appoint an outsider to act as an inquiry officer, disciplinary authority can only be vested in an officer of the employer company or corporation. The disciplinary authority to impose punishment on a delinquent workman cannot be conferred on an outsider because an outsider cannot be vested with the power to appoint employees of the company.[86] In *Heckett Engg*, Jaswant Singh J observed:

> ...It is now firmly established that power to terminate service is a necessary adjunct of the power of appointment and is exercised as an incident to or consequence of that power...The power to terminate flows naturally and as a necessary consequence from the power to create. In other words, it is a necessary adjunct of the power of appointment and is exercised as incident to or consequence of that power; the authority to call such officer into being necessarily implies the authority to terminate his functions.[87]

In *PS Malavenkar*, the draft order terminating the services of the workman was duly approved and initialed by the competent authority, *viz*, the general manager, but the order was communicated to the workman by his executive assistant. The court held that the order was, in fact and in reality, made by the general manager and that the fact that a written document bears initials only instead of full signatures of the competent authority does not make any significant difference'. Nor does affixing signature by initialing a document or order detract from its authority unless the law or the rule specifically require full signatures to be affixed there to make it authentic.[88] In *Awadesh Kumar*, the order of discharge of a workman was not signed by the manager who was the competent authority under the Standing Orders of the company but it was signed by two persons one of whom was authorised by the manager while the other was the secretary of the company. The Supreme Court upheld the validity of the order as the former was competent to sign under the Standing

Orders white the latter was superior to the manager who was the competent authority under the Standing Orders. The exigencies of complex modern industrial organisation of large scale undertakings, particularly where the units of such undertakings are spread over different locations, make it necessary to delegate the powers to terminate the service of a workman by officers other than the appointing authority as well.[89] The officers to whom such power is delegated will be competent to impose the punishment of discharge or dismissal on a delinquent workman, provided that such delegation is not ultra vires of the articles of association and is properly and validly made but the person to whom the power has been delegated, must himself, exercise the power and he cannot sub-delegate such power unless sub-delegation is authorised by express words or necessary implication as *delegatus potest non delegare*.[90]

In *Sambhu Prasad Srivastava*, the court upheld the dismissal of the workman by the resident engineer to whom the power to dismiss any employee from service was delegated by a special power of attorney. On the other hand, a person or authority to whom the power has not been validly delegated will not be competent to dismiss a workman.[91] For instance, in *Rashid Ahmad*, the power to appoint employees vested in the directors or 'an officer authorised by the board of directors'. Therefore, such persons alone had the power to terminate the services of the employees. In this case, the services of an employee were terminated by the regional manager who was not so authorised by the board. Hence, termination of service of the employee was held to be invalid.[92] In *Hindustan Brown Boveri*, the dismissal of the workman, by the works manager in the absence of proof of delegation of power to him to impose the punishment, was held to be invalid.[93] Likewise, in *South Central Rly ECCS*, an order of dismissal passed by the secretary of a co-operative society in whose favour there was no delegation by the managing committee of the society who was the punishing authority, was held to be invalid.[94] There is a marked distinction between initiating the disciplinary proceedings and imposing the disciplinary punishment It is a well settled legal position that it is not necessary that disciplinary proceedings must only be initiated by the authority competent to impose the punishment. The proceedings can be initiated even by any authority superior to the appointing authority.[1] In *Steel Authority of India*, the personnel manager was appointed the disciplinary authority as required by the discipline and appeal rules of the steel authority but the charges were framed by the chief medical officer who was not authorised by the rules to frame the charges or to constitute the inquiry committee. The disciplinary proceedings were held to be invalid.[2] However, in *Nagiah*, the chargesheet was signed by a person who was not authorised to sign. The Karnataka High Court held that the inquiry based on the chargesheet which resulted in the dismissal of the workman was not vitiated because the workman had participated in the inquiry proceedings and he had not suffered any prejudice in any manner.[3] The fact that the order is not made by the competent authority must be pleaded and proved before the tribunal. Even if the point has been taken in the pleadings, if it is not proved by adducing relevant evidence, the impugned order inflicting the punishment of dismissal will be vulnerable. Such a point cannot be raised later before the writ court.[4] A person who is the disciplinary authority for imposing punishment can himself hold the domestic inquiry and then impose the punishment. There is no bar against that in the industrial law. Nor will the order of punishment inflicted upon an employee by the competent officer become vitiated by the mere fact that he subsequently appeared before the industrial tribunal to substantiate the action taken by him on the basis of the report of the inquiry committee of which he was a member.[5]

(iii) Order of Punishment

The disciplinary action commences with the chargesheet and culminates in the order of punishment. The findings of the inquiry officer are not binding on the punishing authority which has to finally decide whether the materials at the inquiry have established the charges and if so, what punishment should be awarded.[6] It is open to the tribunal to come to the different conclusion from the conclusion arrived at by the inquiry officer. If it comes to the conclusion that the charges are not proved, the foundation for the punishment is knocked off but if after taking the materials into account before it, the punishing authority comes to the conclusion that the charge against the delinquent is proved before the inquiry officer, that will be the foundation for the punishment.[7] The order of discharge or dismissal must clearly state the grounds for dismissal of the workman and it would not be proper to apply the common law principle that the ground for dismissal need not be stated in the order whereby the workman is dismissed from service.[8] The requirement of a fair and valid order imposing the punishment are discussed under the following sub-heads:

(a) Bona Fides

In industrial jurisprudence, the requirement of acting bona fide permeates the entire process of disciplinary proceedings. In other words, in all stages right from initiation of the disciplinary proceedings by serving the chargesheet on the delinquent workman through disciplinary inquiry to making the order imposing the punishment, the action of the management must be fair and bona fide. Particularly, the requirement of acting fairly and bona fide while imposing the punishment is accentuated. Lack of bona fide vitiates most solemn transactions.[9] It is unmistakably clear from the judicial dicta that if the disciplinary action is commenced mala fide or is a measure of victimisation or unfair labour practice, it will be liable to be interfered with by industrial adjudication. Violation of the rules of natural justice in conducting the inquiry proceedings and perversity in recording the findings are other variants of mala fides. 'In determining the misconduct, the management must have facts to base its conclusion on and it must act in good faith without caprice or discrimination and without motive

or vindictiveness, intimidation or resorting to unfair labour practice and there must be no infraction of the accepted rules of natural justice'.[10] In order to avoid the charge of vindictiveness, justice, equity and fair play demand that the punishment must always be commensurate with the gravity of the offence charged.[11] An action of the management of which the ostensible purpose is not the real purpose and which, though purporting to carry out one object is, in fact, intended to achieve another, would be lacking in bona fides and would be treated malafide.[12] The action of the management has to be viewed in the context of the entire background in which the action was taken, the circumstances preceding it, attending on it and those that follow it. For instance, where by a seemingly innocuous order made by the management, a workman is sought to be punished for the charges of misconduct, it would be open to the tribunal, as indeed necessary for it, to examine not only the foundation of the order but the real motivation of it. If the action is found to have been conceived with the intention to victimise the workman on account of his trade union activities or otherwise by way of unfair labour practice, such action would be mala fide and shall be liable to be struck down even though it could otherwise be justified on the basis of the contract of service and the rules of service or by any other material in support of the charge.[13]Likewise, where an employer discriminates in the matter of awarding the punishment to persons who have been charged and found guilty of the same act of misconduct, it would lead to an inference of mala fides.[14] An inference of mala fides is also permissible where, it appears that the management had already made up its mind to punish the workman before holding the inquiry, and the matter stood prejudged.[15] A mala fide action cannot be validated merely because it may be justified either with reference to the contract of service or on the basis of the material relevant to the charge of misconduct.[16]

In every case, after ascertaining that the principles of natural justice have not been violated, it would be proper for the tribunal to address itself to the question 'whether on the materials on which the inquiry officer has reached the conclusion adverse to the workmen, a reasonable person could have reached such a conclusion'.[17] The inference of lack of bona fides cannot, however, be drawn from irrelevant and extraneous considerations.[18] Inference of mala fide may, be drawn even from the factum of unduly severe and harsh punishment in certain cases. For instance, where the punishment is shockingly disproportionate to the misconduct or is such as no reasonable employer would impose under the circumstances, an inference of mala fides may be permissible.[19] The mere fact that some of the witnesses, who gave evidence at the domestic inquiry were promoted subsequent to the inquiry, will not affect the bona fides of the inquiry as they might have been promoted in the normal course at the relevant time even if no inquiry had been held.[20] Thus, the initiation of the disciplinary action, inquiry proceedings, report of the inquiry officer and the order of punishment, can all be challenged on the grounds of perversity, mala fides, victimisation and unfair labour practice. However, these are all questions of fact. The burden of establishing them is on the workman who makes these allegations, by adducing relevant evidence before the tribunal as it may not always be possible to decide these questions by merely looking into the records of the inquiry.[21] If there is no such pleading, no evidence to prove it is permissible. Even if there is evidence in support of it, it cannot be examined.[22] An allegation of mala fide, such as unfair labour practice, victimisation or discrimination etc have, therefore, to be specifically pleaded and proved. Hence, a finding of mala fide, victimisation, unfair labour practice or discrimination in the absence of pleadings or proof shall be perverse or beyond the jurisdiction of the tribunal.[23] The question whether a proper inquiry has been held or not involves a further inquiry into the questions such as: whether the workman has been duly notified of the charges; whether he has been given opportunity to submit his explanation; whether he had opportunity to cross-examine witnesses examined on behalf of the management and whether he could lead evidence in his defence. Though these questions may properly be considered by examining the record of the inquiry relied on by the management, it may not always be possible to decide the question whether the inquiry has been vitiated on account of mala fides, unfair labour practice or victimisation by merely looking into the records of the inquiry. In order to establish these facts, therefore, a workman has to lead evidence before the tribunal for satisfying it that existence of the vitiating circumstances was not known to him at the time of the inquiry or even if he knew he was not able to establish them at the inquiry for sufficient reasons.[24]

Inference of mala fides, however, cannot be lightly drawn. The mere fact that the workman takes part in the union activities or is an active office bearer thereof, would, per se, not lead to the inference of mala fides or victimisation.[25] If the action is a measure of victimisation or unfair labour practice, passed with an ulterior motive or is capricious and unreasonable, inference of mala fides will be permissible. In certain cases, a single allegation, if established will be so serious as to lead to the inference of mala fides but in certain cases, each individual allegation treated separately may not lead to the inference of mala fide. When all allegations are taken together, the inference drawn from established facts may lead to the conclusion that the impugned order is passed mala fide, out of personal ill-will or malice.[26] However, to find the plea of mala fides, the tribunal must be in a position to hold positively that the impugned order could have only been made with dishonest motive and it is not sufficient to find that it was probably so.[27] For instance, where the charges of misconduct are based on objective facts and will have to be established by evidence mainly documentary and there is little scope of any personal relationship among the concerned workmen and officials as affecting the establishment of such charges, and the case of malafides is not based on any specific facts or circumstances worth consideration, it would not be possible to hold that the personal relationship of the superior officials with the workmen can have any bearing on initiation and conduct of the domestic inquiry.[28] Likewise, where an employer terminates the service of a workman who shows consistent indifference to work and discipline and gets annoyed when he is asked to give an explanation, the termination of

service cannot be said to be mala fide. The fact that he happens to be an office-bearer of the union will make no difference.[29]

(b) Quasi-judicial Nature

The disciplinary proceedings against a workman are quasi-judicial in nature. It is, therefore essential that before imposing the penalty on the delinquent workman, the disciplinary authority must apply its mind to the record of the proceedings including the report of the inquiry officer and then modulate the quantum of punishment. The punishment must be commensurate with the nature and gravity of the misconduct proved against him. Failure to take these materials into account before awarding the punishment may be fatal to the order of punishment. The order of punishment may be vulnerable to judicial review, if it appears that the order has been made by the punishing authority without applying its mind or has been made at the dictates of somebody else but the mere fact that before imposing the punishment, the punishing authority consults the inquiry officer would not vitiate the order of punishment.[30] For instance, in *Murari Lal*, the Supreme Court upheld the validity of the order of dismissal by the works manager (punishing authority) which was set aside by the tribunal on the ground that he had not applied his mind to the facts before ordering the dismissal and he was simply following the suggestions of the director. The Supreme Court found that, the order was passed by the works manager. The mere fact that he had referred to the opinion of the director which was the same as his own opinion, did not mean that he had not formed his own opinion. No exception could be taken to the reference to the opinion of the director.[31]

In *Kalindi*, the workmen concerned were chargesheeted for four different acts of misconduct. Each one of them was found guilty of the first three charges. The inquiry officer did not record any findings as regards the fourth charge but instead found the workmen guilty of a further misconduct not mentioned in the chargesheet, *viz*, 'behaving in a riotous and disorderly manner by shouting slogans on the shop-floor'. From the record, however, it was dear that the order of dismissal was based only on the finding that they were guilty of the acts of misconduct alleged in the first three charges. It was, therefore, held that the act of misconduct not mentioned in the chargesheet, was mentioned as one of the items on which the order of dismissal was based. This did not affect the validity of the order because the manager would have made the order of dismissal even leaving the act of misconduct not mentioned in the charge-sheet. In other words, when there is evidence to show that the punishing authority considered charges proved against the concerned workman as serious enough to merit the punishment of dismissal, mere mention of the fourth charge, which was not proved in the formal order of dismissal, would not affect the validity of the dismissal. There was no lack of application of mind.[32]

In *Calcutta Jute*, the court observed that an order of dismissal may be rightly sustained if it is based on a finding of a charge which the workmen concerned had the opportunity of meeting, even though in the course of inquiry other incidental matters had crept in. Too legalistic a view of minor matters cannot vitiate the order of punishment.[33] On the other hand, in *Sur Enamel*, the charge against the workman concerned was that he had deliberately caused damage to raw materials in the course of his work. But the order of dismissal, referred entirely to a different misconduct with respect to which no charge had been framed, namely, 'insubordination and disobedience of orders'. The said order was held to be invalid for want of application of mind to the record.[34] In *Rashid Ahmad*, a conductor was dismissed from service on the basis of two charges, *i.e.*, (i) charging excess fare from the passengers and tearing of the allotment chart; and (ii) misbehaviour with a co-worker. The former was the major charge which was not proved while the latter which was the minor one, was proved. The tribunal passed an order directing reinstament of the workman. In appeal, the Allahabad High Court upheld the order of the tribunal.[35]

In a case, where the employer withdraws the order of dismissal on account of a technical defect, which vitiated only the final order and not the earlier proceedings, then the earlier proceedings upto the stage immediately before the order of dismissal will not be invalid. In other words, the proceedings upto the stage at which the employer reaches the conclusion that the workman should be dismissed, will be thoroughly competent and there will be no infirmity in the proceedings. The withdrawal or the cancellation of the order of dismissal will not mean withdrawal or cancellation of the charges.[36] It is in the sole discretion of the employer to accept an apology from a dismissed workman and reinstate him, for that reason any discrimination or unfair labour practice cannot be presumed.[37] In *Dattatray Trimbak Kulkarni*, a certain amount of cash was found missing which the cashier reimbursed but the management proceeded departmentally for misappropriation against the cashier and the branch manager, and after holding an inquiry, dismissed the cashier while allowing the branch manager to retire. In a writ petition filed by the cashier on the ground of discrimination, the Bombay High Court held that the fact of reimbursement cannot oust the right of the bank to take disciplinary action against the delinquent. It may be that because of reimbursement, the bank did not criminally prosecute him. The action of the bank in dismissing the cashier while allowing the manager to retire was justified because the past record of the cashier was not without blemish while there was no such blemish on the conduct of the manager.[38]

(c) Reasons

The order imposing the punishment of discharge or dismissal must clearly state the reasons for imposing the punishment because this order has to undergo the scrutiny of the adjudicatory tribunals and the higher courts in judicial review.[39] In *Siemens Engg*, speaking for the Supreme Court, Bhagwati J said: 'The rules requiring reasons to be given in support of an order is like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.'[40] In this case, the court was dealing with imposition of custom duty on certain goods under the Indian Customs Act. It was not a case of dismissal. However, in *KL Tripathi*, dealing with a case of dismissal of an industrial employee, the court distinguished *Siemens* on facts. The court noticed that though the reasons for the order had not been stated expressly, in the nature of the charges, and in the explanation offered in the response of the employee to the show-cause notice, the reasons appeared to be implicit. In the absence of any denial by the employee of the charges levelled against him, and the admission on the factual basis of the charges by him, the court found that the disciplinary authority had considered the explanation offered by him, in imposing the penalty of dismissal, and held that the conclusion of the disciplinary authority was not unreasonable or one which no reasonable man could make.[41]

In *Ram Kumar*, the court further pointed out that where the punishing authority agrees with the findings of the inquiry officer and accepts the reasons given by him in respect of such findings, it is not necessary for it again to discuss the evidence for coming to the same conclusion as arrived at by the inquiry officer and give its own reasons for coming to the same conclusion. When the punishing authority accepts the findings of the inquiry officer and the reasons giver, by him in his order, the question of non-compliance with the principles of natural justice would not arise and it would not also be correct to say that the order was not a speaking order.[42] In *SSKoshal*, the inquiry officer found that out of the six charges levelled against the delinquent employee, charge nos 1 and 5 were proved while charge nos 2, 3 and 6 were not proved. But the disciplinary authority in its final order imposing the punishment, agreed that the finding of the inquiry officer in respect of charge nos 1 and 5 was proved and charge nos 3 and 4 not proved though he disagreed with the finding with respect to charges nos 2 and 6 and held that charge no 2 was fully proved while charge no 6 was partly proved. The Madhya Pradesh High Court held that since the disciplinary authority disagreed with the findings of the inquiry officer in respect of certain charges, it ought to have recorded and communicated the reasons for such disagreement to the delinquent employee. That, having not been done, the order of punishment was vitiated for violation of principles of natural justice.[43]

In *K Ashoka*, a single judge of the Karnataka High Court held that if the disciplinary authority disagreed with the findings of the enquiry officer that the delinquent was not found guilty, it would be incumbent upon him to serve a show-cause notice to the delinquent and give him an opportunity of being heard, before imposing any punishment or instituting a fresh enquiry.[44] In *Kunj Bihari Misra*, the Supreme Court held that where the disciplinary authority disagreed with the findings of the enquiry officer, he should record his tentative reasons for such disagreement and convey the same to the delinquent employee, afford an opportunity to represent before him and then record its findings.[45] In *M Raja Rao*, the Supreme Court held that it was not necessary for the disciplinary authority to give reasons for agreeing with the conclusions of the enquiry officer. The mere expression 'other relevant factors' used in the order of the disciplinary authority would not necessarily indicate that he had considered other materials than those produced before the enquiry officer, which might require notice thereof being given to the delinquent.[46] In *Anil Gilurker*, the facts were: the employee who was a Branch Manager of a Grammen Bank was charge-sheeted and suspended pending enquiry for sanctioning loans to a large number of brick-manufacturing units but not disbursing the entire loan amount to the borrowers, and for misappropriating part of the loan amount. The enquiry officer submitted his report holding that the charge of financial corruption against him was not proved. The disciplinary authority disagreed with the findings of the enquiry officer, and proposed to impose the punishment of removal of the appellant along with forfeiture of the contribution of the Bank to the Provident Fund of the appellant under the Staff Regulations. A notice was issued to him to show cause against the proposed punishment of dismissal to which the Manager submitted his reply. Eventually he was dismissed by the disciplinary authority. A single judge of the High Court had set aside the dismissal on the ground that the disciplinary authority did not communicate his disagreement with the report of enquiry officer to the charge-sheeted employee and directed the Bank to reinstate the employee with continuity of service and also pay Rs. 1.5 lakhs to him in lieu of arrears of salary. The said order was quashed by a Division Bench. In appeal, the Supreme Court, speaking through Patnaik J, while setting aside the order of the Division Bench and restoring the order passed by the single judge, observed that an enquiry should be conducted in strict adherence to the statutory provisions and principles of natural justice and the charges should be specific, definite and giving details of the incident which formed the basis of charges and that no enquiry could be sustained on vague charges.[47] In *Avinash Bhosale*, the brief facts were: some 12 crores fraudulent transactions came to light in the branch of which the employee was the Branch Manager, with the result he was relieved from the branch presumably for his involvement in the said transactions. The employee, on his own, filed a complaint with police requesting them to identify the culprits. The AGM contended that the Branch Manager was not authorised to make a complaint to police, when he himself was involved in the questionable transactions. He was suspended, charge-sheeted and eventually dismissed. In a criminal case filed against him, he was acquitted of criminal conspiracy u/s. 120B thereof and also of culpability. The case took several complex turns and twists before reaching Supreme Court. Dismissing the petition, Nijjar J (for self and Gokhale J) held:

> .. . the failure of the prosecution in producing the necessary evidence before the trial court cannot have any adverse impact on the evidentiary value of the material produced by the Bank before the Inquiry Officer in the departmental proceedings.. .. It is a settled proposition of law that the findings of Inquiry Officer cannot be nullified so long as there is some relevant evidence in support of the conclusions recorded by the Inquiry Officer. In the present case, all the relevant documents were produced in the Inquiry to establish the charges levelled against the appellant. It is a matter of record that the appellant did not doubt the authenticity of the documents produced by the Bank. (para 46). .. The findings recorded by the Enquiry Officer cannot be said to be based on no evidence. In such circumstances, the appellant cannot take any advantage of the findings of innocence recorded by the criminal court. The 'clean chit' given by the learned Magistrate was influenced by the failure of the prosecution to lead the necessary evidence. No advantage of the same can be taken by the appellant in the departmental proceedings. (para 47). .. The extracts reproduced above would clearly indicate that the Disciplinary Authority was alive to all the submissions made by the appellant. The Disciplinary Authority had taken into consideration all the relevant material and only then concluded that the charges have been duly proved against the appellant. Furthermore, it is a matter of record that the appellant was duly supplied a copy of the Inquiry Report and he had submitted detailed objections to the same. These objections were placed before the Disciplinary Authority together with the Inquiry Report. Therefore, the appellant cannot possibly claim that there has been a breach of rule of natural justice. (para 48). .. we find no merit in this appeal and the same is hereby dismissed.[48] (para 50).

In *SP Malhotra*, the facts were more or less similar to those of *Anil Gilurkar* (supra), which briefly were: the employee was charge-sheeted for certain acts of misconduct, which included tampering with records, doing unauthorised business against the interests of the bank, misutilising his official position etc. An enquiry was conducted into the charges. The enquiry officer exonerated the delinquent employee of all the charges duly supported by sufficient reasons on every charge. The disciplinary authority partly agreed with the findings on two of the charges, while disagreeing therewith in respect of the other two charges, and imposed the punishment of dismissal. The Appellate Authority, while concurring with the enquiry officer on two of the four charges, dismissed the appeal. A single judge of Punjab and Haryana High Court had set aside the dismissal on the ground that the disciplinary authority, having disagreed with the enquiry officer, did not communicate the reasons for the said disagreement to the employee. However, a Division Bench held that the question of communicating the reasons for disagreement did not arise as, in the wake of the decision in *Karunakar*, there was no need to issue a show-cause notice before imposing the punishment of dismissal and, in this view of the matter, the dismissal was valid. Setting aside the order of the Division Bench and restoring the order passed by the learned single judge, the Supreme Court, comprising BS Chauhan and SA Bobde JJ, held:

> In fact, not furnishing the copy of the recorded reasons for disagreement from the enquiry report itself causes the prejudice to the delinquent. .. The learned single Judge has concluded the case observing as under:
>
> > The whole process that resulted in dismissal of the petitioner is flawed from his inception and the order of dismissal cannot be sustained. I am examining this case after nearly 23 years after its institution and the petitioner has also attained the age of superannuation. The issue of reinstatement or giving him the benefit of his wages for during the time when he did not serve will not be appropriate. The impugned orders of dismissal are set aside and the petitioner shall be taken to have retired on the date when he would have superannuated and all the terminal benefits shall be worked out and paid to him in 12 weeks on such basis. There shall be, however, no direction for payment of any salary for the period when he did not work.
>
> We do not see any reason to approve the impugned judgment rendered by the Division Bench. Thus, in view of the above, the appeal is allowed. The judgment and order of the Division Bench is set aside and that of the learned single Judge is restored.[49]

(d) Past Record

The Service Rules, Standing Orders or the Shops and Establishments Act applicable to various establishments and undertakings provide guidelines as to what factors should be taken into consideration by the punishing authority before imposing the punishment. Such statutory provisions generally provide that while considering the question of imposing punishment on the delinquent, the employer shall take into account the gravity of the misconduct, the previous record of the employee, if any, and any other extenuating or aggravating circumstances that may exist.[50] In imposing the punishment, such requirements have necessarily to be complied with. In *Rama Krishna Steel*, the relevant Standing Order provided: 'In awarding punishment under the Standing Order, the employer shall take into account the gravity of the misconduct, the previous record, if any, of the workmen and any other extenuating or aggravating circumstances that may exist'. A single judge of the Madras High Court held that this does not mean that the term 'previous record' in this rule would mean only punishment awarded to the delinquent previously.[51] In other words, apart from any earlier punishment awarded to the delinquent, the past record may indicate his conduct or any other facts or circumstances which may have an

extenuating or aggravating effect on the question of punishment. If the order of dismissal based on the charges proved against the delinquent in the domestic inquiry are sufficiently grave to warrant the punishment of dismissal or discharge, the fact that the past record of the workman was clean would be of no consequence, but, on the other hand, if the punishing authority relies on the past record of the delinquent, for imposing punishment, it is incumbent on it to give him an opportunity to offer his explanation regarding such record. Failure to offer such opportunity will vitiate the resulting action.[52] In *Madras Fertilizers*, the past record of the service of the workman had seriously influenced the mind of the punishing authority on the question of punishment but he was denied opportunity to offer his explanation. The Madras High Court held that the order was vitiated. Speaking for the court, Nainar Sundaram J said:

> ...the vitiating factor was denial of opportunity to the employee to explain the past record of service at the appropriate time. That has nullified the resultant action. Thereafter, the matter has to be viewed untainted by the past record of service. This vitiating factor will not stand mollified by affording an opportunity at the subsequent stage.[53]

In *India Marine Service*, the workman was charge-sheeted for 'insubordination' which was proved at the domestic inquiry held for the purpose but the order of dismissal recited some other charges also which were not inquired into, and it also recited that the past record of service of the workman was against him. Though the order of dismissal referred to these extraneous matters, from its text, as a whole, it was abundantly clear that the decision of the managing director (punishing authority) to dismiss the workman was based only on the charge of 'insubordination'. It was, therefore, held that from a reference to the past record of the workman in the order of dismissal, it did not follow that it was the effective reason for dismissing him. The managing director came to the conclusion that the service of the workman must be terminated on the basis of the charge proved against him and the one sentence referring to the past record was meant only to give additional weight to the decision already arrived at.[54] In *N Chinnaiah*, the past conduct of the workman was not put in issue either before the disciplinary authority or the labour court. It was only put into service as an ancillary issue to enable the labour court to weigh the probabilities of the case while evaluating the quantum of punishment. However, the tribunal was solely influenced by the past record of the delinquent and refused to grant any relief to him. A single judge of the Andhra Pradesh High Court held that the tribunal failed to exercise its jurisdiction vested in it under s 11A.[55]

(e) Quantum of Punishment

It is established law, that imposing punishment for a proved act of misconduct is a matter for the punishing authority to decide and normally it should not be interfered with by industrial tribunals. The tribunal is not required to consider the propriety or adequacy of the punishment. In *Hind Construction*, Hidayatullah J held:

> But where the punishment is shockingly disproportionate, regard being had to the particular conduct and the past record, or is such as no reasonable employer would ever impose in like circumstances, the tribunal may treat the imposition of such punishment as itself showing victimization or unfair labour practice.[56]

In *FICCI*, the employer made a mountain out of a mole-hill and had blown a trivial matter into one involving loss of prestige and reputation. In this situation, the punishment was held to be unwarranted.[57] But in *Prabhakar Chaturvedi*, the court held that the punishment of dismissal for the misconduct of misappropriation of an amount of about Rs 21,000 for a couple of months was not unjustified or grossly disproportionate to the misconduct proved against the delinquent.[58] In *Ram Kishan*, the delinquent employee was dismissed from service for using abusive language against a superior officer. On the facts and in the circumstances of the case, the court held that the punishment was harsh and disproportionate to the gravity of the charge imputed to the delinquent. Speaking for the court, K Ramaswamy J, observed:

> When abusive language is used by anybody against a superior, it must be understood in the environment in which that person is situated and the circumstances surrounding the event that led to the use of abusive language. No straight-jacket formula could be evolved in adjudging whether the abusive language in the given circumstances would warrant dismissal from service. Each case has to be considered on its own facts.[59]

In the same strain, in *BM Patil*, a single-judge of the Karnataka High Court observed that in the exercise of discretion, the disciplinary authority should not act like a robot and justice should be moulded with humanism and understanding. It should assess each case on its own merit and each set of facts should be decided with reference to the evidence regarding the allegations which should be the basis of the decision. The past conduct of the worker may be a ground for assuming that he might have a propensity to commit the misconduct and to assess the quantum of punishment to be imposed. The fact that the delinquent had acted in a particular manner on a past occasion does not mean that in the present case also he

has acted in the like manner. In this case, a conductor of a bus was dismissed from service for causing a revenue loss of 50 paise to the employer by the irregular sale of tickets. It was held that the punishment was too harsh and disproportionate to the act of misconduct.[60]An industrial tribunal has the discretion to consider the question as to whether the punishment imposed by the employer is shockingly disproportionate to the act of misconduct proved against the delinquent. In the circumstances of this case, the labour court was justified in taking a lenient view and setting aside the order of dismissal and giving direction for reinstatement of the workman with a cut of 75 per cent of the wages upto the date of the award.[61] It is needless to say that the discretion has to be judicially exercised and the tribunal can interfere only when it is satisfied that the punishment imposed by the management is highly disproportionate to the degree of the guilt of the workman.[62] In *SBI*, an employee of the bank was dismissed from service for misappropriating five rupees without taking into account his blameless service for 17 years. A single judge of the Bombay High Court upheld the award of the tribunal substituting the order of dismissal by an order of reversion of the employee to a lower post without backwages.[63] On the other hand, in *Lakshmi Machine Works*, the workman engaged in production of textiles spinning machinery was found sleeping behind the cardboard-sheet spread on the floor. In the course of inquiry, his attitude was recalcitrant. The Madras High Court held that sleeping during duty hours by itself might look like a minor misconduct but when viewed in association with a series of other acts of misconduct committed by him in the past, the punishment of dismissal was not unjustified.[64]

(f) Communication of the Decision

The relationship of employer and employee can be effectively terminated 'not merely by the decision of the employer to terminate the employee's service but by the communication of the said decision to the employee',[65] because the punishment becomes effective only from the date when the order is received by the delinquent workman.[66] Therefore, the communication of the order is a necessity for effective termination of the service of a workman. In *Kalyani*, the order of dismissal of the workman was made on 28 May 1960 and was communicated to him on 30 May 1960 which was taken to be the date of dismissal.[67] A single judge of the Kerala High Court in *Kottayam DCMSU*, held that the order of discharge or dismissal does not take effect on the day it is prepared or the day on which it is signed. It takes effect when it leaves the hands of the employer on its journey destined towards the employee and cannot be recalled by the employer.[68]

ADJUDICATION

Adjudicatory Jurisdiction

The labour appellate tribunal, in *Buckingham and Carnatic*,[69] delineated the parameters of the tribunal's jurisdiction to interfere with the hitherto exclusive managerial right of taking disciplinary action against an industrial workman for the first time. It set out four circumstances which would render the managerial action vulnerable, namely:

(i) where there is want of bona fides, or

(ii) when it is a case of victimisation or unfair labour practice or violation of the principles of natural justice, or

(iii) when there is a basic error of facts, or

(iv) when there has been a perverse finding on the materials.

This delineation was adopted by the Supreme Court, with slight modifications, in *IISCO*, where it authoritatively pronounced that the power of the management to direct its own internal administration and discipline was not unlimited and it was liable to be interfered with by industrial adjudication when a dispute arises 'to see whether the termination of service of a workman is justified and to give appropriate relief. Reverberating the voice of the labour appellate tribunal, the Supreme Court said that industrial adjudication can interfere with the disciplinary action taken by the employer only:

(i) when there was want of good faith;

(ii) when there was victimisation or unfair labour practice;

(iii) when the management had been guilty of a basic error or violation of the principles of natural justice; or

(iv) when on the materials, the finding was completely baseless or perverse. This decision became classic for the justification of tribunal interference with the disciplinary sanctions of discharge or dismissal imposed by industrial employers on delinquent workmen. [70]

The postulates (i) and (ii) of *Indian Iron & Steel Co*, are addressed to the bona fides of the employer in initiating the action and inflicting the punishment. In other words, the employer is required to act bona fide in initiating the disciplinary action as well in inflicting the punishment. In initiating the action, the alleged act of misconduct should not be a ruse for something else, such as the trade union activities of the workman or the employer's dislike of the workman for some personal reasons *etc*. Furthermore, the action should not be motivated by vindictiveness or ulterior purposes, so as to smack of victimisation or unfair labour practice. Likewise, in the matter of inflicting punishment also the employer should act fairly. If the punishment is so shockingly disproportionate to the act of misconduct as no reasonable man would ever impose, that itself may lead to an inference of mala fides, victimisation or unfair labour practice. The postulates (iii) and (iv) are addressed to domestic inquiry. In holding the inquiry, the inquiry officer must comply with the rules of natural justice which means, the inquiry officer must be an unbiased person and he must give reasonable opportunity to both sides of being heard. Furthermore, his findings should not be baseless or perverse, ie, such as a reasonable man, from the materials on record, could never arrive at. Subsequent decisions of the Supreme Court,[71] and High Courts,[72] have only elaborated and clarified some of the implications of this decision, without however, working out the details of its scope with precision. In some cases, the Supreme Court observed that the question of victimisation or the management being biased against a workman would not arise once it is held that the finding of misconduct alleged against the employee was properly arrived at and the domestic inquiry was in no way vitiated.[73] This is an over simplification of the matter. These cases cannot be read to mean that when the inquiry has been held to be valid, the tribunal is barred from going into the complaint of mala fides of the employer in the matter of initiating the disciplinary action and inflicting the punishment. in *Hind Construction*, Hidayatullah J held that even if the inquiry is proper and valid, if the punishment is shockingly disproportionate, the tribunal may treat the imposition of such punishment as itself showing victimisation or unfair labour practice.[74]

In *Ved Prakash Gupta*, the court set aside the order of dismissal of the workman who was dismissed on the charge of abusing a worker and an officer of the employer, with the observation that the punishment was shockingly disproportionate, regard being had to the charge framed against him.[75] The Andhra Pradesh High Court in *Radhakrishna Murthy*, held that the punishment of dismissal for the misconduct of cheating the company by claiming medical benefit on a false medical certificate for the treatment of his wife was not shockingly disproportionate to the misconduct. Furthermore, the punishment neither amounted to victimisation nor unfair labour practice. Nor was it such as no responsible employer would ever impose in the circumstances of the case.[76] On the other hand, a single judge of the same High Court in *VK Durga*, held that the punishment of removal of the workman from service for manipulating the entries in the weighing register from where he did not gain any money, was unreasonable and disproportionately harsh.[77] In *Nagendrappa*, a bus conductor of the state road transport corporation was dismissed for failure to issue tickets to some passengers resulting in a loss of Rs 35.10 to the corporation. On the facts and in the circumstances of the case, a single judge of the Karnataka High Court held that the punishment was not proportionate to the act of misconduct and the labour court was justified to direct reinstatement.[78]

The adjudicatory jurisdiction dealing with the disciplinary cases was confined merely to see whether the employer did not act mala fide in the manner of initiating the action and inflicting the punishment, and the inquiry officer had not violated the rules of natural justice and his findings were not baseless or perverse. In the absence of these infirmities, it was beyond the reach of the tribunal to interfere with the managerial action. The questions, whether the material before the inquiry officer was adequate or not or whether a particular witness, upon whom reliance was placed by the inquiry officer, should have been believed or not, were for the consideration of the inquiry officer.[79] In *Ram Swarath Sinha*, the labour appellate tribunal recognised the right of the management to ask for permission to adduce evidence for the first time before the tribunal to justify its action in a 'no-inquiry' case.[80] Following this decision, the right of the employer to defend the action not only on the basis of the domestic inquiry but also to justify the punishment of discharge or dismissal on merits by adducing relevant evidence before the tribunal has been recognised by the Supreme Court as well. Consequently, the right of the workman to plead all infirmities in the domestic inquiry, if one has been held to attack the order of dismissal on all grounds available to him in law and on facts, has also been recognised.[81] In *Motipur Sugar*, it was held that a case of 'defective-inquiry' stands on the same footing as 'no inquiry' and, in either case, the tribunal will have jurisdiction to go into the merits of the case on the basis of the evidence adduced before it by the parties, but in such cases, the employer would not have the benefit which he has in case of a valid domestic inquiry. Wanchoo J observed:

> The entire matter would be open before the tribunal which will have jurisdiction, 'to satisfy itself on the facts adduced before it by the employer whether the discharge or dismissal was justified...if the inquiry is defective or no inquiry has been held...the entire case would be open before the tribunal. The employer would have to justify on the facts as well that its order of discharge or dismissal was proper ...and in either case the tribunal would have jurisdiction to go into the facts and the employer would have to satisfy the tribunal that in fact, the order of discharge or dismissal was proper'.[82]

In such cases, it is open to the tribunal to consider the merits of the dispute and come to its own conclusion on appreciation of the evidence before it without having any regard for the view taken by the management in dismissing the workman.[83] It is irrelevant whether the workman withdrew from the inquiry or participated in it, the decision has to be on the appraisal of evidence, and if it is found that the inquiry was not proper, the whole case would be open before the tribunal to decide for itself, whether the charge of misconduct was proved and what punishment should be awarded.[84] It is open to the employer to rely upon the domestic inquiry conducted by him and satisfy the tribunal that there is no infirmity attached to the same and he has also the further right to justify, on facts as well, that the order of dismissal or discharge was proper.[85] However, when the employer chooses to adduce evidence before the tribunal to justify his action, the workman will have the opportunity to rebut such evidence. If the employer fails to avail himself of such an opportunity, it will be open to the tribunal to make an appropriate award and the employer will, therefore, not be able to make the grievance on that score.[86] In *Bharat Sugar Mills*, after holding that the domestic inquiry was invalid, the tribunal allowed the employer to adduce evidence to justify its action. In appeal, the Supreme Court rejected the contention of the workman that once the tribunal had held the domestic inquiry to be defective, it had no option but to set aside the order of dismissal and it could not allow the employer to adduce evidence before it to justify his action. It would neither be just to the management nor fair to the workman himself that the tribunal should refuse to take evidence and thereby drive the management to pass through the gamut of holding an inquiry all over again and deprive the workman of the benefit of the tribunal itself being satisfied on the evidence adduced before it that he was not guilty of the alleged misconduct.[87] In *Ritz Theatre*, apart from defending its action on the basis of the domestic inquiry, the management further adduced evidence to justify its action on merits as well but without looking into the validity of the inquiry, the tribunal set aside the action of the management on the basis of the evidence adduced before it. In appeal, the Supreme Court accepted the plea of the employer that the tribunal should have first considered the validity of the domestic inquiry and only in case it came to the conclusion that the inquiry was improper or invalid that it could have gone into the merits of the case on the basis of the evidence adduced before it.[88]

In *RK Jain*, it was held that, if the management defends its action solely on the basis that the domestic inquiry held by it is proper and valid and if the tribunal holds against the management on that point, the management will fail. On the other hand, if the management relies not only on the validity of the domestic inquiry, but also adduces evidence before the tribunal justifying its action, it is open to the tribunal to accept the evidence adduced by the management. It is essentially a matter for the management to decide about the stand that it proposes to take before the tribunal. It is the right of the management to sustain its order by adducing independent evidence before the tribunal' and it was 'a right given to the management and it is for the management to avail itself of the said opportunity.[89] In *Ludh Budh Singh*, the court emphasised that when no inquiry has been held by an employer or when the inquiry has been found to be defective, the employer has got the right to adduce evidence before the tribunal justifying his action.[90] In *AVP(C) Ltd*, a single judge of the Kerala High Court held that where the workman contended that the conclusion reached by the inquiry officer was perverse, it would not be open either for the management to ask for or for the tribunal to grant, opportunity to the employer to supplement or improve the evidence adduced by him at the domestic inquiry.[91] On the other hand, a single judge of the Madras High Court in *India FDS*, took the view that the right of the management to adduce additional evidence is not restricted to cases of no inquiry or defective inquiry alone but can as well be exercised even where the findings of the inquiry officer are perverse.[92] Between the two, the Madras High Court was right and Kerala High Court is clearly wrong. The conclusions of domestic inquiry may be vitiated either for non-compliance of rules of natural justice or for perversity. In any case, the inquiry will be vitiated. It is well settled that a vitiated inquiry is equated with no inquiry. The right of the employer to adduce evidence in such a situation is well-recognised. The decision of the Kerala High Court, therefore, runs counter to the ratio of the decisions of the Supreme Court in the undernoted cases.[93]

A question of procedural relevance which engaged the attention of the courts is "whether the tribunal could *suo motu* call for the evidence of the employer on merits to justify the disciplinary action where the validity of the domestic inquiry is in question or is it for the employer to ask for an opportunity to lead evidence? A further corollary to this question is if it is for the employer to ask for such opportunity, at what stage of the proceedings before the tribunal is he to make the request? A single judge of the Andhra Pradesh High Court, took the view that if the management or workman do not seek to adduce any evidence or do not request the tribunal for an opportunity to lead evidence, the tribunal cannot compel the parties to lead evidence. It is not the duty of the tribunal to compel the parties before it to adduce evidence. The only duty that it has, is to receive evidence when it is offered by the parties. As it was not the grievance of either party that they had attempted to adduce some evidence before the tribunal, which it refused to receive, no fault could be found with the order of the tribunal.[94] A similar view was taken by the Orissa High Court, holding that there was no obligation in law on the part of the tribunal to indicate its mind about the infirmity of the inquiry at any stage before it gave its findings in the award.[95] In *Premnath Motors*, a preliminary issue with respect to the validity of inquiry had, in fact, been raised by the employer by making an application. After holding the inquiry to be invalid, the tribunal refused to go into the merits of the case. By an elaborate and logical process of reasoning, a single judge of the Delhi High Court held that after coming to the conclusion that the domestic inquiry was invalid, the tribunal must give an opportunity to the employer as well as to the workman to adduce additional evidence, pro and con the order of dismissal. In such cases, the tribunal is not to content itself by merely quashing the inquiry, but it must proceed to consider the merits of the charge against the workman on the basis of the

documentary and oral evidence adduced before it. He, therefore, took the view that it is for the tribunal to direct the employer to adduce evidence after finding an inquiry to be invalid rather than for the employer to ask for an opportunity to lead evidence.[1]

Where the labour court proceeded to decide the case on merits without first deciding the preliminary issue of 'validity of enquiry' and passed a two-in-one order, *i.e.*, hearing both the preliminary issue and merits, the Madras High Court, had set the order aside and remanded the matter back to the labour court to decide the preliminary issue first.[2] In *Madhya Pradesh SRTC*, it was held that, after coming to the conclusion that the inquiry was invalid, the tribunal suo motu should give an opportunity to the employer to prove the merits of the charge by adducing relevant evidence.[3] A similar view was also taken by the Calcutta High Court in *Fort William.*[4] However, the Madhya Pradesh and the Calcutta High Courts did not support their holding by any reasoning but contented themselves by making a general statement. The dicta of the Orissa, the Madhya Pradesh and the Delhi High Courts were cursorily touched upon by the Supreme Court in *RK Jain*, where it disagreed with the view of the Madhya Pradesh and Delhi High Courts and agreed with the view of the Orissa High Court, without however attempting to reconcile the apparent conflict in their observations.[5] In other words, it was for the employer to ask for an opportunity to adduce evidence in support of his action and there was no obligatory duty, in law, on the tribunal to offer an opportunity to the employer, irrespective of whether he asked for it or not. Commenting on this holding, the court observed that in that case, there was no question of an opportunity to adduce evidence having been denied by the tribunal as the employer had made no such request and the contention that the tribunal suo motu should have given an opportunity to the employer to adduce evidence was not accepted in such cirumstances.[6] In *PP Mundhe*, after holding the inquiry to be invalid, the labour court had set aside the order of dismissal because the employer had not led evidence before it on the merits of the action. In appeal, the Supreme Court had to consider the question whether any duty is cast upon the tribunal to give an opportunity to the employer after holding the domestic inquiry to be invalid and whether failure to do so would vitiate the award but instead of addressing itself to this question, the court indicated the appropriate stage at which the opportunity has to be given to the employer to adduce additional evidence.[7]

Glossing on this decision, in *Shankar Chakravarti*, Desai J observed that it was not an authority for the proposition that the tribunal, as a matter of law, must first frame preliminary issue and proceed to decide the validity or otherwise of the inquiry and then serve a fresh notice on the employer by calling upon him to adduce further evidence to sustain the charges ifhe so chooses to do.[8] He further observed that *PP Mundhe* does not, in any way, overrule the decisions in *RK Jain* and *Ludh Budh Singh* cases. In this case, relying on the observations in *Cooper Engineering*, an argument was built before the court that there was an obligatory duty on the tribunal, irrespective of the fact whether there is any such request to that effect or not, to raise a preliminary issue as to whether the domestic inquiry alleged to have been held by the employer is proper or defective and then record a formal finding on it and if the finding is in favour of the workman, the employer should be called upon which he must demonstrate on record, without waiting for such request or demand or pleading from the employer, to adduce further evidence to sustain the charge of misconduct, if he so chooses. The court rejected the contention and held that the right to adduce additional evidence to sustain the action before the tribunal, must be.availed of by the employer by making a request in the pleadings or before the proceedings are concluded. If such a request is made in the pleadings, the tribunal must give such opportunity. Even if the request is made before the proceedings are concluded, the tribunal should, ordinarily, grant the opportunity but if no such request is made by the employer, to substantiate the charges to sustain the action of dismissal in the pleadings or in the course of proceedings, no duty is cast on the tribunal to suo motu call upon the employer to adduce such evidence. The request to adduce evidence in support of reasons to sustain the disciplinary action has to be specific and mere filing of documents will not constitute such reasons.[9] In *Ludh Budh Singh*, Vaidialingam J held:

> ...the management should avail itself of the said opportunity by making a suitable request to the tribunal before proceedings are closed. If no such opportunity has been availed of, or asked for by the management, before the proceedings are closed, the employer can make no grievance that the tribunal did not provide such an opportunity.[10]

The above observation is based on his earlier decision in *RK Jain*, to the effect:

> It should be remembered that when an order of punishment by way of dismissal or termination of service is affected by the management, the issue that is referred is whether the management was justified in discharging and terminating the service of the workman concerned and whether the workman is entitled to any relief ...There may be cases where an inquiry has been held preceding the order of termination or there may have been no inquiry at all. But the dispute that will be referred is not whether the domestic inquiry has been conducted properly or not by the management, but the larger question whether the order of termination, dismissal or the order imposing punishment on the workman concerned is justified...The point to be noted is that the inquiry that is conducted by the tribunal is a composite inquiry regarding the order which is under challenge. [11]

In *PP Mundhe* (supra), the court posed the question: 'what is the appropriate stage which was specifically adverted to in *Ludh Budh Singh*, which we are now required to seriously consider whether this conclusion is correct and ensures justice to all concerned in an industrial adjudication?' Answering the question, the court observed:

> In our considered opinion, it will be most unnatural and unpractical to expect a party to take a definite stand when a decision of jurisdictional fact has first to be reached by the labour court prior to embarking upon an inquiry to decide the dispute on its merits. The reference involves determination of the larger issue of discharge or dismissal and not merely whether a correct procedure had been followed by the management before passing the order of dismissal...We are, therefore, clearly of opinion that when a case of dismissal or discharge of an employee is referred for industrial adjudication, the labour court should first decide as preliminary issue; whether the domestic inquiry has violated the principles of natural justice. When there is no domestic inquiry or defective inquiry is admitted by the employer, there will be no difficulty but when the matter is in controversy between the parties, that question must be decided as a preliminary issue. On that decision being pronounced, it will be for the management to decide whether it will adduce any evidence before the labour court. If it chooses not to adduce any evidence, it will not be thereafter permissible in any proceeding to raise the issue.[12]

The guidelines provided by the dicta of the Supreme Court lay down that the employer must seek the opportunity to sustain his action diligently by leading evidence without undue delay. Such a request must be bona fide and should not be filed at the belated stage so as to prejudice the interest of the worker. It should not also be calculated to break the morale of the worker through financial stress by adopting dilatory tactics. It should also not have the effect of further delaying the proceedings, If it is shown that the request of the employer is tainted with any of these defects or some such similar defects, the tribunal may decline to grant permission,[13] but if the request does not suffer from any such vice it is the duty of the tribunal to permit the employer to lead such evidence if a request is made at the proper stage. When such an opportunity is asked for, the tribunal has no power to refuse. Giving of an opportunity to an employer to adduce evidence for the first time before the tribunal is, in the interest both of the management, and the employee, to enable the tribunal to be satisfied about the alleged misconduct.[14] Failure to do that will be violative of the rules of natural justice. However, when such an opportunity is given to the employer to exercise his right to sustain his action by adducing evidence before the tribunal, it is equally the right of the workman to plead all infirmities in the order of dismissal and also to attack it in on all other grounds available to him in law and on facts.[15] Once the workman is given full opportunity to rebut and demolish the employer's case, there would be no question of any prejudice being caused to him. Nor would there be any prejudice, resulting in injustice caused to him. The pertinent question is whether any injustice has been done to any party. In the absence of any injustice, a mere technical error in the procedure will not vitiate the findings of the tribunal.[16] It is not possible to appreciate the observations of Varadarajan J that if the request of the employer is not incorporated in the initial pleadings, it may 'result in delay which will lead to wrecking the morale of the workman and compel him to surrender which may not otherwise do'. This is seeing a ghost in every mulberry bush.

In *Rajendra Jha*, a three judge Bench of the court did not follow the norms laid down in *Shankar Chakravarty* and *Shambhu Nath Goyal* cases. In this case, the employer had filed an application under s 33(2)(b) for 'approval' of the action of dismissal of the workman but in that application, the employer had not asked, alternatively, for an opportunity to lead evidence to justify the order of dismissal in case the inquiry was found to be defective. Nor had it asked for such opportunity in its rejoinder to the written statement of the workman putting the validity of the domestic inquiry in issue. However, by about the time the hearing of the employer was coming to a close, it requested the labour court orally for permission to adduce evidence in support of the action of dismissal of the workman. By a composite order, the labour court held that the domestic inquiry was invalid and also granted permission to the employer to adduce evidence to justify the dismissal of the workman. The Supreme Court discountenanced the contention of the workman that the labour court had acted on its own initiative in allowing the employer to lead evidence and held that the labour court had, in fact, granted an oral request of the employer in allowing him the opportunity to adduce evidence to justify the action of dismissal. This holding puts the law in its proper perspective. Neither the court insisted that the request of the employer must be in writing nor that it must be incorporated in the pleadings. The permission granted by the labour court to the employer to adduce evidence to sustain its action, on its oral request about the time the hearing of the application was coming to a close, was held to be justified.[17]

In *Basu Deba Das*, the employer had not filed the application for grant of permission to lead evidence for justifying the order of dismissal but he had made the application for adducing the evidence to which the other side did not raise any objection. A single judge of the Bombay High Court held that the labour court was justified in granting permission.[18] A single judge of the Patna High Court in *Lalu Mahto*, has observed that it is not necessary for the labour court to record a finding that a prayer was made by the employer that he should be given an opportunity to justify his action by adducing evidence, because it is a matter of procedure and no finding is specifically required to be recorded. The court also put the

burden on the workmen to show by pleading or an affidavit that the employer had not made any prayer.[19] In *Desh Raj Gupta*, the Supreme Court affirmed the holding of the Allahabad High Court to the effect that the employer factually had made a request to the tribunal to permit it to justify its order of punishment. In these circumstances, the court held that the tribunal neither committed any illegality nor any impropriety in directing the employer to justify its action. The tribunal also gave a chance to the workman of impugning the action of the employer. The tribunal therefore acted in the interest of the workman and not to his detriment, and further held that the workman could not have made any grievance of the conduct of the tribunal.[20]

In *Chhatia Weaving Mills*, the Orissa High Court held that it is not obligatory on the tribunal to frame preliminary issue on the question whether the inquiry was fair and proper, because the law does not enjoin on it to decide whether the inquiry was fair and proper, and then to grant opportunity to the management to adduce evidence if the finding on inquiry went against it. There is no obligation on the tribunal to decide the dispute under reference piece-meal. If anything, the courts have deprecated such delaying tactics on the part of the employers.[21] The Mysore High Court had to deal with a converse case where the workman contested the order of dismissal on the grounds of mala fides, victimisation and unfair labour practice and sought the permission of the tribunal to substantiate these pleas by leading evidence. The tribunal permitted the workman to lead evidence only in support of his plea of victimisation. This order of the tribunal was challenged in a writ petition before the High Court by the employer on the ground that by permitting the workman to lead evidence on the question of victimisation, the tribunal had exceeded the jurisdiction conferred on it by law as he could not be permitted to lead evidence touching the validity of the domestic inquiry. Though the High Court recognised the right of the workman to establish the pleas of mala fides, bias, victimisation or unfair labour practice, by leading independent evidence before the tribunal, it held that such right is not an unqualified one and stated:

> In such cases, the workman can lead evidence in support of the aforesaid allegations if he satisfies the tribunal that either he did not know the facts on which he relies or that he was prevented by sufficient reason to lead evidence when the domestic inquiry was pending. To hold otherwise would amount to a denial of the right given to the workman to demonstrate that the inquiry is vitiated for one or the other reasons...[22]

After holding that the domestic inquiry is invalid, the tribunal will have to give the employer an opportunity to adduce additional evidence if the request is made at the proper time. The tribunal will also give a similar opportunity to the employee to lead evidence,[23] but the tribunal cannot rely on the evidence in favour of any party which was adduced in the very domestic inquiry which is held invalid. If the tribunal relies on such evidence; it is procedural irregularity and the tribunal is deprived of the opportunity of observing demeanour of the witnesses and the opposite party is deprived of the opportunity to cross examine the witnesses before the tribunal.[24] After taking the evidence of both the parties, if the adjudicator finds that the act of misconduct is not proved, the question of punishment will not arise because the punishment can only be for an act of misconduct. It is not open to him to sustain the punishment on new grounds,[25] but if he finds that the act of misconduct alleged against the workman is proved, he will proceed to consider the question of punishment. In *Surat Singh*, a single judge of the Punjab and Haryana High Court held that the power to alter the punishment is to be exercised only in a case where the punishment is so harsh as to suggest victimisation. In this case, the labour court had not recorded any finding of victimisation, and the award was singularly silent, not only on this aspect but also on the broader aspect whether it would be prudent to reinstate the workman.[26]

(a) Scope of Jurisdiction of Labour Courts under Section 11A

In *Firestone*, the Supreme Court interpreted the provisions of s 11A in the light of the law emerging out of its earlier dicta prior to its insertion, though without making an attempt to reconcile or even showing awareness of the conflicting statements in them. Summing up the law, the court adumbrated the following guidelines:

(1) The right to take disciplinary action and to decide upon the quantum of punishment are mainly managerial functions, but if a dispute is referred to a tribunal, the latter has power to see if the action of the employer is justified.

(2) Before imposing the punishment, an employer is expected to conduct a proper inquiry in accordance with the provisions of the Standing Orders, if applicable, and principles of natural justice. The inquiry should not be an empty formality.

(3) When a proper inquiry has been held by an employer, and the finding of misconduct is a plausible conclusion flowing from the evidence adduced at the said inquiry, the tribunal has no jurisdiction to sit in judgment over the decision of the employer as an appellate body. The interference with the decision of the employer will be justified only when the findings arrived at in the inquiry are perverse or the management is guilty of victimisation, unfair labour practice or mala fides.

(4) Even if no inquiry has been held by an employer or if the inquiry held by him is found to be defective, the tribunal in order to satisfy itself about the legality and validity of the order, has to give an opportunity to the employer and the employee to adduce evidence before it. It is open to the employer to adduce evidence for the first time justifying his action; and it is open to the employee to adduce evidence contra.[27]

(5) The effect of an employer not holding an inquiry is that the tribunal would not have to consider only whether there was a *prima facie* case. On the other hand, the issue about the merits of the impugned order of dismissal or discharge is at large before the tribunal, and the latter, on the evidence adduced before it, has to decide for itself whether the misconduct alleged is proved. In such cases, the point about the exercise of managerial functions does not arise at all. A case of defective inquiry stands on the same footing as no inquiry.

(6) The tribunal gets jurisdiction to consider the evidence placed before it for the first time in justification of the action taken only if no inquiry has been held or after the inquiry conducted by an employer is found to be defective.

(7) It has never been recognised that the tribunal should straightaway, without anything more, direct reinstatement of a dismissed or discharged employee, once it is found that no domestic inquiry has been held or the said inquiry is found to be defective.

(8) An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before the tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the tribunal is in the interest of both the management and the employee and to enable the tribunal itself to be satisfied about the alleged misconduct.

(9) Once the misconduct is proved either in the inquiry conducted by an employer or by the evidence placed before a tribunal for the first time, punishment imposed cannot be interfered with by the tribunal except in cases where the punishment is so harsh as to suggest victimisation.

(10) In a particular case, after setting aside the order of dismissal, whether a workman should be reinstated or paid compensation is, as held by this court in *Management of Panitole Tea Estate v Workmen* (supra), within the judicial discretion of a labour court or tribunal. The above was the law as laid down by this court as on 15 December 1971 applicable to all industrial adjudication arising out of orders of dismissal or discharge.[28]

These guidelines have ever since been followed by the Supreme Court,[29] and the High Courts,[30] in subsequent cases. In the following paragraphs, effort has been made to present the up-to-date evolution of the law by discussing the leading cases, applying these guidelines to various fact situations and explaining and elaborating their implications. The limitations on tribunal jurisdiction, as delineated in *Indian Iron and Steel Co* case, have now been removed by the legislature. Previously, where the employer had held a proper and valid domestic inquiry before passing the order of punishment, the tribunal had no power to interfere with its findings on the misconduct recorded in the domestic inquiry unless it was vitiated by one or other infirmities pointed out in *Indian Iron & Steel Co*. The conduct of the disciplinary proceedings and imposition of the punishment were all considered to be managerial functions with which the tribunal had no power to interfere unless the findings were perverse or the punishment was so harsh as to lead to an inference of victimisation or unfair labour practice. Now this position no longer holds the field. The words, 'in the course of adjudication proceedings, the labour court, tribunal or national tribunal...is satisfied that the order of discharge or dismissal was not justified' clearly indicate that the tribunal now is clothed with the power to reappraise the evidence adduced in the domestic inquiry and satisfy itself whether the evidence relied on by the employer establishes the misconduct alleged against a workman. It is however relevant to note that the 'basic rule of appreciation of evidence is that anything, which ought to have been stated at the earliest opportunity, if not stated, should be treated as an after-thought' and 'courts are slow to accept after-thoughts as genuine or believable'.[31] Therefore, what was originally a plausible conclusion that could be drawn by an inquiry officer from the evidence, has now given place to the satisfaction being arrived at by the tribunal that the finding on the misconduct is correct. The tribunal now is at liberty to consider not only whether the finding on the misconduct recorded by an employer in the domestic inquiry is correct, but also to differ from that finding if a proper case is made out. Therefore, what was in the realm of satisfaction of the employer, has ceased to be so and now it is the satisfaction of the tribunal that finally decides the matter.[32]

Even in cases, where an inquiry has been held by the employer and a finding on the misconduct is arrived at, the tribunal can differ with the findings in a proper case to hold that no misconduct is proved. To come to the conclusion either way, the tribunal will have to reappraise the evidence for itself the tribunal may hold that the misconduct itself is not proved or that the misconduct proved does not warrant the punishment of dismissal or discharge. The jurisdiction to interfere with the punishment is also not confined only to the cases where the punishment is shockingly disproportionate to the act of misconduct. Now the tribunal has to see whether the punishment imposed by the employer is commensurate with the

gravity of the act of misconduct committed by the delinquent workman. In either case, where necessary, the tribunal may set aside the order of discharge or dismissal and direct reinstatement with or without any terms or conditions as it may think fit or give any other relief including award of lesser punishment in lieu of discharge or dismissal, as the circumstances of the case may warrant.[33] Now the tribunal has the jurisdiction and power of substituting its own measure of punishment in place of the managerial wisdom, once it is satisfied that the order of discharge or dismissal is not justified on facts and in the circumstances of the case.[34]

In *General Employees Union*, a single judge of the Bombay High Court said that s 11A specifically gives two-fold power to the industrial adjudicator. 'First is virtually the power of appeal against findings of facts made by the inquiry officer in his report with regard to the adequacy of the evidence and the conclusion on facts. The second and the far more important, is the power of reappraisal of the quantum of punishment'. In this case, the court set aside the order of the discharge of the workman from service for the act of preaching gospel of 'go-slow' and held that reinstatement with one-third backwages from the date of discharge order till the date of reinstatement should be condign in the circumstances.[35] Likewise, in *Mohan Sugan Naik*, a Division Bench of the same court interfered with the quantum of punishment by substituting the order of dismissal with an order of reinstatement without backwages. In this case, the workman had been dismissed for the misconduct of threatening the inquiry officer that he would be stabbed in case he proceeded with the inquiry. Though the Bench noted that the material on record established that the workman had, in fact, given the threat and also observed that such threat is quite a serious misconduct, yet it held that the misconduct did not warrant maximum punishment of dismissal from service.[36] It is submitted, that the rationale of this decision that the threat of stabbing the inquiry officer did not warrant the punishment of dismissal, is wholly misconceived. Does the Bench suggest that the actual act of stabbing would be necessary in order to sustain an action of dismissal? It is, however, relevant to note that this section was not intended to cause embarrassment to the management by interfering with the punishment imposed by it, even in cases of grave nature.[37]

The decision of the tribunal on the preliminary issue that the domestic inquiry was properly held and was valid does not mean that the order of dismissal or discharge is justified. Such finding does not bar the tribunal from going into the merits of the case.[38] It is, therefore, open to the tribunal to go into the questions that the findings recorded by the inquiry officer are perverse or the imposition of the punishment is not warranted.[39] The onus of proof to establish that the action taken by the employer is bad in law in the absence of an inquiry or due to defective inquiry, if any, is on the workman. Therefore, it is for the workman to adduce evidence, and the employer then, may controvert the same, if necessary. The tribunal must hear and decide the preliminary issue regarding the validity or invalidity of the domestic inquiry first.[40] In *Firestone*, the court rejected the contention on behalf of the workmen that if the employer has not held a valid domestic inquiry or held no inquiry at all before imposing the punishment, the tribunal must order reinstatement of the workman on that ground alone. In other words, the employer had no right to adduce evidence to sustain the disciplinary action before the tribunal once the inquiry held by him was found to be invalid or he had held no inquiry at all. Therefore, reinstatement as a sequitur, must follow. The court observed that there was no indication in the section that the right of the employer to sustain his disciplinary action by adducing evidence before the tribunal was abrogated. If that was the intention of the legislature, to do away with this right, the section would have been differently worded. Neither are there express words to that effect nor is there any indication that the section has impliedly changed the law in that respect. Therefore, the position even now is that the employer is entitled to adduce evidence for the first time before the tribunal, even if he had held no inquiry or the inquiry held by him is found to be defective; of course an opportunity will have to be given to the workman to lead evidence contra. If no domestic inquiry has been held by the management or if the management makes it clear that it does not rely upon the domestic inquiry, it is entitled to straightaway lead evidence before the tribunal and the tribunal is bound to consider the evidence as adduced before it on merits and give a decision thereon. In other words, it is open to the management to rely on the inquiry and alternatively to advance a contention that if the inquiry is found not proper, it should be given an opportunity to lead additional evidence but merely because the employer has taken such a stand, the labour court cannot jump to the conclusion that the inquiry was not held properly and in a fair manner. In a case where the employer has sought an opportunity to adduce evidence, it cannot just be ignored on the ground that it will be a sheer exercise in futility.[41]

It is then open to the tribunal to deal with the validity of the domestic inquiry if one has been held as a preliminary issue. If its finding on the subject is in favour of the management, then there will be no occasion for additional evidence being cited by the management. A priori where the domestic inquiry is found to have been properly held, neither the employer nor the employee shall have the right to produce further evidence before the tribunal to support or demolish the finding of guilt recorded nor to sustain the quantum of punishment imposed as a result of the domestic inquiry. It is relevant to note that in the absence of a clear cut finding to the effect that the order of dismissal or discharge is not justified being unsustainable or perverse, it would not be permissible for the tribunal to permit the employer to adduce evidence before it to sustain the action of dismissal or discharge.[42] In all such cases, the tribunal shall be competent to reappraise evidence recorded in the domestic inquiry, not only for upholding or upsetting the finding of guilt recorded by the inquiry officer but also with a view to determine whether or not the punishment was commensurate with the gravity of the charge made against the delinquent workman. In extreme cases, additional evidence has been accepted in addition to the evidence already on record

by the management even when the domestic inquiry was found valid. It is a matter of the discretion of the tribunal just like an appellate court, which if satisfied that such evidence is to be laid to advance justice, there is no bar for the same even though a party has no right to adduce evidence to support or demolish the findings but if the finding is against the management, the tribunal will have to give it an opportunity to cite additional evidence justifying its action. This right of the employer to sustain its action by adducing independent evidence before the tribunal in a no inquiry or invalid inquiry case has been given judicial recognition over a long period of years.[43]

If the preliminary issue is decided against the employer, then the burden shifts and squarely lies on the employer to show by adducing evidence on merits that the action taken against the workman is justified. He has to lead evidence first to establish the case on merits and the workman will then lead evidence, if necessary, to controvert the same. But for adducing evidence on merits, after the preliminary issue is decided against the employer, the employer must have made-a prayer for adducing such evidence at the appropriate stage. Once the domestic inquiry is set aside by the labour court, no fresh inquiry can be started by the employer unless it has been set aside purely for legal lacuna.[44] When such evidence is adduced for the first time, it is the tribunal which has to be satisfied on such evidence about the guilt or otherwise of the delinquent workman. The law, that under such circumstances, the issue about the merits of the impugned order of dismissal or discharge is before the tribunal at large and that it has to decide for itself whether the misconduct alleged is proved, continues to have full effect. It is well-settled that when no domestic inquiry is held or the domestic inquiry has been found to be defective, the tribunal has complete jurisdiction to deal with the entire gamut of the controversy between the parties. In other words in such a situation, the tribunal itself has to hold a full scale inquiry in which the employer has not only to prove the alleged misconduct against the workman but also has to satisfy that on the facts and in the circumstances of the case, the imposition of the punishment was justified.[45] In such a situation, the exercise of managerial functions does not arise at all. In *Mgmt. of TUCS*, a single judge of Madras High Court held that if the management fails to make the plea before the labour court that the validity of the domestic inquiry be tried as a preliminary issue, it cannot raise the plea before the High Court in a writ petition, and, in the absence of an application, there is no duty cast on the labour court to adopt an advisory role by informing the petitioner of his rights.[46] Reproduced below is the observation of Shaman Kumar Sen J of Calcutta High Court in *SMukherjee* on the true import of s 11A of the Industrial Disputes Act. The learned judge observed:

> The judgment and decision in *Workmen of Firestone's* case (supra) only lays down the principle that under section 11-A if the inquiry was not properly conducted by the *employer*, it will be open to the *employee* to lead further evidence before the Tribunal *to establish that the domestic inquiry is invalid.* Since in the instant case, the *Tribunal itself came to the finding that the domestic inquiry was not properly conducted, there is no question of taking further evidence* by the Tribunal itself. The Tribunal was therefore *not justified in allowing fresh evidence to be adduced by the employer when there is already a finding by the Tribunal after consideration of evidence that the domestic inquiry was invalid.* If the *domestic inquiry is found to be invalid by the Tribunal then the dismissal also becomes bad* on the basis of the said finding of the domestic inquiry.[47] (emphasis added).

The above observations merit detailed analysis in the context of the law laid down by the Supreme Court in *Firestone* case. In the first place, if the domestic inquiry conducted by the employer was round to be improper, then applying the *Firestone* ratio, the onus to adduce additional evidence in support of dismissal lies on the employer, and not on the employee. In other words, by leading additional evidence to the satisfaction of the tribunal, the employer can still sustain the action of dismissal, but to say that, in the event of an improperly held domestic inquiry, 'the employee can lead further evidence before the tribunal to prove that the inquiry is invalid' is like putting the cart before the horse. Why should the onus be on the employee to lead additional evidence to establish the invalidity of the inquiry, which in any case is a finding of fact recorded in his favour by the tribunal? After all, by adducing additional evidence, the employee is not going to prove that the inquiry held by his employer is exponentially invalid. Secondly, the question of taking further evidence would arise only after the tribunal has recorded a preliminary finding that the domestic inquiry was not properly held. If the domestic inquiry is found unassailable in every respect, where is the need for the employer to adduce any further evidence, and for what purpose? It is a facility granted to the employer to justify his action, that too, when the domestic inquiry was found defective. The question of the workman leading evidence contra arises only after the management adduces additional evidence, and not before. Thus, the right of the employer to adduce additional evidence is founded on the satisfaction of the following two conditions:

(a) the tribunal has recorded a preliminary finding that the domestic inquiry was not properly held; and

(b) that, in such an event, the employer makes a request to the tribunal seeking permission to lead additional evidence to justify the action of dismissal.

In the absence of these two pre-requisites, no question of the employer adducing additional evidence could obviously arise. Conversely, if these two conditions are fulfilled, it is not within the power of the tribunal to refuse permission to the employer to adduce further evidence. Lastly, it is not in dispute that a dismissal founded on an improperly held domestic inquiry is bad, but at the same time the defect is not conclusive or fatal per se. Such a dismissal could be termed 'bad in law finally' only when:

(a) the employer has been permitted, on a request made by him, to adduce additional evidence in support of the action;

(b) the workman is afforded an opportunity to lead evidence contra; and

(c) the tribunal after appreciating the sum-total of

(i) the evidence adduced at the domestic inquiry;

(ii) the evidence and additional evidence adduced by the employer before the tribunal; and

(iii) the evidence adduced by the workman contra comes to the final conclusion that the employer has still failed to make out a valid case for dismissal.

Paraphrasing, the employer can cure such defects by adducing additional evidence to the satisfaction of the tribunal. This much is clear from the ratio of *Firestone* and other cases decided by the Supreme Court for well over 25 years. In fact, *Firestone* goes a step further. Where the circumstances were so compelling that the employer has no option than to dismiss a workman without conducting an inquiry, he is nevertheless entitled to make a request before the tribunal for adducing evidence for the first time in support of the action taken and, if a request to that effect is made, it is incumbent upon the tribunal to grant the same. With great respect, it is submitted that this decision is questionable and needs review by a larger bench. The law relating to the stage at which the employer must seek permission of the tribunal to adduce evidence before it to sustain the disciplinary action taken by him against the delinquent employee has remained unaltered by s 11A. Even now the law remains the same as evolved by the judicial dicta prior to promulgation of s 11A. In *AB Zodge*, before the closure of the proceedings before the tribunal, the employer sought permission to lead evidence in support of the order of dismissal but the tribunal refused permission and the Bombay High Court upheld the decision of the tribunal. The Supreme Court held that denial of the opportunity to the employer to lead evidence before the tribunal in support of the order of dismissal cannot be justified. Therefore, in view of the law laid down by it in the earlier decision, the court set aside the order and judgment of the High Court as unsustainable. It further observed that it will be open to the parties to lead such evidence as they may deem proper before the Industrial tribunal where the matter is to be reheard.[48]

In *Raveendra Kamath*, the Kerala High Court said that permission can be granted by the labour court to the employer to adduce evidence to sustain his action even on an oral request made before the proceeding comes to a close.[49] Following this holding, in *KK Bharathan*, a single judge of that High Court held that, in the circumstances of the case, the labour court should have given an opportunity to the management to adduce evidence before it, for sustaining its action, because such an opportunity can be given even on an oral request. In this case, as a matter off act, the request for permission to adduce evidence was made in the 'written statement' itself.[50] In *Adichanalloor FSC Bank*, another Bench of the same High Court observed that s 11A does not 'confer an absolute right on the employer to make an application at any time of the proceedings and it has to be made at the earliest opportunity'. When such an application is filed, it is for the labour court to decide whether it is raised at the earliest opportunity or whether delay is explained or whether such application is filed only to delay the proceedings.[51]. In *Rajendra Jha*, the Supreme Court, from the facts on record inferred, that the employer had made an oral request to the labour court for being given an opportunity to lead evidence to justify its action and held that the contention of the workmen that the employer had not at all, asked for an opportunity to lead evidence and the court acted gratuitously in giving an opportunity to the employer of its own accord, was unfounded.[52] The right of the employer to lead additional evidence before the labour court in a case of dismissal does not include leading of fresh evidence in respect of charges which were not levelled against the workman either in the charge-sheet or in the order of termination.[53] In *GA Salimani*, the facts were: The tribunal passed an order on 2 July 1990 holding that the inquiry held was not proper, and directed the management to lead evidence in support of the charges but on a request made by the workman against the direction, the tribunal recalled the said order by passing another order dated 18 October 1990 to the extent it related to giving liberty to the management to lead evidence. The Karnataka High Court held that such recall of the earlier direction was not merely procedural but a substantive review on the part of the tribunal and was not permisslble.[54] In *Lakshmidevamma*, the issue was 'at what stage should the employer make a request to the labour court in order to be permitted to adduce additional evidence to justify the action of dismissal, be it a case of regular adjudication under s 10 or an application rued under s 33(2) (b) '. Santosh Hegde J (for self and Bharucha J with Patil and Khare JJ concurring, and Sabharwal J dissenting) affirmed the ratio of *Shambhu Nath Goyal* in the following words:

Keeping in mind the object of providing an opportunity to the management to adduce evidence before the Tribunal/Labour Court,

> we are of the opinion that the directions issued by this Court in *Shambhu Nath Goyal's* case[55]…need not be varied, being just and fair. There can be no complaint from the .management side for this procedure because this opportunity of leading evidence is being sought by the management only as an alternative plea and not as an admission of illegality in its domestic inquiry. At the same time, it is also of advantage to the workman inasmuch as they will be put to notice of the fact that management is likely to adduce fresh evidence, hence, they can keep their rebuttal or other evidence ready. This procedure also eliminates the likely delay in permitting the management to make belated application whereby the proceedings before the Labour court tribunal could get prolonged. In our opinion, the procedure laid down in *Shambhu Nath Goyal's* case (*vide supra*), is just and fair.[56] (para 17, at p 110).

Sabharwal J, in his dissenting judgment cited inter alia the decisions rendered in *Bharat Sugar, Ritz Theatre, Motipur Sugar, Delhi Cloth Mills, PP Mundhe,* and other cases and observed:

> Such an interpretation [as placed by the majority judges], of procedure takes away the discretion of the labour court/industrial tribunal. To allow or not to allow the prayer of the management to adduce evidence in such a matter should essentially lie within the discretion of labour court/industrial tribunal to be exercised on well-settled judicial principles. (para 26, at p 112)...It has been consistently held that, in principle, there is no difference whether the matter comes before the labour court/industrial tribunal under section 33 or on a reference under section 10 of the Industrial Disputes Act. In either case, the employer would have to justify that the order of dismissal or discharge was proper. In either case, the employer would have right to adduce evidence where the employer dismisses an employee without holding an inquiry or inquiry is found to be defective. (para 28, at p 112)...In the present case, we are not called upon to decide a case where no request to adduce evidence is made by the employer. (para 34, at p 115)...The departure came up only in *Shambhu Nath Goyal's* case. (,)...Except the main judgment of *Shambhu Nath Goyal's* case, no other decision of the court was cited before us wherein it may have been held that the prayer of the management to adduce evidence is to be rejected if not made either in the written statement filed to the statement of claim in a reference under section 10 or at the initial stage of proceedings under section 33(2)(b) of the Industrial Disputes Act ...(para 17, at p 211).

The dissenting judgment of Sabharwal J is consistent with the long line of cases decided on this issue and is right. An employer is under no obligation to make a request to the labour court in the absence of a finding against the validity of the domestic inquiry being recorded. If the employer makes a request immediately after the labour court records such a finding, no inference of the employer attempting to delay the adjudication process could be drawn. Even where the employer makes a request in the written statement or in the application under s 33, he gets permission to lead further evidence only after, and not before, the labour court has recorded a finding against the validity of domestic inquiry. That being the position, what difference would it make whether the request is made at the commencement of the proceeding or immediately after the recording of the finding. It is one thing to say that it would be desirable for the employer to make a request for adducing evidence in the written statement or in the application filed under s 33, as the case may be, and quite another to suggest that if he does not make a request at the very commencement of the adjudication proceeding, he would be barred from making the request at a later stage. The fact that *Motipur Sugar*, decided by a four judge Bench in 1965 was no less a long-standing decision, holding the field for as many years, exposes the congenital weakness of the other consideration, namely, stare decisis. The ratio of *Motipur Sugar* is binding on all subsequent benches of tour judges or less. A fortiori, the said ratio was binding on the Bench that decided *Shambhu Nath Goyal*, which brings to surface the harsh reality that the smaller bench in *Shambhu Nath Goyal* struck out in a new direction of its own.

In *SJ Mehta*, the facts disclosed that the employer contended that it was a case of termination simpliciter after paying compensation as required under s 25F, which was accepted by the workmen, and further offered to lead evidence justifying termination before the labour court and the labour court refused to grant permission on the ground that the management was adopting delay tactics, a single judge of Gujarat High Court quashed the order of the labour court and remanded the matter to the labour court with a direction to give opportunity to the employer to lead evidence.[57]Both the labour court and the single judge were questionable on different counts. Once it is admitted by the employer and accepted by the tribunal that it was a case of termination simpliciter, where is the question of leading evidence in support of such termination validly effected after paying compensation under s 25F? What purpose would be served by remanding the case to the labour court with a direction to give an opportunity to the employer to lead evidence; if so, for or against what? The right course for the High Court would have been to quash the proceedings before the labour court and uphold the action of employer in view of the admitted fact that it was not a case of dismissal for an act of misconduct, but one of termination simpliciter after complying with the requirements under s 25F and, more so, that the workmen had accepted the same without a whisper of protest. In *United Planters Assn*, the Supreme Court reiterated the law to the effect:

> ...it has always been the philosophy of industrial jurisprudence that if the domestic inquiry held by the employer was defective, deficient, incomplete or not held at all, the tribunal instead of remanding the case to the inquiry officer for holding the inquiry de

> novo, would itself require the parties to produce their evidence so as to decide whether the charges, for which disciplinary action was taken against the employee, were established or not. The pending proceedings keep the employer and the employee in a state of confrontation generating further misgivings and bitterness. It is, therefore, of paramount importance that such proceedings should come to an end at the earliest so as to maintain industrial peace and cordial relations between the management and the labour.[58]

Then summed up the ratio of *Firestone's* case:

> ...as to the jurisdiction of the tribunal to take evidence to decide the merits of the charges and it was laid down that in spite of the prohibition contained in the proviso to s 11A, the tribunal, in order to satisfy itself as to the guilt of the person charged,. had the jurisdiction to take the evidence and that the law in that regard had not undergone any change. It was pointed out that if the domestic inquiry had been held by the employer, the tribunal will examine the merits of that inquiry and would confine itself to the evidence already on record but where the inquiry was defective, the tribunal could still take fresh evidence to decide the merits of the charges. (ibid).

In cases, where the tribunal decides to consider the matter on the evidence adduced before it for the first time, it must confine itself to the charges framed against the workman on the basis of which the punishment was imposed. It is not open to the management to level new charges before the tribunal which had not figured in the domestic inquiry or which had not formed the basis of the order of punishment. Hence, the employer cannot be permitted to adduce evidence in support of such new charges. Nor can the tribunal have jurisdiction to record findings on such new charges and justify the order of Eunishment on the basis of such charges as had not preceded the order of punishment.[59] It is well-settled that when no domestic inquiry is held, the matter is at large before the adjudicator on the basis of full scale inquiry and the employer has not only to prove the misconduct alleged, against the workman but also to satisfy the adjudicator that on the facts and in the circumstances, infliction of certain kind of punishment was justified.[60] In other words, the tribunal has complete jurisdiction to deal with the entire gamut of the controversy between the parties. It is open to the management to rely on the inquiry and alternatively advance a contention that if the inquiry is found not proper, it should be given an opportunity to lead additional evidence but merely because the employer has taken such a stand, the labour court cannot jump to the conclusion that the inquiry was not held properly in a fair manner. In a case where the employer has sought an opportunity to adduce evidence, it cannot be just ignored on the ground that it will be a sheer exercise in futility.[61] In *Firestone*, the court observed that it should not be understood as laying down that there is no obligation on the part of the employer to hold an inquiry or the inquiry held by him should be an empty formality. If a proper inquiry is conducted by the employer and a correct finding is arrived at regarding the misconduct, the tribunal will have to give very cogent reasons for not accepting the view of the inquiry officer. Furthermore, by holding a proper inquiry, the employer will also escape the charge of arbitrariness or mala fides. A proper and valid inquiry by an employer will also be conducive to harmonious and healthy relationship between the management and the workman and it will serve the cause of industrial peace. It will also enable the employer to persuade the tribunal to accept the inquiry as proper and also the findings as correct.[62]

In *Super Silk*, the facts were, a workman was dismissed for issuing a false bill to a purchaser. The management could not produce the original bill before the labour court, but produced the carbon copy of the said bill, which was not admitted by the labour court as a valid piece of evidence. A single judge of Madras High Court directed the labour court to permit the management to mark the photocopy of the relevant bill as an exhibit and dispose of the case on merits. The learned judge further observed that the technicality of strict and sophisticated rules of evidence contemplated under the Indian Evidence Act need not be applied in the case of a domestic inquiry.[63] In *BS Kamble*, the facts were: A workman was dismissed for a misconduct involving the bringing of call girls into the hotel premises to be provided to the passengers. The labour court directed reinstatement of the workman on the ground that the evidence was insufficient. In writ petition, a single judge of Bombay High Court quashed the order of labour court and upheld the punishment imposed by the management.[64] A single judge of Punjab and Haryana High Court held that where a dismissed workman failed to adduce any evidence despite the grant of four opportunities, the labour court would be justified in closing the workman's evidence, and dismissing the case for non-prosecution.[65] In *Municipal Committee, Taum,* the Supreme Court held that the evidence tendered in the court should be based on the claim statement, and the courts should be alert on this. In case of inconsistent statement with regard to the claim by the workman, the labour court would not be justified in granting any relief ignoring the inconsistency in the claim on the ground of substantial justice.[66] Where the workman, whose services were terminated, raised an industrial dispute claiming to be a permanent employee, and the employer contended that the workman was only a daily-wager whose services were terminated for being absent without permission, the relief of reinstatement, continuity of service and backwages granted by the labour court is not justified and the award deserves to be quashed.[67]

The expression 'evidence' is not to be understood in a narrow and technical sense as to mean only such evidence as

adduced in a court of law as required by the Evidence Act when a person is examined as a witness by administering the oath. In domestic inquiries, hearsay evidence is not impermissible provided it has reasonable nexus and credibility. The power given to the tribunal to reassess the evidence before the inquiry officer has to be judicially and judiciously exercised. It should be exercised in cases where the findings of the inquiry officer are based on 'no evidence' or are 'so unreasonable' that 'no reasonable man could have ever come to it' or the decision is 'so outrageous' in its defiance of logic or of accepted moral standards that no sensible person could have arrived at it 'or that it is so absurd that' one is satisfied that the decision maker must have taken leave of his senses.' Then, it would call for interference by the tribunal.[68] The wide discretionary power vested in the tribunal by this section are to be exercised in a judicial and judicious manner before interfering with the findings of the inquiry officer and the order of punishment. While exercising this jurisdiction, the tribunal also must act in good faith and must have regard to all the relevant considerations. It should not seek to promote purposes alien to the letter or spirit of the legislation that has given it the power to act and must not act arbitrarily and capriciously.[69] If the tribunal exercises its jurisdiction mechanically and without weighing the circumstances of the case or in disregard to the judicial principles, it would be no exercise of a discretion. If the tribunal exceeds its jurisdiction, or its decision is not reasonably founded on the evidence or it has failed to take into account the matters which it ought to have taken into account or has taken into account irrelevant or extraneous matters or has acted in violation of the rules of natural justice or has misinterpreted or misapplied the law, its order or award will be amenable to judicial review.[70]

The power to set aside the order of discharge or dismissal and grant the relief of reinstatement or lesser punishment does not mean that in each and every case the tribunal has got untrammeled power to interfere with the punishment. The power has to be exercised only when the tribunal is satisfied that the order of discharge or dismissal was not justified. The satisfaction of the tribunal is objective satisfaction and not subjective satisfaction. It involves application of mind by the tribunal to various relevant circumstances, like the nature of delinquency committed by the workman, his past conduct, the impact of delinquency on the employer's business as also the total length of service rendered by him. Furthermore, the tribunal has to consider whether the decision taken by the employer is just or not. It is only after taking all these factors into consideration, can the tribunal upset the punishment imposed by the employer. The quantum of punishment cannot be interfered with without recording specific finding on the point. No indulgence should be granted to a person found guilty of grave misconduct like cheating, fraud, misappropriation of employer's fund, theft of public property.[71] The tribunal has no power to convert a penalty into a reward purporting to exercise the discretion under this section.[72] In *Jai Bhagwan,* the award of the tribunal was quashed by the Supreme Court on the ground that it had utterly failed to apply its mind to the facts of the case and had not even perused the records. As a matter of fact, without even reading the report of the inquiry officer, on the basis of its own imagination, it went far beyond the findings of the inquiry report in holding that the workman was guilty of the misconduct and justified his dismissal from service. Speaking for the court, Chinappa Reddy J observed that such exercise of a tribunal's jurisdiction would be a case either of no exercise of jurisdiction or one not legally exercised. In either case, the writ court can interfere and cannot be content by simply saying that since the tribunal has exercised its discretion, it will not examine the circumstances of the case to ascertain whether or not such power was exercised in accordance with the well-settled principles. If the writ court was not to do so, it would be a refusal on its part to exercise its jurisdiction.[73] In *Gujarat Steel Tubes,* the court said that the writ court can itself reassess the evidence on record and can come to a conclusion which the tribunal was empowered to arrive at in exercise of its powers under s 11A of the Act, where the award suffers from a fundamental flaw.[74]

In *EV Raju,* on the facts and in the circumstances of the case, the High Court itself examined the evidence on record for ascertaining whether the management had proved the act of misconduct alleged against the workman and came to the conclusion that the management was justified in dismissing him.[75]But once the act of misconduct is proved either in the inquiry conducted by the employer or by evidence placed before the tribunal for the first time, the punishment imposed on the delinquent cannot be interfered with by the writ court except where the punishment is so harsh as to suggest victimisation.[76] In *Food Corpn of India,* a peculiar situation arose before a single judge of the Calcutta High Court. The tribunal found that the domestic inquiry held on the charges against the delinquent workman was illegal for non-observance of the principles of natural justice and itself called upon the management to adduce evidence before it to sustain the action of dismissal. Despite this, the management did not adduce any evidence and yet the tribunal upheld the order of dismissal. In a writ against the award of the tribunal, the High Court quashed the order of dismissal and ordered reinstatement of the workman with continuity of service but without backwages.[77] In this case, there is no justification for denying backwages to the workman, because denial of backwages itself is punishment for an act of misconduct. In the peculiar circumstances of this case, there was no warrant for imposing any punishment.[78] In *Godrej,* a single judge of the Madras High Court held that where the workman was found guilty of misappropriation and cheating, which are charges of grave nature, the labour court should not direct reinstatement, though without backwages, on the ground that he was a married man and he should be reinstated to avoid suffering to his family.[79] Once it is found that the charge of theft levelled against the workman was proved, the tribunal cannot order reinstatement on the ground that the punishment of dismissal was aggressive and unjustified.[80] In *Tarun Kr Banerjee,* the Supreme Court held that under s 11A, if the tribunal finds the order of discharge or dismissal of the workman unjustified, it could reappraise evidence adduced in the domestic inquiry and decide the question of misconduct alleged against the workman. Where, on evidence, the charge of misconduct of the

workman has been proved, the award of the tribunal contra is not sustainable.[81] In *Hindustan Motors*, the Supreme Court held that s 11A confers wide discretion on the tribunal in the matter of awarding proper punishment and also in the matter of the terms and conditions on which reinstatement should be ordered. It necessarily follows that the tribunal is duty bound to consider whether in the circumstances of the case, backwages have to be awarded and if so, to what extent.[82]

In *Subhash Chandra Sharma*, the Supreme Court held that once it was found that the conductor was guilty of drunkenness and intimidation of the cashier and that the inquiry was properly held, it is not open to the labour court to interfere with the punishment of dismissal, and that the order passed by the labour court directing reinstatement with 50 per cent of backwages was arbitrary, capricious and unjustified.[83] In a case, where the wife and husband were employees of the same estate, the wife continued to occupy the quarter allotted to her husband even after his demise and refused to vacate the premises despite repeated requests from the management and was dismissed for the said misconduct, it was held that the tribunal was justified in upholding her dismissal on the ground that her action amounted to continued misconduct.[84] In *Anna Transport Corpn*, Jayasimha Babu J, while setting aside the order of the labour court directing a workman dismissed for unauthorised absence, held that the discretion vested in the labour court under s 11A was not meant to be equated to charity. Interference by the High Court would be called for in cases where the reasons given by the labour court were not germane to a decision relating to the appropriate penalty. The fact that the workman had a family could not be a justification for condoning all the misconducts or declining to impose any penalty. The learned judge peremptorily observed that the employer was not required to function as a charity organisation; that any organisation was established to render efficient service and fulfill the object for which it had been set up; and that if its personnel stay away from work frequently and for long periods, no organisation could retain them in employment.[85]

When an employee remains absent from duty without sanctioned leave, the authority can, on the basis of the record, come to a conclusion about the employee being habitually negligent in duties and an exhibited lack of interest in the employer's work. Habitual absence is a factor which establishes lack of interest in work. There cannot be any sweeping generalization. But at the same time some telltale features can be noticed and pressed into service to arrive at conclusions in the departmental proceedings. The charge in the instant case was absence without obtaining leave in advance. The conduct of the employees in this case is nothing but irresponsible in extreme and can hardly be justified. The charge in this case was misconduct by absence. In view of the Governing Standing Orders unauthorized leave can be treated as misconduct. Thus the order of the Tribunal refusing to accord approval primarily on the ground that in most cases the leave was treated as leave without pay and that being the position it cannot be said that the absence was unauthorized, would be liable to be set aside.[86] In *Ashok Leyland*, where the workman was dismissed for assaulting his departmental head, a single judge of the Madras High Court held that the award of the labour court directing his reinstatement on the basis of sympathetic consideration was undoubtedly perverse and could not be sustained.[87] Once the misappropriation of funds is proved, maybe for a small or large amount, there is no question of showing uncalled for sympathy and reinstating the employee into service. The labour court is bound to respect the punishment imposed by the management.[88] Where the labour court had found that the inquiry held by the employer was fair and proper, there is no substance in the contention of the employer that the labour court had committed an error in not trying the validity of domestic inquiry as a preliminary issue, and no prejudice was caused thereby to the employer in any manner.[89]

In *Vikramaditya Pandey*, the Supreme Court held that ordinarily, once the termination of service of an employee was held to be wrongful or illegal, normally the relief of reinstatement with full backwages would be available to the employee. However, it would be open to the employer to specifically plead and establish that there were special circumstances, which warranted either non-reinstatement or non-payment of backwages.[90] In *Krishan Kumar*, the Punjab and Haryana High Court held that where the termination of a workman was held illegal and the employee was ordered to be reinstated with full backwages and service benefits, such employee would be deemed to have worked during the period he remained a dismissed employee, and would be entitled to be considered for retrospective promotion, if during that period the management had promoted his juniors to a higher grade post.[91] The consequences of reinstatement means restoration of contract of service and entitlement to backwages, even where the award of the tribunal was silent on the payment of 'backwages'. Backwages is an implicit, integral part and a necessary inseparable concomitant of an order of reinstatement, unless proved that the workman engaged himself in some gainful employment or there existed any other circumstance which deprive him of the said benefit.[92] In *Ganayutham*, the Supreme Court held that the doctrine of proportionality was at par with the doctrine of Wednesbury's unreasonableness and unless it was held that the punishment imposed upon the delinquent was so irrational as to shock one's conscience and that no reasonable man while reasonably exercising his power would impose the same, the High Court could not interfere with the punishment.[93] In *H Nagaraj*, the Supreme Court observed: 'We fail to see how the Tribunal, when it upheld the inquiry, could have interfered with the quantum of punishment in this fashion.'[94] Fraud and forgery committed by the employee of a bank are serious acts of misconduct causing substantial loss to the bank and hence his dismissal from service cannot be said to be disproportionate. The finding of the tribunal that the charge against the employee was not proved cannot be sustained.[95] It is difficult to accept that the labour court in each and every case has a duty under s 11A to reappraise the whole evidence and to give the findings thereupon.[96] In *Parma Nanda*, the Apex Court held:

> The jurisdiction of the tribunal to interfere with disciplinary matters and punishment cannot be equated with appellate jurisdiction. The tribunal cannot interfere with the findings of the inquiry officer or the competent authority where they are not arbitrary or utterly perverse...It is appropriate to remember that the power to impose penalty on a delinquent officer is conferred on the competent authority either by an Act of Legislature or rules made under the proviso to Art 309 of the Constitution. If there has been an inquiry consistent with the rules and in accordance with the principles of natural justice what punishment would meet the ends of justice is matter exclusively within the jurisdiction of the competent authority ...[97]

Where the tribunal directed that a bank employee, who was dismissed for fraud, misappropriation and unauthorised absence, be reinstated, quashing the award of tribunal and restoring the punishment of dismissal, it was held that it would amount to rewarding fraudulent and dishonest conduct.[1] Where the labour court, after recording a finding that the inquiry held was proper, granted relief of reinstatement with 50 per cent backwages, a single judge of the Rajasthan High Court quashed the award and observed that the said workman not only struck work but also prevented other workers from attending to their duties.[2] Where the employee of a bank was dismissed for a grave misconduct of forging the signature of an account-holder in a withdrawal slip and obtaining payment, consideration of past record of service or of the question whether the bank sustained loss were not relevant, and that the order of the tribunal confirming the dismissal did not warrant interference.[3] The discretion available to the tribunal under s 11A to set aside an order of dismissal or discharge or to direct reinstatement should be exercised in a judicial and judicious manner. If the discretion is exercised on humanitarian grounds, the order of the tribunal is not sustainable.[4] Once the labour court came to the conclusion that the services of a driver of state road transport corporation were terminated for want of control over steering and lack of self-confidence, it is not open to it to direct the corporation to engage him in some other post on 'humanitarian grounds'. The labour court has no jurisdiction to substitute the punishment with something less.[5] Poverty of a workman is not a ground on which the labour court can condone misconduct and direct reinstatement.[6] In *ICRI*, the Supreme Court held that where the tribunal agrees with the inquiry officer, there is no necessity for repeating the evidence and conclusion by the tribunal, even though the tribunal can differ from the findings of the inquiry officer in a properly conducted inquiry on cogent reasons.[7] In *TG Marathe*, a single judge of Bombay High Court held that the imposition of punishment was truly to be left to the disciplinary authority, who, on the one hand, was required to maintain discipline among the employees and to see that the morale of the other employees is kept up and, on the other, while taking disciplinary action, signals should not be sent out to the effect that any unruly behaviour having wider impact would be dealt with leniently. The tribunal should interfere only in a case where the punishment is shockingly disproportionate. The conclusion of the tribunal that the charge was established was correct, but not its order directing reinstatement with 50 per cent backwages.[8] In *Chandra Sekharachari*, the Supreme Court observed:

> ...Once the tribunal had found that the charges against the appellant were not established, it was not open to the learned Single Judge, who had rightly refused to re-appraise the evidence to say that with better proof the charges could have been established. The learned single judge had no jurisdiction, not even under s 11A of the Industrial Disputes Act 1947 to enter into the question whether the charges could have been established by better or further evidence. That is not the function of the court or any quasi-judicial authority. If it is found as a fact that the charges are not established, then the necessary consequences have to follow and,-as a corollary thereto, appropriate orders are to be passed. There may be circumstances justifying non-payment of full backwages but they cannot be denied for the reason that the charges could have been established with better proof. If 'better proof' was available with the management, and it was not furnished or produced before the court, a presumption would arise that such proof, if furnished, would have gone against the management. We are surprised that the view propounded by the learned Single Judge, which falls in the realm of speculation, has been upheld by the Division Bench."[9]

An employer, who wants to avail himself of the opportunity of adducing evidence for the first time before the Tribunal to justify his action, should ask for it at the appropriate stage. If such an opportunity is asked for, the Tribunal has no power to refuse. The giving of an opportunity to an employer to adduce evidence for the first time before the Tribunal is in the interest of both the management and the employee and to enable the Tribunal itself to be satisfied about the alleged misconduct. Once the misconduct is proved either in the enquiry conducted by an employer or by the evidence placed before a Tribunal for the first time, punishment imposed cannot be interfered with by the Tribunal except in cases where the punishment is so harsh as to suggest victimization.[10] In *SA Kasundra*, a single judge of the Gujarat High Court held that once it was found in the course of adjudication that the delinquent committed several acts of misappropriation, the conclusion must be that the delinquent acted dishonestly and the dismissal of the workmen from service could not be said to be illegal. Under s 11A, the tribunal or the labour court does not have unguided power to set aside the order of dismissal passed by the employer.[11] In *Pochaiah*, the facts were that the High Court having upheld the order of the labour court to the effect that the order of dismissal passed by the employer was legal and valid, directed the employer to re-employ the delinquent workman in a lower category as a new entrant. The Supreme Court, while quashing the order of the High Court,

held that there was no jurisdiction vested in the High Court to direct the employer to re-employ the delinquent employee, after upholding the punishment.[12] In *Laxmi Kant*, the Punjab and Haryana High Court held that if there was no order of termination there was no question of holding an inquiry and the workman had himself abandoned the job, and the finding recorded by the labour court to the effect that there was no termination of his services was correct. It was further held that the workman was wanting to take advantage of his own wrong, and there was neither equity nor law in his favour.[13] In *SC Sharma*, the Supreme Court held that even a threat to assault a co-employee amounts to a serious misconduct and the punishment of removal could not therefore be construed as shockingly disproportionate to the charges held proved.[14]

In *Ghanshyam Sharma*, Arun Madan J (for himself and Laksmanan, CJ) of the Rajasthan High Court set aside the order passed by a single judge quashing the labour court's order directing reinstatement of a workman. Briefly, the facts of the case were: A bus conductor was dismissed from service on being found guilty of not issuing tickets to passengers, and the conductor himself admitted his guilt. The labour court found that the inquiry was perfectly in order, but ordered reinstatement. A single judge of the High Court rightly quashed the order of the labour court on the well-settled ground that once the charges of misappropriation, *etc*, were proved and the domestic inquiry did not suffer from any infirmity, the labour court in exercise of its jurisdiction under s 11A cannot substitute dismissal with a lesser punishment on considerations of private benevolence or uncalled for generosity. Viewed in this perspective, the decision given by the learned single judge of the Rajasthan High Court was right.[15] Where a single judge of the Delhi High Court directed the management of the bank to reconsider the decision of dismissal of a workman, a Division Bench quashed the order and held that the single judge was not justified in disturbing an administrative order unless it is found to be illegal, arbitrary or procedurally wrong, and that the bank's decision did not suffer from any malady which could warrant interference by the court.[16] Where the services of a workman were terminated on the ground that the workman had not reported for duty after the expiry of leave, it was held that the principles of natural justice must be read into the certified Standing Orders relating to leave and, so read, it was obvious that the termination of the workman without a show-cause notice and without an opportunity to the workman to explain his stand, and without any inquiry had to be treated as *non est*.[17] In the garb of exercising powers under s 11A, the labour court cannot grant relief of reinstatement to casual workers amounting to regularisation, when there are no sanctioned posts in statutory bodies and Governmental organisations.[18] In a case where the services of a conductor, who was appointed as a probationer for two years on daily wages, were terminated on being found that he had not issued tickets to twelve passengers of whom two had paid fares to him, the labour court, in exercise of the powers conferred on it under s 11A, cannot order reinstatement on the ground that such termination amounts to retrenchment; more so, it being a case of 'loss of confidence', no inquiry was required to be held.[19] Where a driver of state transport corporation was dismissed for having reported for duty in the night shift in a drunken state, there could be no other punishment except dismissal and the labour court committed a grave error of law in directing reinstatement of such a driver.[20]

In *Precipenium Valve*, the labour court, having held that the misconduct committed by the workman was serious, cannot direct payment of four years of wages by way of compensation in lieu of reinstatement and such an award is liable to be set aside.[21] Where the labour court upheld the order of dismissal for proved misconduct of slapping a co-worker while on duty and awarded monetary compensation of Rs 5,000/- in lieu of reinstatement, the High Court held that the award of labour court did not warrant interference.[22] Where the charges of forgery and misappropriation of bank's fund were proved in the inquiry and the tribunal directed reinstatement of the workman without backwages holding that the charges were not proved, the High Court, quashing the award, held that the findings of the tribunal were perverse on facts.[23] In *BS Hullikatti*, the Supreme Court quashed the order of the labour court reducing the punishment of dismissal to one of reinstatement with 50 per cent backwages even after the finding recorded by the labour court that one of the allegations against the conductor that he had issued tickets of lesser denomination as against the correct denomination was proved in the domestic inquiry, which award was confirmed by the single judge and the Division Bench of the High Court. The Supreme Court further held that once the allegation of such a nature had been proved, interfering with the order of dismissal only amounted to showing uncalled for sympathy in favour of the workman.[24] Where the labour court directed the reinstatement of a conductor dismissed for non-issue of tickets to passengers holding that the charge was not proved, the High Court quashed the order of the labour court and upheld the dismissal holding that strict and sophisticated rules of evidence do not apply to a domestic inquiry.[25] The dismissal of a workman employed in a watch factory for a misconduct involving the acceptance of a watch from a third party for repair without the company's permission is a serious misconduct and dishonesty and the punishment of dismissal cannot be termed disproportionate or excessive to the gravity of the proved misconduct.[26] Where a workman was dismissed after proper inquiry for a misconduct involving misappropriation, it is neither proper nor fair on the part of the labour court to substitute the finding and confidence of the employer with that of its own by ordering reinstatement. In such a case, the labour court cannot exercise its discretion and alter the punishment.[27] In *VP Ramulu*, the facts were that the labour court directed reinstatement of a conductor on the ground that the punishment of dismissal was disproportionate as the amount misappropriated was a paltry sum of Rs 2. A single judge of the Andhra Pradesh High Court quashed the said order and restored the punishment of dismissal. In appeal, Sinha CJ of the AP High Court upheld the order of the single judge and observed that the decision of the employer did not warrant interference by the labour court in exercise of its jurisdiction under s 11A.[28]

Where the workman, who secured employment on a fraudulent representation and by furnishing forged educational and academic documents, was dismissed from service, it was held that such employment was liable to be recalled at the option of the employer. The fact that the workman had continued in service for a long period does not create equity in his favour or estoppel against the employer. The fact that the employer has not prescribed any minimum qualifications for appointment to the post in question is immaterial.[29] In a case of dismissal for a misconduct involving assault of a co-workman, the labour court cannot interfere with the punishment in exercise of its jurisdiction under s 11A. Interference is called for, only in cases where the punishment is shockingly disproportionate.[30] A bank employee, who was dismissed after holding an inquiry for acts of misconduct inter alia involving the floating of a cooperative society, cheating and misappropriation of funds, and acting in a manner prejudicial to the interest of the bank, is not entitled to any relief and the decision of the tribunal not to grant any relief to him does not call for interference.[31] Where it is found that the workman was dismissed for putting up an unauthorised construction in the land belonging to the employer, it is wrong for the labour court to have passed an award directing reinstatement. The award was set aside and the dismissal upheld.[32] The mere fact that the same labour court took a sympathetic view in one case of dismissal for unauthorised absence and ordered reinstatement on the ground that the misconduct was not so grave as to warrant dismissal, does not mean that in all subsequent cases also, the same view should be taken.[33] Where a driver was dismissed for being found in a drunken state in the driver's rest seat after his turn of driving the bus was over and after completing his journey, the punishment of dismissal was disproportionate to the gravity of the misconduct, hence, ordered reinstatement but without backwages.[34] Where the tribunal held that the finding of the inquiry officer was not perverse, despite the fact that the said finding was based on the testimony of only one witness who had not seen the accident and no other eye witness was examined, the High Court held that the order of the tribunal itself requires to be interfered with and set aside.[35]

In *Maharashtra GK Union*, a single judge of the Bombay High Court quashed the order of the labour court upholding the dismissal, disclosed the facts that the employer failed to sustain the charge of misconduct even after adducing additional evidence before the labour court.[36] In *V Velayudham*,[37] where the dismissal of a conductor was upheld by the labour court but was modified by the High Court directing the employer to appoint him as a 'cleaner' on compassionate grounds, the Supreme Court, while setting aside that part of the order of the High Court, held that there was no reason for the High Court to have substituted its discretion for that of the labour court. In *Gajanan Vibhute*, a single judge of the Bombay High Court held that where the workman was dismissed on the basis of proved misconduct, and the dismissal was also upheld by the labour court, minor contradictions could not disturb the findings of fact based on record and the High Court in its writ jurisdiction would not reappreciate the evidence.[38] Where the workman was dismissed after due inquiry for misbehaving with his superior lady officer, the punishment of dismissal was justified.[39] In *Dev Singh*, the facts were: a senior assistant was charge-sheeted for misplacing a file which was entrusted to him, and after holding enquiry, he was dismissed from service. The writ petition filed by the workman in the Punjab and Haryana High Court was dismissed. In appeal, it was contended before the Supreme Court that it was a charge of misplacement of the file and no motive was attached to it and that the punishment imposed was shockingly disproportionate. Counsel for the workman further contended that it was open to the Supreme Court to interfere with the punishment in the facts and circumstances of the case and relied upon the decisions of the court in *Bhagat Ram*,[40] *Ranjit Thakur*,[41] *Mahesh Kumar*,[42] in support of the said contention. Setting aside the dismissal order, Hegde J (for himself and Singh J) of the Supreme Court held:

> Applying the said principle laid down by this Court in the cases noted hereinabove, we see that in this case the appellant has been serving the respondent-Corporation for nearly 20 years with unblemished service. .. A reading of the charge sheet shows that the misplacement alleged was not motivated by any ulterior consideration and at the most could be an act of negligence, consequent to which the appellant was unable to trace the file again.. .. We think the punishment of dismissal for mere misplacement of a file without any ulterior motive is too harsh a punishment which is totally disproportionate to the misconduct alleged and the same certainly shocks our judicial conscience.. .. while upholding the finding of mis-conduct against the appellant, we think it appropriate that the appellant be imposed a punishment of withholding of one increment including stoppage at the efficiency bar in substitution of the punishment of dismissal awarded by the disciplinary authority. We further direct that the appellant will not be entitled to any backwages for the period of suspension. However, he will be entitled to the subsistence allowance payable up to the date of the dismissal order.[43]

In *Lalit Popli*, the employee working in Canara Bank was dismissed after holding an enquiry. The brief facts were: on a complaint made by one Mr. SV Deshpande, a customer of the Bank, to the police that an amount of Rs. 1.07 lakhs from his account in five instalments during the year 1991. After conducting preliminary investigation, the employee was charge-sheeted alleging that he issued a cheque book to one Mr. Mohinder Kumar on the basis of an authorization letter purported to have been issued by Mr. Deshpande, resulting in the former withdrawing money by forging the signature of Mr. Deshpande; and that the employee did not verify the signature either at the time of issuing the cheque book or at the time of withdrawal of the amount; and that the forensic examination revealed that the signature was forged on all the aforesaid

occasions. In the course of investigation, it was further observed that the authorization letter purported to have been signed and issued by Mr. Deshpande was not found in the records. The appellate authority rejected the appeal made by the employee. Accepting the contention of the employee that the enquiry officer should not have come to the conclusion of establishment of the charges on the basis of the report of the handwriting expert, a single judge of the High Court had set aside the order of dismissal. In appeal, the division bench quashed the order of the single judge on the ground that while exercising jurisdiction under Art 226, the High Court could not act as an appellate court. Dismissing the appeal filed by the employee, Pasayat J (for himself and Patil J) of the Supreme Court held:

> .. . the employee accepted that there was some lapse on his part but he pleaded lack of criminal intent. A bank employee deals with public money. The nature of his work demands vigilance with the inbuilt requirement to act carefully. Any carelessness invites action.. .. even to the naked eye the mistakes in spelling of 'signature' are visible and should not have escaped the eyes of a bank employee who is supposed to be trained and equipped to notice such glaring mistakes. The Enquiry Officer has noticed the similarities highlighted by the Handwriting expert in the disputed document and the admitted signatures of the employee to show how the similarity is visible and even any layman can notice the similarity. These were factual conclusions.. .. Considering the limited scope of judicial review, the Division Bench was right in upholding the order of dismissal by setting aside the learned single Judge's order by which interference was made with it. We find no reason to differ from the conclusions of the Division Bench. The appeal is without merit and is dismissed accordingly.[44] (paras 20-22)

In *Kailash Nath Gupta*, the Supreme Court held that the power of interference with the quantum of punishment is extremely limited, but when the relevant factors are not taken note of, which have some bearing on the quantum of punishment, certainly the Court can direct re-reconsideration or in an appropriate case to shorten litigation, indicate the punishment to be awarded. Applying the said principles to the instant case, it was found that the appellant-employee, while working as a Manager in a Public Sector Bank had (i) allowed an advance to a borrower under the SEEUT scheme, (ii) granted vehical loan to a borrower without adjusting the outstanding loan amount, and (iii) allowed advances to certain borrowers with a view to extend him the benefit of subsidy money, etc. An enquiry was held into the charges and he was dismissed. Remitting the matter to the High Court for fresh disposal, Patil J (for himself and Pasayat J) of the Supreme Court observed:

> .. . there was no occasion in the long past service indicating either irregularity or misconduct of the appellant except the charges which were the subject matter of his removal from service. The stand of the appellant as indicated above is that though small advances may have become irrecoverable, there is nothing to indicate that the appellant had misappropriated any money or had committed any act of fraud. If any loss has been caused to the bank (which he quantifies at about Rs. 46,000/-) that can be recovered from the appellant. As the reading of the various articles of charges go to show, at the most there is some procedural irregularity which cannot be termed to be negligence to warrant the extreme punishment of dismissal from service.. .. These aspects do not appear to have been considered by the High Court in the proper perspective. In the fitness of things, therefore, the High Court should examine these aspects afresh. The consideration shall be limited only to the quantum of punishment and not to any other question. As the appellant would have superannuated in the normal course in the year 1994, and the matter is pending for a long time, the High Court is requested to dispose of the matter within six months from the date of receipt of this order.[45] (paras 11 & 12).

(b) Judicial Anarchy at the level of Labour Courts and High Courts

The most disturbing tendency is discernible on the part of the labour courts, industrial tribunals and even High Courts, while handling dismissals for grave acts of misconduct involving dishonesty, fraud, riotous, violent and disorderly behaviour on the part of the workmen, admittedly drawing inspiration from a few Supreme Court Judges of yester-years. In this section, quite a few of these decisions are short-listed for discussion and analysis. In *HH Pujar*, the Supreme Court, while quashing the orders of the courts below, held that in view of the fact that the conductor himself admitted that he did not issue tickets to some 20 out of 136 passengers and further conceded that the enquiry was fairly conducted, the labour court could not have interfered with the punishment on the ground that the ticket-less passengers were not examined during the departmental enquiry.[46] In *TK Raju*, the facts were: A sales officer, dealing with LPG cylinders took loans totalling several thousands from different distributors using or abusing his pivotal position in Bharat Petroleum Corporation and was found to have committed several other irregularities. He was charge-sheeted and dismissed after holding an enquiry. While exercising writ jurisdiction, the Kerala High Court, relying on *AL Kalra*,[47] and *Glaxo*,[48] took an ultra-generous view coupled with sympathy for the delinquent officer, and ordered reinstatement on flimsy and untenable grounds. Quashing the said order, Sinha J (for himself and Naolekar J) of the Supreme Court, observed:

> More than one occasion, different courts have taken pains to explain that Kalra (*supra*) does not lay down any inflexible rule. In

> the aforementioned situation, the High Court in our opinion committed a manifest error in relying upon Kalra (*supra*) and Glaxo (*supra*), as we have noticed hereinbefore, that the Respondent was not charged in terms of the Rules alone. He was charged for violation of several other clauses of the Rules. The High Court, therefore, was not correct in coming to the conclusion that as some of the charges were vague and indefinite, thus, no punishment could have been imposed on the basis thereof.. .. The charges levelled against the Respondent must be considered on a holistic basis. By reason of such an action, the Respondent had put the company in embarrassment. It might have lost its image. It received complaints from the Federation. There was reason for the Appellant to believe that by such an action on the part of the Respondent, the Appellant's image has been tarnished. In any event, neither the learned single Judge nor the Division Bench came to any finding that none of the charges had been proved.. .. The power of judicial review in such matters is limited. This Court times without number had laid down that interference with the quantum of punishment should not be done in a routine manner.. . .[49]

Justice Sinha made no secret of his displeasure, and very aptly so, at the way the High Court proceeded to blindly follow the outrageous decisions rendered by Desai J in the above two cases, which stand as monumental illustrations of the colossal degeneration that beset judicial disposition and judicial standards. The learned judge was by all standards very mild in his reproach, even though the learned judges of the Kerala High Court deserved nothing short of an outright condemnation in the strongest terms for following the unruly decisions of Desai J, in preference over *Tata Oil Mills*,[50]*Mulchandani*,[51] and *MS Dhantwal*.[52] All the said three cases were decided by three-judge benches, which laid down the law relating to disciplinary action and dismissal on firm grounds, and are binding on the benches that decided *AL Kalra*, *Glaxo*, *etc*. Apart from displaying lawlessness and disorder both in the reasoning and conclusions, Desai J was further guilty of judicial indiscipline of grave magnitude in so far as he struck out in a weird and chaotic direction. In the light of the fact that a few judges of High Courts, and even of the Supreme Court, continue to be inspired by the judicial anarchy infused by Desai J in the decision-making process, it is considered expedient to devote some space to the quality of the decisions rendered by Desai J, not only in *AL Kalra* and *Glaxo*, but also in *Rajender Kindra*,[53] and *Rasiklal Patel*,[54] all of which were decided by him more or less in the same year. The following passages from the book "*Industrial Jurisprudence: A Critical Commentary*" on the disgusting judicial approaches, not only of Desai J, but also of his two brother judges, *i.e.*, Krishna Iyer and Chinnappa Reddy JJ, and their dysfunctional consequences for the industry, economy and society, deserve mention:

> The sudden and steep deterioration in the judicial process began during mid-70s, strangely coinciding with National Emergency. The three learned judges, namely, Krishna Iyer, Desai and Chinnappa Reddy, can be aptly described as the '*founding fathers of judicial chaos*'. A few decisions rendered by the trio have been analysed in the preceding paragraphs, and a few more in the following pages. In this connection, it is important to note that a judicial decision is not only a *source of rights* as regards the disputing parties, but is also a *source of law* as regards the world at large. As the former, it is 'Judgment' and as the latter, it is the 'Precedent'. What the three learned judges ignored with impunity was that their decisions together with the *ratio decidendi* were likely to set a Precedent—*and a bad Precedent indeed*— for the courts of inferior jurisdiction. It was like a shot-in-the-arm for the Presiding Officers of the Labour Courts and Tribunals, who, while exercising jurisdiction u/s. 11A of the IDA, began looking at themselves more in the role of "*para-union leaders*" and "*champions of working class*", than as judicial officers. The staggering number of obnoxious awards passed by labour courts and tribunals - ordering reinstatement with full back wages, even in cases involving grave acts of misconduct - amply testifies the contagious influence of the three judges on them.
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> The three judges had literally flashed a green signal to unruly workers and militant trade union leaders like *Datta Samant, Suryanarayana Rao, et al*, together with an assurance of the kind: *"Don't worry! Continue with your good work!! We are here to protect your interests!!!"* While it does not take more than a stroke of pen for an irresponsible judge to destroy law and order, it would certainly take ages for his successors to restore them. *That is what exactly has been happening during the past couple of decades with a few right-thinking judges of 1990s and thereafter swimming across the current to restore 'justice' in the Seat of Justice!* The seal of judicial approval put on serious acts of misconduct, and in some cases with criminal overtones, had only fuelled the fire of inter-union and intra-union violence, physical assaults of managerial and supervisory personnel, and the like, during the late 1970s and the whole of 1980s in several industrial belts, prominent among them being the *Whole of West Bengal, Bombay-Thane-Belapur, Bangalore-Whitefield-Hosur* and *Hyderabad-Sanatnagar-Patancheru*.
>
> Even though it would be unfair to place the entire blame at the door of the Supreme Court, notwithstanding a few *extremist-anarchist judges* like Desai J, yet the Labour Courts and Tribunals cannot escape the charge of actively supporting violence, riotous and disorderly behaviour by their generous orders of reinstatement of workmen, who were dismissed for acts of misconduct of grave magnitude. And, strangely and sadly, that is the extent to which judicial standards of labour courts have nose-dived during the past 25-30 years! It is not as if all the employers have the means to fight cases up to the level of Supreme Court. In such a

situation, the decision of the Labour Court or Tribunal, and in some cases that of the High Court, becomes final. *If a confirmed goon or criminal is directed to be reinstated and the court order acquires finality, what is the fate of the employer, the industrial establishment and the people-at-work therein? Secondly, what kind of message is being sent by labour courts to employees/workers? Is it necessary to answer these questions elaborately!?* It is not in doubt that, in the recent past, *the learned Judges of Supreme Court and (a few) of High Courts appear to have firmly resolved not to allow this industrial hooliganism to thrive, as is manifested in their outright condemnation of such acts as well as the indifference and leniency displayed by inferior tribunals*. Even so, here is the factual material extracted from a monograph published by the All India Organisation of Employers (AIOE) on 'industrial violence' involving not only assaults, but also homicide of supervisory and managerial personnel by militant workers, which should be an eye-opener to the over-generous Presiding Officers of Labour Courts and Tribunals.[55]

(**Note**: *The text has been divided into paragraphs and arranged serially numbered by the author to facilitate convenience of reading*).

(i) .. . following 2008, there is sudden increase in labour unrest in certain industry pockets which came at a time when strikes have actually been on the decline in the country. While strikes and protests are common global phenomena, in the recent years India is facing an alarming situation with the increase in number of unrest, leading to violence and killings which reminds us of the trade union militancy period of 1970s and 80s. This surge in industrial unrest has become a concerning situation for all.

(ii) On September 22, 2008 the CEO of Grazianotransmissioni India, the Indian unit of an Italian auto component maker, was *clubbed to death* by a group of 200 workers.

(iii) In another incident, in March 2011, a Deputy General Manager (Operations) of Powmex Steel, a unit of Graphite India Ltd. *was killed after* his vehicle was set afire by irate workers

(iv) In November 2010, an Assistant General Manager of Allied Nippon, an auto parts maker, was *stoned to death* by angry workers.

(v) In September 2009, the Vice-President (HR) of Pricol was *beaten to death* by agitating workers.

(v-a)* On July 19, 2012, Mr. Avanish Kumar Dev, General Manager - HR of Maruti Suzuki, Manesar, was *burnt alive* in the administration building of the factory, in the course of a major rioting on the part of workers

*__Note__: *The above incident, which took place subsequent to the publication of the AIOE monograph, has been added by the author.*

(vi) These surging incidents of industrial unrests are for sure denting investor's confidence in the country being a safe investment destination and a preferred global investment hub. It has also led to production and financial losses to companies operating in the country. If left unchecked, this ongoing turmoil will surely send wrong signals to foreign and domestic investors, which will directly affect the country's economy and employment generation targets. Today, industrial relation needs more detailed understanding of the needs and mindsets of workers and management, to foster harmonious functioning of enterprises to promote growth.

Recent Unrest

(vii) Most of the adverse unrests were witnessed in the manufacturing, textile and automobile and auto auxiliary industries during 2008-11 and names involved — *Hyundai, Honda, Nokia, Bosch, Pricol, Maruti Suzuki* to name a few - most of which represent the best across industries.

(viii) Here worth mentioning is the calamitous case of Maruti Suzuki India Ltd., Manesar Plant the largest automobile manufacturing company in India. The strike at Maruti's Manesar Plant started on 4th June, 2011 and continued throughout the year in three phases, adversely affecting the company's production and also the State Revenues. The Haryana State Government declared the strike as illegal and imposed ban by passing prohibitory orders and referred the matter to the local labour court. But even this could not stop the workers from striking. As per estimation, Maruti Suzuki made a loss of Rs. 400 million or roughly $9 million a day in revenue because of the strike, with 1,200 vehicles a day in lost output. The striking workers were demanding the registration and recognition of a new union at the Manesar plant, besides retaining contract labourers for the two upcoming new units inside the complex and withdrawing disciplinary action against the 11 office bearers of the new union. The strike not only affected Maruti Suzuki but also directly

affected the supply chain of vendors supplying auto-parts directly to Maruti. Over 100 units suffered a virtual shut-down, while 300-odd manufacturers, which were indirect vendors were reported a daily loss to the tune of 15-20%. Moreover, there were numbers of strikes that took place throughout the country during 2011.

(ix) About 900 workers launched a wildcat strike on 16 March that continued for more than a month at General Motor's India Ltd., Halol plant at Gujarat, opposing the working conditions in the factory and demanding wage hikes, making the company suffer a production loss of above 1,500 units. This was the second such incident at Halol in five months.

(x) The leading tyre manufacturer MRF was compelled to declare lockout at its Kottayam plant in Kerala following labour unrest due to suspension of a worker on disciplinary ground.

(xi) The management of the Hindustan National Glass Industries Limited had to issue suspension of worker for an indefinite period after violence erupted in July at Rishra factory premises in West Bengal over a wage revision demand, leading to the closure of the factory.

(xii) Tata Group firm Voltas also faced a similar issue with its workers protesting against the company's recruitment policy and wages.

(xiii) The Hindalco Industries, Kochi had to declare lock-out of its plant for about 10 months, for an odd number of 200 employees went on strike demanding an upward revision in monthly wages.

(xiv) Workers at Moser Baer's Noida facility workers struck a weeklong strike in October demanding a revision in wages and bonuses.

(xv) Over all, in 2008-11, an increased number of strikes were witnessed in India. To name a few - Satari based *Automobile Corporation of Goa Ltd*., *Nestle*, *Mahindra & Mahindra*, *Hyundai India's Chennai plant*, *Rico Auto Limited*, *Honda Motorcycle* and *Scooter India* (HMSI), *Honda Siel Cars*, *Haldia Dock Complex* of Kolkata Port Trust, *Bosch*, *Toyota Kirloskar Motors*, *Pepsico etc*.

(xvi) Looking into the adverse industrial unrests scenario in the country, some enterprises were even planning to shift their base out of the country or to restructure their business operation. As for instance, the Rs. 743 crore automotive instruments maker Prical, which was recovering from a labour strife that claimed the life of a senior executive at its Periyanaickanpalayam unit in Coimbatore, Tamil Nadu in September, 2009 was working on a restructuring plan from automotive business.

(xvii) In another case, frustrated with the continues recurring of labour unrest, Japanese auto major HMSI had threatened to shut operations at its wholly-owned two-wheeler plant in Haryana and has petitioned the Punjab and Haryana High Court for relief or else it may shut operations in India if the situation persists. Earlier the Honda power had moved out from Uttrakhand and shifted its base to Noida following serious labour problem.

(xviii) Even, Toyota Motors, Bangalore in 2006, following a strike, went on to say that it will stall its future investment plans in the state.

(xix) It is very often noticed that some of the industrial belts are quoted as strike prone zones, due to frequent re-occurrence of industrial unrest which can be evaluated from the disputes recorded during the last few years. The Gurgaon-Manesar belt of Haryana is often referred to as notorious belt because of the number of recurring continues labour disputes during the last five years impacting the industrial environment in the state.

(xx) Though there are no concrete figures on the estimated losses due to the unrest, it is believed that they are to the tune of Rs 800-1000 crore, the biggest brunt being borne by Maruti Suzuki India Ltd. and Honda Motorcycle and Scooter India (HMSI), which has seen production falling by above 65% and non-operation of a new third production line.

(xxi) A leading newspaper in 2011 stated that an economic survey has quoted Gujarat at the top of labour unrest chart due to highest number of strikes and other forms of labour unrest on accounts of various financial and disciplinary issues despite of favorable industrialization policy.[56] (Italics supplied).

Supplementary up-date: On January 27, 2012, the workers of Regency Ceramics, Yanam (near Kakinada) went on a rampage and attacked Mr. KC Chandrasekhar, Vice-President of the Company, who succumbed to the injuries in a hospital in Kakinada. The factory was thereafter closed.

Note by the Editor: It is not out of place to mention that the editor of this book was himself an Industrial Relations Manager for nearly 25 years (from the 1970s to 1990s) in different reputed manufacturing organizations and was a witness to the trade union

militancy and worker violence of grave magnitude in various states and parts of the country. *Almost all the companies listed in (xv) above are progressive organizations and best paymasters*, not only by Indian standards, but by international standards even.

It is hoped that the Presiding Officers of Labour Courts and Tribunals read this before showering uncalled for sympathy on goons, and mercy on hooligans - not at their own expense - but of employers! Apart from strikes, go-slow and other kinds of work-stoppages, *it is startling that five senior executives of industrial organizations were killed by militant workers at different places within a span of four years*! Those many Personnel & Industrial Relations Managers had not lost their lives at the hands of militant workers in some 30 years of worst and turbulent IR history of the country during the period from 1960s to 1990s! *Is it civilized for adjudicators, particularly at the trial court level, to remain blind to the ground realities and proceed to decide cases in a callous and irresponsible manner?*[57]

(c) Restoration of Sanity in Judicial Disposition and Judicial Process

The following analysis is again drafted from the aforesaid book on *Industrial Jurisprudence* for the benefit of the civilised citizens, lawyers, academics, students of law and, most importantly, for the judges of labour courts and tribunals, in the fond hope that they would do some soul-searching with special reference to the kind and quality of judgments that are being rendered by them in this branch of law, to the absolute detriment of equity, fair play, good conscience and the very sense of justice.[58] The reasoning and conclusions of Desai J, with all the misstatements of law and judicial abnormalities, did not obviously find favour with several right-thinking judges during the 1990s, as can be seen from the following decisions of Kerala and Bombay High Courts. The *first* in this chain is *Bhavani Metal*, in which Dhanuka J, of Bombay HC, while upholding the dismissal of the workman, observed that *Mulchandani* had been merely distinguished in *Glaxo*, but had not been overruled, as both were judgments of co-ordinate Benches; that both the judgments were operative and binding, each in its own sphere.[59]

The *second* one is that of Sukumaran J, of the Kerala High Court in *BPL India*, which is in a class by itself in so far as the learned judge adopted a down-to-earth approach, unembellished by platform rhetoric or ultra-radical ideological overtones. The facts of the case, in short, were: The workmen resorted to a strike on certain issues. Five workmen, who assaulted management staff outside the main gate of the factory, were charge-sheeted and eventually dismissed. The relevant standing order reads: *'Riotous and disorderly behaviour during working hours within the premises of the company or any act subversive of discipline either within or outside the premises of the company'*. The Labour Court, while observing that the enquiry was in order, nevertheless ordered reinstatement on the ground that the misconduct took place outside the factory. Quashing the order of the Labour Court, Sukumaran J, observed:

Till the *Glaxo Laboratories* case, *no decision of any court had referred to Standing Orders as a Penal Statute.* The Supreme Court has in *Glaxo Laboratories* case (*supra*), no doubt, now made such an observation. That has to be noted by the courts. ...*Glaxo Laboratories* case has not given any interpretation which would render the Standing Order a dead letter. …*A question of interpretation and the invocation of the principles of interpretation would arise only if there be ambiguity in the provisions*. Absent ambiguity, interpretational exercises are irrelevant. …The assault and attack took place just before the factory gate. It was referable to a strike situation of the factory concerned. Those assaulted and attacked were officers of the management. They were proceeding to attend the work, though the strike was on. The striking workers had their agitation and shed at the factory gate itself. It is then abundantly clear that the provocation for the assault and attack was not a private feud, or an individual conflict. ...The decision is fully covered by the *Tata Oil Mills* case. ...Tribunal committed an error of law when it thought that no misconduct could be posited. ...It has, therefore, to be, and is, hereby quashed.[60]

While making a general observation on the pressing need to eschew industrial violence and preserve order and discipline, the learned judge observed:

Discipline in an establishment has to be preserved at all costs; almost like the apple of the eye. Violence, crude violence, directed against the top managerial personnel, would be the swan song of industrial peace. No worker can embrace violence as a motto of grievance redressal. The tragedy gets aggravated when viewed in the background of a nation where non-violence was a well-canvassed creed. ...Industrial Tribunals should not develop cold feet, when they have to deal with hard cases, where the very structure, the morale and discipline of an industrial establishment are imperilled. I have no hesitation in holding that the seriousness and gravity of the misconduct attracts serious and grave punishment. *If the management thought that dismissal was the proper punishment, that cannot be characterised as viciously unreasonable, justifying interference in writ jurisdiction*. The court

has only to uphold and declare the validity of the managerial action in such circumstances. (ibid.) (Italics supplied).

It is a great relief to find that 'sanity' and 'good sense' have not vanished from higher judiciary, despite a few judges of the hue and shade of Desai and Reddy JJ, who condoned with impunity grave acts of misconduct involving militancy, violence, fraud and misappropriation, with absolutely no concern for the larger interests of the industry and industrial community. The decision of Sukumaran J, came as the much-awaited shower to the parched land. The highly irresponsible decisions by the likes of Desai, Iyer and Reddy JJ, during the 1970s and 1980s, graduated themselves to the level of judicial rewards to criminals and incentives for resorting to violence. Justice Sukumaran manifestly rejected the line of reasoning of Desai J, and rightly followed *Tata Oil*, *MS Dhantwal* and *Mulchandani*.

The *third* case, which deserves a mention is that of Srikrishna J, of Bombay High Court (as he then was), in *Mather Platt.* In a somewhat similar set of facts as *BPL*, the learned judge rejected *Glaxo Laboratories* and followed *MS Dhantwal* and *Mulchandani*. The extract from his decision, which has a refreshing impact on an otherwise chaotic Industrial relations scene, is reproduced below:

> The proposition of law deducible from a conspectus of authorities, during the period 1953 to 1975, appears too firmly settled and could not have been intended to be dislodged, by a side wind, by the pronouncement in *Glaxo Laboratories* case. It is difficult to accede to the contention advanced on behalf of the petitioner that the judgment in *Glaxo Laboratories'* case is a radical departure from the law laid down in *Mulchandani's* case. Both *Mulchandani* and *Glaxo Laboratories* were judgments of Benches of the Supreme Court consisting of three Judges. There is no evidence in the *Glaxo Laboratories'* case (*supra*) that the law laid down in *Mulchandani's* case (*supra*), was departed from or, much less, intended to be over-ruled. ...In my view, there is no difficulty in holding that it is the law laid down in *Mulchandani's* case which must apply to the petitioner's case. ...As I read them, with great respect, the observations in the *Glaxo's* judgment must be taken to be confined to and arising out of the peculiar phraseology of the Standing Order which was before the Supreme Court. I am in respectful agreement with the observations of the Supreme Court in *Glaxo.. . In my judgment, interpreting the Standing Order applicable to the petitioner's case, in the manner suggested by the petitioner's counsel, would make it operate as a 'rogue's charter'*.[61] (Italics supplied).

On the facts of the case, Srikrishna J, went on to observe:

> Unfortunately, the section of workmen led by the present petitioner...to the residence of Moses in the dead of the night, not for beseeching him to give up his thinking nor for preaching the benefits of unison in thoughts or deeds, but to overawe and silence him by sheer muscle-power. *They call upon him to open up the doors of his house, and upon his declining to do so, break open the front and rear doors. They march into his house, like a band of maraudering goons; they assault the lady of the house, the son and daughter-in-law of Moses and also Moses*. ...If this be the conduct of the workmen...*can it be said that this was an assault for a purely and personal and private matter unconnected with the industrial relations*...? *Looked at from the point of view of law or common sense which are not sworn enemies - I think that the answer can but be negative*. (Italics supplied)

The mild tone and tenor of Sukumaran and Srikrishna JJ, are understandable, in the light of the fact that they were delivering judgments *qua* judges of High Courts. That the *ratio* of *Glaxo Laboratories* had ruffled the judicial conscience of many right thinking judges is not in doubt. It goes to the credit of Sukumaran and Srikrishna JJ, that they rendered yeomen service to the cause of justice and set the tone for a saner judicial approach to cases involving violence and hooliganism among workers.

The *fourth* one is *BPL Systems*, in which MJ Rao CJ, of the Kerala High Court (as he then was) held:

> The case in *Mulchandani...* is directly in point. ...The present case fits squarely into the above case (*supra*). Likewise in *Lala Ram (supra)* the Supreme Court held that if there was 'nexus' between the misconduct and the employment, it was sufficient. In the light of the above dicta, the present case of dismissal was rightly upheld by the Industrial Tribunal. In our view, in *Glaxo Laboratories*...Supreme Court, on facts, held that there was no misconduct within the scope of the Standing Orders. ...*Glaxo Laboratories'* case cannot therefore be said to have deviated in principle from the ratio of earlier cases decided by Benches of three Judges.[62]

Again, the softer observations made by the learned Chief Justice, like those of Srikrishna and Sukumaran JJ, are understandable, *notwithstanding the fact that the gross abuse of judicial power by Desai J, does not call for anything short of an outright condemnation in the strongest possible terms and language*.

The *fifth* case is that of *Municipal Corporation of Greater Bombay*, in which the facts were: a clash among three rival unions (led by M/s. George Fernandez, Datta Samant and Baburao Patil) snowballed into violence involving pelting of stones on the BEST vehicles, damage to the property of undertaking, and injuries to police personnel. The police rounded up several workers and registered cases under various sections of the IPC. The workmen were charge-sheeted and eventually dismissed. The Labour Court set aside the dismissal on the ground inter alia that the incident took place outside the premises of the establishment. Quashing the order of the Labour Court, Pendse J, held:

> The Supreme Court in *Glaxo's* case specifically observed that the question as to whether there is a causal connection or a nexus with the place of work will have to be determined. ...it is futile to suggest that even if stones are pelted and damage is done to BEST buses, the action will not amount to misconduct because the buses were not on the premises of the undertaking. ...the conduct clearly amounts to misconduct which attracts the Standing Orders. It is necessary to take a pragmatic approach in such matters and not a technical approach which would defeat the cause of justice and would cause untold hardship to the Undertaking which is rendering public service. The contention *urged on behalf of respondent...would give charter to the employees to misbehave in the running buses and avoid the consequences*.[63] (*Italics* supplied).

Five decisions in a row involving similar facts as of *Glaxo* bear ample testimony to the fact that the learned judges of High Courts had to swim against the current and perform an unenviable task to undo the damage done to the cause and sense of justice by Desai J. It is not in dispute that *Glaxo* infused a score of obnoxious elements into the realm of industrial jurisprudence. All the five learned judges, *i.e.*.., Dhanuka, Sukumaran, Srikrishna, MJ Rao and Pendse, JJ, *deserve to be complimented by every sane and right-thinking citizen, and the gratitude of every member of the industrial community for squarely rejecting the intellectual insolvency of Desai J*, as reflected in *Glaxo*, which bore on its forehead the brand of 'irrationality' as picturesquely described by Lord Diplock in *CCSU* thus: 'By irrationality, I mean what can now be succinctly referred to as *'Wednesbury unreasonableness'*. It *applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at.'*[64] In *Bharat Fritz*, in which a few workmen were dismissed, the findings recorded by the High Court showed that:

(i) the workmen had gone into chamber of the Company's President in an aggressive mood;

(ii) they threatened him with dire consequences if the notice was not removed;

(iii) they confined him to his room and came very close to him with gesticulations and fisted hands;

(iv) they did not go out in spite of request and shouted slogans stating that the President should not go out; and

(v) they stayed there till the President gave instructions to his staff to remove the notice.

Despite all this, the High Court took a very liberal and generous view of the matter and held that the said acts were not that grave as to deserve the punishment of dismissal. Quashing the order of HC, Justice Agarwal observed that the said acts were subversive of discipline and that, taking the facts and circumstances of the case as also the interests of the industry into consideration, it would not be desirable and expedient to direct reinstatement of these workmen. On this view, the learned judge ordered payment of compensation in lieu of reinstatement.[65] In *TELCO*, the facts disclosed that the workman was in unauthorised occupation of a company's quarter. The suit filed against the workman for vacation was decreed in favour of the company. When the Town Warden went to execute the decree along with the Nazir of the Civil Court, the workman assaulted him causing serious injuries. The Labour Court and High Court held that the punishment of dismissal was disproportionate and ordered reinstatement. Quashing the orders of the courts below, and very rightly so, Pasayat J, of the Supreme Court, held:

> We find that the Labour Court has found the inquiry to be fair and proper. The conduct highlighted by the management and established in inquiry was certainly of very grave nature. The Labour Court and the High Court have not found that the misconduct was of any minor nature. On the contrary, the finding on facts that the acts complained of were established has not been disturbed. That being so, the leniency shown by the Labour Court is clearly unwarranted and would in fact encourage indiscipline. Without indicating any reason as to why it was felt that the punishment was disproportionate, the Labour Court should not have passed the order in the manner done.[66]

At this point, it is essential to mention *Kerala Solvent Extractions*, one of the greatest decisions rendered by the Supreme Court in the '*post-Desai phase*', which can be rightly described as the fore-runner of several decisions, which restored sanity in the reasoning process. The very fact that several right thinking Judges of the High Courts and the Supreme Court have heavily relied upon the observations made in the said case bears eloquent testimony to this assertion. Reverting to *Kerala Solvent Extractions*, the facts of the case disclosed that the workmen concerned were employed by the company as *badli* headload workers in godowns. A notice was issued stating that only those persons who had studied upto VIII standard or below should apply. The workmen, who applied for employment stating that they had passed VII standard, did not specifically mention that they had passed SSLC. It was only after their appointment that the appellant came to know that they had passed SSLC and that there was a violation of the notification. The appointments were made in the year 1988, and the services of the workmen were terminated by the management in 1989. The labour court ordered their reinstatement with continuity of service but without back wages. Both the single judge and Division Bench of the Kerala High Court upheld the order of labour court. Quashing the orders of all the courts below, a Bench comprising Venkatachaliah CJI, Mohan and Jeevan Reddy JJ of the Supreme Court, made some enlightened observations, which deserve special mention:

> Sri Vaidyanathan, learned senior Counsel for the appellant, submitted, in our opinion not without justification, that the Labour Court's reasoning bordered on perversity and such unreasoned, undue liberalism and misplaced sympathy would subvert all discipline in administration. ...He further submitted that this laxity of judicial reasoning will imperceptibly introduce slackness and unpredictability in the legal process and, in the final analysis, corrode legitimacy of the judicial process. ...We are inclined to agree with these submissions. In *recent times, there is an increasing evidence of this, perhaps well-meant but wholly unsustainable, tendency towards a denudation of the legitimacy of judicial reasoning and process*. The reliefs granted by the Courts must be seen to be logical and tenable within the framework of the law and *should not incur and justify the criticism that the jurisdiction of Courts tends to degenerate into misplaced sympathy, generosity and private benevolence*. It is *essential to maintain the integrity of legal reasoning and the legitimacy of the conclusions*. They *must emanate logically from the legal findings and the judicial results must be seen to be principled and supportable* on those findings. *Expansive judicial mood of mistaken and misplaced compassion at the expense of the legitimacy of the process will eventually lead to mutually irreconcilable situations and denude the judicial process of its dignity, authority, predictability and respectability*. ...In this case, we have no hesitation to hold that both the Labour Court and the High Court have erred... [67](Italics supplied)

The above observation puts the norms of judicial decorum and decency in proper perspective, while chastising the imperialist tendencies of later phase, which, if heeded to by the higher judiciary, can salvage the prestige and honour of Supreme Court. When the decisions rendered and judicial disposition displayed by a few judges of the 70s and 80s are tested on the anvil of *Kerala Solvent Extractions*, the conclusion, that they did indeed subvert the legislative intent as well as the Constitution, is irresistible. Five decades ago, Vivian Bose J, administered a similar note of caution in *JK Iron*, to the effect: 'under the guise of doing social justice, the Tribunal must not adopt the attitude of a benevolent despot, ignoring the real questions at issue and basing its decision on irrelevant considerations'.[68] The said observation, directed to the Labour Courts and Tribunals, did not carve out an oasis for higher judiciary. The only difference between *JK Iron* and *Kerala Solvent* lies in that the former was pronounced at a time when judicial standards were at the zenith of their glory, whereas latter came when they nose-dived to the rock-bottom level. Even so, it is futile for the Supreme Court to pass strictures on courts of inferior jurisdiction, when the judges of the apex court themselves fail to demonstrate self-discipline and restraint. If a lower court is found to be irresponsible in giving a clean chit to cases involving grave acts of misconduct or exhibiting ultra-generous demeanour far beyond the known legal principles, the blame for such transgression should be squarely placed at the door of the Supreme Court.[69] In *Suresh Pal*, the labour court upheld the punishment of dismissal inflicted upon a conductor, who was dismissed for not issuing tickets to twenty passengers thereby causing financial loss to the corporation. The High Court, while exercising its writ jurisdiction, reduced the punishment to one of censure entry and stoppage of two increments, on the ground that the punishment of dismissal was shockingly disproportionate. Quashing the order of the High Court, the Supreme Court observed that the said act on the part of the conductor amounted to serious misconduct, which should be dealt with an iron hand and not leniently.[70]

Here is a recent decision rendered by Banumati J, of the Supreme Court (for herself and Thakur J) in *Collector Singh*, which pathetically reminds of the dark days of *Glaxo*, *AL Kalra*, *Gujarat Steel Tubes*, *Rama Kant Mishra*, *Ved Prakash Gupta*, *etc*., which were decided in a dismal fashion by *anarchist judges* of the hue and shade of Desai, Reddy and Iyer JJ. Before analysing the mediocre reasoning adopted and the misplaced sympathy showered by Banumathi J, in a case which disclosed riotous and disorderly behaviour, disobedience, insubordination and the threatening of his superior with dire consequences outside the factory on the part of a workman, and whose dismissal was upheld by all the courts below, *ie*, the labour court, single judge and the division bench of the High Court, it is necessary to state, briefly, the facts of the case: the workman was charge-sheeted and eventually dismissed, after enquiry on charges of throwing jute / cotton waste balls hitting the face of the foreman of the company and, when objected, abusing the foreman in filthy language and threatening

him with dire consequences outside the premises of the factory. On a reference, the labour court upheld the dismissal. The High Court dismissed the writ petition filed by the workman. A few observartions made by Banumathi J, have been identified, para-wise, for analysis below, duly *italicising* the relevant portions:

> 6... . Learned counsel for the respondent then contended that the appellant is a habitual offender and on a previous occasion, on 18.7.1988 the appellant had misbehaved with a co-worker whereby a warning notice had been issued to the appellant and the appellant assured never to repeat such an act. It was submitted that inspite of such warning the appellant was again defiant and having regard to the gravity of charges, the Management imposed punishment of dismissal from service and Labour Court rightly held that such punishment was justified.

The above facts disclose that it was not a case of momentary, emotional outburst and the workman was having an inherent tendency to be unruly and violent toward his fellow-workmen, which finally graduated to the level of throwing cotton and jute balls on his immediate superior coupled with threatening him of dire consequences outside the factory. What does this threat mean? *Could the learned judge, at the level of the Court of Last Resort, afford to allow such a misconduct to pass muster in convenient silence?* The labour court had, after recording evidence on either side and a finding as to the commission or otherwise of the misconduct, rightly held that dismissal was justified. This decision was upheld by both the tiers of the High Court.

> 7... Yet another argument advanced on behalf of the respondent was that use of abusive language against the Foreman is a serious misconduct and punishment of dismissal from service cannot be said to be harsh or disproportionate. It was submitted that any leniency towards such misconduct would have serious impact on the discipline amongst the workmen in the factory and keeping in view the gravity of the charges proved, the courts below have rightly declined to interfere with the quantum of punishment. To substantiate his contention, learned counsel placed reliance upon a number of judgments.

The arguments advanced by counsel for respondent were sane and right in so far as any lenience in matters of indiscipline involving riotous or disorderly behaviour, sabotage, dishonesty and fraud will have serious consequences for the whole organisation by sending wrong signals to the employees at large. Perhaps the learned judge is not aware of what is happening on the industrial front, particularly, during the past 6-7 years. It will do well for her Lordship to note that some 7 (seven) managerial personnel had lost their lives in four years in union militancy and worker violence. These facts have been presented in some detail in the preceding paragraphs. It would be better for the learned judges, not only of the Supreme Court, but at all levels including High Courts and Labour Courts, to go through the terrible incidents narrated therein.

> 13. Coming to the case at hand, we are of the view that the punishment of dismissal from service for the misconduct proved against the appellant is disproportionate to the charges.. .. . Reference may also be made to the decisions of this Court in *Rama Kant Misra*,[71]. .. and *Ved Prakash Gupta*.[72]

With great respect, it has to be said that the learned judge had chosen to rely on wrong cases, which represent - not judicial sanity - but judicial anarchy of the mid-1970s and 1980s infused and fostered by a few unruly judges like Desai J, who went about condoning grave acts of violence, assaults on fellow-employees, supervisors and managerial personnel. For instance, *Rama Kant Mishra* was decided by Desai J (for himself and Eradi J) and *Ved Prakash Gupta* was decided by Varadarajan J (for himself, Desai and Reddy JJ). What enlightenment can any one expect to derive from the outrageous decisions handed down, *inter alia*, in the above cases? It is surprising why the learned judge left out *Glaxo Laboratories*,[73] from the matrix of cases relied on by her. As a matter of fact, the above two cases cited by her pale into insignificance before *Glaxo* - a landmark case, though for all the wrong reasons - which would have greatly strengthened her conclusion, howsoever frightening it might be, on the issue of proportionality.

> 14. The High Court has relied on the judgment in Mahindra and Mahindra Ltd.,[74]*wherein it was held that the penalty of dismissal on the alleged use of filthy language is not disproportionate to the charge as it disturbs the discipline in the factory. We are of the view that in the facts and circumstances of the present case, the above decision may not be applicable*. Considering the totality of the circumstances, in our view, the punishment of dismissal from service is harsh and disproportionate and the same has to be set aside.

The High Court had, in its infinite wisdom, relied on *Mahindra & Mahindra*, and very rightly so, instead of the bankrupt decisions of Desai and Varadarajan JJ. The High Court deserves whole-hearted compliments for displaying a phenomenal

sense of proportion and civilised approach while handling a critical case of grave indiscipline, which approach was so conspicuous by its absence in the decision claimed to be emanating from the Highest Court of the land. *Secondly*, what is meant by the observation, "*in the facts and circumstances of the present case, the above decision may not be applicable*", when the facts of the two cases are not only identical, but the present case goes a step further and presents an even more grave picture? With great deference, *was the learned judge visualising a situation in which the delinquent workman travels a few yards further and physically assaults the Foreman, before the Court could draw a conclusion that the punishment of dismissal was proportionate to the misconduct?* To say the least, this decision is a standing illustration of the falling standards of decision-making process at the highest level. *Thirdly*, the last observation (in para 14 above), "*considering the totality of the circumstances, in our view, the punishment of dismissal from service is harsh and disproportionate and the same has to be set aside*", betrays the half-tones and the absolute lack of judicial conviction on the part of the learned judge. What is that '*totality of circumstances*', when the case itself consisted of a simple set of facts, *i.e...*, insubordination, riotous and disorderly behaviour and threatening the superior officer, and was proved beyond doubt? What else is there in this short and simple case, in order to justify the so-called 'totality'? If it were so, what prevented the learned judge from highlighting those circumstances before reaching an atrocious conclusion that the punishment was disproportionate. Viewed from any standard, *could any learned judge afford the expensive luxury of adopting Desai J, as a role model in so far as the analysis of facts, line of reasoning, application of law or final conclusions are concerned?* Reverting to the decision proper, the final conclusion of the learned judge runs thus:

> Having said that the punishment of dismissal from service is harsh and disproportionate, this Court in ordinary course would either order reinstatement modifying the punishment or remit the matter back to the disciplinary authority for passing fresh order of punishment. But we are deliberately avoiding the ordinary course. We are doing so because nearly two decades have passed since his termination and over these years *the appellant must have been gainfully employed elsewhere*. Further, the appellant was born in the year 1955 and has almost reached the age of superannuation. In such circumstances, there cannot be any order of reinstatement and award of lump sum compensation would meet the ends of justice. Considering the length of service of the appellant in the establishment and *his deprivation of the job over the years and his gainful employment over the years elsewhere, in our view, lump sum amount of compensation of Rs.5,00,000/- would meet the ends of justicein lieu of reinstatement, back wages, gratuity and* in full quit (sic) of any other amount payable to the appellant.[75] (para 15).

If the reasoning of the learned judge analysed in the above paragraphs is just bad, the final decision granting Rs 5,00,000/- as compensation is worse. This becomes even more conspicuous in the face of the fact that the learned judge admitted that the appellant would have been working elsewhere and was gainfully employed. What kind of message was the Apex Court seeking to send to the civilised citizens at large? At this point, it is considered expedient, even at the cost of repetition, to cite the following passage from "*Industrial Jurisprudence: A Critical Commentary*", which directly refers to the three learned judges, and which pre-eminently applies to the outrageous decision rendered in *collector singh* too:

> The three judges had literally flashed a green signal to unruly workers and militant trade union leaders like *Datta Samant, Suryanarayana Rao, et al*, together with an assurance of the kind: *"Don't worry! Continue with your good work!! We are here to protect your interests!!!"* While it does not take more than a stroke of pen for an irresponsible judge to destroy law and order, it would certainly take ages for his successors to restore them. *That is what exactly has been happening during the past couple of decades with a few right-thinking judges of 1990s and thereafter swimming across the current to restore 'justice' in the Seat of Justice!* The seal of judicial approval put on serious acts of misconduct, and in some cases with criminal overtones, had only fuelled the fire of inter-union and intra-union violence, physical assaults of managerial and supervisory personnel, and the like, during the late 1970s and the whole of 1980s in several industrial belts, prominent among them being the *Whole of West Bengal, Bombay-Thane-Belapur, Bangalore-Whitefield-Hosur* and *Hyderabad-Sanatnagar-Patancheru*.[76]

Could it be said that the decision rendered by Banumati J is any worse? This decision doesn't deserve any further analysis, notwithstanding the fact that the learned judge made certain amusing observations - one such observation is, "*compensation. .. in lieu of 'gratuity', etc.,*" (), which itself is absolutely misconceived in the face of s 4(6) of the Payment of Gratuity Act in terms whereof an employee, who has been dismissed for certain acts of misconduct including riotous, violent or disorderly behaviour, is disqualified from receiving gratuity in its entirety! With great deference, it is submitted that *Collector Singh* is a standing example of the abuse of judicial power at its peak, punctuated by misplaced reliance, perverse reasoning, misconceived conclusion and uncalled for generosity, and deserves to be condemned outright and rejected lock, stock and barrel without a second look.

In *Jayaram Reddy*, the facts briefly were: the employee, who was engaged on a casual basis as a conductor, was removed from service for a misconduct related to ticketing. Sometime later, the Corporation notified some 300 vacancies of conductor. The employee applied for the post without, however, disclosing the fact that he was earlier removed from

service. He was selected, appointed and was also regularised in due course. Later, the corporation came to know that, while working on a casual basis earlier, he was removed from service for a misconduct, which fact was concealed by him while applying for a regular post. He was charge-sheeted and dismissed after enquiry. The labour court directed reinstatement but without back wages. In a writ petition filed by the workman, a single judge of the AP High Court directed payment of full back wages, which was confirmed by the Division Bench. However, the employee did not join the company despite the order of reinstatement as he secured an alternative employment. Quashing the orders of the High Court, Sinha J (for himself and Joseph J), of the Supreme Court ordered that the amount of Rs. 83,954/- paid to the workman as back wages should not be recovered.[77] Where the bus conductor was found carrying passengers without ticket and was dismissed after holding an enquiry, the Supreme Court held that interference by the labour court with the quantum of punishment was improper.[78] In *Tamilnadu STC*, the High Court upheld the order of labour court directing reinstatement of a driver on the ground that there was no eye witness to the accident and that it was further found that he made sincere attempt to avoid collision with the oncoming vehicle, and its interference with the quantum of punishment could not be found fault with. The High Court further observed that it was well established that the accident did not occur due to the rash and negligent driving on the part of the driver, and that the discretionary power available to the labour court under s 11A could not be said to have been exercised arbitrarily.[79] In *Usha Breco*, SB Sinha J (for himself and Sirpurkar J), of the Supreme Court culled out the principles governing the disciplinary process as well as the limitations on exercise of discretion by the labour court while interfering with the disciplinary action and/or the punishment imposed by the management thus:

> The Management is not only required to scrupulously follow the procedures laid down therein but was otherwise bound to comply with the principles of natural justice. If a misconduct has been committed within the purview of the provisions of the Standing Order, whether certified or Model, the workmen should be punished. The gravity of the offence, the impact the same would have on the other workmen as also the fact as to whether the same will have an adverse effect over the functioning of the industry are relevant considerations.. .. Section 11-A of the Act as interpreted by Firestone Tyre and Rubber Co. (*supra*) must be applied at different stages. Firstly, when the validity or legality of the domestic enquiries is in question; secondly, in the event, the issue is determined in favour of the Management, no fresh evidence is required to be adduced by it whereas in the event it is determined in favour of the workmen, subject to the request which may be made by the Management in an appropriate stage, it will be permitted to adduce fresh evidence before the Labour Court. .. Indisputably, in the event, fresh evidence is adduced before the Labour Court by the Management, the Labour Court will have the jurisdiction to appreciate the evidence. But, *in a case where the materials brought on record by the Enquiry Officer fall for re-appreciation by the Labour Court, it should be slow to interfere therewith. It must come to a conclusion that the case was a "proper" one therefor. The Labour Court shall not interfere with the findings of the Enquiry Officer only because it is lawful to do so. It would not take recourse thereto only because another view is possible.* Even assuming that, for all intent and purport, the Labour Court acts as an appellate authority over the judgment of the Enquiry Officer, it would exercise appropriate restraint. It must bear in mind that the Enquiry Officer also acts as a quasi-judicial body. Before it, parties are not only entitled to examine their respective witnesses, they can cross-examine the witnesses examined on behalf of the other side. They are free to adduce documentary evidence. The parties as also the Enquiry Officer can also summon witnesses to determine the truth. The Enquiry Officer can call for even other records. It must indisputably comply with the basic principles of natural justice.. .. *It is one thing to say that the finding of an Enquiry Officer is perverse or betrays the well-known doctrine of proportionality but it is another thing to say that only because two views are possible, the Labour Court shall interfere therewith.* In other words, it is one thing to say that on the basis of the materials on record, the Labour Court comes to a conclusion that a verdict of guilt has been arrived at by the Enquiry Officer where the materials suggested otherwise but it is another thing to say that such a verdict was also a possible view.[80] (Paras 25, 26 & 28)

In *Swapan Kumar Mitra*, the facts, in short, were: The workman, who was working as a driver in South Bengal STC, was charge-sheeted for negligent driving resulting in the death of 15 passengers and was removed after holding an enquiry. In a writ petition, the workman challenged the said dismissal on the ground that certain documents such as the report of the district magistrate, *etc*., which the management relied upon as well as the report of the enquiry officer was not furnished to him. Secondly, the criminal case instituted against the driver at the instance of one of the injured passengers ended in an acquittal on the ground of insufficient evidence. A single judge of the Calcutta High Court, while setting aside the removal, directed the management to supply copies of the said documents to the workman for filing his comments thereon and reach a fresh conclusion after affording reasonable opportunity to him. In appeal, the Division Bench had set aside the order of the single judge and ordered reinstatement of the workman with back wages and continuity of service, *etc*. Addressing the second issue first, *i.e.*.., the legality of dismissal subsequent to his acquittal in the criminal case, Pasayat J (for himself and Chatterjee J) of the Supreme Court surveyed the case law on the subject exhaustively and held:

> .. . the nature and scope of proof in a criminal case is very different from that of a departmental disciplinary proceeding and order of acquittal in the former, cannot conclude the departmental proceedings. This Court has further held that in a criminal case charge has to be proved by proof beyond reasonable doubt while in departmental proceeding the standard of proof for proving the charge is mere preponderance of probabilities. Such being the position of law now settled by various decisions of this Court, two of which

> have already been referred to earlier, we need not deal in detail with the question whether acquittal in a criminal case will lead to holding that the departmental proceedings should also be discontinued.That being the position, an order of removal from service emanating from a departmental proceeding can very well be passed even after acquittal of the delinquent employee in a criminal case. In any case, the learned Single Judge as well as the Division Bench did not base their decisions relying on the proposition that after acquittal in the criminal case departmental proceedings could not be continued and order of removal could not be passed. ()

On the first issue of non-supply of certain documents, while quashing the order of the Division Bench, the learned judge held:

> We have already indicated that the learned Single Judge was fully justified in directing the disciplinary authority to proceed from the stage supplying the Inquiry Report and other documents to the respondent. .. As directed by the learned Single Judge, it would be open to the respondent No. 1 to file comments or representation against the findings made in the Inquiry Report including the report of the District Magistrate. After considering these comments, the disciplinary authority is directed to reach a fresh and final conclusion, on the question whether an order of removal from service of the respondent No. 1 can be passed. It is needless to say that it would be open to the respondent No. 1 or his authorised representative to cross-examine the witnesses, and also to raise the question of admissibility of the zerox copy of the report of the District Magistrate before the disciplinary authority. Accordingly, the judgment of the Division Bench of the High Court is set aside and the order of the learned Single Judge is restored subject to modifications made herein above. It is also directed that the respondent No.1 during the pendency of the departmental proceeding shall be paid subsistence allowance in accordance with the rules of the Corporation. The appeal is allowed to the extent indicated above.[81] ()

In *LIC of India*, one of the issues was the jurisdiction of industrial courts in disputes between the Corporation and its employees in view of the settled law that LIC of India is 'State' within the meaning of Art 12 of the Constitution. Yet another question was the legal status of Development Officer of the Corporation vis-à-vis the relative jurisdiction of civil courts versus industrial courts, in view of the fact that 'Development Officer' of LIC was held to be a 'workman' within the meaning of s 2(s) of the ID Act. Justice Sinha (for himself and Sirpurkar J) held:

> LIC is a "State" within the meaning of Article 12 of the Constitution of India. Its duties and functions are provided for under the 1956 Act. The same by itself, however, having regard to the definition of "Industry" as contained in Section 2(j) of the Industrial Disputes Act, 1947 cannot take within its umbrage the functions of the Life Insurance Corporation outside its purview. (para 11).. . Under the industrial law, and in particular the 1947 Act, the authorities specified therein, the appropriate governments and the industrial courts have various functions to perform. Terms and conditions can be laid down thereunder. Violations of the terms and conditions of service are also justiciable. Safeguards have been provided under the Act to see that services of a workman are not unjustly terminated.The 1947 Act provides for a wider definition of termination of service. Conditions precedent for termination of service have been provided for thereunder. A decision taken by the Disciplinary Authority under the 1956 Act ordinarily could have been a subject matter of suit. The Civil Court, however, exercises a limited jurisdiction. If however, the concerned employee is a 'workman' within the meaning of the provisions of the 1947 Act, his remedy apart from the common law remedies may also lie before an industrial court. When a right accrues under two statutes vis-a-vis the common law right, the concerned employee will have an option to choose his forum. (para 12).. . The jurisdiction of the Industrial Court being wide and it having been conferred with the power to interfere with the quantum of punishment, it could go into the nature of charges, so as to arrive at a conclusion as to whether the respondent had misused his position or his acts are in breach of trust conferred upon him by his employer.[82] (para 17)

In *JK Synthetics*, the reference made to the labour court was in two parts: (i) whether the termination of service of the workmen was proper and legal; and (ii) if not, to what benefits and compensation was the workmen entitled. When the labour court made the original award, it answered the first part and did not answer theconsequential second part of the reference. On an application having been made under s 6(6) of the UP Industrial Disputes Act, the labour court recorded that it accidentally omitted the answer to the second part of the reference and rectified the omission by adding a paragraph therein. A Bench of the Supreme Court comprising BP Singh and Raveendran JJ, held that the case squarely fell within the ratio of *Tulsipur Sugar* (*supra*),[83] and hence the labour court was within its powers to rectify such an error or accidental omission.[84] It is well settled legal position that misplaced sympathy, generosity and private benevolence cannot be a ground to interfere with the punishment imposed by the Appellate Authority. Even according to the Tribunal, the enquiry was conducted in just and proper manner. When the enquiry was conducted in just and proper manner, the Tribunal cannot interfere with the punishment imposed by the Appellate Authority. Only if the findings of the disciplinary authority/appellate authority are perverse or the Management is guilty of vitimisation, unfair labour practice or mala fide,

then only the Tribunal can make an interference with the punishment imposed on the workman. Therefore, the reason assigned by the Tribunal for making interference in the punishment imposed by the Management is not sustainable in law and as such, the interference made by the Tribunal by invoking the provisions under s 11A is not legally sustainable, hence the impugned award is liable to be set aside.[85] It is settled proposition of law that while considering the management's decision to dismiss or terminate the services of a workman, the Labour Court can interfere with the decision of the management only when it is satisfied that the punishment imposed by the management is highly disproportionate to the degree of guilt of the workman concerned. Considering the delay in completing the enquiry and the age of the appellant and the fact that similarly situated workmen were reinstated with lesser punishment, the Labour Court ordered reinstatement, in exercise of its discretion under s 11A. Once the Labour Court has exercised the discretion judicially, the High Court can interfere with the award, only if it is satisfied that the award of the Labour Court is vitiated by any fundamental flaws.[86]

(d) Punishment other than Dismissal: Interference - Whether Justified

Where the management, after conducting an inquiry, imposed the punishment of stoppage of three increments with cumulative effect on a bus conductor for non-issue of tickets and the workman raised an industrial dispute, and the tribunal reduced the punishment to stoppage of three increments without cumulative effect, a single judge of the Gujarat High Court quashed the order of the tribunal holding that the punishment imposed by the management did not call for interference.[87] The facts of this case and the decisions rendered therein require analysis. In the first place, it is not a case of discharge, dismissal or retrenchment or termination otherwise in order to permit an individual workman to raise an industrial dispute by himself as provided under s 2A. Secondly, the facts of the case disclose that neither the union nor a group of workmen had espoused the cause of the individual workman. Thirdly, the powers conferred on labour courts and tribunals under s 11A can only be exercised in the case of discharge or dismissal, which clearly excludes any other punishment short of dismissal from the purview of the adjudicatory jurisdiction of labour courts under s 11A. As a matter of fact, the scope of power vested in the labour court or tribunal under s 11A is so limited that it cannot adjudicate even a case of retrenchment or termination otherwise, even though both involve severance of employer-employee relationship. In the face of this legal position, the reference made by the Government of Gujarat, in a case involving stoppage of increment was itself incompetent. Secondly, the industrial tribunal should have promptly rejected the reference as being outside the scope of its jurisdiction. Instead, it proceeded to exercise its jurisdiction wrongfully. In *DDA*,[88] the facts were that the management refused to allow a workman, who was arrested on a charge of murder and later acquitted by the court, to report for duty. The management did not issue any charge-sheet, did not hold any inquiry, did not issue any termination order, but merely refused the workman to resume duties. Further, when the dispute raised by the workman was taken up for adjudication, the management did not appear before the authority. The labour court passed an *ex parte* award against the management directing that the workman should be reinstated with full backwages. A single judge of the Delhi High Court held that the *ex parte* order passed by the labour court was justified and it did not call for interference.

2. Proviso

For restoring the balance disturbed by the bewildering maze of conflicting dicta, on the scope of tribunal jurisdiction to adjudicate upon the validity and justifiability of punishment of 'discharge' or 'dismissal' imposed upon an industrial workman by his employer, the Parliament enacted s 11A. The main section enlarges the scope of adjudication while the proviso enjoins on the tribunal 'in any proceeding under this section' to rely only on the 'materials on record' and not to take 'fresh evidence' in relation to the 'matter'. The proviso is a typical illustration of obscurity in drafting. Simple and perhaps reasonable though the postulates of this proviso appear, they camouflage a pandora's box of questions to be resolved; what is the scope of the expression 'any proceedings under this section'? What is the 'record'? Is it the record of the inquiry officer, or of the punishing authority or of the tribunal? What is the connotation of the expressions 'material on record', 'fresh evidence' and 'in relation to the matter'? The answer to these questions would depend upon the construction of the proviso. It is well settled that the language of a proviso, even if general, is normally to be construed limiting its operation to the field covered by the section to which the proviso is appended.[89] In *Dwarka Prasad*, speaking for the Supreme Court, Krishna Iyer J, stated the law in connection with construction of a proviso:

> A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must *prima facie* be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. 'Words are dependent on the principal enacting words, to which they are tacked as a proviso. They cannot be read as divorced from their context' ... If the rule of construction is that *prima facie* a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in

such manner that they mutually throw light on each other and result in a harmonious construction.[90]

In *S Sundaram Pillai*, the court summed up the purport and parameters of a proviso thus:

(1) qualifying or excepting certain provisions from the main enactment;

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.[91]

In *Kerala State Cashew Corporation*, the facts briefly were: A workman was charge-sheeted for an act of misconduct. Even though the charges proved were serious, the management took a lenient view and, instead of dismissing, reverted him to the next lower grade. The union took up the case and the labour court, inter alia, held that the enquiry was proper, but the enquiry officer was biased. On this view of the matter, it set set the enquiry proceedings and posted the case for fresh evidence. In a writ petition, a single judge of Kerala High Court upheld the order of the labour court, which was set aside by the the Division Bench. While dismissing the appeal filed by the union, Pasayat J (for himself and Chatterjee J) of the Supreme Court upheld the view of the Division Bench, and peremptorily circumscribed the powers of the labour courts while handing any punishment, which is short of dismissal thus:

> The Labour Court had earlier held that the enquiry was properly held and there was no violation of the principles of natural justice and that the findings were not perverse. The vitiating facts found by the Labour Court against the enquiry are erroneous and are liable to be set aside. If enquiry is fair and proper, in the absence of any allegations of victimization or unfair labour practice, the Labour Court has no power to interfere with the punishment imposed. Section 11A of the Act gives ample power to the Labour Court to re-appraise the evidence adduced in the enquiry and also sit in appeal over the decision of the employer in imposing punishment. ***Section 11A of the Industrial Disputes Act is only applicable in the case of dismissal or discharge of a workman as clearly mentioned in the Section itself***.. .. When enquiry was conducted fairly and properly, in the absence of any of the allegations of victimisation or *malafides* or unfair labour practice, Labour Court has no power to interfere with the punishment imposed by the management. ***Since Section 11A is not applicable, Labour Court has no power to reappraise the evidence to find out whether the findings of the enquiry officer are correct or not or whether the punishment imposed is adequate or not***. Of course, Labour Court can interfere with the findings if the findings are perverse. But, here there is a clear finding that the findings are not perverse and principles of natural justice were complied with while conducting enquiry.. .. Above being the position the impugned judgment of the High Court does not suffer from any infirmity to warrant interference.[92] (emphasis added)

The above ruling is right and places the powers conferred on labour courts u/s 11A in the correct perspective. In the face of clear and unambiguous language used both in the heading which runs thus: "*Power of Labour Courts, Tribunals and National Tribunals to give Appropriate Relief in case of Discharge or Dismissal of Workmen*" and in the opening part of the section, *i.e...*, "*Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court. . .*", it is too far-fetched for the trial courts to assume jurisdiction in respect of any punishment short of dismissal, by relying on flimsy notions and untenable arguments. *This over-reaching tendency of labour courts and tribunals deserves to be condemned outright in the strongest possible language*. The interpretation of the provision by the learned single judge of Kerala High Court is equally misconceived. If this could be the level of construing the plain language of law and the line of reasoning at the level of the High Court, what to speak about a Presiding Officer of the Labour Court?

(i) 'In any Proceeding under this Section'

The section opens with the words 'where an industrial dispute relating to discharge or dismissal of a workman has been referred to a labour court, tribunal or a national tribunal for adjudication'. The expression 'any proceeding under this section' can, therefore mean only the adjudication proceedings relating to the validity and justifiability of the action of 'discharge or dismissal' of the workman but this expression will not comprehend the proceedings under s 33, if during the pendency of the adjudication of a dispute under this section, an application is made to it for 'permission' or 'approval' of the action taken or proposed to be taken against another workman. Taking of 'fresh evidence' by an adjudicator has been

prohibited only 'in any proceedings under this section' but as already discussed, the courts have recognised the right of an employer to sustain the action of 'discharging' or 'dismissing' a workman by adducing evidence before an adjudicator in case he held no inquiry or the inquiry held by him is found to be invalid. In such cases, it goes beyond the scope of s 11A and the whole matter will be at large before the tribunal. The jurisdiction is in such situations much wider than under s 11A.

(ii) 'Materials on Record'

In *Firestone*, the Supreme Court declined to confine the expression 'materials on record' only to the 'materials which were available at the domestic inquiry', but, on the other hand, held that the expression refers to 'materials on record before the tribunal' which will take in:

(1) the evidence taken by the management at the inquiry and the proceedings of the inquiry, or

(2) the above evidence, and in addition any further evidence led before the tribunal, or

(3) evidence placed before the tribunal for the first time in support of the action taken by an employer as well as the evidence adduced by the workmen contra.

The record of the tribunal begins with the order of reference made by the appropriate Government to it for adjudication of an industrial dispute. The charge-sheet, explanation of the workman, the proceedings of the domestic inquiry, *viz*, pleadings, the oral and documentary evidence of witnesses before the inquiry officer, the record of the inquiry proceedings, the report of the inquiry officer, the show-cause notice, if any, given by the employer to the workman before imposing the punishment and the reply of the workman thereto and the final order of punishment, come 'on the record' before the tribunal only by way of evidence adduced in the course of adjudication proceeding. Item no. 1 above comprehends these materials. Item no. 2 above would, in addition to the materials comprehended in item no 1, comprehend the order of reference, the pleadings of the parties and any further evidence led before the tribunal in connection with the validity of the inquiry and the *bona fides* of the employer in initiating the action and inflicting the punishment and the record of the proceedings before the tribunal. Item no. 3 above refers to 'invalid-inquiry' and 'no-inquiry' cases where the evidence is adduced before the tribunal, for the first time, in support of the validity and justifiability of action of dismissal taken by the employer and the evidence adduced by the workman contra. This item comprises of the order of reference, pleadings of the parties and the evidence adduced by the parties along with the record of the proceedings before the tribunal. Speaking for himself, Dua and Vaidialingam JJ of the Supreme Court observed:

> The above items by and large should be considered to be the 'materials on record' as specified in the Proviso. We are not inclined to limit that expression as meaning only that material that has been placed in a domestic enquiry. The Proviso only confines the Tribunal to the materials on record before it as specified above, when considering the justification or otherwise of the order of discharge or dismissal. It is only on the basis of those materials that the Tribunal is obliged to consider whether the misconduct is proved and the further question whether the proved mis- conduct justifies the punishment of dismissal or discharge. [93]

If one of the material pieces of evidence on record is not considered by the tribunal, the award will be amenable to judicial review. In such a case, the writ court has to see as to what is the impact of non-consideration of such a material. If it materially affects the ultimate decision taken by the tribunal, then the writ court will review the award.[94] In *Rohtas*, after holding that the domestic inquiry was fair which position was accepted by the workman, the tribunal directed the parties to adduce fresh evidence with regard to the charges framed against the workman. In these circumstances, the Patna High Court held that it was not permissible for the tribunal to take fresh evidence with regard to the charge framed against the workman. The proviso not only prohibits any 'fresh evidence' in relation to the matter being taken by the tribunal, it also confines the jurisdiction of the tribunal to rely only on the 'materials on record'.[95] In *AV Swami*, the labour court considered the past record of the workman in a detailed manner which was neither considered nor referred to by either the workman or the employer during the domestic inquiry. In view of the clear mandate of the proviso, a single judge of the Andhra Pradesh High Court held that the labour court was not justified in taking into consideration the past record of the workman. Hence, the award upholding the removal of the employee from service was quashed.[96] In *Bhaik Nath*, the facts disclosed that, on the consent of both the management and the workman, the labour court considered the materials available on record, and by a reasoned order directed the reinstatement of the workman. The management challenged the award. Upholding the award passed by the labour court, Hegde J (for himself and Sinha J) of the Supreme Court, observed:

> In the background of this concession and in the absence of seeking permission for leading evidence in support of its charge by the appellant it cannot be now permitted to question the procedure adopted by the Labour Court based on consent of the parties. Even the learned single Judge erred in wrongly recording a finding that the appellant was not given an opportunity to lead evidence. As a

matter of fact a perusal of the award clearly shows that both the parties addressed arguments on merits and demerits on the basis of evidence on record and after considering the same Labour Court by a reasoned order agreed with the Inquiry Officer that though in the two cases in regard to which an inquiry was conducted the respondent workman has not issued tickets to 3 and 2 passengers respectively, the material on record and explanation given by the respondent sufficiently proved that had good reasons for not having issued the tickets when the checking staff came for checking and the respondent workman had no intention of defrauding the Corporation. This is a finding of fact based on material on record accepted by the Inquiry Officer, the Labour Court and the Division Bench and we find no reason whatsoever to differ from this finding. We are also of the opinion that since the Labour Court had formed an opinion that Disciplinary Authority had not properly considered the evidence on record while coming to a contrary conclusion, Labour Court was justified in going into the question of fact that too as consented by the parties and giving a finding.[1]

(iii) 'Fresh Evidence in Relation to the Matter'

The proviso prohibits any 'fresh evidence' being taken in any proceeding under the section, in relation to the matter but what is the connotation of the expressions 'fresh evidence', and 'the matter' has not been indicated. The expression, 'fresh evidence' therefore, has to be read in the context in which it appears in contradistinction to the expression 'materials on record'. The proviso to this section was inserted by the legislature to place limitation on the power of a tribunal as an appellate authority hearing appeal against the decision in the domestic inquiry. It lays down that the tribunal for the purpose of exercising the power conferred by the main provision cannot call for further 'fresh evidence', as an appellate authority may normally do under a particular statute, when considering the correctness or otherwise of an order passed by the subordinate body. The power to receive 'fresh evidence' contemplated by this proviso would apply only against receiving 'fresh evidence', while reappraising the evidence recorded in the domestic inquiry. For the purposes of any proceeding under this section, the tribunal cannot call for 'further or fresh evidence' as an appellate authority may normally do under a particular statute, when considering the correctness or otherwise of an order passed by a subordinate body.[2]

In cases, where no inquiry at all has been held, the employer has the right to satisfy the tribunal with respect to the validity and justifiability of the action of discharge or dismissal. But where a domestic inquiry has been held, it is open to the workman to contend that the inquiry was not valid or proper. It is equally open for the employer to rely upon the inquiry. The employer may entirely rely upon the inquiry or alternatively offer to adduce evidence before the tribunal to justify the validity of the action in case the inquiry is held to be invalid. In the former case the action of discharge or dismissal will depend upon the validity of the inquiry whereas in the latter case even if the inquiry is held to be invalid, the justifiability of the punishment of the action of discharge or dismissal will depend upon the evidence adduced before the tribunal by the employer in support of the action. In such a case, the tribunal will have to try the validity of the inquiry as a preliminary issue,[3] but the tribunal will get jurisdiction to go into the evidence led by the employer only after deciding the question of the validity of the inquiry.[4] If evidence becomes necessary for a decision on this preliminary issue, the workman who impugns the validity of the inquiry will have to lead evidence. The opportunity to lead evidence cannot be denied to the workman on the ground that the management does not want to adduce any 'fresh evidence'. Even if the validity of the inquiry is not tried as a preliminary issue, the position will not be different. In either case, the workman should get the opportunity to lead evidence in the first instance as it is his contention that no legal and proper inquiry was held. Then, it will be for the management to lead evidence contra to show that the inquiry held was legal and valid. The mere fact that the management does not examine the inquiry officer would not lead to unavoidable inference that no inquiry was held. It is only when the tribunal comes to the conclusion that the authenticity of the document is proved, then it may draw inference that no inquiry was held if the inquiry officer has not been examined.[5]

Since the management has the right to adduce evidence before the tribunal justifying the order of dismissal or discharge, it arises only after the tribunal comes to the conclusion that the domestic inquiry was defective. The right of the workman to adduce evidence *contra* cannot depend upon the fact whether the management wants to lead any fresh evidence or not. In cases, where the inquiry held by the employer is found to be invalid or no inquiry at all has been held, the tribunal has to give an opportunity to the employer to adduce evidence for the first time to justify the action and then to give an opportunity to the workman to rebut such evidence of the employer. In such a situation, it is the duty of the tribunal to go into that evidence and see whether the action taken by the management was correct or not.[6] In *Neeta Kaplish*,[7] Saghir Ahmed J observed that, if the labour court found that the domestic inquiry held by the employer was defective, the record pertaining to the said domestic inquiry would not constitute 'fresh evidence'. Such record would also not constitute 'materials on record' within the meaning of s 11A, as the inquiry proceedings had to be ignored altogether. The only way open to the management was to justify its action by leading fresh evidence as required by the labour court. If such evidence had not been led, the management had to suffer the consequences. By permitting the management to adduce evidence, after recording a finding that the inquiry held was not proper, the tribunal does not commit any error. After the incorporation of

s 11A, the tribunal is now entitled to hold that even if the misconduct is proved, the punishment of discharge and dismissal is not justified. Therefore, the tribunal is given the power to substitute the view taken by the management.[8]

3. Relief

After the insertion of s 11A, an industrial adjudicator has not only the jurisdiction to set aside the order of dishcarge or dismissal of a workman and direct his reinstatement but it also has the discretion to mould that relief including the award of lesser punishment in lieu of discharge or dismissal as may be warranted by the circumstances of the case.[9] In *Engine Valves*, the Madras High Court summed up the law thus:

> The court exercising powers under s 11A of the Act after finding the misconduct to have been proved is first obliged to advert itself to the question of necessity or desirability to interfere with the punishment imposed by the management and, if the management could not justify the punishment imposed thereafter it must consider the question as to the relief that is to be granted to the employee. In so considering the relief to be granted, the court has an obligation to consider whether the punishment imposed is disproportionate or shockingly severe to the charges held proved and if so whether a reinstatement has to be ordered or whether any other lesser punishment has to be imposed. A specific finding must be recorded whether it was expedient and proper to reinstate the employee or whether award of compensation in lieu of reinstatement will meet the requirements and ends of justice of the case concerned. Absence of reasons to invoke the power and interfere under provisions of s 11A in a particular case would render the very exercise of powers rbitrary and perverse and the order consequently would stand vitiated.[10]

Even if the charges are proved, the tribunal is not bound to uphold the order of discharge or dismissal. It has the discretion to direct reinstatement with or without any conditions. Nor is the tribunal bound to direct reinstatement merely because the order of dismissal or discharge is found to be invalid. These are now the matters in the discretion of the tribunal. The discretion of the tribunal properly exercised is not amenable to judicial review.[11] But it is relevant to remember that before granting relief under this section, the triibunal must record a finding that the discharge or dismissal is illegal or unjustified. In the absence of such finding, it has absolutely no power to grant any relief or lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require or any other relief such as compensation.[12] The question of relief arises only where the termination, discharge or dismissal of the service of a workman is unjustified and illegal but once the adjudicator comes to the conclusion from the 'material on record', that the order of dismissal or discharge is not unjustified, he is not competent to grant any relief and the only option left to him is to reject the reference, but where the order of discharge or dismissal of a workman is found to be illegal and unjustified, the powers of the adjudicator are wide enough to grant the relief to the aggrieved workman.[13] The relief can be reinstatement with backwages or it may even be of a part of back wages in case the workman was not wholly blameless. Lump sum compensation in lieu of reinstatement or backwages is also awarded. The question of granting relief is in the discretion of the adjudicator. The reliefs generally awarded by the industrial adjudication are discussed under the following three heads:

(i) reinstatement;

(ii) any lesser punishment;

(iii) compensation in lieu of reinstatement; and

(iv) award passed under S 11A - whether amenable to judicial review

In this jurisdiction, it is in the discretion of the tribunal in an appropriate case to award interest on the amount determined by way of compensation and the rate of such interest is also in the discretion of the tribunal.[14] The labour court, while exercising its jurisdiction under s 11A can modify the punishment of dismissal, if found disproportionate, to that of reinstatement as a fresh candidate after assigning reasons therefor.[15] Once the labour court came to the conclusion that the termination of service of workman was not justified, the necessary corollary is that the workman is entitled to be reinstated with full backwages, and not merely by payment of compensation under s 25F sans reinstatement.[16] It is well-settled that in cases where an industrial adjudicator finds the termination of service of an industrial workman by his employer to be wrongful and invalid, the normal relief is reinstatement with backwages. In cases of wrongful 'discharge' or 'dismissal' of a workman by his employer as punishment, s 11A confers jurisdiction on an industrial adjudicator to set aside the order of, discharge' or 'dismissal' and to give the relief of reinstatement of the workman with or without any conditions or give such other relief to the workman including the award of any lesser punishment in lieu of 'discharge' or 'dismissal' in the circumstances of the case. The power to give these reliefs is inherent in industrial adjudication. Such reliefs were being given by industrial adjudicators even before the enactment of this section. This section only makes inherent power of the adjudicators explicit only in cases of termination of service by way of punishment of 'discharge' or 'dismissal'. The relief of 'reinstatement' with or without backwages or of compensation in lieu of reinstatement in cases of termination of service as discharge simpliciter or as a measure of retrenchment, would not fall within the purview of this section as such

termination is not by way of punishment but in such cases, the relief is granted by industrial adjudicator in its inherent power of industrial adjudication.

In *Western India Automobile Assn*, the federal court held that industrial adjudication does not mean adjudication according to strict law of master and servant. Hence, if 'non-employment' arises by reason of termination of employment by the employer, it will be within the jurisdiction of the industrial tribunal to determine whether the termination was justified and will also have the jurisdiction to give relief of reinstatement if, having regard to all circumstances, it thinks that it is necessary in the interest of industrial peace, but the principles of law governing reinstatement or compensation in lieu of reinstatement as evolved by industrial adjudication are the same in all the three situations.[17] Therefore, the discussion on these topics will govern the award of these reliefs not only in cases of termination of service by way of disciplinary punishment of 'discharge' or 'dismissal' but also will govern the cases of contractual termination of service-discharge simpliciter and termination of service as a measure of retrenchment. In a case where a driver, was dismissed for remaining absent without leave, was directed to be reinstated with 75 per cent back wages by the labour court, the High Court took notice of the fact that the medical reasons given by the workman were found to be genuine and his past record was also clearn. However, the court felt that the award of 75% back wages was on the high side and reduced it to 40 per cent.[18]

(i) Reinstatement

The benefit of reinstatement which is awarded to a workman under the terms of an award does not become a term or condition of the contract between him and the employer as there is no statutory provision in that behalf in the Act.[19] There are, no doubt, other reliefs by way of changes in the terms and conditions of employment which when awarded by the appropriate tribunal might be treated as implied terms of the contract between the employer and the workers to whom the award applies and would ensure for the benefit of the workers until varied by appropriate legal proceedings.[20] The effect of an award of reinstatement is merely to set at naught the order of wrongful dismissal of a workman by the employer and to reinstate him in the service of the employer and to restore him to his former position and status as if the contract of employment originally entered into has been continuing.[21] The terms and conditions of the contract which obtained when the workman was in the employment of the employer prior to his wrongful dismissal continue on reinstatement to govern him as before. No variation is affected in the original terms and conditions of the contract. The only thing which happens is that the workman is reinstated in his old service as before. In *Punabhai Govindbhai*, the Gujarat High Court held that reinstatement of a daily wager would mean maintaining his position in the seniority with continuity of service as per his ranking in his seniority list. After reinstatement such a workman will become entitled to work only as a daily wager. In such a case, the continuity of service would mean continuity on the same terms and conditions on which he was working prior to his reinstatement.[22]

If a workman has to be reinstated under an award of an industrial adjudicator, he should report himself for duty within a reasonable time from the date of such award. It is not the duty of the employer to take steps to invite the employee in pursuance of the order of the tribunal setting aside the termination or dismissal order passed by the employer, but it is the duty of the employee concerned either to claim or inform in writing that he is ready and willing to join the service within a reasonable time, to give a notice that he should be reinstated, failing which, he would be taking legal proceedings against the employer. In the absence of any of these things, the employer is under no legal obligation to take steps to reinstate the employee whose service was terminated by him but subsequently restored to his job under the award of an adjudicator. The workman should also express his readiness to join service under the employer within a reasonable time. He cannot keep quiet for months without expressing any desire on his part to take up the employment, in pursuance of the order of reinstatement or settlement but what is a reasonable time would depend upon the facts and circumstances of each case.[23] Where the service of a daily wager engaged against a permanent post was terminated orally, the labour court ordered reinstatement with 50% back wages, on the ground that the said workman had worked for 267 days and that his service was terminated without complying with the provisions of s 25F. The said award was reversed by the High Court. In appeal, the Supreme Court quashed the order of the High Court and restored the award of the labour court.[24] In *Dattatreya Birajdar*, a daily wager challenged his termination after a lapse of 8 years, whereas the evidence produced before the labour court disclosed that he had voluntarily left PWD department and joined another department. Despite this factual position, the labour court directed reinstatement with 25% back wages, which was affirmed by the Bombay High Court. In addition, the labour court placed the burden to prove that the workman had not worked for 240 days on the employer. Both the award of the labour court and the order of the High Court were quashed by Supreme Court.[25] Where the labour court directed the reinstatement of a workman who was employed in the agricultural department of the Government, quashing the orders of the courts below, the Supreme Court held:

> We find that neither the Labour Court nor the High Court considered the relevant aspects like whether the Agricultural Department of the Government of Orissa is an 'Industry' and that whether there was any scope for being regularised when admittedly the Labour Court found that the respondent was engaged on casual basis. The other question was whether there was any termination or whether the respondent had abandoned the work. These factors apparently have not been considered. Further the question whether

the respondent had worked for more than 240 days in a calendar year has also not been considered in the proper perspective. That being so, the impugned order cannot be maintained and is set aside. The matter is remitted to the High Court to consider the relevant aspects afresh.[26]

(a) Principles of Adjudication:

General:

In common law, the court will not ordinarily force an employer to retain the service of an employee whom he no longer wishes to employ,[27] on the well recognised principle that the contract of personal employment cannot be specifically enforced, but in the area of industrial jurisprudence, it is no more open to debate that 'declaration can be given that the termination of service is bad and the workman continues to be in service. The specter of common law doctrine that the contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt this branch of law. The relief of reinstatement with continuity of service can be granted where the termination of service is found to be invalid.[28] Industrial adjudicator can compel the employer to employ a worker whom he does not desire to employ. In other words, industrial adjudicator has jurisdiction to award reinstatement of a discharged or dismissed workman.[29] If the misconduct for which the workman has been dismissed, has not been proved in the domestic inquiry or the tribunal, the order of punishment will not stand and the tribunal is bound to award reinstatement of the workman.[30] Even to deny a part of the backwages to such a workman would be to inflict punishment on him.[31]

Relief of reinstatement is on the same footing as relief of restitution.[32] Reinstatement means restoration of a dismissed or discharged workman to his original post. Upon an order of reinstatement, the employee concerned is entitled to be put back in the same position as if he had never been dismissed or discharged, together with all the back pay, allowances and other privileges.[33] In other words, the effect of an award of reinstatement is to restore the employee to his former position and status setting aside the order of termination of service, as if it had never been passed and the employee gets the benefit of continuity of service.[34] Reinstatement, therefore, requires that the ex-employee should be restored to his previous position so far as his capacity, status and emoluments are concerned.[35] Hence, an employee would be entitled to notional promotion on being reinstated which he could have got, if his service had not been terminated, but the benefit of leave travel concession will be available to the employee only if he has undertaken the travel.[36] In industrial adjudication, this is the same thing as making a contract of employment when the employer is unwilling to enter into such a contract with a particular person, an industrial adjudicator can direct that an employer shall have the relation of employment with the employee although he may be unwilling to have such relation.[37] If the employee is not put back to his employment, then it is not reinstatement at all.[38] In G *Rajendra*, the Supreme Court held that whether to grant continuity of service or not while making the award depends upon the facts and circumstances of each case, and set aside the order of the High Court which modified the award of labour court from reinstatement with continuity of service to reinstatement without continuity of service.[39] Where the labour court directed reinstatement without backwages, the workman will be entitled to notional increments at the time of his pay-fixation.[40]

'Reinstatement' differs from 're-employment' in as much as in case of reinstatement, an employee is deemed to have been in service in spite of the termination of service, whereas in case of re-employment, the workman's services are lawfully terminated and he gets back into service afresh on re-employment. In case of reinstatement, the tribunal can award backwages to a dismissed workman while in case of re-employment such a workman would be entitled to wages only from the date of his actual re-employment. The order of termination of service, discharge or dismissal of a workman even if illegal or wrongful is not a nullity and it continues to be operative until set aside by a competent tribunal or court of law.[41] Therefore, after setting aside the illegal and invalid order of discharge or dismissal of a workman, the tribunal has to make a specific order of reinstatement of the workman. The problem confronting industrial adjudication is to promote its two objectives, the security of employment and protection against wrongful discharge or dismissal on the one hand and industrial peace and harmony on the other; both leading ultimately to the goal of maximum possible production.[42] No hard and fast rule can be laid down in dealing with this problem. Each case has to be considered on its own merits and in reaching final decision an attempt must be made to reconcile the conflicting claims made by the workman and the employer. The workman is entitled to security of service and should be protected against wrongful dismissal, and so the normal rule would be reinstatement such cases. Nevertheless, in unusual or exceptional cases, the tribunal may have to consider whether in the interest of the industry itself it would be desirable or expedient not to direct reinstatement. The industrial adjudication, therefore has to balance the relevant factors without adopting legalistic and doctrinaire approach.[43] The tribunal has to examine, therefore, the circumstances of each case to see whether reinstatement of the dismissed employee is not inexpedient or improper.[44] It has to take a decision in a spirit of fairness and justice, following rules of justice and reason and after carefully examining all the facts and circumstances of the case.[45] Past record of the employee, the nature of his alleged present lapse and the ground on which the order of the management is set aside are also relevant factors for consideration.[46] Normally, where the worker cannot be said to be of a type whose presence as an employee is

undesirable and is not conducive to maintenance of industrial peace, it will not be a fit case for depriving the workman the normal relief of reinstatement and grant him compensation in lieu thereof.[47]

In *Western India Automobile Assn*, the federal court emphasised the discretion of the tribunal in the matter of awarding reinstatement when it observed that 'the tribunal has jurisdiction to adjudicate on the dispute and it can be trusted to do its duty and it cannot be said that it will give reinstatement relief unless it thinks it necessary to do so'.[48] This was reverberated by the Supreme Court in *United Commercial Bank*, where it said that 'whether a discharged employee is to be reinstated in service or whether compensation would be an adequate relief, is a matter of discretion'. Thus, the discretion of the tribunal rather than laying down any rule of universal application was accentuated, as to lay down the general rule of reinstatement being the only remedy would itself fetter the discretion of the tribunal; particularly so when the tribunal is to act in the interest of industrial harmony and peace. The court further observed that it might well be that, in some cases imposition of service of a workman on an unwilling employer might not be conducive to such harmony and peace.[49] Though the federal court and the Supreme Court emphasised the discretion of the tribunal in awarding the relief of reinstatement, the labour appellate tribunal emphasised reinstatement as a normal rule in cases of wrongful and unjustified discharge or dismissal.[50] In *Buckingham Carnatic*, the LAT said that in cases of wrongful dismissal, reinstatement is the normal relief, though it recognised certain exceptions where reinstatement would not be proper relief.[51] In *Steel Bros*, the court reiterated that where the termination of service is unjustified and is not *bona fide*, the normal relief is reinstatement unless there are exceptional circumstances warranting a departure from the rule.[52] In *Jitendra Singh Rathor*, the Supreme Court affirmed the award of reinstatement of the workman with half backwages keeping in view the proved misconduct of the employee as it could not be said that the relief of reinstatement was being granted in terms of withholding of the half of the backwages and therefore did not constitute penalty.[53]

The doctrine that reinstatement is a normal rule in cases of wrongful and illegal discharge and dismissal is not inexorable or absolutely rigid in application. Pragmatic approach has tampered the rule to mean that in unusual or exceptional cases, where it is not proper or expedient to grant the normal relief of reinstatement the relief of compensation would meet the ends of justice, because the problem confronting the industrial adjudication is to promote its two objectives, *viz*, the security of employment and protection against wrongful discharge and dismissal on the one hand and industrial peace on the other—both leading to the goal of maximum possible production. In *Buckingham Carnatic*, the labour appellate tribunal itself observed that in considering the question of reinstatement 'the tribunal is expected to be inspired by a sense of fair play towards the employee on the one hand and consideration of discipline in the concern on the other'. In the same strain, the Supreme Court in *Punjab National Bank*, held that no hard and fast rule can he laid down in dealing with this problem and that each case must be considered on its own merits, and in reaching the final decision, an attempt must be made to reconcile the conflicting claims made by the employee and the employer. An employee is entitled to security of service and should be protected against wrongful dismissal and so the normal rule would be reinstatement in such cases. Nevertheless, in unusual or exceptional cases, the tribunal may have to consider whether in the interests of industry itself, it would be desirable or expedient not to direct reinstatement.[54] The question whether reinstatement should be awarded or not, has to be decided after balancing the relevant factors and without adopting legalistic or doctrinaire approach. This approach has been adopted by the courts in subsequent cases.[55]

There is no doubt that the normal rule in the absence of circumstances which would show that the workman had disentitled himself from claiming reinstatement, would be to grant reinstatement.[56] 'Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workman. It is as if the order had never been made and so it must ordinarily lead to backwages'.[57] In *OP Bhandari*, speaking for the Supreme Court, Thakkar J, held that 'it cannot be posited that reinstatement must invariably follow as a consequence of holding that the order of termination of service of an employee is void. No doubt in regard to blue collar workman and white-collar, *ie*, employees other than those belonging to the managerial or similar high level cadre, reinstatement would be a rule and compensation in lieu thereof a rare exception'.[58] In *MK Agarwal*, on consideration of the entire matter, the court held that it should not refuse reinstatement. However, in the circumstances of the case it restricted the salary to 50 percent of what would otherwise be payable to the employee.[59] But there can be cases where it would not be expedient to follow this normal rule and direct reinstatement.[60] There may be exceptional circumstances which make it impossible or wholly inequitable *vis-a-vis* the employer and workman to direct reinstatement with full backwages. For instance, the industry might have closed down or might be in severe financial doldrums, the workman concerned might have secured better or other employment elsewhere and so on. Reinstatement might also be avoided in extraordinary cases where the post is abolished or there is bitterness between the parties.[61] Likewise, the relief of reinstatement may be refused in exceptional cases like the employer losing confidence in the workman or the retention of the workman leading to apprehension of breach of security.[62] In such situations, there is a vestige of discretion left in the courts to make appropriate consequential orders. The court may deny the relief of reinstatement where reinstatement is impossible because the industry has been closed down. And it may deny relief of award of full backwages where that would place an impossible burden on the employer. In such and other exceptional cases, the court may mould the relief.[63]

In *Hindustan Apparel*, the labour court directed reinstatement of the workmen. But while passing the order of reinstatement, the labour court recorded a finding that the three workers were gainfully employed. Within two months of the award, the employer closed down its business and started another business on somewhat similar lines. In appeal against the award, while granting interim order, the Supreme Court directed payment of Rs. 24000/- to each of the workers and also expressly recognised the right of the three workers to continue in work in another establishment during the pendency of the appeals.[64] In the absence of any impediments or exceptional circumstances, the relief of reinstatement with backwages must be awarded. It is, therefore, for the employer to clearly establish the existence of exceptional circumstances. In other words, the onus to establish the case of departure from the normal rule or practice is on the employer. The employer, therefore, has not only to raise a specific plea but has also to tender all relevant evidence showing that his case falls in one of the exceptions.[65] Generally, reinstatement is not granted where the workman has indulged in activities highly prejudicial to the company or there is loss of confidence of the employer in him or dislocation of work or likelihood of dislocation of work but where the management has not pleaded any of such circumstances, the normal rule of reinstatement with full backwages and other benefits will follow.[66] The tribunal can refuse to order reinstatement where such a course in the circumstances of the case, is not fair and proper. For deciding the question of relief, the tribunal, therefore, has to examine the circumstances of each case to see whether reinstatement of the dismissed employee is not inexpedient or is not improper.[67] If the case presents certain unusual or exceptional features so as to make reinstatement inexpedient or improper, to meet the ends of justice, the tribunal has the discretion to award adequate monetary compensation instead of reinstatement.[68] The power of reinstatement can be exercised by the tribunal where on the facts and in the circumstances of the case, it finds that the discharge or dismissal of the workman was not justified, but in case of gross misconduct, the most appropriate punishment would be discharge or dismissal of the workman and 'it would be a mockery of justice to brand such an order as 'unjustified' and substitute it by an order of reinstatement under s 11A. In cases, where no order other than the order of dismissal of the workman could be made on the proved facts, the arbitrary exercise of power of reinstatement, will be reviewable on *certiorari*.[69] In *Jaslok Hospital*, the Bombay High Court set aside the order of reinstatement of a workman working in hospital and ordered that his dismissal should be deemed as retrenchment with accompanying benefits. Speaking for the court, Pendse J, observed:

> .. . the hospital and the medical research centre are sensitive institutions and are engaged in saving human lives and the success of such institutions depends much upon the confidence generated by the staff working there ... the cure of patients depends more on care and attention lavished than on the medicines administered.[70]

The success of the institution depends not only on the attitude of the employer but equally in the manner in which the employees approach their work. On the facts and in the circumstances of the case, the award of reinstatement was held to be inappropriate. Such relief can also be refused where the workman is virtually on the verge of retirement or is so old and infirm as to be incapable of discharging his duties.[71] In *Metal Box*, the court modified the order of reinstatement in view of the superannuation of the workman and directed the payment of backwages and other benefits up to the date of retirement of the workman.[72] No hard and fast rule can, however, be laid down for the exercise of the discretion of the tribunal, as in each case, it must, in a spirit of fairness and justice in keeping with the objective of industrial adjudication, decide whether it should, in the interest of justice, depart from the general rule.[73] Fair play towards the employee on the one hand and interest of the employer including the consideration of discipling in the establishment on the other, require to be duly safeguarded.[74] This is necessary in the interest of both security of tenure of the employee and smooth and harmonious working of the establishment. Legitimate interest of both of them have to be kept in view, if the order is expected to promote the desired objectives of industrial peace and maximum possible production. Proper balance has to be maintained between the conflicting claims of the employer and the employee without jeopardising the larger interests of industrial peace and progress.[75] 'Reinstatement' is not considered desirable in cases of strained relations between the employer and the employee or where the post held by the employee had been one of trust and confidence or where the employee was found to have been guilty of activity subversive or prejudicial to the interest of the industry. In such a case, suitable compensation could be ordered in lieu of reinstatement.[76] A single judge of the Calcutta High Court observed:

> Supposing the tribunal comes to the conclusion that the employee is a rogue or a blackguard or a thoroughly incompetent one, unable to perform his job, it is ridiculous to suggest that such matters are irrelevant and the tribunals must still reinstate the worker and shut their eyes to the real state of things. Trustworthiness of the worker is one of the important factors to be taken into account.[77]

The nature of the relations between the employer and the employee is also a relevant factor to be taken into consideration.[78] The tribunal is also to safeguard the interests of the employer including the consideration of discipline in the establishment. The nature of the duties performed by the employee and the nature of the industrial establishment

employing him, is also a relevant consideration.[79] These cases are merely illustrative where an exception to the general rule of reinstatement is to be made.[80] No comprehensive rule, as to which circumstances would in a given case constitute an exception to the general rule, can possibly be laid down. In each case, keeping the objectives of the industrial adjudication in mind, and in a spirit of fairness and justice, the tribunal has to deal with the question, whether the circumstances of the case require that an exception should be made and compensation would meet the ends of justice.[81] If, on taking these principles and the relevant factors into consideration, the tribunal comes to the conclusion that reinstatement would not be desirable or expedient in the circumstances of the case, it may award compensation instead of reinstatement to the workman in spite of the fact that his discharge or dismissal was invalid owing to some infirmity in the impugned order. In *Sunit Kumar Roy*, the Patna High Court had set aside the order of reinstatement with backwages passed by the tribunal, even though the termination of the service of the workman was held not to be legal and valid, in view of the fact that the workman had been permanently employed in another concern where he was getting more remuneration than he was getting with the previous employer.[82] The power of an industrial adjudicator under s 11A, to give any relief to the workman including reinstatement or to subject the order of reinstatement to any terms and conditions, can be exercised only when the order of dismissal or discharge is found to be unjustified or illegal and not when it affirms the order of discharge.[83] In either case, the decision of the tribunal will be amenable to judicial review and the reviewing court cannot content itself by simply saying that since the tribunal exercised its jurisdiction, it will not examine the circumstances of the case to ascertain whether or not such exercise has been made in accordance with the well-established principles. If it were to do so, it would be a refusal on its part to exercise its own jurisdiction,[84] but where the tribunal has objectively assessed the over-all position on a fair consideration of the material placed before it and came to the conclusion that the reinstatement of the aggrieved employee was to follow, the reviewing court would not interfere with the discretion of the tribunal when no exceptional circumstance warranting the denial of benefit was made out.[85]

In *Assam Oil*, the facts were: the work of the employee, who was holding a confidential postion as a secretary to the Branch Manager, was thoroughly unsatisfactory coupled with failure on his part to carry out orders, insolence, untruthfulness, and disobedience. The services of the employee were terminated purporting to be in terms of the contract of employment but holding the discharge of the employee to be of a punitive character, the tribunal set aside the termination of service and directed the reinstatement. In appeal, the Supreme Court upheld the decision of the tribunal, but in view of the fact that he was holding a position of trust and confidence and the manager had lost confidence in him, the court held that 'it would not be fair either to the employer or to the employee to direct reinstatement' and substituted reinstatement with an order of suitable compensation.[86] In *Charottar GSM*, the contention of the workman was that once the tribunal had set aside the order of dismissal on the ground that the domestic inquiry was invalid, the direction of reinstatement should automatically have followed. The Supreme Court refused to interfere with the order of the tribunal declining reinstatement for the reason that the workman had resorted to illegal strike, and ordered adequate monetary compensation in lieu of reinstatement.[87]

In *Doomur DT Estate*, the court set aside the order of reinstatement on the ground that some of the workmen had, in fact, been found guilty of and convicted for violent misconduct by a criminal court and with respect to some others, there was evidence that they had participated in the violent misconduct. Taking into consideration such a conduct on the part of the employees, the court held that the relief of reinstatement was not justified.[88] In *PP Chopra*, the court again substituted the order of reinstatement with an order of appropriate compensation holding that reinstatement would not be expedient in the circumstances of the case in view of the fact that the employee, who was holding a position of trust and confidence as a stenographer, had retained the copies of confidential letters dictated to him in regard to other concerns in which the employer company was interested for the purpose of using them for his own purpose without the consent of the company.[89] In *AK Roy*, taking into account the fact that the workman was employed in the blast furnace which was a crucial part of the work, it was held to be a case of an exceptional nature and the relief of reinstatement was not justified and expedient in view of the adverse police report against the workman.[90] Similarly in *Francis Klein*, in view of the fact that the workman, who was a *durban*, had refused to assist another *durban* in apprehending a thief who was trying to get away with certain materials of the employer company, the court substituted the relief of reinstatement awarded by the tribunal with adequate monetary compensation.[91] Likewise, in *ITC*, on the facts and in the circumstances of the case, the court held that the order of reinstatement was not sustainable. In this case, the workman was dismissed from service having been found guilty of neglect of duty. Furthermore, his record of service was also not clean in that he had committed several acts of faults in the past and was sometimes warned and sometimes suspended and sometimes reprimanded for all his acts of omission and commission. Untwalia J, observed that the labour court had awarded reinstatement without applying its mind to the question as to whether it was a fit case for reinstatement or for compensation in lieu of reinstatement.[92]

The burden to establish that one or more of exceptional or unusual circumstances, militating against the award of reinstatement exist, is however, on the employer and unless that is done, the normal relief of reinstatement is to be granted.[93] In *Tulsidas Paul*, the employer declined to give work to eight seasonal workers at the instance of the rest of the workers. The labour court held that the said refusal amounted to unjustified dismissal and directed their reinstatement. The Calcutta High Court held that, in view of the fact that the employer had not put the question of reinstatement in issue nor

had it raised any specific objection against the normal rule of reinstatement, there was no case for interference with the award of reinstatement. The decision of the High Court was affirmed by the Supreme Court.[94] Likewise in *Panitole Tea Estate*, the court declined to interfere with the award of reinstatement because the plea of loss of confidence against the reinstatement which required determination on facts, was not raised before the labour court.[95] In *Assam Match Co*, the court held that the fact that a domestic inquiry was held against the employee on such a charge resulting in loss of confidence, the employee should not be reinstated.[96] In *NM Desai*, the workmen found guilty of misappropriation in a domestic inquiry, withdrew all their contentions including the illegality of the order of the punishment of dismissal and admitted their guilt before the labour court and prayed for mercy but the labour court still ordered their reinstatement with back-wages on the ground that the punishment was too cruel and disproportionate to the act of misconduct, in the circumstances of the case. The Gujarat High Court held that the order of the labour court was unjustified and remanded the matter for examining the cases afresh. Though the court noted that it is hard for the people to find jobs these days and the delinquent workmen were with dependent families, it held that such considerations are not relevant for deciding the case. It had further observed:

> After all, services with such public corporations are not pasture grounds always open for the people or they are not brought about for the purpose of furnishing employment to the unemployed in the society. We would, therefore, say that all cases are required to be examined on their own merits and interests not only of the certain persons likely to be adversely affected are to be seen, but also interests of such public administrations require to be closely examined and given a due thought.[97]

In *Manoj Mishra*, the facts briefly were: the employee who studied up to 12th standard and was working as Tradesman in Kakrapar Atomic Project (KAAP) was charge-sheeted for the misconduct for unauthorizedly communicating with press and misleading information causing embarrassment to and damaging the reputation of the project. In the course of the enquiry, the employee admitted the charges voluntarily and categorically. Acting on enquiry report, the disciplinary authority ordered the removal of the appellant from the service of KAPP w.e.f. 30 March 1996. The issue before the Supreme Court was whether the said acts proved against the employee could be termed as bonafide 'whistle blowing' meant for cleansing the organisation and whether the punishment was disproportionate to the act of misconduct. Dismissing the appeal filed by the workman, Nijjar J (for himself and Iqbal J), of the Supreme Court held:

> In our opinion, the appellant without any justification assumed the role of vigilante.. .. The newspaper reports as well as the other publicity undoubtedly created a great deal of panic among the local population as well as throughout the State of Gujarat. Every informer cannot automatically be said to be a *bona fide* "whistle blower". *A "whistle blower" would be a person who possesses the qualities of a crusader. His honesty, integrity and motivation should leave little or no room for doubt. It is not enough that such person is from the same organization and privy to some information, not available to the general public. The primary motivation for the action of a person to be called a "whistle blower" should be to cleanse an organization. It should not be incidental or byproduct for an action taken for some ulterior or selfish motive*.. .. the action of the appellant herein was not merely to highlight the shortcomings in the organization. *The appellant had indulged in making scandalous remarks by alleging that there was widespread corruption within the organization. Such allegations would clearly have a deleterious effect throughout the organization apart from casting shadows of doubts on the integrity of the entire project*. It is for this reason that employees working within the highly sensitive atomic organization are sworn to secrecy and have to enter into a confidentiality agreement. In our opinion, the appellant had failed to maintain the standard of confidentiality and discretion which was required to be maintained.. .. We are not satisfied that this is a case of 'glaring injustice'.. .. In our opinion, the punishment imposed on the appellant is not 'so disproportionate to the offence as to shock the conscience' of this Court.[98]

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84 *Divisional Manager, APRTC v LC* 1979 Lab IC 1141, 1145 (AP) (DB), per Madhava Reddy J.

85 *Sheo Sampat Lal v State of Uttar Pradesh* 1983 Lab IC 324,327 (All), per TS Misra J.

86 *Balbir Chand v Food Corpn of India Ltd* (1997) 2 LLJ 879 [LNIND 1996 SC 2148]-80 (SC).

87 *Heckett Engineering Co v Workman* 1977 Lab IC 1843 [LNIND 1977 SC 289], 1846-47 (SC), per Jaswant Singh J.

88 *Municipal Corpn Greater Bombay v PS Malavenkar* (1978) 2 LLJ 168 [LNIND 1978 SC 157], 171 (SC) : AIR 1978 SC 1380 [LNIND 1978 SC 157]: 1978 Lab IC 1096 : (1978) 3 SCC 78 [LNIND 1978 SC 157], per Jaswant Singh J.

89 *Awadesh Kumar Bhatnagar v Gwalior Rayon Silk Mig 'Weaving Ltd* (1972) 2 LLJ 143 [LNIND 1972 SC 231] (SC), per Vaidialingam J.

90 *Director General ESI v T Abdul Razak* (1996) 2 LLJ 765, 771 (SC), per Agrawal J.

91 *Jabalpur Electricity Supply Co v Sambhu Prasad Srivastava* (1962) 2 LLJ 216 [LNIND 1962 SC 246] (SC) : AIR 1972 SC 1431 [LNIND 1972 SC 231]: 1972 Lab IC 842 : (1973) 3 SCC 779 [LNIND 1972 SC 231], per Dasgupta J.

92 *Rashid Ahmad v Uttar Pradesh State Road Transport Corpn, Lucknow* 1987 Lab IC 323 -24 (All), per Sahai J.

93 *Hindustan Brown Boveri Ltd v Workmen* (1968) 1 LLJ 571 [LNIND 1967 SC 218] (SC), per Shelat J.

94 *South Central Rly ECC Society v LC* (1983) 1 LLJ 469 (AP) : 1982 (1) ALT 353 : 1988 (33) ELT 351 b (A.P.), per Seetharam Reddy J.

1 *Director General, ESI v T Abdul Razak* (1996) 2 LLJ 765, 771 (SC), per Agrawal J.

2 *Steel Authority of India v LC* (1980) 2 LLJ 456 [LNIND 1980 SC 275], 458-59 (SC) : AIR 1980 SC 2054 [LNIND 1980 SC 275]: [1980] (41) FLR 283 : 1980 Lab IC 1088 [LNIND 1980 SC 275] : (1980) 3 SCC 734 [LNIND 1980 SC 275], per Gupta J.

3 *S Nagiah v Indian Aluminium Co* (1991) 1 LLJ 554 (Kant) (DB), per Mohan CJ.

4 *Santak Singh v Ninth IT* 1984 Lab IC 817, 821 (Cal), per Amitabha Dutta J.

5 *Mgmt of Orissa Industries v State of Orissa* (1974) 1 LLJ 54 (Ori) (DB). per RN Misra J.

6 *Superintendent, Kaliyar Estate v O Kuriakko* (1971) 1 LLJ 83 (Ker), per Isaac J.

7 *Vinayak Bhagwan Shetye v Kismet Pvt Ltd* (1984) 1 LLJ 203. 206 (Born) (DB). per Chandurkar J.

8 *Shalimar Paints Ltd v Eighth IT* 1977 Lab IC 213. 227-228 (Cal). per RM Datta J.

9 *General Assembly of Free Church of Scotland v Overtoun* [1904] AC 515.

10 *G Mckenzie & Co Ltd v Workmen* (1959) 1 LLJ 285 [LNIND 1958 SC 131]. 289 (SC). per Kapur J.

11 *Rama Kant Misra v State of Uttar Pradesh* 1982 Lab IC 1790 [LNIND 1982 SC 149], 1792 (SC).

12 *Blue Star Ltd v NR Sharma* 1977 Lab IC 328, 332 (Del), per HL Anand J.

13 *Manager, SRT Works v Gen,.Secy, OMCTU* 1979 Lab IC 1352, 1354 (Ker), per Gopalan Nambiyar CJ.

14 *Uttar Pradesh SRTC v State of UP* 1978 Lab IC 355, 357 (All) (DB), per SD Agarwala J.

15 *Pepsu RTC v PO, IT* 1982 Lab IC 1479 (P&H), per Punchhi J.

16 *Blue Star Ltd v NR Sharma* 1977 Lab IC 328, 332 (Del), per HL Anand J.

17 *Central Bank of India Ltd v PC Jain* (1969) 2 LLJ 377 [LNIND 1968 SC 221], 379-80 (SC), per Bhargava J.

18 *GM, Parry's Confectionary Ltd v ITL* (1974) 1 LLJ 422 (Mad), per Ismail J.

19 *Hind Constn. & Engg Co Ltd v Workmen* (1965) 1 LLJ 462 [LNIND 1964 SC 313] (SC), per Hidayatullah J.

20 *Pure Drinks Pvt Ltd v Kirat Singh Maungati* (1961) 2 LLJ 99, 101-102 (SC), per Gajendragadkar J.

21 *Orissa Cement Ltd v Workmen* (1960) 2 LLJ 91 [LNIND 1960 SC 86], 94 (SC), per Gajendragadkar J.

22 *Shankar Chakravarti v Britannia Biscuit Co Ltd* 1979 Lab IC 1192 [LNIND 1979 SC 276], 1205 (SC), per Desai J.

23 *Firestone TRCI Ltd v Workmen* (1981), 2 LLJ 218, 220 (SC), per Gupta J.

24 *Ideal Jawa (India) Pvt Ltd v C Madan Mohan* (1972) 1 LLJ 316 [LNIND 1971 KANT 217] : (1971) 2 Mys LJ 472 (Mys) (DB), per Venkataramiah J.

25 *Bharat Iron Works v Bhagubhai Balubhai Patel* 1976 Lab IC 4 [LNIND 1975 SC 406], 7 (SC), per Goswami J.

26 *State of Haryana v Rajindra Sareen* (1972) 1 LLJ 205 [LNIND 1971 SC 585], 218 (SC), per Vaidialingam J.

27 *KK Ramankutty v State of Kerala* 1973 Lab IC 496,506 (Ker), per Subramonian Potni J.

28 *Vinod Behari Dixit v United Commercial Bank* 1979 Lab IC 1239, 1244 (Cal), per Salil Kumar Datta J.

29 *Tata Engg and Locomotive Co Ltd v* SC *Prasad* (1969) 2 LLJ 799 [LNIND 1969 SC 114]-808 (SC), per Shelat J.

30 *Jessop & Co Ltd v Fifth IT* 1974 Lab IC 522 (Cal) (DB), per Sabyasachi Mukherji J.

31 *Dalmia Dadri Cement Ltd v Murari Lal Bikaneria* (1970) 2 LLJ 416 [LNIND 1970 SC 323], 423 (SC) : AIR 1971 SC 22 [LNIND 1970 SC 323], per Mitter J.

32 *N Kalindi v Tata Locomotive & Engineering Co Ltd* (1960) 2 LLJ 228 [LNIND 1960 SC 95], 233 (SC), per Das Gupta J.

33 *Calcutta Jute Manufacturing Co Ltd v CJM Union* (1961) 2 LLJ 686 [LNIND 1961 SC 354] (SC) : AIR 1966 SC 1731 [LNIND 1961 SC 354], per Sarkar J.

34 *Sur Enamel Stamping Works Ltd v Workmen* (1963) 2 LLJ 367 [LNIND 1963 SC 146] (SC), per Das Gupta J.

35 *Rashid Ahmad v UPSRTC* 1987 Lab IC 323, 325 (All), per Sahai J.

36 *Maharashtra SRTC v AN Jadhav* (1981) 1 LLJ 186, 188 (Born) (DB), per Chandurkar J.

37 *Oil India Ltd v CGIT* 1980 Lab IC (NOC) 93 (Cal) (DB), per Amiya Kumar Mookerji J.

38 *Dattatray Trimbak Kulkarni v State Bank of India* (1993) 1 LLJ 547 [LNIND 1992 BOM 174] (Born) (DB), per Pemise J.

39 *Shalimar Paints Ltd v Eighth IT* 1977 Lab IC 213, 227-228 (Cal), per RM Datta J.

40 *Siemens Engineering & Mfg Co of India v Union of India* [1976] Supp SCR 468, per Bhagwati J.

41 *KL Tripathi v State Bank of India* (1984) 1 LLJ 2 [LNIND 1983 SC 283],14 (SC), per Sabyasachi Mukharji J.

42 *Ram Kumar v State of Haryana* 1987 Lab IC 1890 [LNIND 1987 SC 604] (SC), per Dutt J.

43 *SSKoshal v State Bank of India* 1992 Lab IC 2013, 2019 (MP) (DB), per Dhararnadhikari J.

44 *K Ashoka v Vijaya Bank, Bangalore* (1998) 2 LLN 273 (Kant), per Shetty J.

45 *Gopalkrishna Vaman Kamath v Corporation Bank* (2002) 2 LLN 987 (Born), per Bhosale J.

46 *GM, Canara Bank v M Raja Rao* (2001) 2 LLJ 819 [LNIND 2001 SC 772] (SC) : 2003 (5) SCALE 66 [LNIND 2001 SC 772].

47 *Anil Gilurker v Bilaspur-Raipur KG Bank Ltd*, AIR 2012 SC (supp) 181, per AK Patnaik J.

48 *Avinash S Bhosale (Thro' LRS) v Union of India* AIR 2012 SC (supp) 755.

49 *SP Malhotra v Punjab National Bank* AIR 2013 SC 3739 [LNIND 2013 SC 629]: (2013) 7 SCC 251 [LNIND 2013 SC 629].

50 *B Subbiah v Andhra Handloom WCS Ltd* (1978) 1 LLJ 37 (AP) (DB), per Sheth J.

51 *Mgmt of SRK Steel Industries v LC* (1996) 2 LLJ 619 [LNIND 1995 MAD 595], 621-22 (Mad), per Abdul Hadi J.

52 *Sheo Sampat Lal v State of UP* 1983 Lab IC 324, 329 (All), per TS Misra J.

53 *Mgmtt of Madras Fertilizers Ltd v First Addl LC* (1990) 1 LLJ 298 [LNIND 1989 MAD 359], 301 (Mad) (DB), per Nainar Sundaram J.

54 *India Marine Services Pvt Ltd v Workmen* (1963) 1 LLJ 122 [LNIND 1962 SC 260], 124 (SC) : AIR 1963 SC 528 [LNIND 1962 SC 260], per Mudholkar J.

55 *N Chinnaiah v Depot Manager, APSRTC* (1997) 2 LLJ 512, 514 (AP) : 1998 (1) An WR 779 : 1996 (1) APLJ 178, per Bikshapathy J.

56 *Hind Construction and Engg Co Ltd v Workmen* (1965) 1 LLJ 462 [LNIND 1964 SC 313], 465 (SC) : AIR 1965 SC 917 [LNIND 1964 SC 313], per Hidayatullah J.

57 *Mgmt of FICCI v Workmen* (1971) 2 LLJ 630 [LNIND 1971 SC 573], 647 (SC) ; AIR 1972 SC 763 [LNIND 1971 SC 573]: [1972] (24) FLR 103 : 1972 Lab IC 413 [LNIND 1971 SC 573] : (1972) 1 SCC 40 [LNIND 1971 SC 573], per Jaganmohan Reddy J.

58 *Addl District Magistrate v JP Chaturvedi* (1996) 1 LLJ 811 [LNIND 1996 SC 40], 813 (SC) : AIR 1996 SC 2359 [LNIND 1996 SC 40]: 1996 (1) SCALE 202 [LNIND 1996 SC 40] : (1996) 2 SCC 12 [LNIND 1996 SC 40], per Majmudar J.

59 *Ram Kishan v Union of India* (1996) 1 LLJ 982, 985 (SC) : AIR 1996 SC 255 [LNIND 1995 SC 858]: 1995 (5) SCALE 431 : (1995) 6 SCC 157 [LNIND 1995 SC 858], per Ramaswamy J.

60 *Karnataka SRTC v BM Patil* (1996) 2 LLJ 536, 538 (Kant) : 1995 (5) Kar LJ 665 [LNIND 1995 KANT 300], per Mohan Kumar J.

61 *Palghat BPL & PSP Thozhilali Union v BPL India Ltd* (1996) 2 LLJ 335 [LNIND 1995 SC 886] : (1995) 6 SCC 237 [LNIND 1995 SC 886].

62 *Gujarat RTC v Kachraji Motiji Parmar* (1994) 2 LLJ 332, 335 (Guj), per Shah J.

63 *State Bank of India v CGIT* (1997) 2 LLJ 573 [LNIND 1996 BOM 751] (Born), per Sri Krishna J.

64 *Lakshmi Machine Works Ltd v LC* (1997) 2 LLJ 1012 [LNIND 1997 MAD 602], 1019 (AP), per Lakshmanan J.

65 *Ritz Theatre Pvt Ltd v Workmen* (1962) 2 LLJ 498 [LNIND 1961 SC 241],505 (SC), per Gajendragadkar J.

66 J *Gopinathan v Dy Labour Commr* 1991 Lab IC 1003, 1007 (Ker), per DJJ Raju J.

67 *PH Kalyani v Air France* (1963) 1 LLJ 679 [LNIND 1963 SC 45], 682 (SC) : AIR 1963 SC 1756 [LNIND 1963 SC 45], per Wanchoo J.

68 *Secretary, Kottayam DCMSU Ltd v IT* (1983) 2 LLJ 225. 227 (Ker) : 1982 KLJ 686 . per UL Bhat J.

69 *Buckingham and Carnatic Co Ltd v Workers* [1952] LAC 490.

70 *Indian Iron and Steel Co Ltd v Workmen* (1958) 1 LLJ 260 [LNIND 1957 SC 105] (SC) : AIR 1958 SC 130 [LNIND 1957 SC 105], per SK Das J.

71 *Balipara Tea Estate v Workmen* (1959) 2 LLJ 245 [LNIND 1959 SC 80], 249 (SC), per Sinha J.

72 *Mgmt. of Hyderabad Usha Works v IT* (1970) 2 LLJ 315 (AP) (DB).

73 *Tata Engineering & Locomotive Co Ltd v SC Prasad* (1969) 2 LLJ 799 [LNIND 1969 SC 114],812 (SC), per Shelat J.

74 *Hind Construction and Engineering Co Ltd v Workmen* (1965) 1 LLJ 462 [LNIND 1964 SC 313], 465 (SC) : AIR 1965 SC 917 [LNIND 1964 SC 313], per Hidayatullah J.

75 *Ved Prakash Gupta v Delton Cable India Pvt Ltd*, 1984 Lab IC 658 [LNIND 1984 SC 380],662 (SC), per Vardarajan J.

76 *Divl Mgr., United Insurance Co Ltd v T Radhakrishna Murthy* 1986 Lab IC 1954 (AP) (DB), per Jeevan Reddy J.

77 *MPF, APDDC v VK Durga* 1988 Lab IC 833, 835 (AP), per MN Rao J.

78 *Karnataka SRTC v N Nagendrappa* 1991 Lab IC 2470, 2472-73 (Kant), per Shyarn Sundar J.

79 *JK Cotton Spg and Weaving Co Ltd v Workmen* (1965) 2 LLJ 153 [LNIND 1965 SC 153], 156 (SC), per Mudholkar J.

80 *Ram Swarath Sinha v Mgmt of Balsund Sugar Co Ltd* [1954] LAC 697(LAT).

81 *State Bank of India v RK Jain* (1971) 2 LLJ 599 [LNIND 1971 SC 481],613 (SC), per Vaidialingam J.

82 *Workmen of Motipur Sugar Factory v Mgmt.* (1965) 2 LLJ 162 [LNIND 1965 SC 109], 170 (SC) : AIR 1965 SC 1803 [LNIND 1965 SC 109], per Wanchoo J.

83 *Kharadah & Co Ltd v Workmen* (1963) 2 LLJ 452 [LNIND 1963 SC 138], 457 (SC), per Gajendragadkar J.

84 *Imperial Tobacco Co of India Ltd v Workmen* (1961) 2 LLJ 414 [LNIND 1961 SC 116], 416 (SC), per Wanchoo J.

85 *State Bank of India v RK Jain* (1971) 2 LLJ 599 [LNIND 1971 SC 481], 604 (SC), per Vaidialingam J.

86 *Cooper Engineering Ltd v PP Mundhe* (1975) 2 LLJ 379 [LNIND 1975 SC 284], 384 (SC), per Goswami J.

87 *Bharat Sugar Mills Ltd v Jai Singh* (1961) 2 LLJ 644 [LNIND 1961 SC 306], 649 (SC) : [1962] 3 SCR 684 [LNIND 1961 SC 306], per KC Das Gupta J.

88 *Ritz Theatre Pvt Ltd v Workmen* (1962) 2 LLJ 498 [LNIND 1961 SC 241] (SC), per Gajendragadkar J.

89 *State Bank of India v RK Jain* (1971) 2 LLJ 599 [LNIND 1971 SC 481] (SC) : AIR 1972 SC 136 [LNIND 1971 SC 481]: 1972 Lab IC 13 [LNIND 1971 SC 481] : (1972) 4 SCC 304 [LNIND 1971 SC 481] per Vaidialingam J.

90 *Delhi Cloth & Gen Mills Co Ltd v Ludh Budh Singh* (1972) 1 LLJ 180 [LNIND 1972 SC 17], 198-99 (SC) : AIR 1972 SC 1031 [LNIND 1972 SC 17]: (1972) 1 SCC 595 [LNIND 1972 SC 17], per Vaidialingam J.

91 *Mgmt of AVP(C) Ltd v Secretary, AVPE Union* 1982 Lab IC 261 -62 (Ker), per Bhaskaran J.

92 *India FDS Ltd v LC* 1996 Lab IC 725 (Mad) (DB), per Ramanujan J.

93 *Workmen of Firestone TRCI Ltd v Mgmt.* (1973) 1 LLJ 278 [LNIND 1972 SC 133], 296 (SC) : AIR 1973 SC 1227 [LNIND 1973 SC 430]: [1973] (26) FLR 359 : (1973) 1 SCC 813 [LNIND 1973 SC 430], per Vaidialingam J.

94 *Andhra Pradesh SRTC v IT* 1971 Lab IC 594, 597-98, per Sambasiva Rao J.

95 *Hindustan Steel Ltd v Workmen* (1970) 1 LLJ 337 (Ori) (DB), per Barman J.

1 *Premnath Motors Workshop Pvt Ltd v IT* (1971) 1 LLJ 167 (Del), per Deshpande J.

2 *Supdg. Engr., Kancheepuram ED Circle v MK Vasu*, (2010) 4 LLJ 55 (Mad .)

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

[S. 11A. Power of Labour Courts, Tribunals and National Tribunals to give Appropriate Relief in case of Discharge or Dismissal of Workmen.(

Loss of Confidence:

One of the important factors militating against the reinstatement which a good bit of decisional grist has accumulated, is the 'loss of confidence' in the workman by the employer. The plea of the employer of his 'loss of confidence', particularly, where holding a position of trust and confidence, the concerned employees misused that position rendering it insecure and undesirable to retain him in service, despite his discharge or dismissal having been held to be invalid, will militate against the award of reinstatement as it is not a light matter to force an employee upon an unwilling employer in such a case.[1] Though the employer's plea that he has lost confidence in the dismissed employee cannot ordinarily be exaggerated, yet in the special circumstances of a case, it may not be fair to the employer or to the employee to direct reinstatement.[2] Likewise, in *PP Chopra*, the court accepted the employer's plea of loss of confidence in the workman who was a stenographer and was in a position of confidence and trust as he was taking down dictation and typing out all kinds of matters and even secret matters and particularly when he had, in fact, surreptitiously retained with him the copies of some communications. As the employer could legitimately entertain the feeling, that, if reinstated, he would again retain with him copies of documents of a confidential nature whenever he felt that such retention would be of use or advantageous to him. In these circumstances, the feeling on the part of the employer that he could no longer trust the workman for any confidential matter, could not be regarded as unjustified as it was not unlikely that, in future, the workman might collect evidence of even more dangerous and harmful nature. Obviously, if the employer could not repose confidence in the workman if reinstated, he could not make any use of his service as a stenographer.[3]

AK Roy, is another case where the plea of the employer of loss of confidence in the workman prevailed with the Supreme Court in view of the recommendations of the senior security officer, based on the verification report from the police, that it would not be desirable to retain him in service, particularly when the workman was employed in a blast furnace-a crucial part of the work-with respect to which the employer could not hazard any risk. It was, therefore, not possible to retain the workman in service on the ground of security and consequently the employer could not place confidence in him any longer. The court observed that if the management truly felt that it was not possible to retain the workman in the company's service on the ground of security, the case would be one of those exceptions where the general rule of reinstatement could not be applied properly.[4] In *Francis Klein*, the court held the direction of reinstatement of the workman who held the post of a *durban* in the employer's concern, and to allot him some other suitable job, to be unjustified for the reason that the employer had lost confidence in him on account of his refusal to co-operate when a colleague of his asked him for assistance to apprehend a thief. Since the job of the workman involved security of valuable property, both of manufactured goods and other assets, which required to be guarded, the plea of the employer of loss of confidence was held to be justified and the order of reinstatement was replaced with an order of compensation in lieu of reinstatement. Speaking for the Court, Jaganmohan Reddy J, observed:

> .. . when an employer loses confidence in his employee particularly in respect of a person who is discharging an office of trust and confidence, there can be no justification for directing his reinstatement.[5]

In *Sudder Office*, in view of the fact that the workman was holding a very responsible post where integrity and honesty were quite essential, the termination of his service on the ground of loss of confidence was held to be justified.[6] But in *Binny*, though the tribunal had upheld the validity of the domestic inquiry holding the workman guilty of an aggravated act of misconduct, it ordered his reinstatement. In appeal, dealing with the plea of loss of confidence, the Supreme Court observed:

> It has become almost a settled principle that reinstatement should not be awarded where the management justifiably alleges that they have ceased to have confidence in the dismissed employee. In other cases, the tribunal must consider carefully the circumstances of the case to come to the finding that justice and fair play require that reinstatement should be awarded.[7]

In *Binny*, the workman had taken leave on the false pretext of going to his village for settling a land dispute whereas actually, during that period, he participated in a hunger-strike in front of the Government secretariat as a member of a trade union. The employer company, therefore, cancelled his leave and directed him to resume duty forthwith. On his failure to comply with that direction, the company terminated his services under the relevant Standing Order for 'absenting himself without leave for eight consecutive working days'. The labour court set aside the order of termination and directed his reinstatement, with backwages as it took the view that the employer company had no right to revoke the leave already granted to the workman, but in appeal, by special leave, the Supreme Court held that neither reinstatement nor backwages could have been awarded as the employer had lost confidence in the workman on account of his having obtained leave on a false pretext.[8] In *MK Chhatre*, the labout court had awarded reinstatement of the workman after holding that none of the charges against him were proved. However, in appeal, the Supreme Court observed that reinstatement would not be justified in view of the facts relating to one of the charges levelled against him. Accordingly, the award of reinstatement was substituted by a suitable compensation.[9] In *L Michael*, the workman, who was employed as a receipt and despatch clerk in the office of the employer company, was discharged from service and his discharge was sought to be sustained as discharge simpliciter on the ground of loss of confidence in view of his having misused his position by passing on 'very important and secret information about the affairs of the company to certain outsiders'. The labour court held the discharge of the workman from service was justified for the reason of 'loss of confidence' by the employer in him but in appeal by special leave, the Supreme Court held that the labour court in sustaining the order of discharge on the ground of loss of confidence had misread the material evidence, and therefore, itself went into the evidence and found that the plea of loss of confidence was not made out by the employer. In the circumstances, the Supreme Court itself ordered the reinstatement of the workman but an objective perusal of the case discernible from the paper book of the appeal does not warrant this approach and conclusion of the court. Even as a question of law, the following observations are rather off the mark and would require elucidation:

> Loss of confidence is no new armour for the management; otherwise security of tenure, ensured by the new industrial jurisdiction and authenticated by a catena of cases of this court, can be subverted by this neo formula. Loss of confidence in the law will be the consequence of the loss of confidence doctrine. In the light of what we have indicated, it is clear that loss of confidence is often a subjective feeling or individual reaction to an objective set of facts and motivations. The court is concerned with the latter and not with the former, although circumstances may exist which justify a genuine exercise of the power of simple termination. In a reasonable case of a confidential or responsible post being misused or a sensitive or strategic position being abused, it may be a high risk to keep the employee, once suspicion has started and a disciplinary inquiry cannot be forced on the matter. There, a termination *simpliciter* may be bona fide, not colourable, and loss of confidence may be evidentiary of good faith of the employer.[10]

However, the plea of 'loss of confidence' by the employer cannot be accepted as a matter of routine. It does not mean that in every case, where the employer says that since he terminated the service of the workman for loss of confidence in him, reinstatement should not be awarded, should be accepted. Loss of confidence cannot merely be subjective based upon the statement of the mind of the management. Objective facts, which would induce a reasonable apprehension in the mind of the management regarding the trustworthiness of the employee must be alleged and proved. Otherwise, the right of reinstatement to which an employee is ordinarily entitled to, on a finding that he is not guilty of any misconduct, will be irretrievably lost to the employee.[11] The tribunal has to carefully examine all the circumstances of the case before coming to the conclusion that the apprehensions of the employer are genuine and he truly feels that it would be hazardous or prejudicial to the interests of the industry to retain the workman in his service on the ground of security or discipline before deciding that instead of reinstatement, compensation would meet the ends of justice.[12] The mere fact that the relations between the employer and the concerned workman were not cordial or were strained, would not by itself establish the case of loss of confidence and defeat the relief of reinstatement.[13]

The plea of loss of confidence must have some rational relation to the fact that the employee had misused his position of

trust and rendered it undesirable to retain him in service. Loss of confidence in the intergrity of an employee should be substantiated by cogent evidence before the industrial adjudicator. If a workman is entitled, as a general rule, to be reinstated after his wrongful dismissal is set aside and on the facts it is not possible to find cogent material on which the establishment can generally be considered to have 'lost confidence' in the integrity of the workman, he is entitled to be reinstated.[14] In other words the plea of loss of confidence has to be substantiated specifically by the employer by pleading and proving it before the tribunal by adducing the relevant evidence. The plea of loss of confidence is only to be entertained if it is founded on material facts and particulars specifically pleaded and proved. The material facts and particulars in this regard will, inter alia, include the rule of confidence in the business of the employer, nature of the job performed by the workman and the specification of the confidentiality involved therein.[15] The failure of the employer to do so will disentitle him to impugn the order of reinstatement. In a case, where the employer states that he has lost confidence in the employee, the matter has to be weighed properly. The mere assertion of the employer that he has lost confidence cannot compel the tribunal to refrain from passing an order of reinstatement. The tribunal will have to consider whether the employer genuinely feels that it is risky to retain an employee in future or that it is hazardous or prejudicial to the interest of the industry to do so or it is a mere allegation made to send the employee our of employment.[16]Mere surmises or suspicion are no proof of the commission of the act justifying loss of confidence.[17] In *Panitole Tea Estate*, the Supreme Court observed that this aspect requires determination on facts which should be properly placed before the tribunal and a finding secured after appropriate trial. In other words, the employer must plead and prove before the tribunal all the facts relevant to the plea of loss of confidence and obtain a finding on that from it.[18] The first and foremost requirement to be proved is that the workman, in fact, held a place of trust and confidence and while holding such a position, he did something to forefeit the confidence of the employer and to continue him further in the service would be embarrassing and inconvenient to the employer or would be deterimental to the interest of discipline or security in the establishment.[19] In *Cox & Kings*, the court repelled the contention, that since the employer had lost confidence in the concerned workman, compensation without reinstatement would have been adequate relief, because there was no factual basis for the belated contention.[20]

In *MK Chhatre* (*supra*), in spite of the fact that the plea of loss of confidence was not even raised before the labour court, the Supreme Court substituted the order of reinstatement by an order of compensation in lieu of reinstatement, in view of the facts relating to one of the charges. The plea of loss of confidence before the Supreme Court related to a charge which had not been proved before the labout court. If the charge had not been proved, as held by the Supreme Court itself, the question of loss of confidence on account of the facts relating to that charge could not arise. In *PP Chopra* (*supra*), the plea of loss of confidence was not raised before the tribunal but this plea was raised for the first time before the Supreme Court in support of the contention that the tribunal ought not to have directed the workman's reinstatement. The court accepted the plea in view of the fact that the workman being a stenographer in the establishment was in a position of confidence and trust. Since he abused that position by surreptitiously retaining the copies of certain correspondence, the management could not repose confidence in him, and if reinstated, they would not be able to make use of his services as a stenographer. In the circumstances, the court held that the tribunal ought not to have directed reinstatement but ought to have awarded suitable compensation instead. In *Anil Kumar Chakraborty*, where the workman held the position of trust and confidence as a compounder, in which capacity he was entrusted with drugs and medicines for being supplied and distributed to the needy and ailing workers, free of cost, but by abusing his position of trust, he indulged in trafficking in those drugs and medicines to the deteriment of the health and well-being of the workers.[21] A single judge of the AP High Court, in *South Central Rly ECC Society*, has deduced the following principles of a plea of loss of confidence:

(i) in order to arrive at a conclusion whether the employer has lost confidence in the employee, there cannot be any strait-jacket principles as each case has to be assessed on its peculiar facts and circumstances;

(ii) the derelict observance of any act by the employee giving rise to the complaint of losing confidence in him must be a deliberate one; an innocuous and inadvertent act which causes detriment will not be a circumstance for losing confidence in the employee;

(iii) the normal rule is that in cases of invalid orders of dismissal, the direction is for reinstatement of the dismissed employee and the exception is expedience, where, say the employee held a position of confidence and trust and the employer lost confidence, reinstatement will not be fair. [22]

In *M Arunagiri*, the employer lost confidence in the workman on account of his habitual frequent absence, irregular attendance and absence of sincerity. The Madras High Court held that the order of reinstatement would not be proper and only compensation should be awarded.[23] In *D Seeralan*, another Division Bench of that High Court set aside the award of the labour court and held that the termination of service of the employee for loss of confidence was invalid for non-compliance with the relevant Standing Orders inflicting the disciplinary punishment, but in view of the fact that the termination of service was not mala fide, the court awarded compensation in lieu of reinstatement.[24] In *Kanhaiyalal Agrawal*, the Supreme Court held that in a case of termination for loss of confidence, proof based on objective facts was

necessary. Where the employees were charged for making payments for sugarcane not actually brought into mills, the evidence shows that the workmen did not follow the prescribed procedure and were negligent, but there was no evidence to show that the workmen had misappropriated the money, and hence a conclusion of loss of confidence could not be drawn.[25] In *NC Nalwaya*, the facts were: an unknown person visited the bank claiming to be the account holder of a dormant account, and the bank employee disclosed the amount lying in the credit of the account holder without verifying the identity of the person, resulting in the said stranger withdrawing Rs. 6000/- from the account. The employee was charge-sheeted and eventually dismissed. In the meantime, the criminal court acquitted him in respect of the same case on the ground that the charges were not proved beyond reasonable doubt. The Appellate authority dismissed the appeal filed by the employee on ground of delay. The High Court observed that the delay in approaching appellate authority was genuine in the light of the pendency of criminal proceedings and that, the question of loss of confidence would not arise. On this view of the matter, the Court set aside the dismissal. Quashing the order of the High Court and converting the dismissal into compulsory retirement in the special circumstances of the case, Raveendran J (for himself and AK Patnaik J), held:

> It is now well settled that the courts will not act as an appellate court and re-assess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record.Courts will, however, interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on extraneous considerations.[26]

Delay and Employment of New Persons:

Another circumstance, which is relevant in deciding the question, whether departure from the normal rule of reinstatement should be made or not, is long delay. Delay can be of two types, namely,

(1) delay between the occasion for the industrial dispute and the agitation or complaint by labour which leads to the reference; and

(2) delay from the time of reference to the date of final order of reinstatement.

As far as the delay of the second type is concerned, *ie*, the time that lapses subsequent to the reference of an industrial dispute would be quite irrelevant in consideration of the relief but the delay of the first type, *ie*, the time between-the occasion for the dispute and the agitation or complaint by labour which leads to the reference might be a relevant circumstance in shaping the relief. Everything will depend on the period of delay, the facts which occasioned the delay, and the degree of negligence with which the organised labour could be rightly taxed.[27] Even the delay of the first type, though relevant, is not always *per se* adequate ground for declining the relief of reinstatement, particularly where the dismissal or termination of service is illegal or amounts to an 'unfair trade practice'.[28] In *Shalimar Works*, a large number of workmen were discharged in April 1948. Two references with respect to the reinstatement of 250 workmen were made. A list of 250 workmen was sent to the tribunal when practically the whole of the adjudicatory proceedings were over and the tribunal was to consider the question of reinstatement. The tribunal ordered the employer to reinstate 250 workmen with the direction that it should give notice to the discharged workmen to ask for employment. In appeal, the labour appellate tribunal awarded reinstatement of 15 workmen, who did not withdraw their provident fund. The Supreme Court held that even the 15 workmen should not have been ordered to be reinstated by the labour appellate tribunal as there was no reason for ordering the reinstatement of anyone on such vague references after such an unreasonable length of time. The court observed that even though there is no limitation prescribed for reference of disputes to an industrial tribunal, it is only reasonable that disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed, particularly so, when the dispute relates to discharge of a large number of workmen.[29] In *Punjab National Bank*, the court affirmed the order of reinstatement made by the tribunal and rejected the plea of the employer that the labour appellate tribunal had not taken into consideration the fact that a long time had elapsed between the date of dismissal and the award and in the meanwhile it had employed additional hands and the reinstatement would be unfair as it would cause hardship to the employer but in the absence of the relevant facts, as to how many employees had been appointed and on what terms, which were within the special knowledge of the employer, the court found it difficult to deal with the plea on merits. The court said that since the bank had failed to establish its specific case against any of the employees, there was no reason why the normal rule of reinstatement should not prevail and the employees should not get

the relief of reinstatement. The mere fact that the bank might have employed some other persons in the meanwhile, would not necessarily defeat such a claim for reinstatement. Gajendragadkar J, of the Supreme Court observed:

> ...however much the court may sympathise with the employer's difficulty caused by the fact that after the wrongful dismissal in question, he had engaged fresh hands, the court cannot overlook the claims of the employees who, on the findings of the tribunals below, had been wrongfully dismissed. In the case of such wrongful dismissal, the normal rule would be that the employees thus wrongfully dismissed must be reinstated.[30]

The further plea of the employer that a large number of workmen clamouring for reinstatement had already secured employment elsewhere on permanent basis and so, it was unnecessary to force them on the bank, was also discountenanced for want of relevant material as it had not been raised before the labour appellate tribunal. In *Swadesamitran*, the court further observed that once it has been found that the termination of service of a workman is unjustified and improper, it is for the tribunal to consider as to what relief the workman is entitled to. The fact that the protracted litigation in regard to the dispute has inevitably meant delay and in the meanwhile the employer has engaged other workmen, would not necessarily defeat the claim of the workman for reinstatement.[31] In *Bombay Steel Rolling*, under the terms of a settlement, the employer had agreed to take back in service, certain workmen on their acquittal in criminal proceedings. Some of the workmen were acquitted in the criminal proceedings but they did not report for work nor did they ask for reinstatement within a reasonable time on their acquittal. They applied for being taken back after a long time, which the employer refused. The tribunal directed their reinstatement. The Supreme Court itself considered the evidence and held that the concerned workmen had, in fact, not reported for work within a reasonable time after their acquittal and observed that it would be neither fair nor reasonable to ask the management to comply with the demand for reinstatement made months and months after such acquittal, particularly, when during this long period, the employer had naturally employed new hands and in the special circumstances of the case that fact could not altogether be ignored.[32] In *Binny*, the court rejected the plea of the employer that reinstatement should not be ordered four years after the dismissal of the employee as the management had already made other arrangements for the work which was formerly being done by the dismissed workman. The court distinguished its earlier decision in *Shalimar Works* on the ground that in that case there were a very large number of workmen, who were to be reinstated while in this case only one workman had to be reinstated and there would be no serious dislocation of work by the order of reinstatement of one workman. Speaking for the Supreme Court, Mitter J held:

> Normally it will be months before an order of reference is made by the government and one or two years elapsed in almost all cases before the adjudication by an industrial tribunal is complete. If mere lapse of time be enough to lead the industrial tribunal to hold that there should be no reinstatement of service, the power of reinstatement will become obsolete. In any case, the management must try to show that reinstatement will cause dislocation of work and the tribunal must take that into consideration. In this case, we find no such compelling circumstances.[33]

An employer who claims a departure from the normal rule must satisfy the adjudicator that the employee is disentitled to the relief by producing before him necessary evidence. If he fails to raise necessary points for decision, he cannot be permitted to make a grievance against the relief of reinstatement.[34]

Accepting Notice and Wages:

Considering the unequal position between an employer and a needy employee, the acceptance of notice-wages and wages due up to the date of dismissal cannot be a bar to relief or reinstatement of compensation in lieu of reinstatement, unless it is proved that the acceptance was voluntary and made with full knowledge of its consequences upon the dispute.[35] It would be wrong to draw the inference from the mere fact of receipt of wages for the notice period that the workman voluntarily gave up his service and was estopped from claiming reinstatement.[36] The receipt granted by the employee in such a case for the notice-wages received does not bar his claim to the relief of reinstatement, if an industrial dispute is raised over his dismissal.[37] In industrial adjudication, technical pleas of estoppel and waiver are generally not entertained. Estoppel is a rule of evidence and it may have the effect of creating substantive rights as against the person estopped. Besides, the ingredients of estoppel have to be factually and legally satisfied before the principles of estoppel can be pressed into service. Acquiescence denotes conduct which is evidence of an intention by a party to abandon a right legitimately due to him. It may also denote a conduct from which the opposite party could be justified in inferring such an intention. Acquiescence is only a form of estoppel, and it is of the essence of acquiescence that the party acquiescing should be aware of, and by words or conduct should represent that he assents to what is a violation of his rights and the other party should have been deluded by the representation into thinking that this wrongful action was assented to by the first party. The question of estoppel or acquiescence is essentially a question of fact, which has to be decided on proper materials before the court. Once facts are established, acquiescence is a matter of legal inference. Waiver is an intentional

relinquishment of a known right. There could be no waiver unless the person against whom waiver is claimed had full knowledge of his rights and all facts enabling him to take effectual action for the enforcement of such rights.[38] Waiver is contractual and would constitute an agreement to release or not to assert a right. The pleas of acquiescence or waiver have to be specifically taken by the opposite party and there should be an issue on that point. They cannot be a matter of bare presumptions and assumptions. They are questions of fact which have got to be pleaded and proved by adducing relevant evidence. The burden of proof of the ingredients of acquiescence or waiver is on the person who relies on the same.[39] In *Palaniswami*, the labour court granted the relief of compensation in lieu of reinstatement on refusal of the management to reinstate the workmen and the workmen accepted the awarded amount under protest expressly stating that this was without prejudice to challenge the award in a writ petition. The Madras High Court held that the workman was not disentitled to claim the relief of reinstatement in the writ petition as the doctrine of 'approbation and reapprobation' would not apply; nor would the doctrine of'accord and satisfaction' apply to a case of industrial adjudication.[40]

In Seema Ghosh, the facts were: the workman was taken in service in 1947; the workman was examined by the Medical Board and his age was assessed; in 1960 a service card was issued by the Management wherein the age of the workman was recorded as 24 years and the same was duly accepted by the workman by putting his signature; only in 1972, for the first time, the workman produced a transfer certificate issued from the school and disputed his age; the said transfer certificate was sent to the District Education Officer who informed the Management that the transfer certificate was not genuine; it is also not disputed that after the age rectification committee took a decision the workman was examined by a specially constituted Medical Board in 1984 and his age was assessed as 13-9-1926; the service record was again corrected and it was made in 1926. In this way, the service of the workman was increased by two years; the workman accepted the age assessed by the Medical Board in 1984 and according to the age so assessed by the Medical Board workman the same was increased by two years. In 1986, the workman was given one year's extension in service and he accepted the said extension without raising any objection and retired on 13 September 1987. After his superannuation the workman raised the industrial dispute regarding actual date of superannuation. The Labour Court passed the award holding that the workman is entitled to full back wages including admissible allowances and other benefits for the period from 13 September 1987 *i.e.*.. his date of illegal superannuation to 11 August 1990 *i.e.*.. the actual date of retirement. Quashing the appeal filed by the workman, Lakshmanan J (for Himself and Chattejee J) of the Supreme Court held:

> .. . The workman did not challenge the opinion of the Medical Board constituted by the Management for determining the age of the workman and permitted the workman to work till his attaining the age of retirement. *Therefore, the workman in the present case is estopped from challenging the correctness of the opinion of the Medical Board after his retirement*.. .. The workman was to superannuate in the year 1986 but on the basis of the assessment of age made by the Apex Medical Board, he was allowed to continue till 13.09.1987. At that stage, the workman did not challenge the decision of the Medical Board. It is only after enjoying the benefits given to the workman and after availing the benefits, the workman raised a dispute after his retirement in pursuance of which the Labour Court has passed the Award.. .. *the findings arrived at by the Labour Court is nothing but perverse against the facts and passed the award in favour of the workman on totally misplaced sympathy*. In our opinion, both the learned Single Judge and of the Division Bench are right and within their jurisdiction in re-assessing and re-valuing the weight of the evidence in the case recorded by the Labour Court by which the High Court came to the conclusion that the workman was not entitled to any relief.. . .[41] (para 31) (Italics supplied)

Discrimination:

Where an employer dismisses a number of workmen on finding them guilty of an act of misconduct but subsequently takes some of them back in service while leaving others out, it would be open to those workmen who have not been taken back, to claim reinstatement on the ground of discrimination but whether such an act is an act of discrimination or not, would be a question of fact depending upon the facts and circumstances of each case. If the employer while taking some workmen back has left others out for their trade union activities or other ulterior purpose, this may be an act of unfair labour practice of victimisation and would tantamount to unwarranted discrimination. The aggrieved workmen would, therefore have a valid ground for reinstatement. But if on the other hand, the employer has not been able to take in service all the workmen and left some of them out for genuine, valid and justifiable reasons, his action would not be assailable. In *Lakshmiratan Cotton*, the employer had to reinstate 31 workmen out of 53 workmen who were dismissed as decided by the Chief Minister. It was agreed by way of a settlement, that the said decision would be binding on both the sides. It was held that it could not be a ground for reinstatement of the remaining workmen with respect to whom the reference of an industrial dispute was made for adjudication.[42]

Nature of Employment:

In *Sundaramoney*, the workman was employed as a cashier off and on with an intermittent break. His appointment used to be treated purely as a temporary one for a period of nine days at a time which could be terminated without assigning any

reason thereof at the employer's discretion but this nine days employment tacked on, had ripened to a continuous service for a year under s 25B(2) of the Act. The termination of the services of the workman after the expiry of his last term was held to be retrenchment within the meaning of s 2(oo). Accordingly, the Supreme Court directed his reinstatement with continuity of service though, on the facts and in the circumstances of the case did not award backwage. Thus, irrespective of the device adopted by the employer to keep the employee permanently in temporary employment, the relief of reinstatement was considered to be the logical conclusion of its decision to set aside the termination of the services of the workman.[43] A single judge of the Madras High Court in *Crompton Engg*, held that where employment of a particular individual is for a specific period or for specific work, the employment automatically comes to an end on the expiry of such period or after the work was over and consequently, there was no termination and there was no question of reinstatement.[44] In *JS Khadgawat*, the Rajasthan High Court held that acceptance of the payment of wages for termination of service in terms of the contract of employment would neither constitute waiver nor estoppel.[45] Waiver means abandonment of right and it may be either express or implicit from the conduct but its basic requirement is that it must be an intentional act with knowledge. Furthermore, there could be no waiver unless the person who is said to have waived is fully informed of his right and with full knowledge of such right, he intentionally abandons it.[46]Estoppel as envisaged by s 115 of the Indian Evidence Act 1872 can arise only if a party to a proceeding has altered his position on the faith of a representation or promise made by another.[47] In the fact situation of some cases, the courts have held the order of reinstatement to be justified,[48] and in other cases, they have held the reinstatement to be unjustified,[49] depending upon various facts and circumstances of each case. Where the employee of a Land Development Bank did not raise the dispute about her termination within a reasonable time and further averred in her application filed before the labour court to the effect that she was gainfully employed in Haryana Urban Development Authority and that her service was in fact regularised therein, allowing the appeal of the Bank, Sinha J (for himself and Hegde J), of the Supreme Court held:

> It is trite that the courts and tribunals having plenary jurisdiction have discretionary power to grant an appropriate relief to the parties. The aim and object of the Industrial Disputes Act may be to impart social justice to the workman but the same by itself would not mean that irrespective of his conduct a workman would automatically be entitled to relief. The procedural laws like estoppel, waiver and acquiescence are equally applicable to the industrial proceedings. A person in certain situation may even be held to be bound by the doctrine of Acceptance Sub silentio. The Respondent herein did not raise any industrial dispute questioning the termination of her services within a reasonable time. She even accepted an alternative employment and has been continuing therein from 10-8-1988.. .. She, therefore, did not deny or dispute that she had been regularly employed or her services had been regularized. She merely exercised her right to join the service of the Appellant.[50]

(b) Reinstatement with Backwages

Neither reinstatement nor payment of backwages as such is a common law right. These reliefs can, however, be granted by the industrial tribunals in the course of industrial adjudication.[51] Generally the question of backwages would not arise, when the discharge or dismissal is not set aside and is upheld by industrial adjudication as proper and justified[52] but the question is accentuated when the adjudicator sets aside the discharge or dismissal and awards reinstatement. Normally, backwages must follow reinstatement as reinstatement is a compendious concept but industrial adjudication has insisted that backwages must be specifically awarded, to entitle a workman for the claim of backwages because quantum of backwages is in the discretion of the adjudicator.[53] The award of backwages has to be carried out by the employer in letter and spirit. In *Phanindra Chandra Roy*, the industrial tribunal had ordered reinstatement of the workman with full backwages and directed the payment of all his arrears within a month of the receipt of the award. The employer corporation reinstated the workman after more than a year on his agreeing to accept only 40 percent of the backwages to which he was entitled in terms of the award. A single judge of the Calcutta High Court set aside the order of the corporation as unfair and untenable and strongly deprecated such action particularly by a public sector undertaking.[54] The question, whether in a case where reinstatement is found to be a proper relief, what should be the guiding considerations for awarding full or partial backwages, crops up every time when the workman questions the validity and legality of termination of his service howsoever brought about, to wit by dismissal, removal, discharge or retrenchment and the relief of reinstatement is granted? As a corollary to this question, further question is as to, whether the workman should be awarded full backwages or some sacrifice is expected of him?[55] The effect of reinstatement is to restore an employee to his former capacity, status and emolument, as if his services had never been terminated and the employee gets the benefit of continuity of service. In the absence of cogent reasons to the contrary such compensation should normally be equal to the full wages or remuneration which the employee would have received, had he continued in service but for the order of termination of his service.[56]

The general rule in industrial adjudication is that when a workman is reinstated after a certain period of enforced idleness or unemployment, then in the absence of cogent reasons, such reinstated workman should be entitled to full wages or remuneration which he could have received had he continued in service.[57] 'Wages for the purpose of computing back wages can only be those wages which are permissible in law'. For instance, when a workman is reinstated with backwages,

he should be paid the same wages as he would have been getting if he had not been dismissed.[58] In other words, ordinarily when the services of a workman have been illegally terminated by retrenchment, discharge or dismissal, he will be entitled to full backwages except to the extent he was gainfully employed during the enforced idleness.[59] In *Changunabai Palkar,* a female employee was dismissed without serving a charge-sheet or holding an inquiry for passive participation in an illegal strike by the workers in the textile mill. Though the other workers who participated in the strike were allowed to join, the workman in question who had an unblemished record of 40 years of service was not given the backwages for 14 months. The Bombay High Court held that the claim for backwages had a legal foundation and denial thereof in the facts and circumstances of the case was unwarranted and unjustified.[60] The effect of reinstatement is that the workman is to be restored to his previous position so far as his capacity, status and emoluments are concerned.[61] The workman has to be restored to his former position and status setting aside his discharge or dismissal from service as if he had never been dismissed, and he gets the benefit of continuity of service.[62]In other words, relief of reinstatement would mean that the employer has taken away, illegally the right of the workman to work, contrary to the relevant law or in breach of contract, and simultaneously deprived him of his earnings. Hence, the employer cannot shirk his responsibility of paying the wages which the workman has been deprived of by illegal or invalid action. If the workmen were always ready to work but they were kept away therefrom on account of invalid act of the employer, there is no justification for not awarding them full backwages which were legitimately due to them. Any other view would be a premium on the unwarranted litigative activity of the employer.[63] In such cases, full backwages are to be awarded to effectuate a twin purpose: firstly, that the discharge or dismissal having been found illegal, the workman continues in service in spite of the order, and secondly, that in such a case full backwages should be granted for the purpose of creating a climate in which workmen of the concern may be free from fear of reprisals in participating in the legitimate trade union activities.[64] However, there are exceptions to this rule where the tribunal in its discretion may deny or reduce backwages. In *Gujarat Steel Tubes,* the Supreme Court observed:

> Certainly, the normal rule, on reinstatement, is full backwages since the order of termination is *non est*...Even so, the industrial court may slice off a part if the workmen are not wholly blameless or the strike is illegal and unjustified. To what extent wages for the long *interregnum* should be paid is, therefore, a variable dependent on a complex of circumstances' but the discretion is to be exercised only in extraordinary cases.[65]

For instance, the relief of full backwages may be denied where that would place an impossible burden on the employer.[66] Similarly, if it is established by the employer that the management sustained a huge loss or a huge amount has to be paid to a large number of workmen covering a long period and the management will be adversely affected thereby.[67] The extent of income, if any, earned by the workman elsewhere during the period of his enforced unemployment and the nature of the efforts for the absence thereof, on his parr, to secure alternative gainful employment, will be the relevant factors to be taken into account in denying or scaling down quantum of backwages. Once the relevant facts are brought on record, there will be no defect in calculating the income, ifany, earned by the employee elsewhere.[68] Likewise, if the workman is found guilty of misconduct or lapse on his parr, it is within the discretion of the tribunal not to award wages for the period during which he may have remained out of employment.[69] In deciding the question, as to whether the employee should be recompensed with full backwages and other benefits until the date of reinstatement, the tribunals and the courts have to be realistic albeit me ordinary rule of full backwages on reinstatement.[70] In the very nature of things, there cannot be a strait jacket formula for awarding the relief of backwages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the tribunal. Full backwages except to the extent the workman was gainfully employed during the period of enforced idleness, would be the normal rule and the party objecting to it must establish the circumstances necessitating the departure.[71] For instance, in *Zila Sahakari Bank,* where the workman remained almost unemployed till his reinstatement except for a few months, the award of full backwages from the date of termination of the employment till the date of reinstatement was held to be valid and justified.[72] Likewise, in *SG Chemicals and Dyes,* in the circumstances of the case, the workmen whose services were terminated on the ground of illegal closure were entitled to full wages. The court discountenanced the plea of the employer that they must have taken alternative employment during the period between the date of closure of the undertaking and the hearing of the appeal before the Supreme Court and an inquiry, therefore, should be directed into the amount received by them from such alternative employer so as to set off the amount received by them, against full backwages and future salary payable to them.[73] Inordinate delay in agitating the dispute regarding the reinstatement and backwages will have a serious bearing on the question of backwages. For instance in *Steel Authority of India,* the labour court awarded reinstatement with backwages to the workman who had raised the dispute after more than ten years, the Supreme Court observed that even if the order of termination was void *ab initio,* there was no justification for waiting over a decade to challenge the order. The employer, therefore, could not be asked to pay for the default of the workman in raising the dispute after a decade. Even if the order of maximum punishment could be said to be harsh, there was no justification for the direction of payment of full wages. The court, therefore substituted the order of full backwages with 25 per cent of the backwages.[74]

The question really is, as to from what date backwages should be paid? In *Upper Ganges VES Co,* the Supreme Court held

that where the termination of service is found to be illegal, the date, on which such order is made which prevented the employee from returning to his service, should be the starting point for awarding him wages. It would not be proper to say that the date on which the order of termination of service was found to be illegal by the competent authority should be the starting date for awarding wages. The declaration of illegality relates back to the date on which the order was made because the termination brings about cessation in getting wages. In other words, if at the date on which the workman stopped rendering service by an order which is found to be illegal, that must be the relevant date from which the backwages must start subject to the general principle, that if that employee has thereafter served somewhere else, the amount so earned by him should be adjusted.[75] In dealing with different types of cases, the tribunal in each case has to see that relief should be given in a particular case to a particular workman in the matter of compensation by balancing the conflicting claims and the variations that exist in human conduct and the requirements of social justice.[76] On the parity of reasoning, the adjudicator has to counter-balance the claim of the employer that the workman was gainfully employed elsewhere during the period of unemployment with him, with the claim of the workman that he was not employed anywhere at all. The quantum of backwages is, therefore, a matter in the discretion of the tribunal dependent on the facts of a case. The tribunal will exercise its discretion keeping in view all the relevant circumstances.[77] The discretion has to be exercised having regard to certain approved principles an procedures.[78] A workman directed to be reinstated with backwages would not be entitled to backwages for the period during which he was usefully employed elsewhere,[79] because he cannot be allowed to take double advantage and make excessive gains relying on the wrongful act of the employer.[80] In *Hindustan Tin Works*, the Supreme Court reiterated that ordinarily the workman whose service has been illegally terminated would be entitled to full backwages except to the extent he was gainfully employed. If the workman was always ready to work but he was kept away by invalid or illegal act on the part of the employer, there would be no justification for not awarding him full backwages which were legitimately due to him. Speaking for the court, Desai J, observed:

> In the very nature of thing there cannot be a strait-jacket formula for awarding relief of backwages. All relevant consideration will enter the verdict. More or less, it would be a motion addressed to the discretion to the tribunal. Full backwages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the tribunal will exercise its discretion keeping in view all the relevant considerations. But the discretion must be exercised in a judicial and judicious manner.[81]

The court discountenanced the plea that the payment of huge amounts of backwages to the reinstated workman would shake the financial viability of the company and the burden could be unbearable. However, keeping in view the facts and circumstances of the case, the court considered it proper to scale down the backwages to 75 per cent payable in two equal instalments. In *A Phillips*, a single judge of the Andhra Pradesh High Court emphasised that the burden of showing that the normal rule should not be followed and the employee should be awarded full backwages is on the employer. Two factors relevant for departure from the rule and full backwages on reinstatement were pointed out, namely, gainful employment of the workman during the enforced idleness and the delay involved in raising the industrial dispute against the illegal termination of service. The further consideration for exercising the discretion in favour of the full backwages were stated to be harshness of punishment and the period during which the employee was kept out of employment due to no fault attributable to him, the nature of charges levelled against him and the delay in raising the dispute. In the facts and circumstances of this case, the backwages from the date of raising the dispute till the date of reinstatement were held to be just and fair.[82] In *Surendra Kumar Verma*, the court again recognised the discretion of the tribunal to deny the relief of full backwages in cases where the industry might be closed down or might be in severe financial doldrums and the relief of full backwages would place an impossible burden on the employer. In such and other exceptional cases, it *is* permissible for the court to mould the relief.[83] In *GT Lad*, in view of the fact that the period stretched over six years and further that the backwages had to be computed, if ordered in full, on a much higher scale because of two settlements which had raised the scale of wages substantially and the disputed fact that no specific case was put forward by the employer that the workman concerned had been employed elsewhere during this period, the Supreme Court took a total view of the whole case and directed the payment of 75 per cent of the wages for the entire period, ie, from the date of dismissal to the date of reinstatement on the scales and revised scales which might be applicable to the workmen.[84] In *Gujarat Steel Tubes* (*supra*), the court ordered reinstatement of a number of workmen whose services had been terminated en bloc and granted backwages ranging from 50 to 100 per cent to different categories of workmen.[85] In *Pannijee Sugar*, the court quashed the order of the labour court awarding full backwages to the workman as it had not taken into account the fact that the worker was admittedly a seasonal worker and remanded the case to the labour court with the direction to consider the question as to whether the worker is entitled to backwages for all the seasons which he had lost or for a particular season or for the entire period and for quantification of the relief The labour court was further directed to take into consideration the evidence, if any, that may be led by both the parties on the question whether the worker was gainfitlly employed elsewhere during the time he was not working with the employer.[86]

In *Abhinash Chandra Gautam*, the amount earned by the workman in his employment as a teacher, during the period of his unemployment after his discharge was deducted from the total amount of backwages.[87] In *SM Saiyad*, the workman was

dismissed from service in 1969 and he pursued his remedies in civil courts and then got his dispute referred for industrial adjudication to a labour court. The labour court directed the reinstatement of the workman but declined to grant backwages. The Gujarat High Court modified the award by granting backwages only for the period between the date of the order of reference to the date of reinstatement by the labour court. The Supreme Court held that the fact that the workman pursued his remedies in the civil court could not be held against him for denying the relief of backwages, and directed payment of backwages as if he had continued in the service all along. However, with respect to the period of gainful employment of the workman as an advocate, the court directed that in computing the backwages for the period of gainful employment of the workman, an amount at the rate of Rs 150 per month should be deducted.[88] In *Jai Bhagwan*, in view of the fact that the workman had raised the dispute after a considerable delay without doing anything in the meanwhile to question the termination of his services, the Supreme Court did not think it proper to award full backwages. In the circumstances of the case, it awarded halfbackwages from the date of termination till the date of its judgment and thereafter full backwages from the date of judgment until reinstatement.[89] The Kerala High Court in *Senior DPO, Southern Rly*, held that it is inconsequential that no relief in respect of backwages was either prayed for or granted by the tribunal in its award ordering reinstatement. The workman still would be entitled to claim relief of backwages to which he is entitled from the date of the wrongful termination of his service to the date of his reinstatement. He can claim the same in an application under s 33C(2) and such claim would not be barred by the pleas of res judicata, discharge or limitation*etc*. The correctness of this decision is not free from doubt. If in its discretion, the tribunal has not granted backwages, no entitlement is created in the workman to make the claim of backwages.[90] In *Pannijee Sugar*, the Supreme Court remanded the case to the labour court with a direction to consider the question as to whether the worker was entitled to backwages taking into consideration the evidence, if any, that may be led by both the parties on the question whether the worker was gainfully employed elsewhere during the time he was not working with the employer.[91] In *P Venugopal*, the court affirmed the award of the labour court directing reinstatement of the employee with continuity of service and backwages on finding dismissal of the workman invalid and unjustified.[92] In *SGChemical and Dyes*, the court discountenanced the plea of the employer to direct an inquiry as to whether the workmen had taken up any alternative employment during the intervening period and had received any amount from such employment so as to set off the amount so received against the backwages and future salary payable to them. Madon J held:

> It is possible that rather than starve while awaiting the final decision on their complaint some of these workmen may have taken alternative employment. The period which has elapsed is, however, too short for the moneys received by such workmen from the alternative employment taken by them to aggregate to any sizeable amount, and it would be fair to let the workmen to retain such amount by way of solatium for the shock of having their services terminated, the anxiety and agony caused thereby, and the endeavours, perhaps often fruitless, to find alternative employment.[93]

In *Central CSS Ltd*, the employer had adopted a very cantankerous attitude towards the employee throughout the litigation arising out of her illegal dismissal from service which was set aside by the assistant registrar, co-operative societies ordering her reinstatement without backwages. The High Court of Himachal Pradesh ordered payment of backwages. The Supreme Court deprecated the cantankerous attitude on the part of the employer resulting in pain and agony to the employee for over a period of 20 long years. The court observed:

> For such thoughtless acts of its officers, the petitioner-society has to suffer and pay an amount exceeding three lakhs is indeed pitiable. But considering the agony and suffering of the opposite party that amount cannot be a proper recompense.. .. the permission given shall have nothing to do with the directions to pay the respondent her backwages. Steps, ifany, to recover the amount shall be taken only after the payment is made to the opposite party as directed by the High Court.[94]

In *Mathura Electric Supply*, in view of the fact that the year to year computation of backwages would be a long and tardy exercise, the employer requested the court to award a reasonable compensation for backwages. In the circumstances of the case, the court awarded a lump sum of rupees one lac as backwages.[95] In *MS Dhantwal*, on the facts and in the circumstances of the case and having regard to the monthly pay packet of the workman, the court directed the employer to pay Rs 5,000 to the workman as backwages, over and above the amount of Rs 20,000 awarded by way of compensation in lieu of reinstatement. Furthermore, in view of the fact that the workman had been kept on tenterhooks by the employer for nearly eight years, the court directed a further payment of Rs 2,000 to the workman by way of costs. And that all the payments should be made within a period of four weeks from the date of the judgment.[96] In *Municipal Corpn of Delhi*, a single judge of the Delhi High Court instead of remanding the matter for determining the backwages in view of the pendency of litigation for about 19 years, himself fixed the backwages at Rs 20,000 to meet the ends of justice as it was not possible to precisely determine as to what backwages the workman would have earned during that period.[97] In *Vijaykumar Jasani*, the tribunal held that the dismissal of a workman on the ground of absence from duty for two days was too harsh and disproportionate to the offence which was of a minor nature and set aside the dismissal and awarded reinstatement with 50 per cent of backwages. In a writ petition by the workman, challenging the denial of the remaining 50

per cent of the wages, the Gujarat High Court held that even the denial of 50 per cent wages to the workman was unreasonable and excessive punishment.[98] In *RD Toplewar*, a single judge of the Bombay High Court held that even though there was an inordinate delay on the part of the employee in approaching the court in challenging the order of dismissal passed against him, the deprivation of the whole of the backwages would be unjust and disproportionate.[1]

In *Punabhai Govindbhai*, the tribunal had awarded the reinstatement of a daily wager with 50 per cent backwages. The Gujarat High Court observed that the passing of a vague order such as payment of 50 per cent backwages to a daily wager would create difficulties both for the workman and for the employer because a daily wager is not provided with work throughout the year. Accordingly, the court modified the award of the labour court on the basis that he had worked 76 days in a year and directed that the payment of 50 per cent backwages should be calculated on that basis.[2] When the tribunal makes an award stating that the employee in question is entitled to reinstatement with backwages, it really means that the employee should be paid wages for the period for which he has been kept out of employment and the fact that the award does not use the expression that he is 'entitled to backwages till the reinstatement' or 'with backwages till reinstatement' would not make any difference.[3] The direction of payment of backwages would normally contain the entire salary for the period to which the workman would have been emitled ifhis service had not been terminated. This would, a priori include the national and festival holidays. Hence the workman cannot make separate and independent claim for the salary for national and festival holidays particularly so because he was not asked to work on national and festival holidays.[4] In *Ranchhodji Thakore*, a junior clerk was dismissed from service on the basis of his conviction under s 302 read with s 34 of the IPC sentencing him to life imprisonment. But the conviction was set aside in appeal by the High Court. Thereafter, in a writ petition filed by the employee, the High Court directed the electricity board to reinstate the employee with continuity of service but without backwages. In appeal, upholding the decision of the High Court, the court observed that, 'since the petitioner had involved himself in a crime, though he was later acquitted, he had disabled himself from rendering the service on account of conviction and incarceration in jail', he was not entitled to payment of backwages.[5] In *Krishnakant Bibhavnekar*, the employee was charged for an offence under the Indian Penal Code and during the trial, he was kept under suspension. He was acquitted by the trial court and consequently, was reinstated in service without consequential reliefs. The Supreme Court held that in view of the relevant rules, it was in the discretion of the authority to grant him the reliefs consequent upon the reinstatement. The court observed:

> Though the legal evidence may be insufficient to bring home the guilt beyond doubt and though the prosecution may end in acquittal, the grant of consequential reliefs with all backwages cannot be as a matter of course.[6]

In *Metro Tyres*, the Punjab and Haryana High Court held that merely because the workman, after wrongful dismissal, had been earning his livelihood by undertaking agricultural operation in his native village, it could not be said that he was gainfully employed during the period of unemployment so as to reject his claim for backwages ordered by the labour court along with reinstatement.[7] Where the workman was dismissed for tearing of the leave application on not being granted leave, it was held that the punishment was not only shockingly disproportionate but was unconscionable, and the employer was directed to reinstate the workman and pay 25 per cent of backwages.[8] In *Lokashikshana Trust*, the facts disclosed that the workmen were dismissed for staging an illegal strike, after holding a disciplinary inquiry. The labour court, having recorded a finding that the strike was illegal and that the domestic inquiry held into the charges was valid, yet directed their reinstatement with full backwages on the ground that the punishment was disproportionate to the charge. The Supreme Court observed that the direction to pay full backwages in the facts and circumstances was too onerous and accordingly modified the order from full backwages to sixty per cent of backwages.[9] In *Cement Corporation*, the facts were that a workman inspite of notices issued by employer, failed to produce proof of age. He was retired from service on 30 June 1990 on the basis of the record available with the company. The workman raised an industrial dispute two years after his retirement and placed proof before the labour court to show that his date of birth was 2 February 1936. The labour court accepted the same and ordered backwages for the period between 20 June 1990 and 1 February 1994 and also interest thereon. Allowing the appeal, the Supreme Court modified the order of the labour court by reducing the backwages for a period of two years from 1 February 1992 to 30 January 1994 without any interest thereon.[10] The above decision of Supreme Court is open to criticism as that of the labour court. It is an admitted fact that the workman was indifferent to the several notices issued in all fairness by the corporation directing him to produce the proof of age. He did not respond as long as he was in service, but all of a sudden woke up two years after his retirement, and produced a certificate, albeit an authenticated one and claimed wages. It would have been more enlightening, had the Supreme Court reasoned out as to why an industrial employer should shell out, for no fault of his, two years' salary to a retired employee and for nothing in return from him in terms of work, production, *etc*. In *Narsagoud*, a Bench comprising Lahoti and Brajesh Kumar JJ of the Supreme Court observed:

> There is a difference between an order of reinstatement accompanied by a simple direction for continuity of service and a direction where reinstatement is accompanied by a specific direction that the employee shall be entitled to all the consequential benefits, which necessarily flow from reinstatement or accompanied by a specific direction that the employee shall be entitled to the benefit

> of the increments earned during the period of absence. In our opinion, the employee after having been held guilty of unauthorised absence from duty cannot claim the benefit of increments notionally earned during the period of unauthorised absence in the absence of a specific direction in that regard and merely because he has been directed to be reinstated with the benefit of continuity in service.[11]

In *Jarina Bee*, a line attendant of the Electricity Board was dismissed on charge of theft. The labour court found that the departmental enquiry was not in accordance with principles of natural justice and ordered reinstatement with opportunity to Board to prove misconduct. The employee expired in the meantime. The High Court ordered the award of full back wages. Setting aside the order of the High Court as being improper and reducing the backwages to Rs. 85,000/-, Pasayat J (for himself and Raju J), of the Supreme Court held that the award of full backwages is not the natural consequence of an order of reinstatement.[12] In *Nicks (India)*, Hegde J (for himself and Sinha J) of the Supreme Court held :

> In the instant case, we have already noticed that the basic ground on which the Labour Court reduced the back wages was based on a judgment of the High Court of Punjab and Haryana which, as further noticed by us, was overruled by a subsequent judgment of a Division Bench. Therefore, the very foundation of the conclusion of the Labour Court having been destroyed, the appellant could not derive any support from the abovecited judgments of that Court.. .. the trial court, apart from generally observing that in Ludhiana there must have been job opportunities available, on facts it did not rely upon any particular material to hold that either such job was in fact available to the respondent and he refused to accept the same or he was otherwise gainfully employed during the period he was kept out of work. On the contrary, it is for the first time before the writ court the appellant tried to produce additional evidence which was rightly not considered by the High Court because the same was not brought on record in a manner known to law. Be that as it may, in the instant case we are satisfied that the High Court was justified in coming to the conclusion that the appellant is entitled to full back wages.[13]

In *Abdul Kareem*, with an identical set of facts as that of *Narsagoud* (*supra*) and involving the same corporation, the Supreme Court held that, where the labour court directed reinstatement but without backwages, it is improper for the single judge and the division bench to order the payment backwages, and further observed that the principle of law on the point was no longer *res integra*.[14] In *UP State Brassware Corporation*, the Supreme Court held:

> The decision to close down the establishment by the State of Uttar Pradesh like other public sector organizations had been taken as far back on 17-11-1990 wherefor a GO had been issued. It had further been averred, which has been noticed hereinbefore, that the said GO has substantially been implemented. In this view of the matter, we are of the opinion that interest of justice would be subserved if the back wages payable to the Respondent for the period 1-4-1987 to 26-3-1993 is confined to 25% of the total back-wages payable during the said period.. .. .The judgments and orders of the Labour Court and the High Court are set aside and it is directed that the Respondent herein shall be entitled to 25% back wages of the total back-wages payable during the aforesaid period and compensation payable in terms of Section 6-N of the U.P. Industrial Disputes Act. If, however, any sum has been paid by the Appellant herein, the same shall be adjusted from the amount payable in terms of this judgment.[15]

In *Rudhan Singh*, the Supreme Court held:

> There is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination of service was in violation of Section 25-F of the Act, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment *i.e.*.. whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, where the total length of service rendered by a workman is very small, the award of back wages for the complete period *i.e.*.. from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year.[16] ()

In *Daya Shankar Rai*, Sinha J (for himself and Hegde J), of the Supreme Court observed:

> We have referred to certain decisions of this Court to highlight that earlier in the event of an order of dismissal being set aside, reinstatement with full back wages was the usual result. But now with the passage of time, it has come to be realized that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period that was spent unproductively, while the workman is being compelled to go back to a situation which prevailed many years ago when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may be arrived at.[17]

In *Mahendra Nath Tiwari*, a bus conductor was dismissed for driving the bus unauthorisedly and thereby endangering public as well as property of the corporation. That apart, one passenger was found travelling without ticket, all of which constitute grave charges against the conductor who was holding a position of trust as far as the corporation is concerned. The Supreme Court, after taking all the circumstances into account, including the fact that the appeal was admitted on the limited question of back wages, observed that order of reinstatement should not be interfered at that distance of time. However, the Court had set aside the award of back wages, and held that the conductor was entitled to wages or salary only from date of his reinstatement pursuant to direction of labour Court.[18] In *Sarada Prasad Misra*, Thakker J (for himself and Lakshmanan J), of the Supreme Court cited, inter alia, the above decisions and held:

> .. . no precise formula can be adopted nor 'cast-iron rule' can be laid down as to when payment of full back wages should be allowed by the court or tribunal. It depends upon the facts and circumstances of each case. The approach of the court/tribunal should not be rigid or mechanical but flexible and realistic. The court or tribunal dealing with cases of industrial disputes may find force in the contention of the employee as to illegal termination of his services and may come to the conclusion that the action has been taken otherwise than in accordance with law. In such cases obviously, the workman would be entitled to reinstatement but the question regarding payment of back wages would be independent of the first question as to entitlement of reinstatement in service. While considering and determining the second question, the court or tribunal would consider all relevant circumstances referred to above and keeping in view the principles of justice, equity and good conscience, should pass an appropriate order.[19] ()

In a case where a driver was removed from service for hitting a road barrier and injuring an employee of the transport corporation, but it was not proved that the workman had caused injuries intentionally even though he drove the vehical negligently, the Supreme Court directed payment of 25% of backwages on reinstament.[20] In *Swayam Prakash Srivastava*, Lakshmanan J (for himself and Kabir J) of the Supreme Court held:

> We are also of the view that the award of the Labour Court is perverse as it had directed grant of back wages without giving any finding on the gainful employment of Respondent 1 and held that the discontinuance of the services of a probationer was illegal without giving any finding to the effect that the disengagement of Respondent 1 was in any manner stigmatic. In the decision in MP SEB v. Jarina Bee this Court held that payment of full back wages was not the natural consequence of setting aside an order of removal. In the instant case, though the termination was as far back as in 1983, the industrial adjudicator has not given any finding on unemployment. This Court in a recent case of State of Punjab v. Bhagwan Singh held that even if the termination order of the probationer refers to the performance being "not satisfactory", such an order cannot be said to be stigmatic and the termination would be valid.[21] ()

In *Talwara CCSS Ltd*, the Supreme Court observed that, while passing an award relating to back wages, it is necessary for the industrial courts to consider whether the industry is sick and whether it is in a position to bear the financial burden, and adjust the equities between the parties. Sinha J (for himself and Joseph J) of the Supreme Court held:

> Grant of a relief of reinstatement, it is trite, is not automatic. Grant of back wages is also not automatic. The Industrial Courts while exercising their power under Section 11A of the Industrial Disputes Act, 1947 are required to strike a balance in a situation of this nature. For the said purpose, certain relevant factors, as for example, nature of service, the mode and manner of recruitment,*viz*., whether the appointment had been made in accordance with the statutory rules so far as a public sector undertaking is concerned *etc*., should be taken into consideration. For the purpose of grant of back wages, one of the relevant factors would indisputably be as to whether the workman had been able to discharge his burden that he had not been gainfully employed after termination of his service.. .. .We have noticed hereinbefore that the respondent was employed for a short period and that too in two different spells, *viz*., from 1987 to 1990 and from 1995 to 1997. Having regard to the fact that the respondent has not worked for a long period and the appellant does not have any capacity to pay as it is a sick unit, interest of justice would be subserved if in stead and place of an award of reinstatement with full back wages, a compensation for a sum of Rs. 2,00,000/- (Rupees two lakhs only) is directed to be

paid.. . .[22]

In *Mahendra Ram*, the facts disclosed the services of an employee, who had worked for more than 240 days, were terminated. The labour court directed reinstatement with full back wages and continuingy of service, which was upheld by the High Court. Allowing the appeal filed by the employer in part, the Supreme Court restricted backwages to 50%.[23] The employee, after having been held guilty of unauthorized absence from duty, cannot claim the benefit of increments notionally earned during the period of unauthorized absence in the absence of a specific direction in that regard and merely because he has been directed to be reinstated with the benefit of continuity in service. The order of the labour court for re-fixing the pay duly taking into account the notional increments is not maintainable.[24] In *Novartis*, the facts disclosed that the company, which was a successor to Sandoz (India) Ltd., transferred three employees directing them to report at their respective places of transfer. On their refusal to report for duty at the places of transfer, the management discharged them by giving one month's notice, and without holding any enquiry. By the time the industrial tribunal passed the award, all the three of them superannuated. The tribunal, having taken this fact into consideration, ordered payment of back wages, which should be calculated on the last drawn pay. Writ petitions followed in the High Court. The High Court held that West Bengal was not the appropriate Government to make the reference. The workmen filed a special leave petition before the Supreme Court, which quashed the decision of the Division Bench and remanded the matter to it for fresh consideration. Pursuant to the said direction, the Division Bench held that there was no reason to interfere with the order passed by the tribunal and submitted the matter to the Supreme Court. On this, the Supreme Court, dealing with the original special leave petition filed by the workmen, issued notices confined only to back wages. Sinha J (for himself and Joseph J) observed that the Supreme Court was not inclined to exercise its jurisdiction under Art 142 for the purpose of directing the payment of back wages on the basis of revised scales of pay, and held that the award passed by the tribunal did not call for interference.[25]

In *Metropolitan Transport*, the facts briefly were: a conductor of the corporation was eventually selected internally as a Trainee Superintendent (Legal) consequent upon his acquiring a law degree. But during the training period his performance was not found satisfactory and he was reverted back to the post of Assistant. On January 31, 1995, the respondent was transferred to Poonamallee Depot but he did not join his duties there and remained absent for about three months without any prior sanction of leave or intimation. A charge-sheet was issued to him followed by a domestic inquiry. The workman did not attend the domestic inquiry despite repeated letters and notices including a notice published in local newspaper, and he was ultimately removed from service in December 1996. In a complaint filed under s 33A alleging contravention of the provisions of s 33(2)(b), the tribunal, by its order dated July 11, 2003, declared that the workman was deemed to have been in service and was entitled to all the benefits available. In a writ petition filed by the Corporation, the Madras High Court granted an interim stay of the order of tribunal, subject to the Corporation depositing the entire backwages as awarded by Industrial Tribunal and compliance of the provisions of Section 17B of the ID Act. The Corporation instead of paying last drawn wages to the respondent, reinstated him on 15 June 2004 without prejudice to the pending writ petition. The said writ petition came to be dismissed on 30 August 2006 and, thus, the order dated 11 July 2003 passed by the Industrial Tribunal attained finality. As the corporation did not pay back wages for the period from December 1996 to June 2004, the workman filed an application under s 33C(2) for computation and recovery of the same, which was allowed by the labour court, the amount being Rs. 6,54,766/-. The Corporation challenged the same in the High Court on the principal ground that he was enrolled as an advocate on 12 December 2000 and was thus gainfully employed, and hence, he was not entitled to back wages, which was dismissed at both the tiers of the High Court, thus finally reaching the Supreme Court. Allowing the appeal partially, Lodha J (for himself and Chatterjee J) of the Supreme Court held:

> It is difficult to accept the submission of the learned senior counsel for the respondent that he had no professional earnings as an advocate and except conducting his own case, the respondent did not appear in any other case. The fact that he resigned from service after 2-3 years of reinstatement and re-engaged himself in legal profession leads us to assume that he had some practice in law after he took sanad on December 12, 2000 until June 15, 2004, otherwise he would not have resigned from the settled job and resumed profession of glorious uncertainties.In this view of the matter, reasonable deduction needs to be made while determining the back wages to which respondent may be entitled. Taking overall facts and circumstances of the case and all other aspects including the aspect that he was enrolled as an advocate from December 12, 2000 to June 15, 2004, in our considered view, demand of justice would be met if the respondent is awarded back wages in the sum of Rs. 4 lacs instead of Rs. 6,54,766/-. We order accordingly.. . The appeal is, therefore, allowed to the aforesaid extent. The impugned judgments of the division bench as well as the learned single Judge stand modified accordingly. Time of eight weeks is granted to the Corporation to make payment of Rs. 4 lacs to the respondent, if not paid so far, failing which it shall carry simple interest @ 6 per cent per annum from June 15, 2004 until the date of payment.[26]

In *Oberoi Flight Services*, a workman was found carrying some 30 soup spoons concealed in his shoe and was caught by the security. He had himself admitted the misconduct, the management dismissed him from service without issuing any charge-sheet and without conducting any enquiry. The labour court ordered reinstatement with full back wages, which was upheld by a single judge of the High Court. The same was set aside by a division bench which ordered payment of Rs. 60,000/- as compensation in lieu of reinstatement. Allowing the appeal in part, the Supreme Court enhanced the compensation to Rs. 2,00,000/-, but without reinstatement.[27] In a dispute relating to back wages payable to a workman whose service was terminated without enquiry and without reasons coupled with the further facts, namely, (i) there was a dispute whether the workman was gainfully employed; and (ii) the employer in the meanwhile became financially unsound, the amount of back wages be curtailed to 50% from the date of termination to the date of reinstatement.[28] In *Reetu Marbles*, the labour court, while adjudicating a dispute relating to termination of the service of the workman, held that the termination was illegal for non-compliance with the provisions of s 25F, and accordingly directed the reinstatement of the workman. On the question of back wages, the labour court opined that, he must have worked somewhere to earn his livelihood and hence there was no justification to grant back wages, and on this view of the matter, it did not grant any back wages to the workman. In writ proceedings, the Allahabad High Court modified the award granting full back wages for the whole period, which order was challenged by the employer in the Supreme Court. Allowing the appeal, SS Nijjar J (for himself and Chatterjee J), of the Supreme Court reviewed the earlier decisions and summed up the views of the court thus:

> .. . the High Court erred in law in not examining the factual situation. The High Court merely stated that it was not the case of the employer that the workman had been gainfully employed elsewhere. Although it noticed the principle that the payment of back wages having a discretionary element involved in it, has to be dealt with in the circumstances of each case and no strait-jacket formula can be evolved, yet the award of the Labour Court was modified without any factual basis. (). .. *payment of full back wages upon an order of termination being declared illegal cannot be granted mechanically. It does not automatically follow that reinstatement must be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the industry*. (). .. It is now also well settled that despite a wide discretionary power conferred upon the Industrial Courts under Section 11-A of the 1947 Act, the relief of rein-statement with full back wages should not be granted automatically only because it would be lawful to do so. Grant of relief would depend on the fact situation obtaining in each case. It will depend upon several factors, one of which would be as to whether the recruitment was effected in terms of the statutory provisions operating in the field, if any. (). .. *In our opinion the High Court was unjustified in awarding full back wages. We are also of the opinion that the Labour Court having found the termination to be illegal was unjustified in not granting any back wages at all*. (). .. Keeping in view the facts and circumstances of this case we direct that the respondent shall be paid 50 per cent of the back wages from the date of termination of service till reinstatement."[29] ().

Claim for Reinstatement

(1) Claim for Back Wages on Reinstatement - Burden of Proof

The question whether it is for the workman to show that he was not employed elsewhere during the period between the termination of his service and the order of reinstatement or is it for the employer to establish that the workman was employed elsewhere, has given rise to a considerable divergence of judicial opinion. A single judge of the Allahabad High Court in *Rakeshwar Dayal*,[30] as an obiter said that 'a servant who sues his employer for wrongful dismissal must show that he made efforts to minimise his loss'. Following these observations, the Bombay High Court in *Malik Dairy*,[31] quashed the order of the labour court granting full wages and sent the case back to the labour court for rehearing on this point and gave no reasons of its own in favour of the holding. A similar view was expressed by a single judge of the Andhra High Court in *SV Mills*,[32] in observing that the mere order of reinstatement would not automatically entitle the workman to get the backwages for the entire period and in order to be entitled to get the backwages, the workman has to prove that he made sincere efforts to secure a job for mitigating the loss or damage and 'it is then for management to prove otherwise'. Likewise, a single judge of the Delhi High Court in *Krishan ML Kapur*,[33] held that the claim of backwages could not succeed merely because the termination or dismissal is set aside. The aggrieved workman would still be bound to make out a case for award of backwages by producing sufficient material which may show that during the period of his forced unemployment by the management, he had remained unemployed or partly employed or was otherwise not able to earn what his employment, if subsisting, with the management would have entitled him to. A single judge of the Madras High Court in *United Bleachers*, held that the allegation that the concerned workman was employed elsewhere and was earning during the period of unemployment has to be proved by the employer and it is not sufficient to take the plea in the written statement, but it has to be proved by leading evidence or cross-examining the workman before the tribunal for enabling it to assess the quantum of the backwages.[34] Similarly, a single judge of the Allahabad High Court in *Kripa Shankar*, held that the burden of proving that the workman was gainfully employed during the period of his unemployment was upon the employer and in the absence of any such plea or evidence in this behalf, the workman cannot be deprived of his full or partial backwages.[35] The Punjab and Haryana High Court observed that 'it is for the employer to raise this matter in the

course of the inquiry and prove that the employee has been earning wages for the whole or for the part of the period in question.[36] In *Postal Seals*, the Allahabad High Court observed that if the normal rule is to award full backwages on reinstatement, then the burden of establishing the countervailing circumstances to neutralise the normal rule would be on the employer. It was, therefore, for the employer to prove that the workman had made some earnings during the period of his enforced idleness or that he had refused to seek or accept alternative job.[37]

The Bombay High Court in *Lalit Gopal*, also explained its earlier holding in *Malik Dairy Farms* case and held that the question whether the employee had been gainfully employed during the relevant period must ordinarily be raised not by the employee but by the employer in the proceedings before the industrial adjudicator.[38] In *Sadanand Patamkar*, another Division Bench held that it is only fair and proper that the employee should first state whether he was employed or not and whether any amount of income was earned by him. It is in that sense that the burden of proving the said facts lies on the employee. Once, however, the said burden is discharged, it is for the employer to prove facts to the contrary.[39] The Gujarat High Court in *Dhari Gram Panchayat*, held that a workman is entitled to full backwages unless the employer specifically proves that the workman was employed with some other employer and earning wages.[40] In *Hindustan Tin Works*, the court has specifically stated that ordinarily a workman whose services have been illegally terminated would be entitled to full backwages except to the extent that he was gainfully employed during the period of enforced idleness. Backwages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure.[41] In *BEST Workers Union*, a single judge of the Bombay High Court held that it is for the employer to allege and prove the circumstances, justifying the deviation from the normal rule of payment of backwages, such as that the workman was gainfully employed. The workman is not expected to allege and prove the negative. In view of the fact that the employer had not raised the contention either before the industrial court or in the affidavit filed before the writ court that the workman was gainfully employed at the time during the relevant period, the court confirmed the award of full backwages.[42] In *Balakrishna Tindal*, the same High Court further held that even if the employer makes an application to the tribunal to adduce evidence at the fag-end of the trial regarding gainful employment of the workman when he was not in service of the employer, the tribunal must give reasonable opportunity to the employer to prove his case.[43] The question of burden of proof as to who is to prove whether the workman did not get alternative employment for the period for which the backwages have been awarded to him could arise only if no evidence was given by either party or if the evidence given by them was evenly balanced but it loses its importance when the parties adduce whatever evidence they had to adduce.[44]

(2) Discharge and Disimissal - Whether Interim Relief can be Granted

The relief of reinstatement and payment of backwages or wages in lieu thereof, cannot be granted as an interim measure by the tribunal where the validity of the order of dismissal or discharge is pending adjudication before it. The final order that in such a case the tribunal can pass is either reinstatement or compensation in lieu of reinstatement and such final order would be passed if the employer failed to justify the disciplinary action taken by him before the tribunal.[45] The interim relief cannot be the whole relief that a workman would get if he succeeds finally.[46]

(3) Power to Order Reinstatement under Section 33A

Section 33A of the Act lays down that where an employer contravenes the provisions of s 33 during the pendency of proceedings before any labour court, tribunal or national tribunal, any employee aggrieved by such contravention may make a complaint in writing to any of these authorities and on receipt of such complaint the authority to whom the complaint is made, shall adjudicate upon the complaint as if it were a dispute referred to it or pending before it, in accordance with the provisions of the Act and shall submit its award to the appropriate Government and the provisions of the Act shall apply accordingly. It is thus clear that a complaint under s 33 A is equated to a reference under s 10 of the Act and the tribunal has all the powers to deal with it as it would have in dealing with a reference under s 10 of the Act. *A priori*, the provisions of s 11A will *mutatis mutandis* apply to the adjudication of such complaint. It follows, therefore, that the tribunal has the power to make such order of relief as may be appropriate in the circumstances of the case and as may be made if a dispute is referred to it relating to the dismissal or discharge of a workman. Hence, in such a complaint, it is open to the tribunal, in proper cases, to order reinstatement, as it is within its powers to order reinstatement on such complaint, if the complaint is that the employee has been dismissed or discharged in breach of s 33 of the Act.[47] In s 33A jurisdiction too, the tribunal cannot grant the interim relief of reinstatement or full backwages, in case the employer does not take the workman back in his service.[48]By making a complaint under s 33A of the Industrial Disputes Act, an employee would not succeed in obtaining an order of reinstatement by merely proving contravention of s 33 of the Act by the employer. After such contravention is proved, it would still be open to the employer to justify the impugned dismissal on merits, as the complaint is to be treated as an industrial dispute and all the relevant aspects of the said dispute are to be considered by the tribunal under s 33A of the Act.[49]An application for reinstatement in case of wrongful dismissal, can only be maintained by the person who is a 'workman' within the meaning of s 2(s) of the Industrial Disputes Act. The claim of a dismissed workman for reinstatement with or without compensation for the period of unemployment is not a 'question or claim respecting property' within the meaning of Art 133(1)(b). Hence, the aggrieved party cannot be entitled

as a matter of right to get a certificate under Art 133(1)(b).[50]

(ii) Any Lesser Punishment

It is a fundamental principle of justice that the punishment should be commensurate with the guilt *judex acquitalem semper spectat debet*, a judge ought always to have equity before his eyes.[51] In *Rama Kant Misra*, the Supreme Court observed that it is a well-recognised principle of jurisprudence which permits the penalty to be imposed for misconduct that the penalty must be commensurate with the gravity of the offence charged.[52] For instance, in *Bharat Fritz Werner*, the misconduct of the workmen of indulging in acts subversive of discipline in threatening the president of the company with dire consequences, wrongfully confining him in his room and compelling him to withdraw notice were established. However, the court did not find this misconduct sufficient to warrant dismissal. Therefore, keeping in view the interests of the industry, the court held that reinstatement was not desirable and expedient. In the circumstances, the court directed compensation for loss of service in lieu of reinstatement.[53] In *RM Parmar*, the Gujarat High Court observed that the power under this section is a benevolent power conferred on the industrial adjudicators and has to be exercised 'in the spirit' in which the provision has been enacted in order to further the intendment and purpose of the legislation, keeping in view the following dimensions for adjudication of the question of punishment.[54] In *B Maharana*, it was held:

(1) There is widespread unemployment in our country and it is difficult to secure a job to earn enough to keep body and soul together unlike in developed countries.

(2) The state does not provide social benefits like unemployment allowance to enable a discharged employee to sustain himself and his family to some extent, as is being done in developed countries.

(3) In imposing punishment on an erring employee an enlightened approach informed with the demands of the situation and the philosophy and spirit of the times requires to be made. It cannot be a matter of the *ipse dixit* of the disciplinary authority depending on his whim or caprice.

(4) Be it administration of criminal law or the exercise of disciplinary jurisdiction in departmental proceedings, punishment is not and cannot be the 'end' in itself. Punishment for the sake of punishment cannot be the 'motto'.

(5) The length of service, based on good record and socio-economic condition of the delinquent workman are also considerations which should weigh with the tribunal while exercising its discretion.[55]

The powers under s 11A are alternative; the first is to direct reinstatement of the workman on such terms and conditions as it thinks fit and the second is to give some other relief to the workman including the award of any lesser punishment in lieu of reinstatement as the circumstances of the case may require.[56] Under the second alternative, the tribunal may give the relief of compensation to the workman, instead of directing reinstatement. In the absence of specific words requiring the application of the first limb to one category of unjustified dismissals and second limb to another category, it would not be reasonable or permissible to interpret the provisions so as to limit or restrict the application of either limb to any particular class of unjustified dismissals, if the tribunal is satisfied that the order of discharge or dismissal is unjustified, it may set aside that order and direct the reinstatement of the workman on terms, like with backwages or without backwages or with any part of the backwages. It may also award compensation in lieu of the reinstatement if the circumstances of the case justify such compensation or it may give any other relief to the workman including award of any lesser punishment.[57] The expression 'such other relief' does not necessarily mean payment of backwages upon the reinstatement of the workman. If the adjudicator holds that the workman should be given some kind of relief, he can award so. For instance, where after having taken all the relevant factors into consideration, the tribunal ordered reinstatement with 50 per cent backwages of workmen discharged from service on the ground of misappropriation of money, the award was held to be legal and justified because the denial of 50 per cent backwages to the workman was considered by the tribunal to be sufficient punishment for the misconduct proved against him.[58]

Likewise, where the labour court, took into account various mitigating circumstances having found the misconduct alleged against the workman to have been proved, and recorded a finding that in the totality of circumstances, the charges proved did not warrant the extreme punishment of dismissal and ordered reinstatement without backwages, the exercise of discretion by the labour court was held to be proper and judicious.[59] Similarly, where the tribunal alters the punishment of dismissal with reinstatement without backwages for the misconduct of a driver found to be blameworthy for some acts of misconduct duly proved against him, the High Court declined to interfere with the award which was just and reasonable though not exactly in conformity with law.[60] If the punishment of discharge automatically disentitles the workman to receive the terminal benefits like leave, salary, payment of gratuity *etc*, he can reduce the order of dismissal into one of discharge.[61] It is not necessary that the tribunal must arrive at a finding regarding unfair labour practice or victimisation. Even if no victimisation or unfair labour practice is proved, it is open to the tribunal to award lesser punishment in lieu of discharge or dismissal, if it is satisfied that the order of discharge or dismissal was not justified. For instance, where the

tribunal finds that the domestic inquiry was fairly and properly conducted, the order of dismissal was out of proportion to the misconduct proved, taking into consideration the magnitude of the offence and the previous conduct of the workman, the tribunal may award lesser or minor punishment.[62]

Where the tribunal passes an order of reinstatement without backwages, it would mean penalty imposed upon the employee by way of lesser punishment. Ordinarily, reinstatement contemplates payment of backwages to the employee directed to be reinstated for all the period during which he was out of employment on account of the original order of wrongful dismissal or discharge. A direction withholding payment of backwages either fully or partly is, therefore, penal in nature.[63] 'Lesser punishment' contemplated by s 11A is not confined to the Standing Orders or any regulation of the employer. It takes in its sweep all punishments lesser than discharge or dismissal whether provided in the Standing Orders or regulations of punishment or not. The tribunals have very wide discretion in awarding punishment to the delinquent workman while dealing with a dispute relating to discharge or dismissal.[64] If on the facts and in the circumstances of a case, the tribunal finds that a lesser penalty than dismissal or discharge would be sufficient, it is incumbent upon it to convert the discharge or dismissal into lesser punishment.[65] In *Bansi Purushottam*, the labour court held that the misconduct alleged against the workman stood proved but the labour court still ordered the reinstatement of the workman with backwages. In the totality of the circumstances, the Supreme Court felt that the workman should either get the reinstatement with no backwages or just backwages without reinstatement. The court therefore modified the award of the labour court and ordered backwages and a sum of Rs. 20,000/-.[66] In *HMT*, while affirming the order of reinstatement of the workman, but in view of the fact that there was a 14 years time lag between the date of dismissal and the date of the order of the court, the court felt that instead of full backwages 60 per cent wages till the date of the reinstatement of the workman will meet the ends of justice.[67]

Reinstatement under Section 54 of the Bombay Co-operative Societies Act 1925:

Disputes contemplated under s 54 of the Bombay Co-operative Societies Act are disputes of civil nature which would have been decided by civil courts but for the provisions with regard to compulsory adjudication contained in this section. A dispute regarding reinstatement cannot be considered to be a civil dispute as there is no right of reinstatement under the civil law which can be enforced by an employee against his employer.[68] The relief of reinstatement of the workmen even of a co-operative society has to fall within the purview of the industrial law and only tribunals can give the relief of reinstatement in industrial adjudication.[69]

(iii) Monetary Compensation in Lieu of Reinstatement

It is well-settled now that in cases of wrongful dismissal or discharge, the normal rule is to award reinstatement but where a case falls in any of the exceptions to the general rule of reinstatement, the industrial adjudicator has the discretion to award reasonable and adequate compensation in lieu of reinstatement. Section 11A vests the industrial adjudicators with discretionary jurisdiction to give 'such other relief' to the workmen in lieu of discharge or dismissal as the circumstances of the case may require, where for some valid reasons it considers that reinstatement with or without conditions will not be fair or proper. Compensation in such a case is the solarium for unjustified and premature termination of employment.[70] In *Air Lanka*, it was held that the tribunal has the discretion to award compensation instead of reinstatement if the situation of a particular case is unusual or exceptional so as to make reinstatement inexpedient or improper. The tribunal has to exercise its discretion judicially and decide whether the case is one of exception to the general rule of reinstatement.[71] As in case of reinstatement, so also in case of awarding compensation in lieu of reinstatement, it is necessary that the tribunal must hold that the dismissal or discharge of the concerned workman is wrongful.[72] The compensation cannot be granted on the ground of social justice.[73]

The award granting compensation in lieu of reinstatement does not infringe the provisions of Art 19(1)(g) in any way, as the tribunal, which is competent to award reinstatement, is equally competent to award compensation in lieu of reinstatement.[74] Termination of service as a punishment inflicted by way of disciplinary action has been specificially excluded from the definition of retrenchment. There is, therefore, no scope for allowing retrenchment compensation in such cases, for there is no question of retrenchment as such, where the tribunal decides not to pass an order of reinstatement but to give compensation instead.[75]Hence, compensation for wrongful dismissal cannot be quantified in accordance with the provisions of s 25F of the Act. Even in cases where the retrenchment of a workman with immediate effect is held to be unjustified, in fact and law, for want of the retrenchment notice and payment of compensation as required by s 25F and the court does not consider the order of reinstatement to be proper and expedient, the compensation payable instead of reinstatement in such a case, cannot be limited to compensation payable in the case of lawful retrenchment under s 25F and the quantum of compensation in such a case is in the discretion of the tribunal.[76] In *SSShelly*, the workman claimed compensation equivalent to a sum which he could have earned if he had continued in service till the age of retirement. The Supreme Court held that the compensation was not to be computed on the basis of breach of contract or tort committed by the employer in implementing the direction for reinstatement. Bhagwati J, of the Supreme Court observed:

> The industrial tribunal would have to take into account the terms and conditions of employment, the tenure of service, the possibility of termination of the employment at the instance of either party, the possibility of retrenchment by the employer or resignation or retirement by the workman and even of the employer himself ceasing to exist or of the workman being awarded various benefits including reinstatement under the terms of future awards by industrial tribunal in the event of industrial disputes arising between the parties in the future....In computing the money value of the benefit of reinstatement, the industrial tribunal would also have to take into account the present value of what his salary, benefits *etc* would be till he attained the age of superannuation and the value of such benefits would have to be computed as from the date when such reinstatement was ordered under the terms of the award. Having regard to the considerations detailed above, it is impossible to compute the money value of this benefit of reinstatement awarded to the appellant with mathematical exactitude and the best that any tribunal or court would do under the circumstances would be to make as correct an estimate as is possible bearing, of course in mind all the relevant factors pro and con.[77]

From the dicta of the Supreme Court, the Patna High Court in *B Choudhury*, deduced certain guidelines which have to be borne in mind in determining the quantum of compensation, *viz*:

(i) the backwages receivable;

(ii) compensation for deprivation of the job with future prospect and obtainability of alternative employment;

(iii) employee's age;

(iv) length of service in the establishment;

(v) capacity of the employer to pay and the nature of the employer's business;

(vi) gainful employment in mitigation of damages; and

(vii) circumstances leading to the disengagement and the past conduct. [78]

These factors are only illustrative and not exhaustive. In addition to the amount of compensation, it is also within the jurisdiction of the tribunal to award interest on the amount determined as compensation. Furthermore, the rate of such interest is also in the discretion of the tribunal.[1] In *Assam Oil*, the employee had given up previous employment for joining the company. Her services were terminated after she had been in employment for about two years. As against this, the court also took into account the countervailing facts that the employer had paid certain sums to her and her own earning in the alternative employment and ordered that 'it would be fair and just to direct the appellant to pay a substantial sum as compensation to her'. Accordingly, a sum of Rs 12,500/-, offered by the employer which represented about two years' salary of the employee, was considered to be a fair amount of compensation on payment of which the order of reinstatement passed by the tribunal was set aside.[2] In *Santi Patnaik*, the amount of compensation equivalent to two years' salary of the employee awarded by the industrial tribunal was reduced by the Supreme Court to an amount equivalent to one years' salary of the employee in view of the fact that she had been in service with the employer only for five months and also took into consideration the unusual manner of her appointment at the instance of the chief minister of the state. The court distinguished this case from the *Assam Oil Co's* case on facts.[3]

In *Charottar GSM*, an amount equivalent to six months' wages in the circumstances of the case was considered proper in lieu of reinstatement.[4] In *PP Chopra*, in the circumstances of the case, the Supreme Court substituted the award of the tribunal directing reinstatement of the workman with half of his backwages till the date of reinstatement, with an order of compensation equivalent to his salary for one year.[5] However, in *AK Roy*, compensation equivalent to two years' salary (last drawn by the workman) was held to be fair and proper to meet the ends of justice.[6] In *Brahmbhatt*, the award of reinstatement was set aside and the workman was given salary up to the date of actual termination of his service. Since the termination of his service, was upheld as bona fide under the contract, the question of compensation in lieu of reinstatement did not arise.[7] In *MK Chhatre*, though the Supreme Court upheld the order of reinstatement made by the labour court, in view of the fact that the workman was prepared to accept payment at the rate of Rs 380 per month from the date of his suspension till the date of the award of the tribunal which worked out to Rs. 22,800/- by way of compensation in lieu of reinstatement, which the employer agreed to pay, the court awarded accordingly. The order of reinstatement made by the tribunal was converted by the Supreme Court into an order of compensation.[8]

In *Johnson & Johnson*, on the agreement of the parties before the Supreme Court, the award of reinstatement was converted into compensation of Rs 10,000/-.[9] In *MS Dhantwal*, the court quantified the compensation payable to the workman in lieu of reinstatement with full backwages to a sum of Rs 20,000/-. But while making the payment to the

workman, the employer deducted Rs 2,145/- towards income-tax. In appeal, the Supreme Court held that the employer was not justified in making the deduction, and directed the employer to refund the amount deducted with 15 per cent interest to the workman.[10] In *ITC*, having held that, on the facts and in the circumstances of the case, it was not a fit case when the order of reinstatement could be sustained, the court directed that in lieu of reinstatement, the workman will get compensation of Rs 30,000/- which, roughly speaking, would include almost all sums of money payable to him such as basic pay, dearness allowance *etc* for a period of about five years.[11] In *Anil Kumar Chakraborty*, in view of the holding that the workman who held the position of trust and confidence had abused his position, the court converted the award of reinstatement into compensation of a sum of Rs 50,000/- as just and fair compensation in full satisfaction of all his claims for wrongful dismissal from service.[12]

In *OP Bhandari*, the Supreme Court observed that it was a fit case for granting compensation in lieu of reinstatement as it found that the apprehensions of the employer corporation as regards the negative consequences of reinstatement was not unreasonable. The court felt that compensation in lieu of reinstatement would be more appropriate relief but it felt that the claim for full salary and allowance till the date of superannuation which was more than eight years away was not reasonable and awarded compensation equivalent to 3.33 years' salary (including admissible allowances), found to be reasonable, as it would yield 50 per cent of annual salary and allowances to the employee.[13] In *MK Agarwal*, while affirming the order of the High Court reinstating the employee, the court restricted the back salary to 50 per cent of what would otherwise be payable to the employee.[14] In *Bharat Fritz Werner*, the workmen entered inside the room of the president of the company in an aggressive mood and threatened him with dire consequences if the notice given to them was not recalled. Not content with that, they confined him to his room and came very close to him making gesticulations with fisted hands. They did not go out inspite of requests and shouted that he should not go out. They stayed in the room till the president gave instructions to recall the notice. For these acts of misconduct, some of the workmen were found guilty in the domestic inquiry and were dismissed from service. The Karnataka High Court held that these acts of misconduct were not such as to deserve extreme penalty and directed that they should be taken back on duty with one-half of the backwages as such denial of backwages was sufficient punishment for the acts of misconduct committed by them. In appeal, the Supreme Court observed:

> Reinstatement has not been considered as either desirable or expedient in certain cases where there had been strained relations between the employer and the employee, when the post held by the aggrieved employee had been one of trust and confidence, or when, though dismissal or discharge was unsustainable. In the impugned order, the employee was found to have been guilty of an activity subversive or prejudicial to the interest of the industry ... In cases where it is felt that it will not be desirable or expedient to direct reinstatement, the workman is compensated monetarily by awarding compensation in lieu of reinstatement for loss of future employment.[15]

Then, the court noted that the acts of misconduct alleged against the workmen had been established. These acts were subversive of discipline on the part of the employees. In this fact situation, the court said that it is not desirable and expedient to direct reinstatement of these workmen and compensation in lieu of reinstatement may be granted. Accordingly, the court awarded Rs 1,80,000/- each towards backwages and compensation for loss of future employment in lieu of reinstatement in addition to the sum of Rs 72,000/- which had already been paid to them. In *TP Srivastava*, in view of the fact that the case had remained pending for 16 long years, the Supreme Court ordered that the employee may be paid three years' salary in addition to whatever had already been paid to him. However, the court made it clear that this decision will not be treated as a precedent.[16] In *Yashvir Singh*, the order inflicting the punishment of dismissal was attacked on the ground that the person who issued the chargesheet and ultimately inflicted the punishment was biased as it was he against whom the workman had misbehaved and to do so would be to appreciate the worth of his own evidence. Further, the mere fact that the appellate authority had confirmed the order, would not remove the taint which attached to the original order. Thus, the order of punishment was violative of the rules of natural justice. On the other side, the employer contended that under the Standing Orders of the company only that person was charged with the duty to pass order of punishment and had to do so out of sheer necessity. Hence, the order was not liable to be challenged. The court did not decide upon the rival contentions but in the circumstances of the case, with a view to put an end to the matter, it directed the payment of Rs 75,000/- in lieu of reinstatement with backwages.[17] In *Naval Kishore*, the tribunal held that the termination was not justified but it awarded compensation of Rs 15,000/- in lieu of reinstatement. In appeal by special leave against the award of the tribunal, the employer conceded that the workman may be reinstated. However, without recording any reason as to why the reinstatement should not be granted, the Supreme Court directed that, in view of the special circumstances of the case, a sum of Rs. 2,00,000/- be paid to the workman as and by way of compensation. The court gave the following further instructions:

> We further direct that from the amount herein directed to be paid Rs 75,000 are payable as backwages with interest for the period commencing from 1 March 1980 till today. The payment is Rs 15,000 for the period from 1 March 1980 to 31 March 1980 and Rs 15,000 for each subsequent year. As the income of the appellant is Rs 15,000 per year and as he had no other income, the

> respondent is discharged from the liability of deducting income-tax as required by s 12 of the Income Tax Act 1961. The balance amount of Rs 1,10,000 (Rupees one lac and ten thousand) shall be deposited by the respondents-Management in the companies the name of which will be supplied by Mrs P Govindan Nair, learned counsel for the appellant within ten days, by way of fixed deposits at the rate of interest not less than 15 per cent per annum for a period more than three years in the joint names of the appellant and his wife. This amount of Rs 1,10,000 (Rupees one lac and ten thousand) is awarded as future compensation for loss of service at the rate of Rs 15,000 per year for the period of eight years but in order to save the respondents-management from the liability of paying the interest the payment shall be made as herein directed and spill over will be for a period of eight years. After the expiry of eight years from today, the amount shall be withdrawn and taken over by the appellant. The respondents-management is also directed to pay the costs to the appellant which is quantified at Rs 5,000.[18]

It is submitted that this decision of Desai J was based on his private sense of justice and is repugnant to all notions of law, justice, reason and fair play, and does not disclose any principle known to law. As already cited elsewhere in this book, Desai J was part of the three '*founding fathers of judicial chaos*' along with Iyer and Reddy JJ. In this connection, it is considered expedient to cite the following passage from the book '*Industrial Jurisprudence: A Critical Commentary*':

> That there has been a conspicuous decline, in the quality of appointments to High Courts and Supreme Court, is not in doubt. There appears no mechanism worth the name for screening the candidates or for conducting proper reference checks before elevating them to High Courts. Even if it is there, appointments are being made, as the reports reveal, on extraneous considerations and in derogation of even IB reports. There are no yardsticks to determine the competency and legal acumen of the persons being considered for higher judicial positions. *Mere marking attendance regularly in the High Court for 10-15 years does not by itself make an advocate fit to be elevated as a judge!* As Washington Irving once said, "*young lawyers attend the courts, not because they have business there, but because they have no business anywhere else!*". .. Several cases have been cited in this book, *which betray the absolute ignorance of even elementary legal principles, not to speak of a reasonable command or a minimum degree of philosophical penetration, on the part of several judges*. To cite a few, with great respect, the decisions in *Navinchandra*,[19]*Bharat Fritz*,[20]*GTTC*,[21]*S. Mukerjee*,[22]*Tansi Leather*,[23]*Amarnath Dey*,[24] and a score of others (discussed in the preceding pages) bear eloquent testimony to the deteriorated standards of selection and/or elevation to High Courts. Even a few decisions of Supreme Court fall in this category. To illustrate, *Crompton*,[25]*Sundaramony*,[26]*GST*,[27]*Hindustan Tin Works*,[28]*Maheswari*,[29]*Port of Bombay*,[30]*Santosh Gupta*,[31]*Govindarajulu*,[32]*TTD*,[33]*Glaxo*,[34]*Fakirbhai*,[35]*Meenakshi Mills*,[36]*Nedungadi*,[37]*Orissa Textile*,[38]*Punjab LDRC*,[39] and several others *are patently mediocre and/or perverse and/or even outrageous with far reaching consequences for the industrial community*. It is common knowledge that the repercussions of poor quality selection and placement at the level of High Courts does not stop there, but extend up to the Supreme Court in the course of time. It is a wakeup call to the Chief Justice of India as well as the Governments at the Centre and in the States that a comprehensive, objective and transparent selection policy with focus on competence and integrity, duly supplemented by rigorous screening and clearance from Intelligence agencies, should be designed and put in place.[40]

In *Sant Raj*, the labour court, having held that that the termination of the service of the workmen was illegal for non-compliance with s 25F, declined the relief of reinstatement but it awarded one year's wages as compensation in lieu of reinstatement, as it held that 'the termination of service of the workman was bona fide and not in colourable exercise of power in accordance with the service rules'. The Supreme Court upheld the award, but modified the compensation payable, in lieu of reinstatement, to Rs. 2,00,000.[41] A similar order was made in *KC Joshi*,[42] where the termination of the service of the workman as assistant store keeper of the oil and Natural Gas Commission, was held to be illegal and unjustified by the Supreme Court but in the facts and circumstances of the case particularly that a period of nearly 18 years had passed, the court again awarded a sum of Rs. 2,00,000. In *Chandulal*,[43] the court awarded compensation of Rs 2 lakhs by way of backwages and in lieu of relief of reinstatement but no directions were given with respect to income-tax liability. In England, the Royal Commission on Trade Unions and Employers Association observed:

> while we do not favour a scale of compensation, we think it desirable for practical reasons to fix a ceiling to the amount of compensation which can be awarded. This will make it easier for employers to insure against the risk of being obliged to pay compensation which can be awarded. It would, in our view, be reasonable to provide that the maximum should be an amount equal to the employees' wages or salary for two years; and that, as in the case of compensation under the Redundancy Payments Act, in the compensation of this amount there should be wages or salary in excess of £40 a week[44]

This was carried into effect in 'The Industrial Relations Act, 1971' which provided in s 116 and 118(1) that the amount of compensation shall be such as the 'tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the aggrieved party ...' up to a maximum limit of £40,160 or two years' pay whichever is less. The Industrial Relations Act 1971 was repealed and replaced by the Trade Union and Labour Relations Act 1974 which has raised the

maximum compensation payable to £5,200. Statutory provisions in regard to assessment of compensation in lieu of reinstatement vary in different countries. A survey conducted by the International Labour Office in 1974 noted that 'where compensation is awarded either in lieu of reinstatement or as the principal remedy the legislation in some cases leaves the calculation of the amount of compensation to the entire discretion of the competent body, it indicates certain factors which must be taken into account in the compensation, specifies a minimum amount of compensation or lays down a maximum amount of compensation'. However, in no case, the compensation in lieu of reinstatement extends to the balance work span of the workman. The factors which have to be taken into consideration are inter alia wages, length of service, loss of career prospects, circumstances of dismissal, age, nature of the work and custom.[45] In an illuminating review of the Indian, English and Ceylonese case-law on the relevant statutory provisions, the Supreme Court of Sri Lanka in *Wijeratne*, has stated the principles for awarding compensation in lieu of reinstatement in the following words:

> The labour tribunal should normally be concerned to compensate the employee for the damages he has suffered in the loss of his employment and legitimate expectation for the future in that employment, in the injury caused to his reputation in the prejudicing of further employment opportunities. Punitive considerations should not enter its assessment except perhaps in those rare cases where very serious acts of discrimination are clearly proved. Account should be taken of such circumstances as the nature of the employer's business and his capacity to pay, the employee's age, the nature of his employment, length of service, seniority, present salary, future prospects, opportunities for obtaining similar alternative employment, his past conduct, the circumstances and the manner of the dismissal including the nature of the charge leveled against the workman, the extent to which the employee's actions were blameworthy and the effect of the dismissal on future pension rights and any other relevant considerations. Account should also be taken of any sums paid or actually earned or which should also have been earned since the dismissal took place. The amount, however, should not mechanically be calculated on the basis of the salary he would have earned till he reached the age of superannuation and should seldom, if not never exceed a maximum of three years' salary.[46]

In *Jagdish Chandra Sharma*, it was held that the punishment of dismissal imposed for hitting a superior officer and also unauthorised absence is not disproportionate and the interference by the labour court in the punishment is unjustified and without jurisdiction.[47] In *Tata Press Employees Union*, the Bombay High Court peremptorily observed that once the labour court had come to the conclusion that the enquiry held by the employer was in order and that the punishment of dismissal was not disproportionate. Having held thus, the labour court proceeded to award compensation of Rs. 2 lakhs and 3 lakhs to the dismissed workmen. The said award was set aside by a single judge of Bombay High Court. The Division Bench, upholding the order of the single judge, observed:

> .. . the Labour Court has recorded a finding that considering the gravity of the misconduct proved against the workmen, punishment of dismissal cannot be said to be too harsh and disproportionate. In our opinion, once the Labour Court recorded this finding, it lost jurisdiction under Section 11-A of the Act to say anything further and to interfere with the punishment awarded. The view taken by the learned single Judge, in our opinion, is perfectly justified and therefore, the order of the learned single Judge does not require any interference."[48]

In a case where an employee was terminated without complying with the provisions of s 25F, the Rajasthan High Court held that a compensation of Rs. 25000/- in lieu of reinstatement would meet the ends of justice in view of the fact that there was a lapse of 8 years and further the said employee had set up his own business.[49] Where the workman was dismissed for using filthy language against superiors and answering them insolently, the Supreme Court held that, in view of the bitter relations between the parties, it would be inappropriate to go foist a cantankerous and abrasive workman on it, and ordered payment of Rs. 10,00,000/- as compensation in lieu of reinstatement.[50]

Award Passed under S 11A - Whether amenable to Judicial Review

The discretionary power of the tribunal in upholding the punishment inflicted by the employer or interfering with it by awarding lesser punishment is amenable to judicial review by the High Courts in exercise of jurisdiction under Arts 226 and 227 or by the Supreme Court under Art 136. Under Art 227, a High Court is vested with the right of superintendence and it is indisputably entitled to scrutinise the order of a subordinate tribunal within well-accepted limitations.[51] The reviewing courts can examine whether the tribunal has properly approached the matter for exercising or refusing to exercise its power under s 11A but when the award is well-reasoned and the tribunal has stated the various considerations for inflicting the lesser punishment, the award cannot be said to be illegal and void.[52] In *Baldev Singh*, for instance, the tribunal found that the inquiry was held fairly and properly and there was no violation of the rules of natural justice but in view of the fact that the punishment was too harsh considering the nature of the charge, it directed reinstatement of the workman with continuity of service but without backwages and further directed that the period of absence from service is to be treated as leave of the kind due and in case no leave is due, as leave without pay. The Supreme Court held that the

award of the tribunal was in conformity with the provisions of s 11A and there was no want of jurisdiction in making the order in question. The order was not contrary to the provisions of s 11A which vests the adjudicator, to whom the dispute has been referred, with jurisdiction to pass an appropriate order which he may think proper and expedient on the facts and in the circumstances of the case.[53] Likewise, in *Scooter India*, the Supreme Court held that the direction of the labour court on the facts and in the circumstances of the case, for reinstatement of the employee with 75 per cent backwages on the ground that the delinquent workman should be given an opportunity to reform himself and prove to be loyal and disciplined employee, was not illegal and arbitrary even though the disciplinary inquiry was fair and lawful.[54]

In *Balwant Singh*, the labour court converted the order of dismissal into one of discharge and awarded compensation to the workman in lieu of reinstatement.[55] A single judge of the Punjab and Haryana High Court held that such award was not permissible under s 11A. Similarly in *AA Fernandes*, the workman was dismissed from service for an oral altercation between him and his superior officers. The labour court directed reinstatement without backwages and in cross appeals by the workman and the employer, the industrial court restored the order of dismissal. The Bombay High Court held that the misconduct in question even if it is read with the past conduct of the workman could not be considered to be a major one. Since the misconduct was of a minor nature, the punishment of dismissal was not justified and the maximum punishment it could merit was suspension for a few days or fine or stopping of increment *etc*. However, since the employee had already attained the age of superannuation, the court granted a declaration that the employee be deemed to have been continued in service till he attained the age of superannuation and he would be entitled to all retirement benefits on that basis.[56] In *BV Rao*, on the facts of the case, the Andhra Pradesh High Court held that the order of the labour court holding the dismissal to be wrong and ordering reinstatement without backwages, could not be interfered with because it could not be said that there was no evidence to support the finding. Nor could it be said that the finding was perverse.[57]

In exercising discretion to award the lesser punishment, the tribunal has to consider the seriousness and gravity of the charge committed by the delinquent workman. The Madras High Court, held that the seriousness of the charges will not be mitigated with reference to the motive with which the workman behaved. Nor is the length of service of the workman relevant in imposition of punishment to prove misconduct because length of service cannot give license to a workman to commit misconduct. Likewise, the consideration whether the workman is married or not cannot be relevant in the matter of leniency of punishment which only depends upon the nature of the misconduct. Similarly, any undertaking by the workman not to commit misconduct in future or the fact that he had no motive to commit the misconduct or cause loss to the employer, cannot mitigate the seriousness of the charge. The question of punishment, therefore, has to be considered with reference to the gravity of the charges levelled against the workman and not *de hors* them.[58] Where the tribunal, having set aside the order of dismissal, directs reinstatement of the workman without backwages but with continuity of service, such an order of the tribunal would not be reviewable.[59]

The discretion should not be exercised in an arbitrary manner but it should be exercised in a judicious manner. The tribunal, therefore before interfering with the punishment imposed by the management, must take into consideration all the relevant facts and circumstances and should interfere with the punishment imposed by the management only when it comes to the conclusion that the punishment imposed is extremely harsh and unjust and wholly disproportionate to the misconduct proved. The altered punishment imposed by the tribunal, however, should not amount to absolving the employee of the misconduct or make the punishment illusory or allow the employee to go scot-free, particularly when the charges are found to be grave in nature.[60] On the facts and circumstances of the case, in *Rama Kant Misra*, the Supreme Court quashed the award of the labour court which had upheld the validity of the dismissal of the workman for the misconduct of using abusive and threatening language against a superior officer, as it felt that the punishment on the facts and in the circumstances of the case was too severe for the act of misconduct and substituted the punishment with 'withholding of two increments with future effect' which it felt would be more than adequate for a low paid employee.[61] In *Mohd Usman*, the Supreme Court upheld the award of the labour court reducing the punishment by setting aside the order of termination of service and substituted it with the punishment of stoppage of increments for two years. The court observed:

> Section 11A confers power on the labour court to evaluate the severity of misconduct and to assess whether the punishment imposed by the employer is commensurate with the gravity of misconduct. The power is specifically conferred on the labour court under s 11A. If the labour court after evaluating the gravity of misconduct held that punishment of termination of service is disproportionately heavy in relation to misconduct and exercised its discretion, this court, in the absence of any important legal principles, would not undertake to re-examine the question of adequacy or inadequacy of material for interference by labour court.[62]

In *Jaswant Singh*, while affirming the award of the labour court ordering reinstatement of the workman, the court imposed the punishment of stopping three increments in the time scale in which he would be reinstated for the next three years with a view to keep the workman within the bounds of well-disciplined conduct so that the humanistic approach of the court

may not induce him to repeat his intemperate performance.[63] In *Vasanti Shah*, the Gujarat High Court held that the labour court had erred in upholding the extreme penalty of dismissal of the employees concerned as it had failed to consider the question as to whether in the background of the circumstances that transpired and the mass hysteria suffered by the workmen, the misconduct was so grave as to justify the extreme penalty of dismissal.[64] In *Bhimsen Maharana*, the Orissa High Court upheld the award of the labour Court setting aside the order of discharge of the workman found guilty of misappropriation taking into account his otherwise long unblemished record and ordering his reinstatement with 50 per cent of the backwages.[65] On the other hand, in *EV Raju*, a single judge of the Karnataka High Court after setting aside of the award of the labour court ordering reinstatement of the workman with half backwages, in view of the fact that the order of dismissal would seriously prejudice the future career of the workman who was in his middle age, ordered an ad hoc payment of Rs 25,000 as a lump sum compensation to enable him to rehabilitate himself by seeking suitable employment elsewhere.[66]

A single judge of the Bombay High Court in *Unnikrishnan*, upheld the award of the tribunal awarding 65 per cent of the wages up to the date of award in lieu of reinstatement as it had found that though the dismissal was not based on a proper and fair inquiry, the workman was guilty of gross negligence resulting in serious monetary losses to the employer, and therefore, the dismissal was justified.[67] In *Sayar*, the Management of the Mills was taken over by NTC under the provisions of the Industries (Development and Regulation) Act 1951 and an 'authorised controller' was appointed. The 'authorised controller' dismissed the delinquent workman for an act of misconduct. The reference relating to the dispute regarding dismissal of the workman was discharged by the labour court on the ground that no relief could be claimed against the owner of the mills. In a writ petition against the order of the labour court, the High Court held that the dispute had to be continued against the NTC Ltd. The High Court further held that the proceedings before the labour court were contested only on one ground, *viz*, against whom the award would be made and itself granted reinstatement of the workman with full backwages from the date of his dismissal. In appeal, the Supreme Court held that the High Court was in error to hold that the workman was entitled to reinstatement with full backwages without there being any adjudication of the dispute. The court, therefore, set aside the order of the labour court and remanded the matter to the labour court for adjudication of the dispute raised by the workman and with direction to dispose it of in accordance with the law expeditiously.[68]

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2 *Assam Oil Co Ltd v Workmen* (1960) 1 LLJ 587 [LNIND 1960 SC 108], 592 (SC), per Gajendragadkar J.

3 *Ruby General Insurance Co Ltd v PP Chopra* (1970) 1 LLJ 63 [LNIND 1969 SC 333], 66 (SC), per Shelat J.

4 *Hindustan Steels Ltd v AK Roy* (1970) 1 LLJ 228 [LNIND 1969 SC 497], 234-25 (SC), per Shelat J.

5 *Francis Klein & Co Pvt Ltd v Workmen* (1971) 2 LLJ 615 [LNIND 1971 SC 480], 619 (SC), per Jaganmohan Reddy J.

6 *Workmen of Sudder Office v Mgmt* (1971) 2 LLJ 620 [LNIND 1971 SC 493] (SC), per Vaidialingam J.

7 *Binny Ltd v Workmen* (1972) 1 LLJ 478 [LNIND 1972 SC 117] (SC), per Mitter J.

8 *Binny Ltd v Workmen* 1973 Lab IC 1119 (SC), per Grover J.

9 *Chembur Co-op Industrial Estate v MK Chhatre* (1975) 2 LLJ 357 [LNIND 1975 SC 222], 359 (SC), per Alagiriswami J.

10 *L Michael v Johnson Pumps India Ltd* (1975) 1 LLJ 262 [LNIND 1975 SC 55], 268 (SC), per Krishna Iyer J.

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16 *Western India Plywoods Ltd v IT* (1982) 2 LLJ 113, 119 (Ker), per UL Bhat J.

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18 *Mgmt of Panitole Tea Estate v Workman* (1971) 1 LLJ 233 [LNIND 1971 SC 132], 239--40 (SC), per Dua J.

19 *Assam Oil Co Ltd v Workmen* (1960) 1 LLJ 587 [LNIND 1960 SC 108] (SC), per Gajendragadkar J.

20 *Cox & Kings (Agents) Ltd v Workmen* (1977) 1 LLJ 471 [LNIND 1977 SC 142], 478 (SC), per Sarkaria J.

21 *Anil Kumar Chakraborty v Saraswatipur Tea Co Ltd* (1982) I LLJ 983(SC), per Tulzapurkar J.

22 *South Central Rly Employees CCS v LC* (1983) 1 LLJ 469, 473 (AP), per Seetharam Reddy J.

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24 *D Seeralan v Mgmt of Facit Asia Ltd* 1991 Lab IC 362, 366 (Mad) (DB), per Nainar Sundaram J.

25 *Kanhaiyalal Agrawal v Gwalior Sugar Co Ltd* (2002) 1 LLN 58 (SC), per Rajendra Babu J.

26 *State Bank of Bikaner and Jaipur v NC Nalwaya* AIR 2011 SC 1931 [LNIND 2011 SC 247]: (2011) 3 LLJ 13 [LNIND 2011 SC 247] : 2011 LLR 634 : 2011 (4) SCALE 56 [LNIND 2011 SC 247] : (2011) 4 SCC 584 [LNIND 2011 SC 247], per Raveendran J.

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37 *United Commercial Bank Ltd v KD Chaturvedi* (1953) 2 LLJ 34 (LAT).

38 *Pallavan Transport Corpn v PO, Addl LC* (1984) 2 LLJ 132, 137 (Mad), per Nainar Sundaram J.

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64 *Postal Seals Industrial Co-op Society v LC* (1971) 1 LLJ 33, 327(All) (DB), per Dwivedi J.

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80 *Lalit Gopal Berry v MV Hirway* (1973) 2 LLJ 22, 25 (Bom) (DB), per KK Desai J.

81 *Hindustan Tin Works Ltd v Employees* (1978) 2 LLJ 474 [LNIND 1978 SC 227], 478 (SC), per Desai J.

82 *Indian Air Lines v A Phillips* (1989) 2 LLJ 86, 89 (AP), per Quadri J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

S. 12. Duties of Conciliation Officers.—

(1) Where any industrial dispute exists or is apprehended, the conciliation officer may, or where the dispute relates to a public utility service and a notice under section 22 has been given, shall, hold conciliation proceedings in the prescribed manner.

(2) The conciliation officer shall, for the purpose of bringing about a settlement of the dispute without delay investigate the dispute and all matters affecting the merits and the right settlement thereof and may do all such things as he thinks fit for the purpose of inducing the parties to come to fair and amicable settlement of the dispute.

(3) If a settlement of the dispute or of any of the matters in dispute is arrived at in the course of the conciliation proceedings the conciliation officer shall send a report thereof to the appropriate Government [69][or an officer authorised in this behalf by the appropriate Government] together with a memorandum of the settlement signed by the parties to the dispute.

(4) If no such settlement is arrived at, the conciliation officer shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances, relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at.

(5) If, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, [70][Labour Court, Tribunal or National Tribunal], it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefor.

(6) A report under this section shall be submitted within fourteen days of the commencement of the conciliation proceedings or within such shorter period as may be fixed by the appropriate Government:

> [71][*Provided* that, [72][subject to the approval of the conciliation officer,] the time for the submission of the report may be extended by such period as may be agreed upon in writing by all the parties to the dispute.]

LEGISLATION

This section was enacted in the original Industrial Disputes Act 1947. The subsequent amendments have been indicated in the foot-notes to the body of the section. No doubt, sub-ss (1) to (4) and sub-s (6) deal with the duties of conciliation officers, but sub-s (5) does not at all refer to the duties of the conciliation officers. Instead it deals with the discretionary power of the appropriate Government to make or to refuse to make an order of reference. This sub-section further deals with the duty cast on the Government to record and communicate its reasons in case it refuses to make a reference. The proviso to sub-s (6) again does not refer to the duties of the conciliation officers but deals with the appropriate

Government's power to extend the time for submission of the report of conciliation proceedings.

SUB-SECTION (1):

(i) Holding Conciliation Proceedings

Sub-section (1) requires a conciliation officer to hold conciliation proceedings in the prescribed manner where an industrial dispute exists or is apprehended, and it makes a clear distinction between disputes relating to non-public utility services and public utility services; in case of non-public utility service concerns, discretion is vested in the conciliation officer whether or not to hold conciliation proceedings, whereas in disputes relating to public utility service concerns, conciliation is mandatory.[73] The Bombay High Court in *East Asiatic*, took the view that since the law confers discretion upon the conciliation officer whether he should enter upon conciliation or not, he should satisfy himself by all means available to him about the propriety of undertaking conciliation and, in doing so, if the conciliation officer embarks upon a preliminary inquiry, in the course of which he holds discussions with the representatives of the parties and even conveys proposals made by one of the parties to the other, such steps cannot be regarded as a part of conciliation proceedings.[74] In *Suresh Vithoo Nare*, it was held that mere issuance of a notice by a conciliation officer showing his intention that he may institute conciliation proceedings would not amount to institution of proceedings.[75] The Orissa High Court in *Pratap Chandra Mohanty*, expressed the view that the conciliation officer explores the possibility of a settlement by asking the parties for joint deliberations and such exploration is a preliminary inquiry to the actual conciliation proceedings.[76] This is not the correct view of law. Rule 10 of the Industrial Disputes (Central) Rules 1957, lays down that where the conciliation officer receives information about an existing or apprehended 'industrial dispute', which does not relate to a public utility service and he considers it necessary to intervene in the dispute, he shall give formal intimation in writing to the parties concerned declaring his intention to commence conciliation proceedings with effect from such a date as may be specified therein. Section 2(e) defines 'conciliation proceedings' to mean 'any proceedings held by a conciliation officer...under this Act'. There is no provision either in the Act or in the Rules providing for holding any preliminary inquiry to enter upon the conciliation proceedings. If the parties attend 'any proceedings' held by a conciliation officer, in compliance with the notice served by him, such proceedings must necessarily be 'conciliation proceedings'. The concept of a preliminary inquiry into conciliation proceedings' is foreign to the statute.

A single judge of the Orissa High Court held that the conciliation officer can and should start conciliation proceedings as soon as he gets any information from any source about the existence or apprehension of an industrial dispute. There is nothing in the Act to show that the conciliation proceedings can be initiated by the conciliation officer only when he is formally moved by any of the parties. He has the jurisdiction to initiate conciliation proceedings as soon as he finds on some material or information before him that an industrial dispute exists or is apprehended.[77] Under this sub-section, either upon receiving a complaint from one of the parties or *suo motu*, where any industrial dispute exists or is apprehended, a conciliation officer may commence conciliation proceedings in a non-public utility service. In the course of a conciliation proceeding, the conciliation officer has to get the employer and the representative of the workmen together and investigate the dispute and for that purpose do all such things, as he thinks fit, with a view to induce the parties to arrive at a fair settlement of the dispute.[78]He has to act without delay. For this purpose, he is empowered to enforce attendance of any person for examining him and also to inspect any document which he deems necessary to inspect. The jurisdiction of the conciliation officer does not extend only to resolution of the disputes which are brought before him by the parties, but at least in certain cases it is possible that a dispute is raised about something and the final settlement requires solution of other disputes as well. For instance, the workmen may demand wage increase and go on strike and during the strike the management may take disciplinary action against some of the activists for intimidation of loyal workers, the dispute may ultimately be resolved only if the management agrees at the conciliation talks to drop the disciplinary proceedings. In such a situation, the conciliation officer would not be incompetent to counter-sign the final settlement embodying the withdrawal of the disciplinary proceedings. There is no manner prescribed for raising an industrial dispute and bringing it into existence. Fresh disputes are apt to arise during the conciliation proceedings of another dispute. A conciliation officer, therefore, is certainly competent to deal with all disputes brought to his notice whether existing at the commencement of the conciliation proceedings or cropping up during the pendency of such proceedings.[79] It is his duty to see that a settlement which, in his opinion, is a right settlement is amicably arrived at between the parties. After such a settlement is arrived at, he has to make a report to the Government accordingly and also forward along with it a memorandum of the settlement duly signed by the parties, *ie*, the representatives of the workmen and the representatives of the employer.[80]

The functions of conciliation officers are only conciliatory and not adjudicatory. The main task of the conciliation officer is to go from one camp to another and find out the greatest common measure of agreement, which certainly cannot be achieved, if the nature of his duties were judicial.[81] 'Even though a conciliation officer is not competent to adjudicate upon the disputes between the management and its workmen, he is expected to assist them to arrive at a fair and just settlement. He is to play the role of an adviser and a friend of both the parties and should see that neither party takes undue advantage of the situation'.[82] Form H of the Central Rules shows that the conciliation officer has also to sign the memorandum of

settlement, evidencing that the settlement has been reached in the course of conciliation proceedings. It is, however, not the duty of the conciliation officer that he must investigate into the dispute even when the persons who raised the dispute are not present to substantiate as to what the dispute is. If the parties raising the dispute are not interested to get a settlement, it is not the duty of the conciliation officer to try to resolve the dispute in the absence of the persons raising the dispute. It is the duty of the persons raising the dispute to assist the conciliation officer regarding facts of the dispute and how the same can be possibly resolved. Rule 9 of the Central Rules envisages that the conciliation officer on receipt of the notice of strike shall forthwith arrange to interview both the employer and the workmen concerned at a given place and time as he may deem fit. If on calling the workmen who raised the dispute, the conciliation officer finds that the concerned workmen have failed to appear, there is no duty cast upon him to go ahead with the matter.[83] A union which is not the bargaining agent, cannot be allowed to join the pending conciliation proceedings. In *Indian Aluminum Co*, in a tripartite settlement for holding referendum for determination of 'bargaining agent' for workers, it was agreed that a union securing less than 20 per cent votes in the referendum, shall not be entitled to be a bargaining agent. In view of this settlement, a single judge of the Kerala High Court held that the union which has not secured 20 per cent votes in the referendum, had no right to represent the workmen in the conciliation proceedings. The union, therefore, could not be a party to the dispute in respect of which conciliation proceedings were pending.[84]

(ii) Industrial Dispute Exists or is Apprehended

Before a conciliation officer can embark upon conciliation proceedings, there must be:

(a) an industrial dispute within the meaning of s 2(k) of the Industrial Disputes Act; and

(b) such dispute must be either existing or apprehended.

The conciliation officer can take up the matter for conciliation not only when there is an 'existing' dispute but also when such dispute is 'apprehended'.[85]But the 'existing' or 'apprehended' dispute must be an -industrial dispute as defined in s 2(k) of the Industrial Disputes Act. A dispute which is not between the employers and employers, employers and workmen, or workmen and workmen, will not be an industrial dispute. Furthermore, a dispute even between such parties will not be an industrial dispute unless it is connected with the employment, non-employment, terms of employment or conditions of labour of any person. Any conciliation proceedings in a dispute which is not a dispute or difference connected with the employment or non-employment, terms of employment or conditions of labour of any person will not be conciliation proceedings for the purposes of this section.[86] An industrial dispute can come into existence when one party has made a demand on the other and the other party has rejected the same. Even the employer can approach a conciliation officer if there is a disagreement between the management and the workman on certain vital matters. But mere placement of charter of demands on the management does not create an apprehended or existing industrial dispute. A demand partakes the character of an 'industrial dispute' when it is rejected by the management either directly or before the conciliation officer. In exercise of his jurisdiction under s 12(1) to initiate 'conciliation proceedings', the conciliation officer has not been conferred by s 11 (1) the power to follow such procedure as he may think fit. He has, therefore, to confine himself to the procedure indicated by s 12 or prescribed by the relevant Rules.[87]

(iii) Conciliation Proceedings in Non-public Utility Service

The use of the word 'may' in s 12(1) referring to 'industrial dispute' in non-public utility service concerns makes it abundantly clear that the legislature has invested the conciliation officer with the discretion whether to enter upon conciliation in regard to such disputes or not. Such discretion cannot, however, be exercised in an arbitrary or capricious manner. In a case where any existing or apprehended industrial dispute relates to a public utility service is there, it is mandatory for the conciliation officer to hold conciliation proceedings where notice under s 22 has been given.[88] Where the conciliation officer refused to initiate conciliation proceedings on the ground that there was no industrial dispute existing or apprehended, he cannot be compelled to hold such proceedings as the Act confers a discretion on the conciliation officer to decide whether to hold such proceedings or not.[89]

(iv) Conciliation Proceedings in Public Utility Service

It is incumbent upon a conciliation officer to enter upon conciliation proceedings if:

(a) the concern to which the dispute relates is a public utility service within the meanings of s 2(n) ; and

(b) a notice under s 22 of the Act has been given.

From the text of the section, it appears that both these conditions are cumulative for making it compulsory for the conciliation officer to hold proceedings. But if the notice under s 22 is not given, it is in the discretion of the conciliation officer to initiate conciliation proceedings. In *Jaslok Hospital*, the industrial tribunal held that the conciliation proceedings are mandatory only when the dispute relates to a public utility service and notice under s 22 has been given. In other words, s 12(1) requires that, before holding the conciliation proceedings, both the conditions must be satisfied. But a single judge of the Bombay High Court held that this view was not correct as 'though the expression 'and' is used after the words 'where the dispute relates to a public utility service', the said expression must be read as 'or'.[90] But this holding is not supported by any reasoning. It is not correct law. From the language of s 12(1), s 22 and r 9 of the Industrial Disputes (Central) Rules 1957, it is unequivocally clear that the holding of the conciliation proceedings in a public utility service is mandatory only where a notice under s 22 has been given. Otherwise, it is discretionary.

'In the Prescribed Manner':

The Central and state Government have made Rules prescribing the procedure for conciliation proceedings. Rules 9 to 12 of the Industrial Disputes (Central) Rules 1957 are the relevant Rules prescribing the procedure for conciliation proceedings under the Act with respect to the industries in relation to which the Central Government is the 'appropriate Government'.

(v) Functions of Conciliation Officer not Judicial or Quasi-judicial

A conciliation officer is not an adjudicatory authority under the Act,[91] nor is he a 'court' within the meaning of s 195(1)(c) of the Code of Criminal Procedure.[92] He is not invested with the powers to adjudicate on industrial disputes.[93] No doubt there are opposing parties and various points at issue between them before him, but the conciliation officer is not competent to hear and decide any of them; all that he can do is to try to persuade the parties to come to a fair and amicable settlement.[94] Although a conciliation officer has wide powers to exercise his resourcefulness and power of persuasion to try to induce and persuade the parties to come to a fair and amicable settlement, he is not competent to decide the various points in issue between the opposing parties.[95] In other words, his duties are only administrative,[96] and are purely incidental to industrial adjudication.[97] His function under s 12 advisedly is not of judicial or quasi-judicial nature, for if it were so, then in connection with everything he does, the formalities of a judicial trial would have to be observed.[1] Unless, therefore, a conciliation officer has committed some error of law in refusing to take up a dispute for conciliation, his action cannot be interfered with in writ proceedings. Thus, where the conciliation officer, after satisfying himself that the action of the management in regard to promotions was *bona fide*, refused to take up the dispute for conciliation, his order could not be interfered with by the High Court in writ proceedings.[2]

SUB-SECTION (2): EXPEDITIOUS INVESTIGATION OF DISPUTES

Sub-section (2) casts a duty on a conciliation officer to investigate disputes expeditiously and empowers him to do all such things as he thinks fit for the purpose of inducing the parties to arrive at a fair and amicable settlement.[3] The first part of the sub-section is mandatory on its construction while the second part is merely directory. The first part requires the conciliation officer, for the purpose of bringing about settlement of the dispute, to investigate the dispute and all matters affecting the merits and the right settlement thereof, without delay while the second part gives the discretion to him to do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute.[4] He is required to do all necessary things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute. If a settlement of the dispute or any of the matters in dispute is arrived at in accordance with the conciliation proceedings, the conciliation officer shall send a report thereof to the appropriate Government or an officer authorised in that behalf by the appropriate Government together with a Memorandum of Settlement signed by the parties. In the words of Venkatramiah J:

> Even though a conciliation officer is incompetent to adjudicate upon the dispute between the management and its workmen, he is expected to assist them to arrive at a fair and just settlement. He is to play the role of an adviser and friend of both the parties and should see that neither party takes undue advantage of the situation'.[5]

The Act does not provide any machinery to verify the membership of association. Therefore, the correct way of calculating membership is by check-off and by form E returns given by the members under the Trade Unions Act. For this purpose, the conciliation officer can call for records under check-off system and find out the majority union on the basis of form E returns filed by each of the union but the expression 'may do all such things as he thinks fit' cannot be given wide interpretation as to include power to verify physically the membership of the association to find out which of the unions operating in a particular establishment has got the majority character.[6] It is, therefore, the duty of the conciliation officer to satisfy himself that amicable settlement reached between the parties is a fair settlement.[7] The main task of the conciliation

officer, therefore, is to go from one camp to the other and find out the greatest common measure of agreement.[8]A conciliation officer has to do a variety of things in the course of investigation for the conclusion of conciliation proceedings. His first duty for the purpose of bringing about a settlement is to act expeditiously without loss of time. When the conciliation officer decides to act, he has to find out what the dispute between the parties is. This has to be done by ascertaining from the parties to the dispute what their contentions are. The next function, that he has to discharge, is to further ascertain the merits and the right to settlement. The last important duty that he has to discharge is that of inducing the parties to come to a fair and amicable settlement of the dispute.[9]In effecting a settlement, the conciliation officer has always to take into account the conflicting claims between the employer on the one hand and the employees on the other and the view of the different groups of workers as well as all those relevant factors which would lead to the well-being of the industry, and a satisfactory settlement of the disputes. This necessarily means that adequate consideration must be given to the demands and viewpoints of the majority of workers. The scheme of the Act is that it reposes confidence in the conciliation officer in these matters.[10] But where a union is not a party to a dispute, the conciliation officer is not obliged to persuade such a union to participate in the proceedings or to come to a fair and amicable settlement of the dispute raised by the other unions against the management.[11]

The mere presence of a minister of the Government in the conciliation proceedings does not vitiate such proceedings in which the conciliation officer does not abdicate his functions and duties as such officer, but takes such active part as is required under this provision by way of investigation of the dispute, examination of all matters involving right settlement of the dispute, and doing all such things as he may think fit for inducing the parties to come to a fair settlement thereof. In such a case, even absence of the conciliation officer from some meetings in relation to the demands in question, would not alter the character of conciliation proceedings.[12] The power of the conciliation officer is, however, only to promote the settlement. His power is not adjudicatory. He is not competent to decide finally the various points at issue between the opposing parties. All that he can do is to try to persuade the parties to agree upon a fair and reasonable settlement. Thus a special responsibility is placed on the conciliation officer to see that the settlement arrived at is fair and reasonable and he has to satisfy himself that it is so and then give his concurrence accordingly. The reason is that a settlement arrived at in the course of conciliation proceedings has a far-reaching binding effect than a settlement arrived at otherwise than in the course of conciliation proceedings.[13]

SUB-SECTION (3): SETTLEMENT IN THE COURSE OF CONCILIATION PROCEEDINGS

Sub-section (3) makes it obligatory upon the conciliation officer to send a report to the 'appropriate Government', in case a settlement of industrial dispute is arrived at in the course of conciliation proceedings before him, together with a memorandum of settlement signed by the parties to the dispute.[14] Such reports must be accompanied by a memorandum of the settlement signed by the parties to the dispute. Rule 58 of the Industrial Disputes (Central) Rules 1957 deals with the requirements of a memorandum of settlement. Sub-rule (1) prescribes that the memorandum of settlement shall be in form H, whereas sub-r (2) prescribes the mode and manner of signing the settlement and sub-r (3) enjoins upon the conciliation officer to send to the Central Government, the report of the settlement, together with a copy of the memorandum of settlement signed by the parties to the dispute.[15] The Punjab and Haryana High Court in *Punjab Kesri* held that a settlement which complies with all the ingredients of form H even though not formally written on form H, is a valid settlement in the eyes of law. This provision requires that, though a copy of the memorandum of settlement is to be sent to the Government, the said copy is to be duly signed by the parties to the dispute.[16] The Madras High Court in *Natarajan Engg,* had to deal with the question as to whether the signatures on the memorandum on true construction of s 12, should be only of the parties to the dispute. A corollary to this was whether r 25(2) of the Madras Rules which corresponds with r 58 of the Central Rules was *ultra vires* s 12 ? But the court left this question undecided because the case was decided against the employer on the ground of estoppel in view of his conduct in having altered the position and rights of the parties.[17] A single judge of the Delhi High Court in *Krishna Gold,* held that though a duty is cast on the conciliation officer to send the report to the 'appropriate Government' or authorised officer together with the signed memorandum of settlement, failure to perform this duty to dispatch the signed copy of the report cannot invalidate the settlement.[18]

The word 'report' must derive its meaning from the context in which it is used. When there is a settlement, a detailed report may not be necessary since the dispute in the ordinary course is amicably settled. Even the absence of a report under this section would not vitiate the settlement.[19] An agreement entered into between a majority union and the management can be validly certified and converted into a conciliation settlement by the conciliation officer provided it is fair and reasonable. It is, however, the duty of the conciliation officer to ascertain that the union which has entered into an agreement is a majority union and commands support of the majority of the workers in the establishment and that the agreement is fair and reasonable, when such an agreement is presented before him in the prescribed form. On such satisfaction, the conciliation officer is bound to certify that the agreement is a conciliation settlement so as to be binding on the parties to the dispute and also the persons who were not party to the dispute.[20] There is nothing in the Act which makes it obligatory on a conciliation officer to issue notice to any party before a settlement is signed under s 12(3) of the Act between the management and the workman. Nor is the conciliation officer obliged to hear the union which raised the

dispute before certifying the settlement reached between the management and the recognised union. The fact that the conciliation officer has sent a failure report to the Government because of the stand taken by the employer that he is negotiating with the recognised union for settlement, would not bar a settlement being entered into between the management and the recognised union with the assistance of another conciliation officer.[21] Such a settlement cannot be said to be vitiated.

There is no provision either in the Act or under the Rules framed under the Act obliging a conciliation officer to counter-sign only those settlements where the consenting union officials represent a majority. Any settlement made with a minority union will bind all the workmen of the establishment when it is counter-signed by the conciliation officer, unless it is established that the dispute related to some special section of workmen with a special kind of demand and that the consenting parties were in no way representatives of such workmen. It is only a collusive settlement designed to defeat certain kinds of claims entered into by those who could not speak for even a small section of the workmen interested, could be an exception to the rule.[22] A settlement once arrived at in the course of conciliation proceedings cannot subsequently be nullified by any party to it unilaterally. In *Tiruchirapalli HCBE Union*, the facts were: certain settlements were arrived at in the course of conciliation proceedings in connection with wage structure of the employees in co-operative societies. In the settlement, the co-operative societies were represented by their office-bearers of the elected bodies who were in charge of the management of the societies. Subsequently, in place of the elected bodies, special officers were appointed. Thereupon, the registrar of the co-operative societies issued a circular purporting to nullify the settlement and directed the special officers to ignore the settlement. The Madras High Court in writ proceedings held that the circular of the registrar of co-operative societies is incompetent and without jurisdiction.[23] In *Steel Authority of India*, the facts disclosed that a settlement was arrived at under s 12(3) between the management and the union. Clause 8.9.4 of the settlement provided that "in case of death due to accident arising out of and in course of employment, employment to one of his/her direct dependents will be provided." It was contended that the death of an employee arose out of and in the course of employment, whereas the post-mortem report did not disclose that it was a natural death. The dependents of the deceased employee claimed appointment on compassionate grounds in terms of the aforesaid settlement. A writ petition filed by them was dismissed by a single judge of the Jharkhand High Court, but allowed by the Division Bench. Quashing the order of the Division Bench, Sinha J (for self and Joseph J) of the Supreme Court observed:

> Public employment is considered to be a wealth. It in terms of the constitutional scheme cannot be given on descent. When such an exception has been carved out by this Court, the same must be strictly complied with. Appointment on compassionate ground is given only for meeting the immediate hardship which is faced by the family by reason of the death of the bread earner. When an appointment is made on compassionate ground, it should be kept confined only to the purpose it seeks to achieve, the idea being not to provide for endless compassion.. .. It was, thus, not held that the death occurred due to an accident. It was not even the case of respondent. What would constitute 'an accident arising out of and in the course of employment' has not been defined. Evidently, the said phraseology has been borrowed from the provisions of the Workmen's Compensation Act.[24]

On the issue of compassionate appointments, Sinha J (for self and Bedi J) cited the earlier decision of the Court in *Umesh Kumar Nagpal*,[25] and observed:

> .. . compassionate employment cannot be granted after a lapse of a reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over. What should be a reasonable period would depend upon the rules operating in the field. (para 19). .. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed. Respondent is hereby directed to offer appointment to the appellant on a suitable post within eight weeks from date.[26] (para 20).

In *Karnataka Power Corporation*, respondent was working in the corporation as a nominal muster roll workman with the appellant-corporation. On 29 January 1979 a settlement was arrived at under s 12(3) between the corporation and the union, clause 4 of which read thus:

> Casual Labour - Casual workmen who have worked for a period of not less than 240 days during a period of 12 calendar months are agreed to be brought on monthly establishment from the first of the following month effective from 1-10-1978, subject to availability of vacancies. The surplus workmen, if any, will be kept on the waiting list and appointed as and when vacancies occur. In the case of workmen who are not provided with work during monsoon period, the number of days worked in two consecutive seasons will be counted to determine their eligibility.

The facts disclosed that the respondent did not report for duty from February 1979, but sent a few letters on and off seeking employment as a mason. After a lapse of some 18 years, he filed a writ petition seeking directions to the corporation to absorb him for regular service. Both the single judge and Division Bench of the Karnataka High Court ordered in favour of the respondent-workman. Quashing the orders of the High Court, Pasayat J (for self and Chatterjee J) of the Supreme Court relied on several decisions of the court including *KV Raja Lakshmiah*,[27] RN Bose,[28] and *P Samantaray*,[29] and held that: (i) representations would not be adequate explanation to take care of delay, and if the Government had turned down one representation, the making of another representation on similar lines would not explain the delay; (ii) no relief could be given to the petitioner who without any reasonable explanation approaches the Court under Article 32 after inordinate delay, and that it could not be the intention of the Constitution makers that the Supreme Court should disregard all principles and grant relief in petitions filed after inordinate delay. Most importantly, the learned judge further observed *that the question, whether the relevant clause in the settlement can be applied for providing appointment to the respondent, could not be adjudicated in a writ petition.*[30]

SUB-SECTION (4): REPORTING FAILURE OF CONCILIATION PROCEEDINGS

'Failure Report'- Sub-section (4) requires the conciliation officer, as soon as practicable, to submit the 'failure report' to the appropriate Government, in case the conciliation proceedings do not end in a settlement. This requirement is mandatory, where the conciliation proceedings have taken place. But, when the conciliation proceedings have not taken place, the question of sending the failure report would not arise.[31] The scope of the report contemplated by this section is different from that of the report of the settlement under sub-s (3). The report under this section should set forth:

(i) the steps taken by the conciliation officer for ascertaining the facts and circumstances relating to the dispute;

(ii) the steps taken by the conciliation officer to bring about a settlement of the dispute;

(iii) a full statement of the facts and circumstances relating to the dispute and steps taken by the conciliation officer to bring about its settlement; and

(iv) the reason on account of which a settlement could not be arrived at.

The word 'full report' must derive its meaning from the context in which it is used. The section requires a 'full report' when there is no settlement.[32] The failure report under s 12(4) is a very important document. It is one of the most important materials to be considered by the appropriate Government for considering the questions, whether there is a case for reference and whether it is expedient to make a reference or not. The object requiring the conciliation officer to make such a full and detailed report of all the relevant facts and circumstances including the reasons for failure of conciliation is to enable the Government to be in possession of all facts for deciding as to what course it should adopt under s 12(5) in making or refusing to make a reference.[33] In case of failure of the conciliation proceedings, the conciliation officer is required to submit the failure report 'as soon as practicable after the close of the investigation', stating therein the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof together with full statement of such facts and circumstances and the reasons on account of which, in his opinion, the settlement could be arrived at. Though this sub-section does not provide any specific period of time for submission of the failure report, sub-s (6) provides that the report under s 12 shall be submitted by the conciliation officer within 14 days of the commencement of the conciliation proceedings and within such further period as may be fixed by the appropriate Government. The proviso to the section, however, provides that this period may be extended by agreement of all the parties to the dispute in writing and the approval of the conciliation officer. A single judge of the AP High Court in *Praga Tools*, held that even after having reported failure under this provision, a conciliation officer does not become *functus officio* and can hold conciliation proceedings again notwithstanding the submission of failure report. The court observed:

> .. . if, after submission of the report to the government, the parties approach him or if he feels that the parties are in a mood to relent or reconcile, it would be perfectly open to him to initiate fresh conciliation proceedings for bringing about a settlement of the dispute between the parties'.. .. this court's attention had not been invited to any provision in the Act or to any decision on the point. In case of failure of conciliation proceedings, such proceedings, according to s 20(2), are deemed to have been concluded on the day when the failure report is received by the appropriate government.. .. after the conclusion of the conciliation proceedings, if the parties again approach the conciliation officer, he can commence conciliation proceedings afresh for bringing about a settlement of the dispute.[34]

This may be correct as long as the dispute has not been referred to adjudication by the Government. But when the Government has referred the dispute to adjudication, even if the conciliation proceedings are pending before a conciliation

officer, they are deemed to have been concluded under cl (c) of sub-s (2) of s 20. Hence, after the reference of the dispute to adjudication, a conciliation officer cannot commence conciliation proceedings whether he has to commence such proceedings for the first time or after submitting the failure report. If conciliation proceedings after the reference of the dispute for adjudication were permissible, it would lead to a conflict between the award resulting from the adjudication and the settlement arrived at, in the course of conciliation proceedings, both of which are binding under s 18(3) of the Act. Where the conciliation officer declined to admit the dispute raised by the union in conciliation on the ground that there was a subsisting settlement between the parties, that the award of the tribunal stipulating a 48 hour week was confirmed right up to the Supreme Court, the Bombay High Court held that the conciliation officer had no jurisdiction to determine the merits of the demands of the union while declining to admit the dispute in conciliation.[35] When an employee raises an industrial dispute against the termination of his services, saying that he was performing only clerical duties notwithstanding the designation of 'Manager', it is not open to the labour officer to refuse to close the proceedings and to submit his failure report to the Government on the ground that the said employee was not a workman. In such a case, the order passed by the labour officer is quashed and the Government is directed to refer the dispute for adjudication under s 10.[36] Where the subject-matter of the dispute has already been settled and the workmen have enjoyed benefits under the settlement, the conciliation officer has the discretionary power to refuse to take up the dispute for conciliation and to submit a failure report under s 12(4).[37] In *Ramesh*, the facts briefly were: the services of a few employees were terminated by the management. When the employees protested, the management promised to give them alternative employment in another plant owned by them, which promise was apparently not kept up. In addition, there were other contentions, claims and rival claims too. The conciliation officer accepted the case of management that the said employees were designated as Managers (Technical), *etc*., and, on that basis, the Conciliation Officer has prima facie decided that the petitioners could not be treated as workmen. On this view of the matter, he held that the conciliation proceedings could not be continued further, and no failure report was sent to the Government either. Quashing the order, a single judge of the Madras High Court held that the conciliation officer exceeded his jurisdiction in determining whether the employees were workmen or not, which could only be decided in an adjudication proceeding, and directed the conciliation officer to send a failure report under s 12(2) (sic).[38]

SUB-SECTION (5)

(i) Making or Refusing to Make a Reference

Sub-section (5) of s 12 contains a dimorphism of power, *viz*, power to make a reference and the power to refuse to make a reference. The first part of the dimorphism which speaks of the power of the appropriate Government to make a reference lays down that if on a consideration of the report under sub-s (4), the appropriate Government is satisfied that there is a case for reference, it may make such reference. The first part of the sub-section has however, to be read as part of sub-s (1) of s 10, which empowers the appropriate Government to make a reference of the dispute. The combined effect of these provisions is that ordinarily the question of making a reference would arise after conciliation proceedings have been gone through and the conciliation officer has made a failure report.[39]However, the expression at 'any time' in sub-s (1) of s 10 signifies that the Government does not have to wait until the failure report has been made. It can decide to refer the dispute even if conciliation proceedings had not yet begun or were still pending. There is nothing in s 10(1) to indicate that the Government has to wait for the conciliation officer's report for exercising the power to refer a dispute because the jurisdiction of the Government to make a reference under s 10(1) is independent of the procedure laid down in s 12(5) of the Act.[40] Either on being satisfied after the consideration of the failure report that there is a case for reference, or otherwise, where the appropriate Government is of opinion that an industrial dispute exists or is apprehended, it may at any time refer the dispute. In case the Government decides to make a reference, it has to act under s 10(1), for that is the only provision which empowers the Government to make reference.[41] In other words, the appropriate Government has the power under s 10(1) to refer a dispute as soon as it forms the opinion that there is an existing or apprehended industrial dispute. This does not mean that the Government is bound to make the reference. The Government has been given an important voice in the matter of permitting industrial disputes to seek adjudication by reference to industrial tribunals, because 'it is not every case where parties allege the existence of an industrial dispute that a reference can be made'.[42] In UTI Cycles, the Supreme Court observed:

> The government has to weigh the facts keeping in mind the objective of industrial peace and smooth industrial relations between the parties. If, taking into consideration all the facts, the government finds that in the interest of industrial peace, it is not necessary to make the reference, it may not do so.[43]

In *Alekh Bihari*, Pasayat Acting CJ of the Orissa High Court held that it was open to the state Government to take broad features into considerations while exercising jurisdiction under s 10(1) of the Act. When the appropriate Government considers the question as to whether a reference should be made under s 12(5), it has to act under s 10(1) of the Act, and s 10(1) confers discretion on the appropriate Government either to refer the dispute or not to refer it for adjudication

according as it is of the opinion that it is expedient to do so or not.[44] Refusal by the Government to refer a dispute raised by a workmen against his not being appointed as a physiotherapist was valid as the workman concerned did not possess the requisite qualifications and was overaged.[45] Where the Government refused to refer a dispute raised by the workman against the transfer order passed by the management on the ground that transfer is a management prerogative, the Gauhati High Court held that such refusal was not open to challenge.[46] In *Pix Transmissions*, the facts disclosed that subsequent to the submission of failure report by the conciliation officer to the Government under s 12(4), the parties arrived at a settlement at the bipartite level and filed the same with the Government with a request not to refer the matter for adjudication. Despite this request, the Government referred the dispute for adjudication. A single judge of the Bombay High Court, while quashing the order of reference, held that the Government had not addressed itself to the crucial aspect, namely, whether there was any subsisting industrial dispute at the relevant time, and directed the Government to re-examine the matter in the light of the settlement arrived at between the parties after the submission of failure report.[47] While exercising power under s 12(5), the appropriate Government cannot go into the merits of the industrial dispute and if it finds that the industrial dispute has arisen, then such dispute needs to be referred for adjudication.[48] Where a dismissed workman, having moved a writ petition in the High Court which was dismissed on merits, raised an industrial dispute and the Government refused under s 12(5) to make a reference of the said dispute, it was held that the refusal by the Government was in order, and that it was not open to the workman, he having lost the case in the High Court on merits, to agitate the matter before another forum.[49] In *Dhenkenal Mehantar Sangha*, the union submitted 18 demands and on the receipt of the failure report from the conciliation officer, the Government referred 15 demands for adjudication, while leaving out 3 of them. Further, the Government did not communicate any reasons for refusing to refer the said 3 demands. A single judge of the Orissa High Court while, directing the Government to take a fresh decision, observed the three disputes refused to be referred were covered by Item 6 of second schedule.[50]

In other words, the Government has to take into account the question of expediency of making a reference in the facts and circumstances of a case. However, when the 'appropriate Government' declines to make a reference, the second part of the dimorphism comes into play, *ie*, compliance of the requirements of sub-s (5) of s 12 also becomes relevant and necessary. The discretion not to make reference can be exercised only if (a) there is no existing or apprehended dispute; or (b) it is inexpedient to make a reference in the circumstances of the case.[51] Even if the Government comes to the conclusion that a *prima facie* case for reference has been made out, it would still be open to the Government to consider whether there are any other relevant or material facts which would justify its refusal to make reference. The question as to whether a case for reference has been made out or not, can be answered in the light of all the relevant circumstances, which would have a bearing on the merits of the case as well as on the incidental question as to whether a reference should invariably be made.[52] The discretion has to be exercised in such manner that it would not exceed the limits prescribed for the sphere of reference and enter into the territory of adjudication, the appropriate Government is only expected to decide before making a reference as to 'whether on a *prima facie* examination of the facts of the case, there is a dispute which requires a trial or adjudication by a tribunal or court'. The Government cannot take upon itself the function of adjudication.[53] For instance, where on a *prima facie* examination of the dispute, the writ court found that the dispute raised by the workman was covered by a valid settlement, it was held that the Government was justified in refusing to make the reference.[54] In *Moorco*, the facts were:

(a) the question whether the company is entitled to the infancy protection under s 16 of the Payment of Bonus Act was, pursuant to a settlement reached between the parties under s 12(3), referred to the Deputy Labour Commissioner for arbitration;

(b) the arbitrator gave his decision holding that the management was entitled to protection under s 16 of the Payment of Bonus Act, but the said decision was neither submitted to the Government nor published under s 17 ;

(c) the union in the meantime filed a civil suit questioning the award, apart from raising an industrial dispute on the self-same issue of bonus;

(d) the Government on receipt of the failure report from the conciliation officer referred the said dispute to the tribunal for adjudication;

(e) the management moved the High Court for issuing a writ of *mandamus* directing the Deputy Labour Commissioner to forward his decision under (b) above to the Government for publication, which writ petition was pending in the High Court; and

(f) the management filed another writ petition challenging the reference made by the Government under (d) above.

A single judge of the Madras High Court held that the reference was bad in law in view of the fact that the question of infancy protection was decided by the Deputy Labour Commissioner as agreed to by the parties in the course of as 12(3) settlement, and a suit filed by the union questioning the said decision of the Deputy Commissioner of Labour is pending in

the civil court.[55] Where the facts disclosed that the salary and allowances of the workmen were revised unilaterally and were accepted by the workmen under protest and without prejudice to their rights as indicated in their letter submitted to the management, the refusal by the Government to refer the dispute on the ground of existence of a settlement between the management and one of the unions or of the acceptance of the benefits arising out thereunder under protest are not good grounds for refusing the reference, and accordingly the impugned order of the Government deserves to be quashed.[56] The first part of sub-s (5) of s 12 signifies that after forming the opinion under s 10(1), the appropriate Government ordinarily will further take into consideration the failure report for being satisfied whether there is a case for reference or it would be expedient to make the reference.[57] The problem which the Government has to consider under s 12(5) is whether there is a case for reference, which means that the Government must first consider whether a *prima facie* case for reference has been made out on merits.[58] In the name of such *prima facie* examination of merits to find out whether the claim is patently frivolous or not, the Government cannot undertake detailed examination, investigation, appreciation of facts and principles of law.[59] Refusal to make a reference on the ground that the demand mentioned in the demand notice was not fit for being referred for adjudication because the employee's case was not proved is incompetent and bad in law.[60]

In *Sharad Kumar,* the Supreme Court held that it was wrong for the Government to have refused to refer a dispute raised by an area sales executive on the ground that he was not a workman within the meaning of s 2(s), and it was for the labour court or tribunal to decide the question.[61]Where the Government declined to refer a dispute, raised by the union against a notice of change issued by the management under s 9A on the ground that the said change was sought to be introduced by the management after due notice under s 9A, the Government was directed to refer the issue for adjudication. It was held that the application of s 9A could not be held to be decisive for declining a reference under s 10 read with s 12(5) of the Act, and that it would be appropriate for the management to establish the justification for the said change before an adjudicatory forum before implementation.[62] Where the Government refused reference on the basis of rival contentions, namely, the employer contending that the workman resigned from service and offered to re-employ him, whereas the workman contended that he had neither resigned nor was there any offer of reinstatement, it was held that the refusal to refer the dispute was not legal.[63] Where it was an admitted fact that the workman had worked only for 85-90 days, the refusal by the Government to make a reference was justified and it could not be said that the Government had adjudicated upon the controversy regarding the denial of benefit of s 25F to the workman.[64] The refusal to refer a dispute relating to termination on the ground that there was no material to show that the workman had put in 240 days of service is bad in law as it has no power to delve into the merits of the dispute.[65] Where the workers raised a dispute that they were the employees of Indian Airlines and that they were entitled to the same wages as paid to the other employees of the Airlines, the refusal by the Government to refer the said dispute, on the ground that they were the employees of contractors and not of the Airlines, amounts to adjudication of the matter and is hence incompetent.[66] In *Ramruch Pande,* the Bombay High Court held that it was not open to the Government to go into the merits of demands and refuse to refer the dispute on the ground that the union had not substantiated its demand, and directed the Government to make the reference.[67] The order of the Government refusing to refer a dispute raised under s 2A, on the ground that the said termination was not illegal, amounts to adjudication of the dispute and is without jurisdiction.[68] Refusal by the Government to refer a dispute relating to termination of the service of a workman, who was given a fixed-tenure appointment for a period of 85 days, is an order and such refusal does not amount to adjudication of the dispute.[69] Refusal by the Government to make a reference of the dispute raised by bank employees on the issue of 'the non-granting of medical leave sans medical certificate from the bank's panel of doctors', on the ground that leave cannot be claimed as a matter of right and hence it was not a fit case for reference, does not amount to adjudication of the dispute by the Government, and the refusal is well within the power conferred on the Government under s 10 read with s 12(5).[70]

In deciding the question of expediency to make the reference or not, the consideration of the Government is not confined to the conciliation officer's failure report under s 12(4) alone.[71] It would be further open to the Government to consider other relevant materials and facts which may not be appearing in the report but may come to its knowledge or which may be brought to its notice.[72] Whether there was an expediency or not in the matter of making a reference is to be decided on evidence in the peculiarity of facts and circumstances of the case.[73] For instance, if *prima facie* the claim is patently frivolous or is clearly belated,[74] or the facts are glaringly against the claim and do not require any trial or adjudication, then it is open to the appropriate Government to take the view that the case is not a fit one for reference.[75] 'In fact, the patentness or frivolousness of the dispute would mean that the claim is so utterly untenable that it could not stand for a minute and that there is no arguable case and there is no case for any consideration whatsoever'.[76] Where the employer challenged the order of reference on the ground that the dispute was raised nine years after termination, it was held that the Government could not decline reference solely on the ground of delay.[77] Refusal by the Government to refer a dispute on the ground of unexplained delay of 10 years is justified.[78] Refusal by the Government to refer a dispute, raised after a lapse of 11 years on the ground that the dispute was frivolous, is justified.[79] A single judge of the Madhya Pradesh High Court held that the refusal of a reference on the ground that there was a delay of 7 years is not justified when the workman furnished adequate reasons explaining the delay.[80]

Likewise, if the impact of the claim on general relations between the employer and the employees in the region is likely to

be adverse, the appropriate Government may take that into account in deciding whether it would be expedient to make the reference or not.[81] In *Atic Employees Union*, the state Government found that referring the dispute would raise a spirit of discontentment amongst a substantial number of workmen who had already signed an undertaking and resumed work. Referring the dispute would, therefore, amount to giving fillip to industrial unrest on the spot. In the circumstances, the discretion of the Government refusing to make the reference was not held to be uncalled for or perverse which could be interfered with, in judicial review.[82] If a *prima facie* case has been made out, reference of the dispute for adjudication cannot be refused only on the ground of expediency without considering other relevant materials. Though expediency is a relevant circumstance to be taken into account, the fact of the rights and interests of a vast number of workmen is also a relevant consideration to be taken into account alongwith the consideration of the question of expediency. As a matter of fact, the consideration of the effect of the rights and interests of a vast number of workmen is itself a question of expediency.[83] In *Shaw Wallace*, the Madras High Court deduced the following principles for the Government to bear in mind while deciding the question of referring or refusing to refer a dispute for adjudication:

(1) The government would normally refer the dispute for adjudication.

(2) The government may refuse to make reference, if-

  (a) the claim is very stale;

  (b) the claim is opposed to the provisions of the Act;

  (c) the claim is inconsistent with any agreement between the parties;

  (d) the claim is patently frivolous;

  (e) the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse; or

  (f) the person concerned is not a workman as defined by the Act.

(3) The government should not act on irrelevant and extraneous considerations.

(4) The government should act honestly and bona fide.

(5) The government should not embark on adjudication of the dispute.

(6) The government should not refuse reference on the ground that domestic inquiry was fairly and properly held and punishment awarded was appropriate. [84]

It may be pointed out here that the question whether 'the person concerned is or is not a workman as defined by the Act' as formulated in point no 2(f) above is a jurisdictional question. It is a mixed question of fact and law, on the determination of which, will depend the jurisdiction of the tribunal. It cannot be said that the determination of such a question will not involve adjudication. In *Hira Cement*, it was held that, in a case involving the termination of the contract workers by the contractor, the Government is justified in refusing to make a reference of the dispute on the ground that there was no employer-employee relationship between the contract labour and the principal employer, and the High Court would not canvass the order passed under s 12(5) closely to see if there was any material before the Government to support its conclusion, as if it was judicial or quasi-judicial determination. The law is well settled that the jurisdiction to decide about abolition of contract labour, or to put it differently, to prohibit employment of contract labour is to be adjudicated in accordance with s 10 of the Contract Labour Act. The ID Act has absolutely no application.[85]Sub-section (5) requires the 'appropriate government' to record and communicate, to the parties concerned, its reasons for the refusal to make the reference. In other words, in dealing with an industrial dispute in respect of which a failure report has been submitted under s 12(4), the appropriate Government exercises its power under s 10(1) subject to the obligation imposed by s 12(5) to record and communicate its reasons for not making the reference when the dispute has gone through conciliation and failure report has been received under s 12(4) of the Act.[86] The requirement of recording and communicating the reasons to the parties by the 'appropriate Government' is mandatory and mere recording of the reasons cannot be characterised as adjudication.[87] In *Maize Products*, repelling the contention of the petitioner-employer, the Gujarat High Court held that, in terms of the Notifiation dated 26 March 1973 issued by the Government of Gujarat, the Deputy Commissioner of Labour had the power to refer an industrial dispute for adjudication to a tribunal under s 10(1) read with s 12(4) & (5) of the Act.[88] Where the petitioner-employee approached civil court in the first instance to enforce his right and got an adverse finding and, thereafter filed a writ petition without disclosing the fact that he lost in the civil court, a single judge of the Rajasthan High Court held that the petitioner was not entitled to any relief because of the suppression of material facts before the High Court as well as the competent authorities.[89]

(ii) Judicial Review

(a) Quashing the Order refusing Reference

On the question whether the word 'may' used in the phrase 'it may make such reference' in s 12(5) should be construed to mean as 'shall' so as to make it obligatory on the Government to make reference, after it has formed its opinion that there is an existing or apprehended dispute, a considerable amount of decisional grist has got accumulated. The divergence in the interpretation of the words 'may' and 'shall' by different High Courts was set at rest in *KP Krishnan*, in which the Supreme Court juxtaposed the rival contentions on the construction of s 12(5) and steered clear of the decision on the question whether the word 'may' in the context of this provision should be construed to mean 'shall' and observed that both the approaches ultimately lead to the same crucial inquiry, *viz*, 'are the reasons recorded and communicated by the Government under s 12(5) germane or relevant or not'. If the writ court is satisfied that the reasons given by the Government for refusing to make a reference are extraneous and not germane, then it can issue, and would be justified in issuing a writ even in respect of such an administrative order.[90] Elaborating this view further in *Bombay Union of Journalists*, the court said that if the appropriate Government refuses to make a reference for irrelevant considerations, on extraneous grounds or acts mala fide, a party would be entitled to move the High Court for a writ of *mandamus*.[91] In *Hochtief Gammon*, the court pointed out that these are not the only powers of the courts in relation to the administrative orders of the governmental authorities. In this case, the court held that the order of the Government was unsustainable as it had not taken into consideration the relevant material and had also not said that it was inexpedient to refer the question for adjudication. In other words, the order of the Government really amounted to an outright refusal to consider the relevant matters and it also misdirected itself on a point of law in wholly omitting to take into account the relevant considerations which amounted to unlawful behaviour. Speaking for the court, Alagiriswami J, enunciated the law thus:

> The executive have to reach their decisions by taking into account relevant considerations. They should not refuse to consider relevant matter nor should take into account wholly irrelevant or extraneous consideration. They should not misdirect themselves on a point of law. Only such a decision will be lawful. The courts have power to see that the executive acts lawfully. It is no answer to the exercise of that power to say that the executive acted bona fide nor that they have bestowed painstaking consideration. They cannot avoid scrutiny by courts by failing to give reasons. If they give reasons and they are not good reasons, the courts can direct them to reconsider the matter in the light of relevant matters, though the propriety, adequacy or satisfactory character of those reasons may not be open to judicial scrutiny. Even if the executive considers it inexpedient to exercise their powers they should state their reasons and there must be material to show that they have considered all the relevant facts.[92]

The writ court cannot place itself in the position of the Government and make a reference itself by reason of its own satisfaction. Howsoever 'satisfied' the court may be,[93] it cannot direct the Government to make a reference because it cannot sit as a court of appeal on the order passed by the Government.[94] The court is, therefore, not entitled to consider the propriety or correctness of the reasons assigned by the Government,[95] nor can the Government be *mandamussed* to make a person a party to the reference as the remedy of such an aggrieved party would be before the industrial tribunal.[96] The writ court can, however, direct the Government to reconsider whether a reference should be made or not after leaving out the irrelevant and extraneous reasons.[97] The Punjab High Court in *Oswal Weaving*, enunciated the following proposition with respect to the judicial review of the Government's order refusing to make the reference:

(1) The appropriate government acting in exercise of its powers under s 10(1) read with s 12(5) of the Act exercises administrative functions and not judicial or quasi-judicial functions.

(2) In exercise of its powers under s 10(1) of the Act, the appropriate government has discretion to refer or not to refer any dispute to a labour court or tribunal, but such discretion has to be exercised in accordance with the provisions of the Act itself, ie, the appropriate government can decline to make a reference only on two grounds, *viz*:

  (i) that there is no industrial dispute which can be referred; or

  (ii) that it is not expedient to make a reference in the circumstances of the case.

(3) If the appropriate government declines to make a reference on any of the abovementioned two permitted grounds, the decision of the government would not be amenable to a writ or direction, and it would not be open to the court to compel the government to make a reference. The writ court will not sit in appeal over the decision of the appropriate government on any of the abovementioned two matters.

(4) The appropriate government can be compelled by a writ in the nature of *mandamus* to consider the matter as required by s 12(5) of the Act and then to exercise its discretion under s 10(1) of the Act in accordance with law if it is either admitted or proved that conciliation proceedings had taken place and a report had been submitted by the conciliation officer under

s 12(4) of the Act, but that the government had not seen the report of the conciliation officer or taken it into consideration at all before deciding whether to make a reference or not.

(5) A writ of *mandamus* would also be issued if the government declines to make a reference under s 12(5) of the Act without recording the reasons for such refusal and without communicating the same to the parties concerned.

(6) An appropriate writ would also be issued to the appropriate government if it is admitted or proved that the refusal to make a reference of the dispute in question is not bona fide or is actuated by malice or is based on considerations which are wholly irrelevant or extraneous and are not germane to the statutory considerations on which reference can be declined.[1]

From the decided cases, the following grounds are discernible, on which the writ court would be justified in issuing a writ of *mandamus* directing the Government to reconsider the question of making or refusing to make reference of a dispute:

(i) Failure to record and communicate reasons

(ii) Ignoring conciliation officer's report

(iii) Nature of reasons:

(a) Irrelevant or extraneous

(b) Reasons tantamounting to adjudication

(iv) Mala fides.[2]

Failure to Record and Communicate Reasons:

In case the Government refuses to refer a dispute, it is the mandatory requirement of s 12(5) that it shall record its reasons for the refusal and communicate such reasons to the parties concerned, when the dispute has gone through conciliation and a failure report has been submitted under s 12(4) of the Act.[3] It is, therefore, obligatory on the part of the Government to set out in the communication issued to the parties clearly and precisely the grounds on which the request for reference was being declined.[4] The object of this provision is to require the 'appropriate Government' to state its reasons for refusing to make a reference, so that the reasons should stand public scrutiny,[5] because when the Government has to record reasons, it would apply a much closer mind to the question, as otherwise it may not be easy for it to give reasons for the decision it has come to.[6] The knowledge that reasons would be made public and be the subject of criticism, would manifestly tend to prevent capricious and ill-considered actions on the part of the Government,[7] and no Government-surely not a democratic Government-would ever take the risk of giving reasons which would be open to public criticism and even condemnation.[8]

After the Government has recorded and communicated its reasons to the parties, it cannot in its counter-affidavit to the writ petition say that in addition to reasons mentioned in the order refusing to make the reference, certain other relevant facts or grounds not disclosed in the order had also weighed with it in reaching the conclusion that no reference need be made.[9] Hence, in case of failure of the appropriate Government to comply with the mandatory requirement to record and communicate the reasons to the parties, it can be compelled by a writ of *mandamus* to record and communicate its reasons when it decides not to make a reference after considering the report of the conciliation officer under s 12(4) of the Act and other relevant materials.[10] The Patna High Court, held that the state Government was not obliged to record and communicate its reason for not referring some of the disputes for adjudication under s 12(5), because the power was exercised by the state Government straightaway under s 10(1)(d) without there being any conciliation proceedings.[11] This view is incorrect as it loses sight of the basic principles of industrial law in this behalf. Each one of the demands which is connected with the employment, non-employment, the terms of employment or with the conditions of labour of any person, when made by the workmen or their union and refused by the employer would give rise to an industrial dispute.[12] A number of such disputes arising out of the demands of the workmen may be referred for adjudication by a single order of reference. In other words, there is a clear distinction between an 'industrial dispute' and an 'order of reference'. When the appropriate Government exercises its power to make reference of some of the demands out of a charter of demands, it no doubt, exercises its power under s 10(1)(d) with respect to such dispute, but with respect to the demands which the Government refuses to refer, its power under s 10(1)(d) is not exhausted.[13]

Section 12(5) enjoins upon the 'appropriate government' to record and communicate its reasons to the parties for its refusal to refer the dispute. With respect to the demands which the Government refuses to refer, each one of which is an industrial dispute by itself, it is obligatory on it to record and communicate its reasons to the parties concerned. The failure of the Government to record and communicate the reasons with respect to the demands not referred would make the refusal order amenable to a writ of *mandamus*. Want of reasons in the order refusing reference cannot be supplied by the plea

subsequently raised by the Government in the writ petition.[14] In other words, the Government cannot be, subsequently, heard to say that in addition to the reasons mentioned by them in the order, certain other relevant facts or grounds not disclosed in the order had also weighed with it in reaching the conclusion that no reference need be made,[15] because otherwise the mandatory provisions of this subsection may be deliberately violated and the aggrieved party will have to undergo the painful necessity of going to the High Court in order to ascertain the reasons for the Government's decision in refusing to make the reference.[16] In *Nirmal Singh*, where the labour commissioner exercising the powers of the state Government under s 12 for making reference, had not given any reasons to justify his conclusion that the delinquent workman was not a 'workman', the Supreme Court instead of remanding the matter for stating reasons, directed him to make a reference with a view to avoid delay in adjudication.[17]

Ignoring Conciliation Officer's Report under Section 12(4) :

From the background of the provisions of sub-ss (1), (2) and (4) of this section, it is clear that the appropriate Government is bound to consider very carefully the failure report of the conciliation officer under s 12(4) and treat it as furnishing relevant material which would enable it to decide whether a case for reference has been made out or not.[18]Section 12(5), inter alia, provides that if on consideration of the report referred to in sub-s (4), the appropriate Government is satisfied that there is a case for reference to the tribunal, it may make such reference. On the other hand, if it is satisfied that either there is no case for reference or it would not be expedient to make a reference of the dispute, it may decline to make the reference on consideration of the report of the conciliation officer and other relevant materials.[19] If, therefore, it is either admitted or proved that the conciliation proceedings have taken place and a report has been submitted by the conciliation officer under s 12(4) of the Act, but the appropriate Government has not seen the report or taken it into consideration at all before refusing to make a reference, the Government can be compelled by a writ of *mandamus* to reconsider the question after taking this report into account. In *Oswal Weaving* (*supra*), the facts disclosed that the conciliation officer had, in his failure report, travelled to the length of making recommendation to the Government about making reference and even enclosed a draft of the 'order of reference'. The High Court, instead of condemning the action of conciliation officer, commended his recommendation.[20] The legal position in this regard is very clear. Section 12(5) does not require a conciliation officer to make any recommendation unlike s 13(4). Hence, any recommendation made by the conciliation officer cannot form an integral part of the report. The case clearly falls within the ratio of *Bombay Union of Journalists.* The decision of High Court, therefore, is not correct.

Nature of Reasons:

The area of reasons is one of those areas where the courts having strayed into thickets, the compass reading of principle, not the random broken twigs or unbiased trail, must show the way out. Broadly stated, in entertaining a petition for issuing a writ of *mandamus*, the writ court does not sit in appeal against the value, quality, propriety, correctness, adequacy or the satisfactory character of the reasons recorded by the appropriate Government in refusing to make a reference.[21] The object of requiring the 'appropriate government' to state its reasons for refusing to make a reference is that the reasons should stand public scrutiny. It is, therefore, desirable that the parties concerned should be told clearly and precisely the reasons why no reference is made. However, that does not mean that the party challenging the validity of the Government's order declining to make a reference can require the court in writ proceedings to examine the propriety or correctness of the said reasons.[22] This provision has been made in order to provide an objective test which may be subjected to judicial scrutiny by a writ court to examine as to whether the reasons for refusing to make a reference are irrelevant or foreign.[23] As to what is the nature and extent of the reasons to be stated by the 'appropriate Government' when it refuses to make an order of reference, the Supreme Court has stated that the reasons should be germane to the dispute under consideration and should not be irrelevant or extraneous to the dispute. Furthermore, the reasons should not tantamount to the adjudication by the Government itself because the Government under s 12(5) discharges only an administrative function and not a judicial or quasi-judicial function which is the field of the adjudicator. The refusal of the Government, therefore, will be amenable to the writ of *mandamus* if the reasons (a) are irrelevant and extraneous or (b) tantamount to adjudication.

Irrelevant and extraneous reasons:

It is now a well settled principle that the order of the Government acting under s 10(1) read with s 12(5) is an administrative order and not a judicial or quasi-judicial one.[24] If in taking the decision to refuse to refer the matter for adjudication, the Government fails to take some vital and relevant material which it ought to have taken into account for taking the decision, the decision will be liable to be quashed.[25]Even in dealing with the question as to whether it would be expedient not to make reference, the Government must not act in a punitive spirit, but must consider the question fairly and reasonably, and take into account only the relevant facts and circumstances.[26] The requirement to record and communicate reasons means reasons, which have relevance to the conclusion reached by the Government, which, when adjudged by the normal test of cause and effect, were intelligible. Refusal to make reference for the reason that the case does not disclose any legal flaw is not a valid reason.[27] For instance, the refusal to refer the dispute for adjudication on the ground that the union which raised the dispute is not a recognised union is not germane to the question in dispute.[28] The refusal of the

appropriate Government to make reference of a dispute relating to dismissal of a workman by saying that since the proceedings had been taken in accordance with the principles of natural justice or *prima facie* it was not mala fide, was held to be irrational. In *Ashwini Kumar Mohanty*, the reason for refusal to refer the dispute for adjudication that the bank was going to have regular recruitment in future, has been held to be improperly based on extraneous considerations.[29] Where the statement in the impugned order was to the effect that the state Government on consideration of the report of the conciliation officer as well as the surrounding facts and circumstances did not consider it fit to refer the dispute for adjudication, it was held that the order did not comply with the mandatory requirement of recording relevant reasons for refusing to make reference of the dispute for adjudication.[30] Similarly, where the Government refused to make reference between a corporation owned by it and its employees relating to quantum of bonus for the reason that it could not interfere in the payment of bonus more than the minimum permissible limit, it was held that refusal to refer was on a consideration which was totally on a different keel and was, therefore, reviewable.[31] Likewise, the order of the Government refusing to make reference was set aside for non-application of mind and the Government was directed to make reference.[32]

The mere statement that 'in the opinion of the state Government the dispute was not fit for reference', or 'it would not be expedient to refer the unsettled disputes to adjudication', or 'the action of the management was not mala fide', would not constitute due compliance with the requirements of this provision.[33] The Madras High Court held that where the services of a workman were terminated under the relevant Standing Order providing for automatic loss of lien of a workman who absents himself from duty for more than eight consecutive days is not an irrelevant or extraneous consideration.[34] No doubt, taking the relevant Standing Order into consideration cannot be said to be an irrelevant or extraneous consideration, but the question as to whether the workman was in fact absent for more than eight consecutive days or whether the relevant Standing Orders applied to him or not, are questions relevant to be taken into account.[35] In *Tamil Nadu JAC&TT Union*, the Government referred a dispute raised in a cluster of textile mills for adjudication. Later on, another order was issued specifying the individual mills. A few member-mills, which were parties to conciliation proceedings, were left out of the reference. These mills challenged the order of the Government by a writ petition before the Supreme Court. The court held that the dispute was an 'industry-wise dispute and not establishment-wise'; hence, these mills should also have been included in the reference and should not have been left out. Since these mills were members of the association and were parties to the conciliation proceedings, the Government should not have taken on itself the task of deciding whether these mills should or should not be governed by the general adjudication affecting all the workmen in the industry. In the circumstances, the court directed the state Government to forthwith include the mills so left out.[36] The refusal of the Government to make a reference on the ground that a temporary workman had failed to qualify for permanent recruitment in the written test was upheld by the Allahabad High Court in *Onkar Nath Kapoor*.[37] A single judge of the Madras High Court held that in refusing to refer the dispute relating to the termination of service of an apprentice on completion of two years of apprenticeship, after taking into account the relevant material considerations, the Government was not influenced by irrelevant considerations and there was no misdirection whatsoever in law.[38]

Reasons Tantamounting to Adjudication:

In *TELCO Convoy Drivers*,[39] the Supreme Court pointed out that the function of the appropriate Government is an administrative function and not a judicial or quasi-judicial function. Also, in performing this administrative function, the Government cannot delve into the merits of the dispute and take upon itself the determination of the *lis*, which would certainly be in excess of the power conferred on it by this section. To form opinion as to whether an industrial dispute 'exists' or 'is apprehended' is not the same thing as to adjudicate the dispute itself on its merits. The question as to whether the persons raising the dispute were workmen or not cannot be decided by the Government. In other words, in exercising its administrative powers under s 10(1), the Government cannot embark on detailed examination, investigation, appreciation of facts and application of law which is to be done by the adjudicatory authorities under the Act.[40] However, for forming its opinion, the Government may determine as to whether an industrial dispute 'exists' or 'is apprehended' or the claim is frivolous, bogus or put forth for extraneous and irrelevant reasons, not for justice or industrial peace and harmony.[41] The appropriate Government, before refusing to refer a dispute for adjudication, will have to apply its own mind to the question whether the punishment meted out by the management is justified by the proved misconduct. This is the field of objective adjudication by the tribunal and not the subjective satisfaction of the Government. In such a situation, the Government will not be justified to refuse to make the reference, because the workman is entitled to get the evidence as to the proof of his misconduct reviewed in such a reference as also the quantum of punishment, even if misconduct is held to have been proved.[42] The Government cannot decline to refer the dispute for adjudication simply because in its opinion based on examination of the merits of the case, it finds no substance in the same because such an approach would amount to arrogation by the Government to itself the role which properly belongs to an adjudicator.[43]

The Government is not empowered to decide the merits of the industrial dispute under the garb of giving reasons for refusal to make the reference.[44] The order of the Government refusing to make a reference will also be quashable on *certiorari*, if it has refused or failed to take into consideration the plea of the workman that his dismissal was by way of victimisation.[45] In cases of disciplinary discharge or dismissal, there is little scope left for the Government to refuse to

make reference. However, the Orissa High Court,[46] upheld the refusal of the Government to refer the dispute relating to the dismissal of the workman on the ground that the workman was not able to show that the domestic inquiry was not proper. The attention of the court does not appear to have been drawn to the provisions of s 11A which has expanded the scope of the jurisdiction of adjudication. In *Munichowdappa*, the workman was dismissed from service for having obtained employment in the army by producing false certificate. The Government of Karnataka refused to refer the dispute on the ground that the workman had produced false army certificate for getting the appointment, and the services were terminated after conducting regular inquiry and found guilty of charges framed against him'. The High Court upheld the refusal.[47] In *Syndicate Bank*, the Supreme Court *mandamus* sed the Government to reconsider the question of making reference of a dispute relating to the punishment of stoppage of three increments of the workmen which was rejected on the ground that the 'charges of misconduct against the workmen were proved in a duly constituted departmental inquiry and the penalty was imposed after following the required procedure'. The Supreme Court held that the ground for refusal to make reference was not valid. It observed:

> If such a ground were permissible it would be the easiest thing for the management to avoid a reference to adjudication and to deprive the worker of the opportunity of having the dispute referred for adjudication even if the order holding the charges of misconduct proved was unreasonable or perverse or was actuated by mala fides or even if the penalty imposed on the worker was totally disproportionate to the offence said to have been proved. The management has simply to show that it has held a proper inquiry after complying with the requisite procedure and that would be enough to defeat the worker's claim for adjudication. Such a situation cannot be countenanced by law. [48]

In a batch of writ petitions in *Ram Avtar*, the Government had declined reference in a couple of cases on the ground that it was learnt that in the first one, the services were terminated only after the charges against him 'were proved in a domestic inquiry'; and in the second, that the removal was in accordance with the procedure. The court held that in both the cases, the reasons given were irrelevant, extraneous and not germane to the determination, and tantamounted to adjudication which was impermissible. Desai J observed:

> Section 11A confers power on the tribunal to examine the case of the workmen whose service has been terminated either by discharge or dismissal qualitatively in the matter of nature of inquiry and quantitatively in the matter of adequacy or otherwise of punishment, the question of legality and validity of the inquiry has to be adjudicated upon by the tribunal in a quasi-judicial determination not by the government and the government cannot usurp this field of adjudication.[49]

In *Madhya Pradesh IK Sangh*, Khalid J, of the Supreme Court observed:

> .. . while conceding a very limited jurisdiction to the state government to examine patent frivolousness of the demands, it is to be understood, as a rule, that adjudication of demands made by workmen should be left to the tribunal to decide. Section 10 permits the 'appropriate government' to determine whether the dispute exists or is apprehended and then refer it for adjudication on merits. The demarcated functions are: (i) reference and (ii) adjudication...There may be exceptional cases in which the state government may on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Government should be very slow to attempt an examination of the demand with a view to decline reference and courts will always be vigilant whenever the government attempts to usurp the powers of the Tribunal for adjudication of valid disputes. To allow the government to do so would be to render sections 10 and 12(5) of the Industrial Disputes Act nugatory.[50]

In *Jute Mills Staff Assn*, the Patna High Court held:

> The state government's jurisdiction under s 10 of the Industrial Disputes Act to make a reference of the industrial dispute is confined to the satisfaction as to whether any industrial dispute existed or not or is apprehended or not. It has no jurisdiction to form its own opinion about the correctness or otherwise of the allegations made by either party to the dispute. It cannot come to its own conclusions on the merits of the dispute. It, however, can determine the issues which emerge from the facts placed before it but cannot record any finding to say that although a dispute has been raised and parties are at issue with respect to certain allegations of fact, yet it is not satisfied that an industrial dispute is in existence or is in offing. It shall be, in such a situation obliged to make a reference.[51]

A single judge of the Madras High Court in *Balakrishnan*, has suggested that the normal rule in cases of dismissal, discharge, termination of service or retrenchment of a workman falling under s 2A read with s 11A of the Act should be to refer the dispute for adjudication. However, in appropriate cases of exceptional nature, the Government may decline to

make a reference. The court further observed that the reasons generally shall relate to the larger interest of labour or the establishment of industrial peace in the region and not on mere merits of the case either on law or on facts.[52] In *Madhya Pradesh IK Sangh* (*supra*), the Government had rejected the demand of workmen for (i) dearness allowance and (ii) *cambal* allowance on the ground that the Government could not bear the additional burden and that the workmen were not entitled to *cambal* allowance as the same was included in the consolidated pay of the workmen. The court held that the said rejection constituted adjudication and that the Government exceeded its jurisdiction in refusing to refer the dispute. The Madras High Court struck a different note in *K Subramaniam*, where speaking for the court Natrajan J, said:

> ...The government cannot be compelled to refer every dispute for adjudication by the labour court or tribunal solely because of the additional powers conferred on the tribunal under s 11A, irrespective of the fact whether the inquiry had been held in a fair and proper manner and the finding had been rendered on the basis of evidence. We are, therefore, unable to approve the view taken by the learned single judge and hold that because of s 11A the government is bound to apply its mind to the quantum of punishment before refusing to refer a dispute for adjudication, notwithstanding the fact that no reference is called for as regards the manner in which the inquiry was held or the correctness of the findings by it.[53]

In *Port and Dock Workers*, in the facts and circumstances of the case despite the fact that Government had encroached upon the jurisdiction of the adjudicator, a single judge of the Bombay High Court declined to issue any directions for reference of the demands for adjudication which could be termed as state demands.[54] The appropriate Government is not required to write an elaborate order indicating all the reasons that weighed in its mind in refusing to make reference,[55] but it is not precluded from considering the merits of the disputed questions of law of the facts *prima facie*,, for deciding whether a dispute should be referred or not the Government has to consider whether a *prima facie* case has been made out, *ie*, an 'industrial dispute' exists or is apprehended and whether it would be expedient to make the reference.[56] A *prima facie* examination of the merits of the matter, therefore, cannot be said to be foreign to the inquiry which the appropriate Government is entitled to make.[57] A *prima facie* case does not mean a case proved to the hilt but a case which can be said to be established if the material before the Government is to be believed. In other words, the relevant consideration is whether on the basis of the material before it, is it possible for the 'appropriate Government' to arrive at the conclusion in question, and not whether that was the only conclusion which could have been arrived at on the basis of that material. In the words of Gajendragadkar J:

> The question, as to whether a case for reference has been made out, can be answered in the light of all relevant circumstances which would have a bearing on the merits of a case as well as on incidental question, as to whether a reference should, nevertheless, be made or not.[58]

For this purpose, the Government may consider the *prima facie* merits of the case by taking into account the failure report submitted by the conciliation officer under s 12(4) and also other relevant considerations which would help to decide whether making a reference would be expedient or not. For instance, where the claim, on the face of it, is patently frivolous or is clearly belated or where on *prima facie* examination, if the impact of the claim appears to be such as is likely to adversely affect the relations of employers and employees in the region, the appropriate Government may take that aspect into consideration in refusing to make the reference.[59] Such reasons would not tantamount to the adjudication of the dispute by the Government. The only requirement of s 12(5) is that when the Government declines to make the reference for such reasons, it should set out those reasons in its order of refusal to make the reference and communicate the same to the concerned parties.[60] For deciding, therefore, whether a *prima facie* case has been made out or not, the Government has to see whether there is an existing or apprehended industrial dispute and then to consider whether it would be expedient to make a reference of such dispute in the circumstances of the case.[61] However, in determining the question, 'if the dispute in question raises questions of law,' the government should not purport to reach a final decision on the question of law, because that would normally lie within the jurisdiction of the industrial tribunal.[62] For instance, the question whether the establishment to which the dispute relates is 'industry' or not, is a mixed question of fact and law, and it is not for the State Government to reach the final decision on such question. Such matter falls appropriately within the jurisdiction of industrial adjudication.[63] Furthermore, if instead of saying that the workman has no *prima facie* case, the Government says that he has no case in law, it shall be reaching a final conclusion on law.[64] Likewise, the point whether an award could be terminated in part or not being a question of law should not be decided by the appropriate Government, but must be left for tribunal to decide.[65]

Questions as to whether a dispute is an industrial dispute,[66] or whether an employee is a workman, being mixed questions of fact and law cannot be appropriately decided by the Government because their determination falls within the realm of adjudication.[67] Every person whose employment falls within the ambit of s 2(s) is a 'workman' whether he is temporary, permanent or probationer. The question that he should have worked for 240 days may be relevant for the purpose of s 25F, but it is irrelevant in deciding the question whether the dispute should be referred or not.[68] The question involving the

interpretation of rules and regulations of an establishment having far-reaching effects would require adjudication, and the Government would not be justified in rejecting the demand for reference.[69] In *Indian Oxygen,* the Government had declined to refer the dispute arising out of the termination of service of a workman for unauthorised absence from duty in accordance with the Standing Orders without inquiry. The Supreme Court held that matter required reconsideration by the Government on the merits and directed the Government to consider various aspects of the matter and pass an order as to whether or not the dispute in question required to be referred.[70] Similarly, on disputed questions of fact, the appropriate Government cannot purport to reach a final conclusion, for that again would be the province of the industrial tribunal.[71] In a case of a disciplinary action, if for the purpose of seeing whether there is a *prima facie* case for reference or not, the Government looks into the report of the inquiry officer to see whether the inquiry was regularly conducted or not, it cannot be said that the Government gave a final decision on the disputed question of fact.[72] Conversely, it is not the jurisdiction of the appropriate Government to direct reinstatement of a dismissed workman as the question as to whether a workman should be reinstated or not is a question which falls within the jurisdiction of the industrial adjudicator. Hence, such an order will tantamount to adjudication.[73] It cannot be suggested that in any decision of the Government, the element of decision, even to a limited extent, should be absent as that would make s 12(5) entirely nugatory.[74] The power vested in the Government under this provision being dependent on its own satisfaction, the writ court is only concerned to find out whether such satisfaction was, in fact reached by the Government in good faith and on consideration of the matters that are relevant and uninfluenced by extraneous or mala fide considerations. The court will not go into the conclusion of fact *prima facie* reached by the Government.[75]

The mere fact that the workmen were dissatisfied with the result of conciliation or that the management did not concede to their demands does not *ipso facto* justify the reference of dispute. A speaking order passed by the Government scrutinising the record before it to see whether the grievance was genuine or baseless, without substance, frivolous or unjustified would not tantamount to adjudication. For coming to the *prima facie* conclusion, it is within the competence of the Government to see the genuineness of the dispute.[76] In England also, the courts quash administrative acts, if those performing them have acted on extraneous considerations,[77] though they persistently deny that in judicial review they can interfere with the way in which discretion is exercised[78] or that they are acting as a court of appeal[79] and maintain that they only ensure that discretion is exercised 'properly' or 'according to law',[80] or that the administration 'is not declining jurisdiction'.[81] The actions of the administrative authorities, therefore, are investigated in judicial review, with a view to see whether they have taken into account matters which they ought not to have taken into account, or conversely have neglected to take into account vital considerations which they ought to have taken into account.[82] Sometimes, the courts have suggested that they will quash an unreasonable decision, because extraneous factors have been taken into consideration.[83] However, Lord Greene suggested 'unreasonableness' may be a head separate from 'extraneous consideration'.[84] Of late, the English courts have been extending the field of judicial review to look into the 'reasons' of the administrative orders not only for their being extraneous but also for being vague, ambiguous and 'inadequate'. In *Baldwin & Francis,* Lord Denning wistfully remarked: 'Is there a difference when the order speaks but speaks the ambiguous voice of the Oracle? This may someday call for decision!'[85] In *Re Poyser and Mills' Arbitration,* the tribunal's decision was quashed on the ground that it had not given 'adequate reasons' as required by s 12 of the Tribunal and Enquiries Act 1950.[86] Megaw J observed:

> The reasons that are set out must be reasons which are not only intelligible but which deal with the substantial points that have been raised. The courts would intervene where the reasons were substantially wrong or inadequate.[87]

Mala Fides:

A discretion to consider all relevant facts which is conferred on the Government by s 10(1) could be exercised by the Government even in dealing with s 12(5) provided of course that the said discretion is exercised *bona fide,* its final decision is based on consideration of relevant facts and circumstances, and the second part of s 12(5) is complied with. In other words, if it is admitted or proved that the refusal to make a reference is mala fide or dishonest, or is actuated by malice or the refusal is based on considerations which are wholly irrelevant, extraneous and not germane to the question in dispute, a writ of *mandamus* would be issued against it.[88] For instance, where the workmen alleged that the Government refused to make the reference because it itself was a party to the dispute and the allegation was not controverted by the Government, the order of refusal was held to be mala fide.[89] However, the mere fact that the Government does not refer a dispute cannot be sufficient to charge the Government with mala fide or dishonest intentions,[90] though the reasons stated by the Government may be considered in dealing with the question of mala fides in its order refusing to make a reference.[91]There is a presumption of constitutionality of an administrative act,[92] and the Government may and should, be presumed to act with complete propriety and without any bias while exercising the statutory functions under ss 10(1) and 12(5) of the Act.[93]The burden of proving mala fides is, therefore, on him who seeks to invalidate such an administrative act or order of the Government. However, mala fides in the sense of improper motives need not be established only by direct evidence and if bad faith would vitiate the order, the same can be deduced as a reasonable and inescapable inference from proved facts.[94] In *Rajindra Roy,* GN Ray J held that it might not be always possible to establish malice in fact in a straight-

cut manner. In an appropriate case, it is possible to draw reasonable inference of mala fide action from the pleadings, and antecedent facts and circumstances. However, there must be firm foundation of facts pleaded and established. Such inference cannot be drawn on the basis of mere insinuations or vague suggestions.[95]

(b) Directing Government to make Reference

In *KP Krishnan*, the Supreme Court issued a writ of *mandamus* to the Government directing that it should consider the question of, making or refusing to make a reference under s 12(5) ignoring the reasons for its refusal to make the reference. However, the court did not direct the Government 'to make the reference'.[1] In *BPT*, a single judge of the Bombay High Court said that it would be possible to urge in a given case that where the only grounds for refusing a reference have been found to be unsustainable, the court could direct the appropriate Government to make the reference.[2] Even after forming such opinion and being so satisfied, the Government has further to consider the question of the expediency of 'making the reference'. It is not obligatory on the part of the Government to refer each and every dispute where the workmen seek such a reference. The Government has to weigh 'the facts keeping in mind the objective of industrial peace and smooth industrial relations between the parties.[3] The AP High Court in *Non-Pensioners Assn*, held that the scope of *mandamus* is to declare a particular order of the Government as illegal and unconstitutional and to direct the Government to consider or reconsider the matter afresh. However, it cannot straightaway direct the Government to pass an order in a particular manner, *ie*, directing the Government to refer the dispute, since it is the discretion of the Government to pass orders after applying its mind to relevant factors and subject to *prima facie* satisfaction as to the existence of dispute or otherwise. In this view of law, the Bench set aside the order of the single judge directing the Government to refer the dispute as it suffered from arbitrariness and non-application of mind.[4] A number of High Courts held that the reviewing court, even if satisfied that the order refusing to make a reference is not proper or valid, cannot place itself in the position of the Government and make a reference by reason of its own satisfaction. In other words, even an erroneous view taken by the appropriate Government is not susceptible to correction by the reviewing court.[5] Nor can the reviewing court compel the appropriate Government to make a reference.[6] However, in subsequent decisions, the Supreme Court gave a go-by to this rule and itself directed the appropriate Government to refer the dispute for adjudication. In *Sankari Cement*, the court directed the Government to make a reference of the dispute for adjudication within four weeks from the date of its order.[7]

In *Nirmal Singh*, the Government was directed to refer the matter forthwith to dispose it of within two months from the receipt of its order.[8] In *K Veerarajan*, the Government was directed to refer the dispute for adjudication within one month from the date of the order of the court and further directed the labour court to dispose of the reference within four weeks from the time of the order of reference.[9] In *TELCO Convoy Drivers*, quashing the refusal order of the Government, the court directed it to make the reference of the dispute.[10] The charter of demands may contain a number of demands. Some of the demands may be genuine and some may even be of frivolous nature. Some of such demands may not even constitute an 'industrial dispute' at all, say for instance, the ideological demands. The appropriate Government may straightaway reject such demands because they will not fall within the ambit of the definition of 'industrial dispute'. if the dispute under consideration is not an 'industrial dispute' at all, the Government may justifiably refuse to make the reference.[11] However, each one of the demands of the workmen made to the employer which is connected with the employment or non-employment, or the terms of employment or with the conditions of labour of any person when made by the workmen or their union and rejected by the employer, would give rise to an 'industrial dispute.[12] A corollary to this is that the Government can decline to refer all or any of such items of dispute which in its opinion are not 'existing' or 'apprehended' industrial dispute if it is satisfied that it would not be expedient to refer such dispute. The Government, therefore, will refer only those demands which in its opinion are 'existing' or 'apprehended' industrial dispute and it is further satisfied that it would not be inexpedient to refer such disputes.

SUB-SECTION (6): PERIOD WITHIN WHICH THE REPORT SHALL BE SUBMITTED

Section 12 contemplates two types of reports, namely, (i) settlement report under sub-s (3) and (ii) failure report under sub-s (4). Sub-section (6) prescribes the period for submission of these reports. In the first instance, either of the reports is to be submitted within fourteen days or such shorter period as may be fixed by the appropriate Government. However, by virtue of the proviso to this sub-section, the time for submission of the report can be extended by such further period as may be agreed upon in writing by all the parties to the dispute. There appears to be some conflict between sub-ss (4) and (6). Under sub-s (4), the conciliation officer, in a case where no settlement has been arrived at, is required to send a full report to the appropriate Government, 'as soon as practicable after the close of the investigation'; whereas under sub-s (6), the report must be 'submitted within fourteen days of the commencement of the conciliation proceedings'.[13] This seems to be the result of careless drafting. The intendment of the legislature may, however, become clear by reading these two provisions together to mean that the report is to be submitted 'as soon as practicable' 'within fourteen days of the commencement of the conciliation proceedings'. However, a single judge of the Calcutta High Court held that the time-limit prescribed by sub-s (6) is directory and not mandatory.[14] Contravention of s 12(6) requiring submission of the report within the prescribed time may be a breach of duty on the part of the conciliation officer, but that does not affect the

legality of the proceedings which are concluded as provided in s 20(2) of the Act in view of certain decisions, laying down that the legality of the proceedings before the conciliation officer would not be affected in case he exceeds the time-limit prescribed by the section or the proviso. The proviso therefore, seems to have been rendered redundant, as there is nothing to stop a conciliation officer from continuing with the proceedings without waiting for the consent of the parties to the extension of the period.[15] In *Bombay Tyres*, the conciliation officer held 20 meetings to arrive at a negotiated settlement. However, no settlement could be arrived at. In the facts and circumstances of the case, a single judge of the Bombay High Court held that the holding of 20 meetings with the management and the union without any result clearly indicated failure of the conciliation proceedings. The failure of the conciliation officer to submit the failure report was, therefore culpable and without any justification. The court, therefore, issued *mandamus* to the conciliation officer to forward to the Government peremptorily, the failure report within one week [16]

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69 Ins by Act 35 of 1965, s 4 (wef 1-12-1965).

70 Subs by Act 36 of 1956, s 10, for 'a tribunal' (wef 10-3-1957).

71 Ins by Act 36 of 1956, s 10 (wef 17-9-1956).

72 Ins by Act 36 of 1964, s 8 (wef 19-12-1964).

73 *General Manager, Security Paper Mill v RS Sharma* 1986 Lab IC 667 [LNIND 1986 SC 39], 669 (SC), per Venkatramiah J.

74 *East Asiatic & Allied Companies v BL Shelke* (1961) 1 LLJ 162, 165 (Bom) (DB), per Mudholkar J.

75 *Suresh Vithoo Nare v Dharamsi Morarji Chemicals Co Ltd* 1991 Lab IC 1932, 1934 (Bom), per Kantharia J.

76 *Pratap Chandra Mohanty v Union of India* (1971) 2 LLJ 196, 198 (Ori) (DB), per RN Misra J.

77 *Kalinga Tubes Ltd v KT Mazdoor Sangh* 1981 Lab IC 277, 280 (Orr), per Acharya J.

78 *Sasamusa Sugar Works Ltd v State of Bihar* AIR 1955 Pat 49, per Ahmed J.

79 *Manoharan Nair v State of Kerala* (1983) 1 LLJ 13, 16 (Ker), per MP Menon J.

80 *BK Jobanputra v BS Kalelkar* (1965) 1 LLJ 543, 546 (Bom) (DB), per Tambe J.

81 *Royal Calcutta Golf Club Mazdur Union v State of West Bengal* (1957) 1 LLJ 218 [LNIND 1956 CAL 118] (Cal), per Sinha J.

82 *General Manager, Security Paper Mill v RS Sharma* 1986 Lab IC 667 [LNIND 1986 SC 39], 670 (SC), per Venkatramiah J.

83 *State Bank of India SRC v Union of India* 1992 Lab IC 1062 [LNIND 1991 PNH 235], 1066 (P&H), per Mongia J.

84 *Indal Employees Orgn v Indian Aluminum Co Ltd*, 1992 Lab IC 1237, 1240 (Ker), per Sreedharan J.

85 *KH Gandhi v RNP Sinha* (1958) 1 LLJ 82 (Pat) (DB), per Sinha J.

86 *State Bank Staff Union v SBI* (1991) 1 LLJ 163 [LNIND 1990 MAD 579], 175 (Mad) (DB), per Nainar Sundaram J.

87 *Mico Employees' Assn v State of Karnataka* (1987) 1 LLJ 300, 311 (Kant), per Bopanna J.

88 *East Asiatic & Allied Companies v BL Shelke* (1961) 1 LLJ 162 (Bom) (DB), per Mudholkar J.

89 *Workmen of VM Bus Service v Labour Officer* (1970) 2 LLJ 95 (Mad), per Alagiriswami J.

90 *Jaslok Hospital & Research Centre v BV Chavan* 1983 Lab IC 1100, 1105 (Bom), per Pendse J.

91 *Jaswant Sugar Mills Ltd, Meerut v Lakshmi Chand* (1963) 1 LLJ 524 [LNIND 1962 SC 308] (SC), per Shah J.

92 *Wadhu Mal Agnani v Rulia Ram Sharma* (1965) 1 LLJ 659 (Punj), per Khanna J.

93 *Jaswant Sugar Mills Ltd, Meerut v Lakshmi Chand* (1963) 1 LLJ 524 [LNIND 1962 SC 308] (SC), per Shah J.

94 *Employees, Caltex (I) Ltd v Col* (1959) 1 LLJ 520, 524 (Mad), per Balakrishna Ayyar J.

95 *Madhvan Kutty v Union of India* (1982) 2 LLJ 212, 213 (Ker), per Khader J.

96 *Royal Calcutta GCM Union v State of West Bengal* (1957) 1 LLJ 218 [LNIND 1956 CAL 118] (Cal), per Sinha J.

97 *Jaswant Sugar Mills Ltd, Meerut v Lakshmi Chand* (1963) 1 LLJ 524 [LNIND 1962 SC 308] (SC), per Shah J.

1 *Royal Calcutta Golf Club Mazdur Union v State of West Bengal* (1957) 1 LLJ 218 [LNIND 1956 CAL 118] (Cal), per Sinha J.

2 *Paints Employees' Union v MD Nail* (1966) 1 LLJ 579 (Bom) (DB), per Chainani CJ.

3 *Sasamusa Sugar Works Ltd v State of Bihar* AIR 1955 Pat 49, per Ahmad J.

4 *Mico Employees' Assn v State of Karnataka* (1987) 1 LLJ 300, 311 (Kant), per Bopanna J.

5 *General Manager, Security Paper Mill v RS Sharma* 1986 Lab IC 667 [LNIND 1986 SC 39], 669 (SC), per Venkatramiah J.

6 *Tamil Nadu NEE Union v Mgmt. TIC of India Ltd* (1992) 1 LLJ 506, 517 (Mad), per Bakthavatsalam J.

7 *Mysore Sugar CE Union v Commr of Labour* (1968) 1 LLJ 491, 495 (Mys) (DB), per Somnath Ayyar J.

8 *Royal Calcutta Golf Club Mazdur Union v State of West Bengal* (1957) 1 LLJ 218 [LNIND 1956 CAL 118] (Cal), per Sinha J.

9 *Krishnarajendra MW Union v Conciliation Officer* (1968) 1 LLJ 504, 507 (Mys) (DB), per Tukol J.

10 *TK Padmanabha Menon v PV Kora* 1968 Lab IC 1134 (Ker), per Isaac J.

11 *Kerala Minerals Employees Congress v ACL* (1983) 1 LLJ 424 [LNIND 1982 KER 250] (Ker), per UL Bhat J.

12 *Calcutta Electric Supply Corpn Ltd v PC Sen* 1978 Lab IC 1395 (Cal) (DB), per SK Datta J.

13 *Britannia Biscuit Co Ltd Employees' Union v ACL* (1983) 1 LLJ 181, 190 (Mad), per Padmanabhan J.

14 *Krishnarajendra MW Union v Conciliation Officer* (1968) 1 LLJ 504, 512-13 (Mys) (DB), per Tukol J.

15 *Praga Tools Ltd v Praga Tools Ltd, Mazdoor Sabha* (1975) 1 LLJ 218, 221 (AP), per Obul Reddi J.

16 *Kesri Printing Press v Ratan Singh* (1992) 1 LLJ 759, 761 (P&H) (DB), per Mongia J.

17 *Mgmt of Natarajan Engg Works v G Naicker* 1970 Lab IC 334 (Mad) (DB), per Anantanarayanan CJ.

18 *Krishna Gold & Silver Thread Mills v Union of India* 1980 Lab IC 887, 892 (Del), per Leila Seth J.

19 *ITC Employees Assn, Bangalore v State of Karnataka* (1981) 1 LLJ 431 (Kant), per Bopanna J.

20 *Secretary, Plantation EUSI v Estate SUSI* 1991 Lab IC 1393, 1403 (Ker) (DB), per KPB Marar J.

21 *Britannia Biscuit Co Ltd Employees' Union v ACL* (1983) 1 LLJ 181, 190 (Mad), per Padmanabhan J.

22 *Manoharan Nair v State of Kerala* (1983) 1 LLJ 13, 16 (Ker), per MP Menon J.

23 *Tiruchirapalli HCBE Union v Jt Registrar of CS* (1992) 1 LLJ 747 [LNIND 1992 MAD 79] (Mad) (DB), per Nainar Sundaram Ag CJ.

24 *Steel Authority of India v Madhusudan Das* AIR 2009 SC 1153 [LNIND 2008 SC 2075]: (2009) 3 LLJ 54 [LNIND 2008 SC 2075] : 2008 (15) SCALE 39 [LNIND 2008 SC 2075] :, (2008) 15 SCC 560 [LNIND 2008 SC 2075], per SB Sinha J.

25 *Umesh Kumar Nagpal v. State of Haryana* (1994) 4 SCC 138 : 1994 (2) LLN 420.

26 *Mohan Mahto v Central Coalfields Ltd,* AIR 2008 SC 39 : (2007) 8 SCC 549, per Sinha J.

27 *KV Raja Lakshmiah v State of Mysore* AIR 1967 SC 993 [LNIND 1966 SC 288]: (1967) 2 LLJ 434 [LNIND 1966 SC 288] SC, per Mitter J.

28 *RN Bose v Union of India* AIR 1970 SC 470 [LNIND 1969 SC 386]: 1970 Lab IC 402 : (1970) 1 SCC 84 [LNIND 1969 SC 386], per SM Sikri J.

29 *State of Orissa v. P Samantaray* AIR 1976 SC 2617, per Singhal J.

30 *Karnataka Power Corporation v K Thangappan* AIR 2006 SC 1581 [LNIND 2006 SC 239]: (2006) 2 LLJ 421 [LNIND 2006 SC 239] : 2006 (4) SCALE 56 [LNIND 2006 SC 239] : (2006) 4 SCC 322 [LNIND 2006 SC 239], per Pasayat J.

31 *Workmen of VM Bus Service v Labour Officer* (1970) 2 LLJ 95 (Mad), per Alagiriswami J.

32 *ITC Employees' Assn, Bangalore v State of Karnataka* (1981) 1 LLJ 431 (Kant), per Bopanna J.

33 *Kartikeswar Panda v State of Orissa* (1971) 1 LLJ 70, 72 (Ori) (DB), per Ray J.

34 *Praga Tools Ltd v Praga Tools Ltd Mazdoor Sabha* (1975) 1 LLJ 218, 220-21 (AP), per Obul Reddi J.

35 *Philips Workers' Union v Philips India Ltd* (2000) 4 LLN (Bom) (DB), per Chandrachud J.

36 *Devdas S Amin v State of Maharashtra* (2001) 1 LLN 645 (Bom) (DB), per Daga J.

37 *M Sundaramoorthy v Commissioner of Labour* (2002) 2 LLN 1167 (Mad), per Rajan J.

38 *Ramesh S & Ors v Commissioner of Labour* (2010) 1 LLJ 348 (Mad .).

39 *Western India Match Co v WIMCO Workers' Union* (1970) 2 LLJ 256 [LNIND 1970 SC 4] (SC), per Shelat J.

40 *Raju's Cafe v IT* (1951) 1 LLJ 218 (Mad), per Rajamannar CJ.

41 *State of Bombay v KP Krishnan* (1960) 2 LLJ 592 [LNIND 1960 SC 125], 599-601 (SC), per Gajendragadkar J.

42 *State of Bihar v DN Ganguly* (1958) 2 LLJ 634 [LNIND 1958 SC 92], 638 (SC), per Gajendragadkar J.

43 *Workmen v UTI Cycles of India Ltd* (1995) 2 LLJ 688, 699 (SC).

44 *Alekh Bihari Rout v Union of India* (2001) 2 LLN 513 (Ori), per Pasayat ACJ.

45 *Hospital Employees Union v Govt of NCT of Delhi* (2002) 3 LLN 356 (Del), per Sarin J.

46 *Sekhar Rudra v. Oil India Ltd* (2003) 2 LLJ 238 (Gau), per Ranjan Gogoi J.

47 *Pix Transmissions Ltd v State of Maharashtra* (2000) 4 LLN 1008 (Bom), per Khanwilkar J.

48 *Bombay Port Trust Employees Union v Union of India* (1999) I LLJ 175(Bom), per Lodha J.

49 *Ramaswamy Palledar v Government of NCT of Delhi* (2001) 1 LLN 223 (Del), per Sikri J.

50 *Dhenkanal Mehentar Sanghatan v State of Orissa* (2009) 3 LLJ 86 [LNIND 2008 ORI 75] : 107 (2009) CLT 189 (Ori), per Biswal J.

51 *Workmen of Oswal Weaving Factory v State of Punjab* (1967) 1 LLJ 557, 566 (Punj) (DB), per Narula J.

52 *Kunjuraman Nair v Secy, Government* 1978 Lab IC 1169, 1171 (Ker), per Chandrashekhar Menon J.

53 *Shaw Wallace & Co Ltd v State of Tamil Nadu* (1988) 1 LLJ 177 [LNIND 1987 MAD 333], 186 (Mad) (DB), per Srinivasan J.

54 *Mgmt. of Netha Spg Mills v Govt of AP* 1990 Lab IC 451, 453 (AP), per K Ramaswamy J.

55 *Moorco (India) Ltd v Tamil Nadu* (1999) 1 LLN 484 (Mad), per Venkatachalam J.

56 *Kamgar Utkarsha Sabha v Ghatge Patil Transport Ltd* (1999) 1 LLJ 838 [LNIND 1998 BOM 750] (Bom) (DB).

57 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 354-55 (SC), per Gajendragadkar J.

58 *State of Bombay v KP Krishnan* (1960) 2 LLJ 592 [LNIND 1960 SC 125], 600 (SC), per Gajendragadkar J.

59 *NDDB Employees' Union v State of Gujarat* (1995) 1 LLJ 1,3 (Guj) (DB), per Mehta J.

60 *Harbanslal v Labour Commissioner* (1998) 2 LLN 369 (P&H), per Sat Pal J.

61 *Sharad Kumar v Govt of NCT* (2002) 2 LLN 872 (SC), per Mohapatra J.

62 *Tamil Nadu APEU v Nuclear Power Corporation* (2001) 1 LLN 468 (Mad), per Kalifulla J.

63 *Vasudevan v Government of Tamil Nadu* (1998) 2 LLN 581 (Mad), per Sathasivam J.

64 *Sukhdev Kumar v Union of India* (2000) 1 LLJ 1001 (P&H) (DB), per Garg J.

65 *P Mallesha v Union of India* (1999) 1 LLN 1013 (Kant) (DB), per Ashok Bhan J.

66 *Gen Secy, Delhi Mazdoor Sangh v Indian Airlines* (1999) 2 LLN 291 (Del), per Mudgal J.

67 *Ramruch Pande v State of Maharashtra* (2002) 4 LLN 253 (Bom) (DB), per Lodha J.

68 *Rajivbhai K Davera v Union of India* (2008) 2 LLJ 1156,(Guj.).

69 *Sukhdev Kumar v Union of India* (1999) 2 LLN 534 (P&H) (DB), per Garg J.

70 *Canara Bank Staff Union v Union of India* (1998) 1 LLN 893 (Ker), per Lakshmanan J.

71 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 354-55 (SC), per Gajendragadkar J.

72 *State of Bombay v KP Krishnan* (1960) 2 LLJ 592 [LNIND 1960 SC 125], 600 (SC), per Gajendragadkar J.

73 *Andrew Yule & Co CS Union v Mgmt.* (1996) 1 LLJ 524, 529 (Cal) (DB), per NK Bhattacharya J.

74 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 354-55 (SC), per Gajendragadkar J.

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84 *Shaw Wallace & Co Ltd v State of Tamil Nadu* (1988) 1 LLJ 177 [LNIND 1987 MAD 333], 195 (Mad) (DB), per Srinivasan J.

85 *Hira Cement Workers Union v State of Orissa* (2001) 2 LLN 516 (Orr), per Naidu J.

86 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 354-55 (SC), per Gajendragadkar J.

87 *Workman of Sundaram Industries Ltd v Mgmt.* (1997) 2 LLJ 1090 [LNIND 1997 MAD 792] (Mad) (DB), per Lakshmanan J.

88 *Maize Products v Gujarat Kamgar Panchayat* (2003) 4 LLJ 1011 (Guj), per PB Majumdar J.

89 *Babu Lal v State Bank of Bikaner and Jaipur* (2002) 1 LLJ 145 (Raj), per Gyan Sudha Misra J.

90 *State of Bombay v KP Krishnan* (1960) 2 LLJ 592 [LNIND 1960 SC 125], 602 (SC), per Gajendragadkar J.

91 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 358 (SC), per Gajendragadkar J.

92 *Hochtief Gammon v State of Orissa* (1975) 2 LLJ 418 [LNIND 1975 SC 322], 428 (SC), per Alagiriswami J.

93 *Engineering Staff Union v State of Bombay* (1959) 1 LLJ 479 [LNIND 1958 BOM 126], 495 (Bom) (DB), per Chagla CJ.

94 *Coimbatore DTMS Union v State of Madras* (1967) 2 LLJ 407, 411 (Mad), per Kailasam J.

95 *National Union of Comml. Employees v State of Maharashtra* (1968) 2 LLJ 169 (Bom), per Thakker J.

96 *Dalmianagar Mazdoor Union v State of Bihar* (1969) 1 LLJ 358 (Pat) (DB), per Untwalia J.

97 *State of Bombay v KP Krishnan* (1960) 2 LLJ 592 [LNIND 1960 SC 125] (SC), per Gajendragadkar J.

1 *Workmen of Oswal Weaving Factory v State of Punjab* (1967) 1 LLJ 557, 566 (Punj) (DB), per Narula J.

2 *Engineering Staff Union v State of Bombay* (1959) 1 LLJ 479 [LNIND 1958 BOM 126], 494 (Bom) (DB), per Chagla CJ.

3 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 355 (SC), per Gajendragadkar J.

4 *Workmen of J & P Coats (I) Pvt Ltd v State of Kerala* 1978 Lab IC 265, 267 (Ker) (DB), per Eradi J

5 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 355 (SC), per Gajendragadkar J.

6 *Engineering Staff Union v State of Bombay* (1959) 1 LLJ 479 [LNIND 1958 BOM 126], 493 (Bom) (DB), per Chagla CJ.

7 *Allcroft v Lord Bishop of London, Lighton* (1891) AC 666, 681 observation of Lord Herschell.

8 *Engineering Staff Union v State of Bombay* (1959) 1 LLJ 479 [LNIND 1958 BOM 126], 493 (Bom) (DB), per Chagla CJ.

9 *V Shivshankar v State of Karnataka* 1981 Lab IC 648, 651 (Kant), per Sabhahit J.

10 *Sri Chitra Mills Workers' Union v State of Kerala* (1958) 1 LLJ 295 (Ker), per MS Menon J.

11 *Dalmianagar Mazdoor Union v State of Bihar* (1969) 1 LLJ 358, 361-62 (Pat) (DB), per Untwalia J.

12 *Western India Match Co v WIMCO Workers' Union* (1970) 2 LLJ 256 [LNIND 1970 SC 4] (SC), per Shelat J.

13 See notes and comments under s 10(1).

14 *Wings Wear Corpn v Workmen of Wings Wear Corpn* 1989 Lab IC 974, 978 (Del) (DB), per Saharya J.

15 *Workmen of J & P Coats (I) Pvt Ltd v State of Kerala* 1978 Lab IC 265, 267 (Ker) (DB), per Eradi J.

16 *Barauni TSM Union v State of Bihar* 1977 Lab IC 483, 488 (Pat) (DB), per HL Agrawal J.

17 *Nirmal Singh v State of Punjab* 1984 Lab IC 1312 [LNIND 1984 SC 203]-13 (SC), per Chandrachud CJI.

18 *State of Bombay v KP Krishnan* (1960) 2 LLJ 592 [LNIND 1960 SC 125], 599-600 (SC), per Gajendragadkar J.

19 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305] (SC), per Gajendragadkar J.

20 *Workmen of Oswal Weaving Factory v State of Punjab* (1967) 1 LLJ 557, 566 (Punj) (DB), per Narula J.

21 *State of Bombay v KP Krishnan* (1960) 2 LLJ 592 [LNIND 1960 SC 125]. 602 (SC), per Gajendragadkar J.

22 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 355 (SC), per Gajendragadkar J.

23 *Barauni TSM Union v State of Bihar* 1977 Lab IC 483, 486-7 (Pat) (DB), per HL Agrawal J.

24 *State of Madras v CP Sarathy* (1953) 1 LLJ 174 [LNIND 1952 SC 84] (SC), per Patanjali Sastri CJI.

25 *R v Paddington VO ex p PP Corpn Ltd* [1965] 2 All ER 836, 842 (CA), per Lord Denning.

26 *Kunjuraman Nair v Secy to Govt.* 1978 Lab IC 1169 -70 (Ker), per Chandrashekhara Menon J.

27 *Workmen of CC of Commerce v State of Kerala* (1976) 2 LLJ 108 (Ker), per Subramoniam Poti J.

28 *Dalmianagar MS Sangh v State of Bihar* (1974) 1 LLJ 35 -36 (Pat) (DB).

29 *Ashwini Kumar Mohanty v BM, State Bank of B &J* 1992 Lab IC 1780, 1786 (Ori) (DB), per Jagadeb Roy J.

30 *Barauni TSM Union v State of Bihar* 1977 Lab IC 483, 488 (Pat) (DB), per HL Agrawal J.

31 *Workmen of Punjab DDC Ltd v State of Punjab* 1982 Lab IC 1273, 1275 (P&H), per Punchhi J.

32 *Bharat Petroleum Corpn Employees Union v HN Thadani* 1991 Lab IC 1183, 1187 (Bom), per Daud J.

33 *Barauni TSM Union v State of Bihar* 1977 Lab IC 483, 488 (Pat) (DB), per HL Agrawal J.

34 *KN Vellayan v Government of Tamil Nadu* (1979) 2 LLJ 186 [LNIND 1979 MAD 67] (Mad) (DB), per Ramanujam J.

35 *Delhi Cloth and General Mills Ltd v Shambhu Nath Mukherjee* (1978) 1 LLJ 1 [LNIND 1977 SC 280] (SC), per Goswami J.

36 *Tamil Nadu JAC &TT Union v Govt of Tamil Nadu* (1987) 1 LLJ 105 [LNIND 1986 SC 264] (SC), per Chinnappa Reddy J.

37 *Onkar Nath Kapoor v Union of India* 1979 Lab IC 1341 (All) (DB), per KN Singh J.

38 *R Vasantha Selvakumari v State of Tamil Nadu 1985 Lab IC* 1064 (Mad), per Ratnam J.

39 *TELCO CD Mazdoor Sangh v State of Bihar* 1989 Lab IC 1546, 1548 (SC), per MM Dutt J.

40 *NDDB Employees' Union v State of Gujarat* (1995) 1 LLJ 1, 3 (Guj) (DB), per Mehta J.

41 *Ram Avtar Sharma v State of Haryana* (1985) 2 LLJ 187 [LNIND 1985 SC 122], 191 (SC), per Desai J.

42 *K Ramaswamy v Government of Tamil Nadu* (1979) 2 LLJ 304 (Mad), per Padmanabhan J.

43 *Chandra Pratap Singh v Uttar Pradesh SCC Ltd* 1988 Lab IC (NOC) 33 (All) (DB).

44 *Wings Wear Corpn v Workmen of Wings Wear Corpn* 1989 Lab IC 974, 978 (Del) (DB), per Saharya J.

45 *Workmen of WW Corpn v Lieutenant Governor, Delhi* 1984 Lab IC 798, 800 (Del), per GC Jain J.

46 *Radhshyam Rout v State of Orissa* (1979) 2 LLJ 396 (Ori) (DB), per RN Mishra J.

47 *C Munichowdappa v State of Karnatak* a (1985) 1 LLJ 356 (Kant) (DB), per Murlidhar Rao J.

48 *Workmen of Syndicate Bank v Govt of India* (1985) 1 LLJ 93 [LNIND 1984 SC 301]-94 (SC).

49 *Ram Avtar Sharma v State of Haryana* (1985) 2 LLJ 187 [LNIND 1985 SC 122] (SC), per Desai J.

50 *Madhya Pradesh Irrigation Karmachari Sangh v State of MP* 1985 Lab IC 932 (SC), per Khalid J.

51 *Jute Mills Staff Assn v State of Bihar* 1991 Lab IC 337, 339 (Pat) (DB)

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52 *N Balakrishnan v Government of Tamil Nadu* (1987) 2 LLJ 43 (Mad), per Ramaswami J.

53 *Government of Tamil Nadu v K Subramaniam* 1987 Lab IC 387, 389-90 (Mad) (DB), per Natarajan J.

54 *All India P&DWF v Union of India* (1989) 2 LLJ 600, 607-08 (Bom), per Ashok Agarwai J.

55 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 355 (SC), per Gajendragadkar J.

56 *Karlikeswar Panda v State of Orissa* (1971) 1 LLJ 70, 73 (Ori) (DB), per Ray J.

57 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 355 (SC), per Gajendragadkar J.

59 Ibid.

60 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 354-55 (SC), per Gajendragadkar J.

61 *Workmen of Oswal Weaving Factory v State of Punjab* (1967) 1 LLJ 557, 566 (Punj) (DB), per Narula J.

62 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 354 (SC), per Gajendragadkar J.

63 *Rajkumari v State of Himachal Pradesh* 1989 Lab IC 841, 844 (HP) (DB), per Desai CJ.

64 *HM Venkatachaliah v State of Mysore* (1971) 1 LLJ 41, 42 (Mys) (DB), per Somnath Iyer J.

65 *Amritsar Textile Clerks' Assn v State of Punjab* (1968) 2 LLJ 343 (Punj), per JN Kaushal J.

66 *Karnataka CCE Assn v State of Karnataka* 1989 Lab IC 1022 (Kant), per Chandrakantaraj Urs J.

67 *Nirmal Singh v State of Punjab* 1984 Lab IC 1312 [LNIND 1984 SC 203]-13 (SC), per Chandrachud CJI.

68 *Kerala PM&M Workers' Federation v State of Kerala* (1993) 1 LLJ 401, 403 (Ker), per KA Nayar J.

69 *Federation of IBE Union v Government of India* 1991 Lab IC 65 (Mad) (DB).

70 *Indian Oxygen Employees' Union v State of TN* (1992) 1 LLJ 583, 592 (Mad) (DB), per Janarthanam J.

71 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 354 (SC), per Gajendragadkar J.

72 *TS Sivasubrahmanyam v State of Madras* (1968) 2 LLJ 89 (Mad), per Venkatadari J.

73 *Onkar Chand Dutta v State of Himachal Pradesh* 1989 Lab IC 470, 475 (HP) (DB), per PD Desai CJ.

74 *Engineering Staff Union v State of Bombay* (1959) 1 LLJ 479 [LNIND 1958 BOM 126] (Bom) (DB), per Chagla CJ.

75 *Secretary, MMT Employees Union v State of Kerala* (1977) 2 LLJ 79, 81 (Ker) (DB), per Eradi J.

76 *Mypower MW Union v Secretary-and-Commr, SWD* 1996 Lab IC 107, 109 (Kant), per Saldhanha J.

77 *SA de Smith, Judicial Review of Administrative Action*, pp 297-300.

78 *DR Fraser & Co Ltd v Minister of National Revenue* [1949] AC 24, 36, per Lord Macmillan J.

79 *Ex p Tebbit* [1917] 116 LT 85 per Lord Reading CJ.

80 *Roberts v Hopwood* [1925] AC 578, 600, per Lord Atkinson.

81 *R v Bowman* [1898] 1 QBD 663, 666, per Wills J.

82 *R v Paddington VO, ex p PP Corpn Ltd* [1965] 2 All ER 836, 842 (CA), per Lord MR Denning.

83 *Roberts v Hopwood* [1925] AC 578, 600, per Lord Atkinson.

84 *Associated PPH Ltd v Wednesbury Corpn* [1948] 1 KB 223, 233-34 (CA), per Lord MR Greene.

85 *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] 2 All ER 433, 447 (HL), per Lord Denning.

86 *Mgmt of Natarajan Engg Works v G Naicker* 1970 Lab IC 334 (Mad) (DB), per Anantanarayanan CJ.

87 *In Re Poyser and Mills' Arbitration* [1963] 2 WLR 1309.

88 *State of Bombay v KP Krishnan* (1960) 2 LLJ 592 [LNIND 1960 SC 125], 600 (SC), per Gajendragadkar J.

89 *Central Regional WK Sangh v State of UP* 1972 Lab IC 75 -76 (All), per Gulati J.

90 *Royal Calcutta Golf Club Mazdoor Union v State of West Bengal* (1957) 1 LLJ 218 [LNIND 1956 CAL 118] (Cal), per Sinha J.

91 *Ramachandra Abaji Pawar v State of Bombay* AIR 1952 Bom 293 [LNIND 1951 BOM 176] (DB), per Chagla CJ.

92 *Harman Singh v Regional Transport Authority* [1954] SCR 371 [LNIND 1953 SC 105], 377, per Mahajan J.

93 *Workers and Staff Assn of GSF v State of Mysore* 1971 Lab IC 79, 82 (Mys) (DB), per Narain Pai J.

94 *Pratap Singh v State of Punjab* (1966) 1 LLJ 458 [LNIND 1963 SC 211], 464 (SC), per Ayyanagar J.

95 *Rajindra Roy v Union of India* 1993 Lab IC 446 (SC), per GN Ray J.

1 *State of Bombay v KP Krishnan* (1960) 2 LLJ 592 [LNIND 1960 SC 125], 596, 604 (SC), per Gajendragadkar J.

2 *Bombay Port Trust Employees' Union v Union of India* (1988) 2 LLJ 39, 41 (Bom), per Bharucha J.

3 *Workmen v UTI Cycles of India Ltd* (1995) 2 LLJ 688, 699 (SC).

4 *ITC Ltd v Non-Pensioners Assn* (1996) 1 LLJ 1106, 1110 (AP) (DB), per Hanumanthappa J.

5 *Bombay Union of Journalists v State of Bombay* (1961) 1 LLJ 727, 731 (SC), per Mudholkar J.

6 *Workmen of OWCP & Sales Society v State of Madras* (1966) 2 LLJ 887 (Mad), per Kailasam J.

7 *Sankari Cement ATM Sangam v Govt of Tamil Nadu* (1983) 1 LLJ 460 [LNIND 1981 SC 415] (SC), per Desai J.

8 *Nirmal Singh v State of Punjab* 1984 Lab IC 1312 [LNIND 1984 SC 203]-13 (SC), per Chandrachud CJI.

9 *K Veerarajan v Government of Tamil Nadu* (1987) 1 LLJ 209 [LNIND 1987 SC 49], 214 (SC), per Ranganath Misra J.

10 *TELCO Convoy DM Sangh v State of Bihar* 1989 Lab IC 1546, 1548 (SC), per MM Dutt J.

11 *Kanshahal Mazdoor Union v State of Orissa* (1995) 1 LLJ 295, 297 (Ori) (DB), per SK Mohanty J.

12 *Papanasam Labour Union v State of Madras* (1959) 1 LLJ 526 [LNIND 1958 MAD 158] (Mad), per Balakrishnan Ayyer J.

13 *Colliery Mazdoor Congress v New Birbhum Coal Co Ltd* [1952] LAC 219(LAT).

14 *Sree Type Foundry v State of West Bengal* (1962) 1 LLJ 715 [LNIND 1961 CAL 172] (Cal), per BN Banerjee J.

15 *ITC Employees Assn v State of Karnataka* (1981) 1 LLJ 431, 449 (Kant), per Bopanna J.

16 *All India Bombay Tyres IEF v CB Dinagre* 1993 Lab IC 817 (Bom), per K Sukumaran J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

S. 13. Duties of Board.—

(1) Where a dispute has been referred to a Board under this Act, it shall be the duty of the Board to endeavour to bring about a settlement of the same and for this purpose the Board shall, in such manner as it thinks fit and without delay, investigate the dispute and all matters affecting the merits and the right settlement thereof and may do all such things as it thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute.

(2) If a settlement of the dispute or of any of the matters in dispute is arrived at in the course of the conciliation proceedings, the Board shall send a report thereof to the appropriate Government together with a memorandum of the settlement signed by the parties to the dispute.

(3) If no such settlement is arrived at, the Board shall, as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting for the proceedings and steps taken by the Board for ascertaining the facts and circumstances, relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, its findings thereon, the reasons on account of which, in its opinion, a settlement could not be arrived at and its recommendations for the determination of the dispute.

(4) If, on the receipt of a report under sub-section (3) in respect of a dispute relating to a public utility service, the appropriate Government does not make a reference to a [17][Labour Court, Tribunal or National Tribunal] under section 10, it shall record and communicate to the parties concerned its reasons therefor.

(5) The Board shall submit its report under this section within two months of the date [18][on which the dispute was referred to it] or within such shorter period as may be fixed by the appropriate Government:

Provided that the appropriate Government may from time to time extend the time for the submission of the report by such further periods not exceeding two months in the aggregate:

Provided further that the time for the submission of the report may be extended by such period as may be agreed on in writing by all the parties to the dispute.

LEGISLATION

This section is somewhat analogous to s 7 of the repealed Trade Disputes Act, 1929, and it was enacted in the original Industrial Disputes Act of 1947. The subsequent amendments of section have been indicated in the footnotes to the text of the section.

SCOPE OF POWERS AND DUTIES OF BOARDS

'Board' has been defined in s 2(c). 'Conciliation proceedings' has been defined in s 2(e) to mean any proceeding held by a conciliation officer or Board under this Act. The scope of the powers and duties of Board under s 13 is much larger than

the scope of the powers and duties of conciliation officer under s 12.

SUB-SECTION (1): DUTY TO BRING ABOUT THE SETTLEMENT

Unlike a conciliation officer under s 12(1), a Board under sub-s (1) of s 13 acquires jurisdiction to start conciliation proceedings only on reference being made to it by the 'appropriate Government' under s 10(1). On such reference being made, the Board shall commence conciliation proceedings with a view to bring about an amicable settlement of the dispute referred to it. Like a conciliation officer, the Board also endeavours to bring about a settlement of a dispute. Its powers are wider than those of a conciliation officer, but its functions are substantially the same.[19] In the course of its endeavour to bring about a settlement, the Board has been vested with the powers:

(i) to investigate the dispute and all matters affecting the merits and the right settlement of the dispute and for this purpose to act without delay and in such manner as it thinks fit;

(ii) to induce the parties to come to a fair and amicable settlement of the dispute; and

(iii) to do all such things as it may think fit for that purpose.

SUB-SECTION (2): SETTLEMENT OF DISPUTES

This sub-section is analogous to sub-s (3) of s 12. [See notes and comments under sub-s (3) of s 12].

SUB-SECTION (3): FAILURE REPORT

This sub-section is analogous to s 12(4), but its requirements are much wider than those of s 12(4). [See notes and comments under s 12(4)]. Under this sub-section, as soon as practicable after the close of the investigation under sub-s (1), the Board has to make a full report of the appropriate Government setting forth:

(i) the steps taken by it for ascertaining the facts and circumstances relating to the dispute;

(ii) the steps taken by it for bringing about a settlement of the dispute;

(iii) a statement of the facts and circumstances ascertained by it in the course of investigation;

(iv) its findings on the facts and circumstances ascertained;

(v) the reasons on account of which, in the opinion of the board, a settlement could not be arrived at; and

(vi) its recommendations for the determination of the dispute.

SUB-SECTION (4): DUTY TO RECORD AND COMMUNICATE REASONS

Under this sub-section, if on receipt of the failure-report made by the Board in respect of a dispute relating to a public utility service, the appropriate Government does not make a reference to a labour court, tribunal or national tribunal under s 10, it shall record and communicate to the parties concerned its reasons therefor. The provisions of s 13 considered as a whole clearly indicate that the power to make a reference in regard to dispute referred to the board is undoubtedly to be found in s 10(1). In regard to non-public utility services, there is no 'express provision made authorising the Government to make a reference. In case of a public utility service, it is open to the Government to refer a dispute under s 10(1) to a board, and if the board fails to bring about a settlement between the parties, the Government will be entitled either to refer or to refuse to refer the dispute for adjudication under s 10(1) of the Act. The second proviso to s 10(1) enjoins upon the appropriate Government to make a reference where a dispute relates to a public utility service and a notice under s 22 has been given.

SUB-SECTION (5): PERIOD WITHIN WHICH THE REPORT SHALL BE SUBMITTED

This sub-section prescribes, for the board, the maximum period of two months for submitting its report from the date on which the dispute was referred to it. The first proviso empowers the appropriate Government to extend the time maximum by another two months *suo motu* and the second proviso empowers it to further extend the period if all the parties agree to that in writing.

17 Subs by Act 36 of 1956, s 11, for 'tribunal' (wef 10-3-1957).

18 Subs by Act 40 of 1951, s 6, for 'of the notice under section 22 ' (wef 26-5-1951).

19 *State of Bombay v KP Krishnan* (1960) 2 LLJ 592 [LNIND 1960 SC 125], 601 (SC) : AIR 1960 SC 1223 [LNIND 1960 SC 125]: 1961 (63) Bom LR 127, per Gajendragadkar J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

S. 14. Duties of Courts.—

A Court shall inquire into the matters referred to it and report thereon to the appropriate Government ordinarily within a period of six months from the commencement of its inquiry.

LEGISLATION

This section was enacted in the original Act of 1947 and is based on s 5 of the repealed Trade Disputes Act 1929 and it has not undergone any amendment. 'Court' has been defined as a court of inquiry in s 2(f) of the Act.

JURISDICTION AND DUTIES OF COURTS OF INQUIRY

The court acquires jurisdiction on a reference made to it under s 10(1). Courts of inquiry are constituted under s 6 for inquiring into 'any matter appearing to be connected with or relevant to an industrial dispute'. The procedure and powers of the court have been dealt with under s 11. The duties of a court of inquiry as laid down in s 14 have to be considered in the light of s 11. The first duty of the court is to inquire into the matter referred to it. It is not that all sorts of matters can be referred to the court of inquiry. The language of s 6 makes it clear that such court is constituted for the purpose of inquiring into 'any matter appearing to be connected with or relevant to an industrial dispute'. In other words, it is only those matters which are appearing to be connected with or relevant to an industrial dispute that can be referred under s 10(1) to a court of inquiry. The second duty of the court is to make a report to the appropriate Government on the inquiry held by it on the matters referred to it, ordinarily within a period of six months from the date of commencement of the inquiry. The word 'ordinarily' qualifying 'the period of six months' appears to indicate that the period can be extended. Even if the period is not extended, the inquiry made beyond the period of six months will not be rendered illegal as the provision in this respect appears to be only directory.

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

[20][S. 15. Duties of Labour Courts, Tribunals and National Tribunals.—

Where an industrial dispute has been referred to a Labour Court, Tribunal or National Tribunal for adjudication, it shall hold its proceedings expeditiously and shall,[21] [within the period specified in the order referring such industrial dispute or the further period extended under the second proviso to sub-section (2A) of section 10], submit its award to the appropriate Government.]

ADJUDICATORY BODIES UNDER SECTION 15

There are three adjudicatory authorities under the Act, *viz*:

(i) labour courts

(ii) Industrial tribunals

(iii) National tribunals

These authorities are discharging functions similar to those of courts, although they are not courts in the technical sense of the word.[22] To use a well-known expression they have 'all the trappings of court' and perform functions which cannot but be regarded as judicial.[23] The decisions of these authorities are not 'awards' in the sense in which that term was used in the Arbitration Act 1940. An 'award' under this Act cannot be filed in court, nor is there any provision for applying to the court to set it aside. All considerations that apply to an 'award' under this Act, cannot be said to apply to an award made under the Arbitration Act.[24]

DUTIES OF TRIBUNALS, *ETC*

The duties of tribunals, *etc*, under s 15 are threefold:

(i) To hold Proceedings Expeditiously

The whole object of the Act is to ensure peace and harmony in the functioning of industry with a view to achieve maximum industrial productivity. With this object in view, the legislature has enjoined upon the adjudicatory bodies under the Act to hold adjudicatory proceedings expeditiously. As these bodies are not encumbered with the technicalities of procedure under the procedural law or the Evidence Act 1872, the proceedings before them should not involve the delays of the civil courts.

(ii) Adjudication

The adjudicatory authorities, in law, are under a statutory obligation to adjudicate the disputes referred to them by the appropriate Government. This function has to be discharged by them in accordance with the procedure laid down in the Act and the rules framed thereunder. The adjudicator is also under a statutory obligation, to grant relief as it may think fit

and proper. He is to exercise jurisdiction conferred on him by making adjudication and such jurisdiction cannot be avoided or relinquished. In *Jai Bhagwan*, the Supreme Court observed:

> ...the tribunal to whom the dispute has been referred has no discretion to decide whether to adjudicate or not. Once a reference has been properly made to industrial tribunal, the dispute has to be duly resolved by the industrial tribunal. Resolution of the dispute cannot be avoided by the tribunal on the ground that the workman had failed to pursue some other remedy.[25]

This is illustrated by a Division Bench decision of the Calcutta High Court in *GN Vohra*, wherein the tribunal had refrained from adjudicating the dispute referred to it relating to the dismissal of certain workmen on the ground that they had elected to seek their relief before the labour court under s 33C(2). The High Court quashed the award of the tribunal for failure to exercise the jurisdiction.[26] However, during the course of adjudication before the tribunals occasionally the workmen give up or do not press some of their demands. Consequently, they do not lead any evidence relating to such demands. In the absence of any evidence on record, it would be impossible to adjudicate on the merits of such demands. In such situations, the tribunal has to content itself by recording the statement that the demands were given up or not pressed. This itself will constitute adjudication of the dispute.[27]

(iii) Submission of Award

This section has been amended by the Amending Act 46 of 1982.[28] Sub-section (2A) inserted in s 10 has engrafted the requirements of specifying the period of adjudication in the order of reference. The first proviso to that sub-section has made it incumbent on the adjudicators to submit their awards within a maximum period of three months in cases involving disputes of individual nature. The second proviso has empowered the adjudicators to extend the period of adjudication in their discretion. As a sequel to that amendment, this section has been amended to make it clear that the adjudicators will submit their awards within the period specified in the second proviso to sub-s (2A) of s 10.

JURISDICTION TO ADJUDICATE

[For the scope of jurisdiction of tribunals under s 15, see notes and comments under ss 10(4), 33, 33A, 33C and 36A.]

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20 Subs by Act 36 of 1956, s 12, for s 15 (wef 10-3-1978).

21 Subs by Act 46 of 1982, s 10, for "as soon as it is practicable on the conclusion thereof" (wef 21-8-1984).

22 *Bharat Bank Ltd v Employees of Bharat Bank* (1950) LLJ 921 [LNIND 1950 SC 4], 922 (SC), per Kania CJI.

23 *Ibid*, p 923, Fazal Ali J.

24 *S Dutt v University of Delhi* AIR 1958 SC 1050 [LNIND 1958 SC 97], 1056, per AK Sarkar J.

25 *Jai Bhagwan v Mgmt of Ambala CCB Ltd* 1983 Lab IC 1694, 1696 (SC), per Chinnappa Reddy J.

26 *Oil India Ltd v GN Vohra* 1977 Lab IC 1610, 1613 (Cal) (DB), per SK Datta J.

27 *Glaxo Laboratories (India) Ltd v PO, LC* 1977 Lab IC 1523, 1533-34 (AP) (DB), per Sheth J.

28 Brought into force wef 21 August 1984.

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CHAPTER IV Procedure, Powers and Duties of Authorities

[29][S. 16. Form of Report or Award.—

(1) The report of a Board or Court shall be in writing and shall be signed by all the members of the Board or Court, as the case may be:

Provided that nothing in this section shall be deemed to prevent any member of the Board or Court from recording any minute of dissent from a report or from any recommendation made therein.

(2) The award of a Labour Court or Tribunal or National Tribunal shall be in writing and shall be signed by its presiding officer.]

SUB-SECTION (1): REPORT OF BOARD AND COURT

Sub-section (1) makes it incumbent on all members of the Board or a court of inquiry to affix their signatures to the report submitted by them to the appropriate Government. The proviso to this sub-section clarifies the position that the requirement that all members should affix their signatures to the report should not be deemed to imply that any member choosing to dissent from a report or from any recommendation made therein is in any way prevented from doing so. It has already been noticed that a report of the inquiry court is the report about its investigation and a report of the Board is the report about the conciliation proceedings held by it, *ie*, settlement report or failure report. [See note and comments under s 13 .]

SUB-SECTION (2): AWARD

The term ‘award’ has been defined in s 2(b) of the Act to mean an interim or final ‘determination’ of an industrial dispute or any question relating thereto by a labour court, industrial tribunal or .national industrial tribunal, and includes an arbitration award made under s 10A of the Act.[30] After the evidence of the parties is concluded and all the necessary documents have been put in, the authority to whom the dispute has been referred has to decide the dispute, and embody its decision in the form of an award. In making his award the adjudicator must pay particular attention to certain points which are essential to its validity. Some of the points may be considered in the following order:

(i) Time of making the Award

Sub-section (2A) of s 10 now requires the appropriate Government to specify the period of adjudication in each order of reference. The first proviso to that sub-section requires the adjudicators to submit their awards in cases of the disputes of individual nature, while the second proviso vests the discretion in the adjudicators to extend the period. The award, therefore has to be submitted within the specified or extended time, as the case may be.

(ii) Form of the Award

Sub-section (2) requires that an award made by a labour court, tribunal or national tribunal, ‘shall be in writing’ and ‘signed by its presiding officer’. Sub-section (4) of s 10A requires that the award of an arbitrator under that section shall be

'signed by the arbitrator'. The requirement of an arbitral award to be in 'writing' is implicit in this. Further, s 17 requires that such awards are to be published by the appropriate Government. An unsigned award will, therefore, not be operative in law.[31] Furthermore, the award must be signed by the presiding officer who heard the matter. An award heard by one presiding officer, but signed by his successor who did not hear the case at all will be illegal and vitiated for want of jurisdiction because he does not have the authority to sign the award without hearing the case. This will constitute a material irregularity touching the rights of the parties. Such an award will not be an award in the eyes of law.[32] Although such awards are to be in writing, no particular form has been prescribed. However, in preparing an award, care has to be taken to avoid any question arising in the future as to its validity. Broadly, an award usually consists of two parts, *viz*, (i) the recitals, and (ii) the operative part.

(a) The Recitals

Normally, an award should contain introductory matter by way of recitals. However, it is not necessary for its validity to preface the award with recitals, but in many cases they may be added with advantage, especially where the nature of the award, or certain part of it may be difficult to understand without some preliminary explanation. If recitals are introduced, they should be full and clear, and should be so drawn as to lead up to the operative part of the award. They must also be consistent with the subsequent parts of the award. The following matters may, advantageously be referred to in the recitals where they are included in the awards:

(i) the name of the appropriate Government;

(ii) parties to the dispute;

(iii) existence or apprehension of the dispute between the parties;

(iv) points of dispute specified in the order of reference or any matters relating thereto; and

(v) the subject-matter of reference, namely, the genesis of the dispute.

The fact that the recitals are incorrect or incomplete will not, however, vitiate the award. However, as an inaccurate recital might lead to a misconstruction of the award, it is highly desirable to guard against an error of this kind.

(b) The Operative Part

By operative part of an award is meant the decision of the adjudicator upon the matters in dispute under reference. It is the only real and essential part in an award. It is the duty of the adjudicator or arbitrator to give a decision upon the disputes which have been referred, and, so long as he gives a clear decision, the form or words in which it is expressed are of no importance. However, there are many points to be observed in an order. It may be clear that a full and complete decision has been given, and all the requisites have been satisfied for a valid and binding award.

(iii) Essentials of an Award

Section 10(4) requires that an award of an adjudicator should be confined to the points specified for adjudication in the order of reference and matters incidental thereto. It is, therefore, clear that the jurisdiction of the adjudicator is limited to giving decision upon such points and matters only. He has no authority to investigate other matters or give decision thereon. Hence, where the adjudicator goes beyond such points or matters, his award will not bind the parties so far as it applies to matters outside the order of reference. The award, to the extent it exceeds jurisdiction, will be quashable. The exact effect of such excess of jurisdiction will depend upon the award itself. If it is severable, ie, if that part of the award can be separated from the remainder, the award will be good as to the former part and bad as to the rest; but the good and the bad parts must be severable. If the good and bad parts cannot be separated, the whole award will be bad. The award must be so expressed that parties may know exactly what decision has been given by the adjudicator—*Id certum est quod certum reddi potest.* In other words, the parties must be able to ascertain from the award what must be done by them to satisfy its requirements. The following are some pertinent points upon which certainties are required in the award:

(i) The parties to be bound by or to perform the award must be certain.

(ii) If the payment of a sum of money by one party to another is directed, the amount to be paid must be specified, or some rule or direction given by which the sum to be paid may be calculated without any doubt.

(iii) If the performance of any conditions or terms is directed by the award, such conditions or terms must be clearly defined, and specific directions should be given as to their proper performance.

(iv) The time for performance of the award, or of any conditions or terms contained therein, must be expressly fixed, or such directions given as will enable the time to be easily determined.

If the award is not certain in its meaning, it will be bad, and it may be remitted to the adjudicator for the uncertainty to be removed unless from its terms a specific and certain meaning can be deduced. An award will not be bad for lack of certainty and held to be inconclusive, if it contains sufficient indications of the intention of the adjudicator. However, it is always preferable to prepare an award in clear and unmistakable terms in the first instance than to risk the consequences of a careless and ill-expressed decision. As a corollary to the rule of certainty, an award must be consistent in all its parts, and not ambiguous or contradictory. It applies, particularly to cases where several items have been referred for adjudication, or where from the nature of the dispute, the award directs the performance of certain terms and conditions. In such cases, care must be taken to see that the findings on the terms and conditions are consistent with one another and with the general implication of the award. The award must determine the points in dispute though such determination may be 'interim' or 'final'.[33] In order to be binding, an award must provide for settlement of all the points referred for adjudication, so that the parties to the dispute are able to know their legal position without having to resort to further judicial inquiry. The award must decide all the points covered by the order of reference and raised by the parties to the reference otherwise it will be vitiated. In deciding the points specified in the order of reference or any matter relating thereto, the tribunal is required to discuss the materials on which it bases its findings. Mere reference to certain documents without indicating as to what they say is not enough. When the materials which are the basis of the findings are not disclosed, it will be open to the reviewing court to examine whether the inference drawn from the undisclosed documents could be reasonably drawn from the materials on record.[34] In addition to deciding the points of reference, the adjudicator must give directions necessary for proper performance to give effect to the decision. The award which lacks necessary directions may be bad on the ground of want of finality. However, any directions that are contrary to the law of the land will render the award bad. Likewise, the directions given beyond the scope of the power of the adjudicator will also be bad for excess of jurisdiction. Finally, the award must be legal and capable of being performed. In other words, it must be physically possible for the parties to perform the award and to perform it without contravening the law. This is similar to the rule of law of contract which requires all contracts to be capable of performance, and to be legal and not contrary to public policy.

(iv) Language of the Award

In making an award it is the duty of the adjudicator not to indulge in language which is not characteristic of judicial approach. Remarks and criticism can be justified only when they are based on facts, but imputation of motives and mala fide to any party to the proceedings is not permissible when the facts of the case do not furnish any basis for the same.[35] The use of strong language may sometimes be permissible in judicial pronouncements, but using strong words without realising their due significance and without considering whether their use is justified is entirely out of place in such pronouncements.[36]

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29 Subs by Act 36 of 1956, s 12, for s 16 (wef 10-3-1957).

30 For a detailed discussion of the subject, see notes and comments under s 2(b).

31 *Lloyds Bank Ltd v Lloyds Bank Indian Staff Assn* (1953) 5 FJR 149 (SC), per Patanjali Sastri CJI.

32 *SM Mujeeb v LC* (1990) 2 LLJ 535 -36 (AP), per Radhakrishna Rao J.

33 Notes and comments under 2(b).

34 *State of Bihar v PO, IT* 1977 Lab IC 803, 810 (Pat) (DB).

35 *India General Navigation & Rly Co Ltd v Workmen* (1960) 1 LLJ 13 [LNIND 1959 SC 182] (SC), per Sinha CJI.

36 *Pure Drinks Pvt Ltd v Kirat Singh Maungatt* (1961) 2 LLJ 99, 102 (SC), per Gajendragadkar J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

[37][S. 17. Publication of Reports and Awards.—

(1) Every report of a Board or Court together with any minute of dissent recorded therewith, every arbitration award and every award of a Labour Court, Tribunal or National Tribunal shall, within a period of thirty days from the date of its receipt by the appropriate Government, be published in such manner as the appropriate Government thinks fit.

(2) Subject to the provisions of section 17A, the award published under sub-section (1) shall be final and shall not be called in question by any court in any manner whatsoever.]

SUB-SECTION (1): PUBLICATION OF AWARD - MANDATORY

The use of the word 'shall' indicates that the requirements of s 17 are mandatory. The intendment becomes clear from the reading of ss 17 and 17A together, that a duty is cast on the Government to publish the award within 30 days of its receipt, and the provision for its publication is mandatory not directory.[38] The principle behind this requirement is that the parties should know the reasons which the tribunal may have recorded in determining the dispute referred to it. It has no authority to withhold the publication on the ground that the findings recorded by the tribunal indicated that the dispute referred to it was not an industrial dispute.[39] In *Sirsilk*, certain disputes between the employer and the workmen were referred to an industrial tribunal. After adjudication, the tribunal sent its award to the Government for publication. However, before the award was published, the parties to the dispute came to a settlement and accordingly, wrote a letter to the Government jointly, intimating the fact that the dispute had been settled, hence the award should not be published. On the Government's refusal to withhold the publication, the employer approached the High Court for a writ or direction to the Government to withhold the publication. The High Court rejected the writ petition as well as the writ appeal arising therefrom. In appeal, Wanchoo J, on a conspectus of ss 17 and 17A observed, 'It is clear, therefore, reading ss 17 and 17A together that the intention behind s 17(1) is that a duty is cast on the Government to publish the award within 30 days of its receipt and the provision for its publication is mandatory and not merely directory.' Though the Supreme Court maintained that s 17(1) is mandatory, and ordinarily the Government has to publish an award sent to it by the tribunal, in the special circumstances of the case and with a view to avoid a conflict between a settlement binding under s 18(1) and an award binding under s 18(3) on publication, it held that the only solution is to withhold the publication of the award as this would not in any way affect the mandatory provision in s 17(1) of the Act.[40]

In *Remington Rand*, the award having reached the Government on 14 October 1966, it had to be published latest on the 12 November 1966. However, it was published on 15 November 1966 instead. The award was challenged before the Supreme Court in appeal by special leave on the ground that it was ineffective as it was published after the period of 30 days prescribed by s 17(1) had expired, which was a mandatory requirement of law. While glossing on its observations in *Sirsilk*, the court observed that those observations merely showed that it was not open to the Government to withhold publication, but it never meant to lay down that the period of time fixed for publication was mandatory. It was, therefore, held that though s 17(1) makes it obligatory on the Government to publish its award, the time-limit of 30 days prescribed therein is merely directory and not mandatory. Mitter J held:

> The limit of time has been fixed as showing that the publication of the award ought not to be held up. But the fixation of the period of 30 days mentioned therein does not mean that the publication beyond that time will render the award invalid. It is not difficult to

> think of circumstances when the publication of the award within 30 days may not be possible. For instance, there may be a strike in the press or there may be any other good or sufficient cause by reason of which the publication could not be made within 30 days. If we were to hold that the award would therefore be rendered invalid, it would be attaching undue importance to a provision not in the mind of the legislature. It is well-known that it very often takes a long period of time for the reference to be concluded and the award to be made. If the award becomes invalid merely on the ground of publication after 30 days, it might entail a fresh reference with needless harassment to the parties. The non-publication of the award within the period of 30 days does not entail any penalty and this is another consideration which has to be kept in mind.[41]

The language of s 17(1) does not admit of the dissociation of the requirement of publication from the time-limit prescribed therein. An indication of the legislative intent is that the section does not prescribe any particular mode of publication. The mode of publication is deliberately left to the discretion of the 'appropriate Government' and as such depending on the circumstances, the Government can decide in a particular case the quickest mode of publication. Therefore, the reason that due to a strike in the press, the Government may have to delay publication does not seem to have any relevance to the construction of the section. Nor the fact, that no penalty is prescribed for non-publication within 30 day, any bearing on the question, because there is also no penalty fixed even for non-publication of the award. Besides, the doctrine of 'good and sufficient cause' introduced by *Remington Rand* is not warranted by the statute. Question arises whether an award can be held to be valid on showing 'good and sufficient cause' even though published after an inordinate delay, say of a year or two? Conversely, can an award published after the delay of a day or two be held to be invalid, if the cause shown is not 'good and sufficient'? What are the norms that the court will bear in mind in determining whether the reasons given by the Government show 'good and sufficient cause'? Then, who is to show 'good and sufficient' cause? Is it the Government who may not be before the court? Or is it the party interested to sustain the award, who may not even be aware of the cause of delay? Furthermore, the holding that for 'good and sufficient cause', publication may be delayed, is apt to be used as a shield for procrastination in publication of awards resulting in hardship to employees and employers. In other words, it will be providing judicial protection to administrative inactions. Besides, delayed publication of awards may lead to anomalous consequences and in certain cases may even frustrate the purpose of the adjudication itself. For these reasons, *Remington Rand* requires reconsideration.

The NCL-II recommended that, instead of waiting for the publication of the awards in the Official Gazette, awards of the competent court including the labour courts and the labour relations commissions should be deemed to have come into effect unless an appeal is preferred within the prescribed period. The labour courts should be empowered to enforce their own awards as well as the awards of labour relations commissions. They should also be empowered to grant interim relief in cases of extreme hardship. Officials of labour departments at the Centre and the states who are of and above the rank of deputy labour commissioners/regional labour commissioners with ten years experience in the labour department and a degree in law, may be eligible for being appointed as presiding officers of labour courts. The Central and state labour relations commissions should be declared as set up under Art 323-B of the Constitution. The National Commission should be empowered with the powers of the Supreme Court of India.[42]

SUB-SECTION (2): AWARD FINAL AFTER PUBLICATION

Exclusion of Civil Court's Jurisdiction

This sub-section makes the award of an adjudicator final, subject to the provisions of s 17 A which empowers the appropriate Government to reject or modify the award in certain contingencies.[43] Once the award become final, it is sacrosanct and cannot be altered or modified by the parties. Nor would any other court be justified to modify or alter the award by taking a different view of the matter, simply because the status of that court is higher than that of the tribunal whose order has become final. The award can be reviewable only on the recognised grounds of judicial review.[44] The act of rejection or modification of an award under s 17 A is only an administrative act, and not a judicial act. There is no appellate or revisional remedy, against the orders and awards of the adjudicators, provided in the Act. On the other hand, this sub-section expressly makes the award on being published under sub-s (1), as 'final' and not liable to 'be called in question by any court in any manner whatsoever'. The crux of this provision is to oust the jurisdiction of the civil courts to interfere with industrial awards, but in cases where such awards are null and void, civil courts have not hesitated from setting them aside on the theory that such awards are not the 'awards' as contemplated by the Act, hence the provision of s 17, making them final and ousting the jurisdiction of the civil courts would not apply to them.[45] There is a growing tendency to exclude or restrict judicial review by legislative measures, by using the expression like the order 'shall be final' or 'shall not be questioned in any legal proceedings whatsoever' *etc*. This has resulted in a large body of legislation excluding or restricting judicial review by this device giving the final word to the authority concerned. However, indiscriminate use of such clauses even in cases where no necessity is evident, has made them an 'insidious habit'.[46] The courts, therefore, have penetrated the checkmate by holding that a general finality clause would be insufficient to deprive them of their power to interfere for patent errors of law, jurisdictional defects or violation of the rules of natural justice. In

such cases, the ouster clauses have been held to be ineffective 'to abridge or attenuate judicial review',[47] as pointed out by Prof SA de Smith:

> A prominent characteristic of English public law has been the restrictive interpretation given by the superior courts to statutory formulae which, read literally, would have deprived them of their supervisory jurisdiction over inferior tribunals and administrative bodies, a jurisdiction exercised principally by the award of *certiorari* to quash. It is perhaps paradoxical that they have sometimes held their jurisdiction to be effectively ousted by subjectively worded grants of power to either bodies, while substantially disregarding the plain words of a statute giving the orders and decisions of those bodies the impress of finality.[48]

In England, to begin with, the courts took the ouster clauses at face value. The House of Lords held that such clauses provided an exclusive code of judicial review and, though there is no reference to prohibition and *certiorari*, prevent recourse to these remedies.[49] In *Medical Appeal Tribunal*, Lord Denning observed that where the statute said: 'any decision of a claim or question shall be final', *certiorari* could never be taken away except by most clear and explicit words. The expression 'final' *etc* only meant 'without appeal' and made the decision 'final only on facts not on law' and *certiorari* might still issue for excess of jurisdiction or for error of law on the face of the record.[50] In *Anisminic*, the House of Lords itself took a divergent view from the one it took in *East Elloe.* In this case, despite the statute providing that a determination of the foreign compensation commission 'shall not be called in question in any court of law', the House unanimously held that though this provision bars any challenge for mere error within jurisdiction, it would not protect any decision which was *ultra vires*. A majority of the House considered an error which might well have been considered a mere error within jurisdiction, as an error involving excess of jurisdiction for circumventing the ouster clause 'by stretching the doctrine of *ultra vires* to an extreme point'. Lord Wilberforce pointed out that in holding a 'decision' protected by ouster clause to be nullity, the courts are carrying out the intention of the legislature and it would be a misdescription to speak in terms of a struggle between the courts and the executive. The House made it perfectly clear that nullity is the consequence of all kinds of jurisdictional errors, *eg*, breach of natural justice, bad faith, failure to deal with the right question and taking wrong matters into account. Furthermore, the similarity of both kinds of ouster clauses was emphasised while rejecting *East Elloe* as contrary to precedent and principle.[51] Prof Wade has suggested that the result of this striking case was to focus attention on the danger of indiscriminate use of ouster clauses and to 'persuade Parliament to provide limited rights of appeal from the commission to the courts'.[52] It seems that the use of the ouster clause will no longer prevent an order being impugned on the ground that it is made mala fide or on wrong grounds, or is unreasonable, contrary to natural justice or *ultra vires* in any other way. However, this will have its own anomalous consequences. A solution to the dilemma has been suggested that the principle in *Anisminic* should only be applied in cases, of absolute ouster clauses and where recourse to court is restricted only after a prescribed time, the eventual barring of legal remedies may be necessary as under a normal statute of limitation, except possibly where an order is *ultra vires* on its face. Although this merely confirms the long-established law, it should help to resolve the tangle caused by paradoxical suggestion that action in excess of jurisdiction may be 'voidable' as opposed to 'void'. As observed by Lord Reid, there are no degrees of nullity. Thus, it may be possible to reconcile the two extreme views taken by the House of Lords in *East Elloe* and *Anisminic.* In the United Kingdom, though the courts disclaim any intention of rebelling against the sovereign legislature and appear to obey it rather than defy it, they take the 'uncompromising stand of holding ouster clauses to be inoperative in every kind of case where the error can be said to go to jurisdiction, artificial as some of these are'.[53]

In Australia, the legislature has made a frequent use of the drastic ouster clauses for keeping the courts of law out of the sphere of labour law. The High Court of Australia has adopted a pragmatic approach of reconciling the obvious intention of such clauses with the equally obvious intention that the powers of the arbitration court shall be legally limited. It would decline to intervene 'where the tribunal has made a bona fide attempt to exercise its authority in a matter relating to the subject with which the legislation deals and capable reasonably of being referred to the powers possessed by the tribunal,[54] Thus, the court refused relief where an appeal board went beyond the question under appeal which it had no power to do,[55] and where the tribunal was said to have exercised its jurisdiction by misconstruing 'lockout,[56] On the other hand, the High Court granted prohibition, in spite of express ouster of judicial remedies, where a board sat without the statutory quorum which was required for it to function validly. In this way a balance appears to have been struck between the 'legislative intention and constitutional logic'. But in Canada the exclusion of the courts from the field of labour law is less successful than in Australia and the decisions there are in the English tradition.[57] In the United States of America, there appears to be a considerable conflict of judicial dicta though, by and large, their approach is comparable to *Anisminic* case in favour of avoiding the exclusionary power by holding error of law to be jurisdictional.[58] Thus, though in Australia, the approach of the court to exclusionary clauses is resilient, in England, Canada and USA, the courts appear to refuse all compromise of any kind of jurisdictional question as a part of their judicial function.[59]

After the decision of the Supreme Court in *Bharat Bank*,[60] and *Muir Mills*,[61]it is established that the orders and awards of industrial adjudicators or the administrative orders of the administrative authorities under the Act are amenable to judicial review because 'the concept of rule of law still assumes that the judicial power of the state extends to review of executive,

judicial and quasi-judicial acts, and that any restriction on this power of review is a menace to the rule of law'.[62] The awards of the industrial adjudicators or the orders of the administrative authorities have been made 'final' only on facts and not on law. In other words, the right of an aggrieved person to judicial review is not restricted.[63] Though judicial review of administrative, quasi-judicial or judicial orders would not normally extend to examination of the merits of the action, it would cover its legality on the grounds of jurisdictional defects, errors of law apparent on the face of the record or the violation of the rules of natural justice. However, the legislature has intended that the awards of the adjudicatory authorities shall be 'final' and that such awards shall not be called in question by any court 'in any manner whatsoever'. This intention normally shall not be defeated except in cases where the award of the tribunal is vitiated by errors of law apparent on the face of the record and has resulted in such grave miscarriage of justice as to disturb the conscience of the court or the award is in violation of the principles of natural justice, or is perverse or arbitrary in the sense that it is without any evidence whatsoever or extraneous considerations have gone into the making of the award. Except in such and similar circumstances, the power of judicial review shall not be exercised for the purpose of invalidating an award which is intended to be final and beyond question.[64]

Power to Set Aside an *Ex Parte* Award

A single judge of the Calcutta High Court held that the finality as such does not affect the right of the tribunal to recall the award for reconsideration. What it affects is that so far and so long as it stands, it should not be reopened in any proceeding. In this connection, reference will have to be made to s 17A which lays down that the award shall become enforceable on the expiry of 30 days from the date of its publication. Therefore, before the expiry of the 30 days, the tribunal has the implied power to recall, in appropriate cases, the awards which have not become enforceable by operation of s 17(1).[65] In *Grindlays Bank*, the facts disclosed that the *ex-parte* award was made by the Tribunal on 9 December 1976, which was published by the Government on 25 December 1976. Thus, the said award became enforceable on the expiry of 30 days, *ie*..., with effect from 25 January 1977. The workman submitted his application for revival on 19 January 1977, and the Tribunal passed the revival order on 12 April 1977. One of the two issues raised was whether the Tribunal becomes *functus officio* on the expiry of 30 days from the date of publication of the *ex parte* award under Section 17, by reason of sub-section (3) of Section 20 and was, therefore, deprived of jurisdiction to set aside the award and the appropriate Government alone had the power under s 17-A(1) to set it aside. The Supreme Court observed:

> The contention that the Tribunal had become *functus officio* and, therefore, had no jurisdiction to set aside the *ex parte* award and that the Central Government alone could set it aside, does not commend to us. Sub-section (3) of Section 20 of the Act provides that the proceedings before the Tribunal would be deemed to continue till the date on which the award becomes enforceable under Section 17A. Under Section 17A of the Act, an award becomes enforceable on the expiry of 30 days from the date of its publication under Section 17. The proceedings with regard to a reference under Section 10 of the Act are, therefore, not deemed to be concluded until the expiry of 30 days from the publication of the award. Till then the Tribunal retains jurisdiction over the dispute referred to it for adjudication and up to that date it has the power to entertain an application in connection with such dispute. That stage is not reached till the award becomes enforceable under Section. In the instant case, the Tribunal made the *ex parte* award on December 9, 1976. That award was published by the Central Government in the Gazette of India dated December 25, 1976. The application for setting aside the *ex parte* award was filed by respondent 3, acting on behalf of respondents 5 to 17 on January 19, 1977 *ie*.., before the expiry of 30 days of its publication and was, therefore, rightly entertained by the Tribunal. It had jurisdiction to entertain it and decide it on merits.[66] ()

In *Anil Sood*, the facts disclosed that the Labour Court had rejected the recall application on the very same ground as of *Grindlays Bank, i.e...*, that after making the award it became *functus officio* in the matter. The order of the labour court was challenged before the High Court, which upheld the view of the labour court. In appeal this Court noted that the award was made on 11 September 1995 and the application for its recall was filed on 06 November 1995. The Court referred to the earlier decision in *Grindlays Bank* and the provisions of s 11(2) & (3) of the Act and held:

> The aspect that the party against whom award is to be made due opportunity to defend has to be given is a matter of procedure and not that of power in the sense in which the language is adopted in Section 11. When matters are referred to the Tribunal or Court they have to be decided objectively and the Tribunals/Courts have to exercise their discretion in a judicial manner without arbitrariness by following the general principles of law and Rule s of natural justice.. .. The power to proceed *ex parte* is available under Rule 22 of the Central Rules which also includes the power to inquire whether or not there was sufficient cause for the absence of a party at the hearing, and if there is sufficient cause shown which prevented a party from appearing, then if the party is visited with an award without a notice which is a nullity and therefore the Tribunal will have no jurisdiction to proceed and consequently, it must necessarily have power to set aside the *ex parte* award.. .. If this be the position in law, both the High Court and the Tribunal (sic Labour Court) fell into an error in stating that the Labour Court had become *functus officio* after making the award though *ex parte*. We set aside the order made and the award passed by the Labour Court and affirmed by the High Court in

> this regard, in view of the fact that the learned counsel for the respondent conceded that application filed by the appellant be allowed, set aside the *ex parte* award and restore the reference. [67] (Paras 6, 7 & 8)

It is submitted that *Grindlays Bank* itself was wrongly decided in so far as the facts of the case revealed that the award was already published by the Government at the time when the proceeding was restored. Having stated the principle of law correctly, Sen J, misapplied the said legal principle to the case at hand, for the reason that as on the date the tribunal passed the order, the award was already in force for over two months. The reasoning of Sen J, in that case that the Tribunal had the power to revive the proceeding, in view of the fact that the workman filed his application before the expiry of 30 days u/s. 20 of IDA, is clearly misplaced. *What is critical is not so much the date on which the workman submitted his application as the date on which the award became enforceable*. In that case, the award became enforceable on 25 January 1977, whereas the Tribunal passed the order on 12 April 1977, *i.e.*., two and half months after the award became enforceable. Applying the provisions of the Act and the settled law on the point, what was the legal status of the Tribunal on and after 25 January 1977 in so far as the said award was concerned? Could it be said that the Tribunal remained alive to the said reference or did it become *functus officio*? The answer can unmistakably and manifestly be in favour of the latter. Thus, the decision rendered in *Grindlays Bank* was a product of misapplication of law and is clearly wrong.

Adverting to *Anil Sood*, which followed *Grindlays Bank*, the facts disclosed that the award was submitted on September 11, whereas the application for setting the said award aside was filed in November, *i.e*..., two months later, which admittedly implies that the award was published by the Government on or before October 11 in terms of the mandatory provision in s. 17, and that it came into force or was in the process of coming into force. Further, it was a case where the party did not enter appearance before the Tribunal despite notice, with the result he was set *ex parte*. Both the above decisions deserve to be assailed for propounding that the Tribunal has the power to set aside an award even after the expiry of 30 days after its publication by the Government. It is one thing to say that the Tribunal does not become *functus officio* after submitting the award, and quite another to suggest that it continues to enjoy the power to set aside the award after it had come into operation. Such an interpretation of law militates against the very objects of IDA. Once the award is published, the decision of the tribunal stands 'made public' with the further implication that the dispute has been conclusively adjudicated by a competent authority. The only exception to this position is where the Government simultaneously publishes another notice u/s. 17-A stating that the award so published u/s. 17 would not come into force on the expiry of 30 days, for certain extraordinary reasons, which is an exception to the normal rule. Even in such a rare of the rarest eventuality, the tribunal has no power to recall the award because, once the award is published, the matter passes into the absolute jurisdiction of the appropriate Government as provided for in s. 17-A. The facts of the case did not disclose publication of any second notice by the Government u/s. 17-A withholding the operation of the award. In these circumstances, what remains after the publication of the award u/s. 17 is nothing but the enforcement of the award, even if it was found that the award was, or had to be, passed *ex parte*, and it cannot be permitted to be set aside by the same Tribunal merely because the defaulting party had shown sufficient cause. If it was found that the Tribunal adjudicated the dispute arbitrarily without putting a party to notice, then the right course for the aggrieved party is to get it quashed in a writ proceeding, instead of permitting the tribunal to meddle with the award after it came into force. If, on the other hand, it was found that the party did not choose to appear even after being put it on notice and after granting sufficient number of adjournments, then the defaulter should not be allowed to gain an undue advantage from his own wrong. It is submitted that *Grindlays Bank* and *Anil Sood* were wrongly decided and require review. However, in *Ajit Singh*, a single judge of Punjab & Haryana High Court held that the Labour Court would become *functus officio* on the expiry of 30 days after the publication of the award, and hence the order passed by it setting aside the *ex parte* award after that period would be invalid.[68]*Ajit Singh* lays down the correct law as against *Grindlays Bank* and *Anil Sood*.

At this point it is necessary to draw the attention of the reader to the observation made by SB Sinha J, in *Sangham Tape Co*, while referring to the decision of Sen J, in *Grindlays Bank*. In *Sangham Tape Co*, the question relating to the "*power of the tribunal to recall an ex parte award after the expiry of 30 days from the date of its publication*" had once again come up for the consideration of the apex court. SB Sinha J (for self and Hegde J), categorically held that the tribunal had no power to recall the award once it became enforceable u/s 17A. The learned judge admittedly relied upon *Grindlays Bank* (*supra*) as can be discerned from the following passage:

> In view of this Court's decision in *Grindlays Bank* (*supra*), such jurisdiction could be exercised by the Labour Court within a limited time frame, namely, within thirty days from the date of publication of the award. Once an award becomes enforceable in terms of Section 17A of the Act, the Labour Court or the Tribunal, as the case may be, does not retain any jurisdiction in relation to setting aside of an award passed by it. In other words, upon the expiry of 30 days from the date of publication of the award in the gazette, the same having become enforceable, the Labour Court would become *functus officio*.[69]

The reliance placed by Sinha J, on *Grindlays Bank* calls for some analysis. For this purpose, it is necessary to re-state the facts of *Grindlays Bank*, as admitted by Sen J, which, briefly, are:

(i) The Central Government made a reference of the dispute to the Tribunal on July 26, 1975;

(ii) The Tribunal, by a notice dated March 6, 1976 fixed peremptory hearing of the reference for May 28, 1976, but the *hearing was adjourned from time to time on one ground or the other*;

(iii) The final hearing of the reference was fixed by the Tribunal for December 9, 1976;

(iv) Counsel for the employees' association *requested for adjournment on the ground that the General Secretary of the Association suffered bereavement of his father who died on November 25, and that he was required to perform the Shraddha ceremony of the departed soul*, and also produced a telegram to that effect;

(v) Despite *the genuineness of the request, duly supported by evidence to that effect, the tribunal rejected its request for adjournment* and decided to proceed *ex parte*;

(vi) The award was made and submitted to the Government, which was *published on December 25, 1976* u/s. 17;

(vii) The Government did not publish a second notice withholding the operation of the award, with the result, the decision of the Tribunal thus came into public domain and *the award was destined to come into force on the expiry of 30 days, i.e..., with effect from January 25, 1977,*

(viii) The Employees' Association *filed a petition before the Tribunal on January 19, 1977*, on the ground that they were prevented by *sufficient cause* from appearing on the day of final hearing on December 9, 1976;

(ix) The said application was admitted by the tribunal; and

(x) The tribunal *passed its order on April 12, 1977* setting aside the award. (Italics supplied)

Sen J, categorically held that the Tribunal becomes *functus officio* on the expiry of 30 days from the date of the publication of the award. The learned judge discussed elaborately the provisions of IDA and Code of Civil Procedure, 1908 —'CPC' in short) in his judgment, but failed to realise that his final conclusion was diametrically opposite to the principle enunciated by him in the same case! The *decision proper* rendered by Sen J, in *Grindlays Bank* calls for some analysis on the anvil of the legal principle enunciated by himself in the same case. Once the award is published by the Government u/s 17, and no further action is taken by it either modifying or rejecting the award under the Proviso to s 17A (1) r/w the other provisions thereof, the legal consequences of publication would automatically follow, *i.e...*, the dispute stood finally determined and the award comes into force on the expiry of 30 days, in this case, on 25 January 1977. The recall petition was filed by the Association at the fag-end of the interregnum, *i.e...*, 19 January 1977—less than a week before the scheduled enforcement of the award. The Tribunal passed its order on 12 April 1977 setting the said *ex parte* award aside. In other words, as on the date of setting aside the award, the award was not only in public domain, but was also in force for over two months. In the face of this factual and legal position, could it be said that, even as early as 26 January 1977—not to speak of 12 April 1977—the Tribunal had the power to recall and set aside the award? What made the Tribunal to take a right-about-turn within a span of 40 days and persuade itself that there was *sufficient cause*, which *self-same cause* did not appeal to its judicial mind when the request was first made to it on 6 December 1976, in face of an ardent plea made by counsel for Association, duly substantiated by a telegram? Why did the Tribunal refuse to grant the adjournment in the first instance and why did it grant the same request later, when there was no change in the circumstances between 9 December 1976 and 19 January 1977? *If this is not an abuse of power by the Tribunal, what else could it be?* In such a situation, what is the duty of the Supreme Court, more so, in the light of the fact that the award came into force some 80 days before it was set aside? Should it close its eyes and passively condone the approbation and reprobation on the part of the Tribunal or should it uphold the rule of law, given the fact that the award had major implications for the disputing parties? Could it still be said that the final decision of Sen J, in *Grindlays Bank* was consistent with the principle enunciated by him in the same case? Under what provision of law did the Government comply with the recall order passed by the Tribunal, when it was fully aware of the fact that the award published by it had started producing its legal consequences? What was the justification for Sen J, to travel beyond the four walls of the law, and uphold a patent illegality attributable to the Tribunal? Answers to these questions are too obvious to need elaboration. Reverting to *Sangham Tape Co*, the decision of Sinha J, and the *ratio* enunciated therein are beyond the pale of attack, but his observation to the effect that *Grindlays Bank* was rightly decided, is a travesty of truth.[70]

In *Radhakrishna Mani Tripathi*, the facts briefly were: In an industrial dispute concerning the termination of service of a workman, the Labour Court passed an *ex parte* award in favour of the workman on 12 June 1998 directing his reinstatement with full back wages and continuity in service. The award was made after taking evidence (ex parte) led on behalf of the appellant. It was published on 05 August 1998. On 29 January 1999 employer filed a petition before the

Labour Court making a prayer for recall of the award, on the ground that no notice was served on him and he was not aware of the proceedings before the Labour Court; and that he came to know about the matter only on 27 January 1999 on receiving a copy of the award sent to him by the Court. After a full dressed hearing on the recall petition the Tribunal found and held, vide order dated 12 July 2005, *that the workman obtained the order for ex parte hearing of the reference by knowingly suppressing the correct address of respondent No. 1 and as a result the notice issued by the Labour Court was never served on him. In light of the finding, the Labour Court recalled its earlier award dated 12 June 1998 and fixed the matter for fresh hearing*. The workman filed a writ petition in the Bombay High Court challenging the order of Labour Court setting aside the award. The High Court dismissed the writ petition and confirmed the order passed by the Labour Court. One of the issues was whether there was any conflict between r. 26(2) of Industrial Disputes (Bombay) Rules 1957 and s 17(1) of the Industrial Disputes Act 1947. The said Rule runs thus:

> (2) Where any award, order or decisions made *ex parte* under sub-rule (1), the aggrieved party, may within thirty days of the receipt of a copy thereof, make an application to the Board, Court, Labour Court, Tribunal or an Arbitrator, as the case may be, to set aside such award, order or decision. If the Board, Court, Labour Court, Tribunal or Arbitrator is satisfied that there was sufficient cause for non-appearance of the aggrieved party, it or he may set aside the award, order or decisions so made and shall appoint a date for proceeding with the matter:
>
> *Provided* that, no award, order or decision shall be set aside on any application as aforesaid unless notice thereof has been served on the opposite party.

In appeal, Aftab Alam J surveyed the decisions rendered in *Grindlays Bank* and *Anil Sood*, and dismissed the appeal holding that the labour court does not become *functus officio* after submission of the award, and further observed that there was no conflict between r 26(2) of Bombay Rules and s 17A(1) of the Act.[71] In *South Seas Distillaries*, the facts disclosed that the employer did not appear even once before the conciliation officer during the pendency of conciliation proceedings despite sever letters having been sent to him nor did he present before the labour court despite notice resulting in the labour court passing an *ex parte* award. The employer filed an application before the labour court after a lapse of five months for setting aside the said award, which was rejected by the labour court. In writ proceedings, the Bombay High Court held that the labour court was right in rejecting the application, and observed that no case was made out by the petitioner-employer to interfere with the order of labour court.[72] In *Tamil Nadu KVIB*, the a single judge of Madras High Court held that the labour court becomes *functus officio* on the expiry of 30 days from the date of publication of the award, and that an application for setting aside the *ex parte* made, if made after the expiry of 30 days from the date of publication, was not maintainable.[73] In *Stallion Garments*, the facts briefly were: some 20 temporary workers remained absent unauthorisedly for several months, whereafter the management relieved them from their duties in June 2004. Thereafter they obstructed the premises of the company in a riotous manner, about which a police complaint was lodged and also obtained an interim injunction from the District Munsif against the workers from disturbing the peaceful running of the factory. After the said order, 17 out of 20 workers resigned from service, but a few raised an industrial dispute against the termination. It is stated that the summons sent by the labour court were received by one of the staff of the employer, who did not bring the same to the knowledge of the employer, and the employer was set *ex parte* and the award was passed on 28 May 2005. The *ex parte* award came to be known to the employer when the workmen sent letters on 26 June 2006 seeking employment based on the award and thereafter, the management filed application to set aside the *ex parte* award and also to condone the delay of 262 days. The labour court dismissed the petitions on the ground that it had become *functus officio*. Allowing the appeal a single judge of Madras High Court followed the ratio of *Anil Sood* and *Radhakrishna Tripathi* (*supra*) and held that the very *ex parte* award passed by the labour court was without application of mind and further observed that, in the circumstances of the case, the labour court could not be said to become *functus officio*.[74]

In *Janakiram Mills*, the facts were: the management terminated the service of a watchman, who had put in some 12 years service, without any charge-sheet or enquiry. The resultant dispute was referred for adjudication. Before the Labour Court, the parties have filed their respective statements. The workman marked 10 documents and examined himself, after the Management was set *ex-parte*. The Labour Court did not pass an award on merits and, instead, held that the Management was set *ex-parte* and claim of the workmen was proved, passed the award on 23 October 2010. In the writ petition, the management contended that (i) it was not an award, (ii) that it had received the copy of the award only in February 2011, (iii) since the award came into force by that time, it did not file a petition under s 11 of the Act r/w rule 48 of ID (Tamil Nadu) Rules to recall the award as it would serve no purpose, and (iv) hence, it approached the High Court. Allowing the writ petition, Vaidyanathan J of Madras High Court cited the decisions rendered in *Andhra Handloom Weavers*,[75] and *United Transformers*,[76] and observed:

> "The Courts have held that "dismissal for default" is not an award. If the contention of the Management has to be accepted that the labour Court has become *functus officio* and hence after the award has come into force they have approached this Court, all the

> Management would wait for the award to come into force and thereafter file a writ petition stating that they have no remedy and the period mentioned under the Rules has expired.. .. It is a well settled law that mere absence of workman or the Union does not absolve the Labour Court or Tribunal from proceeding with a reference referred to it and making the award. . ., the Tribunal or Labour Court has to adjudicate on the dispute and not just close or end the proceedings before it by any method which does not involve adjudication or resolution of the dispute referred to. .. a technical termination of the proceedings does not serve the purpose of the reference or the object of the Act, 1947. Similar view is applicable to the dispute under the amended provisions. In case, the party to the proceeding fails to attend or to be represented, the Labour Court or Tribunal will have to proceed with the Industrial Dispute as if the party had duly attended or had been represented.. .. Based on the materials available on record, the Tribunal will have to pass an award on merits. In case, an *ex-parte* award is passed, the matter can be reopened and I.D can be restored if an application is filed before the award has come into force. If the award has come into force, the Tribunal or the Labour Court will become *functus officio*."[77]

In *Birla Cotton*, the facts briefly were: the tribunal, having submitted the consent award, recalled it on the application made by certain other unions which alleged that the settlement reached before the conciliation officer was not fair and just. Accordingly, the tribunal framed an additional issue for review, *i.e.*., "whether the settlement was fair and just". The writ petition filed by the management was admitted by the Delhi High Court and the reliefs prayed for were granted. In appeal by the union, inter alia, two questions touching upon the power of quasi-judicial tribunals *i.e.*., (i) procedural review, and (ii) review on merits, came up for the consideration of Supreme Court. Dismissing the appeal, Singh J (for self, Hegde and Sinha JJ) of the Supreme Court observed:

> .. . different considerations arise on review. The expression 'review' is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a mis-apprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record.. .. no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected *ex debit justitiae* to prevent the abuse of its process, and such power inheres in every court or Tribunal.. .. it is apparent that where a Court or quasi judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the Court or the quasi judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the Court or quasi judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. *Cases where a decision is rendered by the Court or quasi judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked*.. .. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding.. .. The recall of the Award of the Tribunal was sought not on the ground that in passing the Award the Tribunal had committed any procedural illegality or mistake of the nature which vitiated the proceeding itself and consequently the Award, but on the ground that some matters which ought to have been considered by the Tribunal were not duly considered. *Apparently the recall or review sought was not a procedural review, but a review on merits. Such a review was not permissible in the absence of a provision in the Act conferring the power of review on the Tribunal either expressly or by necessary implication*. (Paras 18-20) (Italics supplied).

On the question 'whether there was a conciliation proceeding' and 'whether the settlement reached between the parties could be said to be a settlement arrived at in the course of conciliation proceedings', the learned judge observed:

> .. . The settlement itself recites the fact that there were series of bipartite and tripartite meetings between the representatives of the Management and the Unions in view of the labour unrest and threat of closing down the operation of the weaving department. Meetings were also held in the office of the Chief Labour Commissioner with a view to resolve the dispute and a meeting was thereafter held on May 17, 1983 in the office of Shri K. Saran, Joint Chief Labour Commissioner (Central) where the representatives of the Management and the Unions participated alongwith the officers of the Labour Department which ultimately resulted in a settlement. All these facts establish beyond doubt that there was labour unrest and the Conciliation Officer intervened in the matter and made attempts to bring about a settlement. The submission, therefore, that no conciliation proceeding was in progress when the settlement was arrived at, must be rejected.[78] ()

JUDICIAL REVIEW

Legislation

The orders and actions of authorities under this Act are reviewable in writ jurisdiction under Art. 32 & 226 and in superintendent jurisdiction under Art 227 and special appeal jurisdiction under Art 136. The writ jurisdiction of the Supreme Court under Art 32 can only be invoked for enforcing the 'fundamental rights' while the jurisdiction of the High Court under Art 226 can be invoked not only for enforcing 'fundamental rights' but 'for any other purposes' as well.[79] The 42nd amendment of the Constitution substituted a new Art 226 for the old one. In the new Article, the words 'for any other purposes' appearing in cl (1) of the old Article did not find any place. The remedies of directions, orders or writs mentioned in this article were available apart from the enforcement of the fundamental rights, for redressal of any injury of a substantial nature by reason of contravention of any other provision or any provision of any enactment or ordinance or any order, rule, regulation, by-law or other instrument made therein or for the redressal of any injury by reason of any illegality in any proceedings by or before any authority, under any such law where illegality has resulted in substantial failure of justice.[80]

Two new articles namely, Arts 133A and 226 A were introduced, which prohibited the High Courts from considering the constitutional validity of any Central law in any proceedings. Under Art 226, the jurisdiction in regard to a question as to validity of such laws was exclusively vested in the Supreme Court by Art 131A. Clause (3) of the new Art 226 prohibited the High Courts from entertaining petitions under that Article for redress of any injury referred to in sub-cl (b) or sub-cl (c) of cl (1) thereto, if any other remedy for such redress was provided by or under any other law for the time being in force. Clause (4) prohibited the High Courts from granting interim injunctions or stay orders unless (i) copies of writ petitions and all relevant documents were served on the opposite side and (ii) the opportunity was given to the opposite side of being heard in the matter. Clause (5) gave discretion to the High Court to dispense with the requirements of cl (4) in exceptional cases where the threatened injury could not be adequately compensated in money. Such interim order was, however, to stand vacated on the expiry of 14 days unless before that the opposite party was served with the writ petition and the relevant documents and was heard. Clause (6) proscribed grant of an interim order by way of injunction, stay or otherwise which would have the effect of delaying an inquiry into a matter of public importance. Article 227 was also substituted, partially restricting the High Courts' jurisdiction taking away its superintendence over 'tribunals'. By s 58 of the Constitution (42nd Amendment) Act 1978, special provisions were made as to the pending petitions under Art 226. Then by the Constitution (43rd Amendment) Act 1977,[81] Arts 133A and 226 A were omitted and consequential amendments were made in Art 226. Shortly afterwards, by the Constitution (44th Amendment) Act 1978, Art 226, was amended again. Clause (1) of Art 226 was substituted by the present cl (1) which has again made the Constitutional remedies available 'for any other purpose', apart from the enforcement of fundamental rights. The ban of an alternative remedy in the previous cl (3) has also been removed and the procedure with respect to the interim stay orders or injunctions too has been modified, by substituting the previous cll (3), (4), (5) and (6) by the present cl (3). In Art 227, the previous cl (1) has been substituted by the present clause which restores the superintendence of the High Courts on 'tribunals'. Clause (5) of this article was omitted.[82]The effect of 44th Amendment is that the law has substantially been restored to its ante Constitution (42nd Amendment) Act 1976.

The scope of the jurisdiction of the writ courts to interfere with the orders and awards of the industrial adjudicators and to give appropriate relief to the aggrieved parties is very wide and comprehensive. However, this jurisdiction will not lend itself to aid a party when the relief prayed for raises a triable issue, such as, the issue of limitation in which case it would be best to leave the party to seek its remedy by the ordinary mode of action in a civil court.[83] The phrase 'for any other purpose', used in Art 226 is to be understood to mean 'for any other purpose for which any of the writs would, according to the well established principles, issue'.[84] The jurisdiction of the writ courts to issue directions, orders or writs in the nature of habeas corpus, *mandamus*, prohibition, *quo warranto* and *certiorari* is quite wide, which confers on it an extensive discretion with the possible limitation that the discretion has to be exercised in accordance with well-established judicial principles and only on judicial considerations and not arbitrarily.[85] Therefore relief by way of appropriate writs or orders, cannot, generally be refused on an application under Art 226 on the ground that the particular relief, which the applicant was found entitled to has not been claimed by him.[86]Apart from the Government and its departments, such directions, orders or writs can be issued to other persons and authorities as well. A detailed treatment of such authorities is beyond the scope of this work, as it concerns itself only with the authorities under the Industrial Disputes Act.

Authorities under the Act

The authorities under this Act whose awards, orders or acts are generally exposed to judicial review are:

(i) The Appropriate Government

Since the state intervention permeates the scheme of the Industrial Disputes Act, the role of the Government is dominant in the statute. Its orders under various provisions of the Act, therefore, though of administrative nature, are reviewable by writ

courts if they breach the fundamental rights or are made *mala fide* or are *ultra vires* the constitutional or statutory limitations. The finality conferred by the statute will not stand in the way of their judicial review.

(ii) Conciliation Officers, Board of Conciliation and Court of Inquiry

Section 12(1) of the Industrial Disputes Act confers discretion on the conciliation officer to decide whether he shall hold conciliation proceedings or not excepting cases where the dispute relates to a public utility service and a notice under s 22 has been given in which case, it is mandatory to hold conciliation proceedings. The statute makes a clear distinction between disputes relating to public utility service concerns and other concerns by using the words 'may' in the former case and 'shall' in the latter.[87] In the former case, there is no obligation cast on the conciliation officer to undertake the conciliation proceedings. Hence, there is no room for the issue of a writ of *mandamus* to a conciliation officer to hold conciliation proceedings. However, in a public utility service, it is incumbent on the conciliation officer to hold conciliation proceedings when notice under s 22 has been given. However, if such notice has not been given, the conciliation officer is not bound to hold the conciliation proceedings. Hence, he cannot be compelled by *mandamus* to hold conciliation proceedings unless such notice has been given.[88] A single judge of the Delhi High Court, held that there is no legal duty cast on the conciliation officer to intervene in the matter till some action is taken against the workman and the workman has a grievance to that extent. Therefore, a conciliation officer cannot be compelled to intervene before any dispute has arisen between the parties by a writ of *mandamus*.[89]

The function of a conciliation officer under s 12 is of a purely administrative character and not of quasi-judicial nature because he is not under a duty to act judicially and he cannot give a decision on the merits of the dispute. His task is one of discussion, advice and persuasion for thrashing out the various points of dispute in the presence of the parties for enabling them to come to a fair and amicable settlement. A settlement arrived at during the course of conciliation proceedings before a conciliation officer is not quashable on *certiorari* as it is an act of the parties to the settlement in which the conciliation officer only uses his good offices to induce the parties to come to a settlement. It is neither an order passed by the conciliation officer nor a decision recorded by him. Even a writ of *mandamus* cannot be issued to a conciliation officer.[90] In *Jaswant Sugar,* the Supreme Court held that a conciliation officer acting under s 33 of the Act for the purposes of according or refusing 'permission' is not a tribunal within the meaning of Art 136. Hence an appeal against such decision of the conciliation officer is not competent. However, the court left the question whether such an order would be reviewable by writ courts, undecided, with the observation that this function of the conciliation officer is of quasi-judicial nature.[91] A Full Bench of Gujarat High Court in *Testeels,* has however, held that the decision of the conciliation officer under s 33 being of a quasi-judicial nature is amenable to the jurisdiction of the writ court under Art 226. Hence, the conciliation officer is bound to make a speaking order in this capacity, in other words, he must give reasons for his order.[92]

The board of conciliation can conciliate upon an 'industrial' dispute, only after a reference is being made under s 10(1)(a) of the Industrial Disputes Act. However, the reference is only for the purpose of 'promoting a settlement' of the dispute. The functions of the board, therefore, are analogous to those of the conciliation officer. Any settlement brought about with the mediation of the board will neither be by an order nor a decision of the board. It will purely be an agreement between the parties and not the 'result of any quasi-judicial proceedings. Therefore, such a settlement, will not be quashable on *certiorari*. Though a board may be severed a unit of *mandamus* to act under s 13 to promote a settlement of the dispute, no *mandamus* can be issued to it for the implementation or non-implementation of a settlement which is purely an agreement between the parties. A court of inquiry is constituted for the purpose of 'inquiring into any matter appearing to be connected with or relevant to an industrial dispute'. It can, however, take cognizance of such a matter for inquiry, only when the appropriate Government refers such a matter to it under s 10(1) (b) of the Act. The court of inquiry is, therefore, nothing more than a fact finding body and its' findings will not have the character of a decision of the dispute or any matter appearing to be connected with or relevant to the dispute. On receiving the findings of the court of inquiry, the Government may consider the question, whether or not to make a reference under s 10(1)(a). If however, the court of inquiry does not investigate the matter referred to it, it may be issued a writ of *mandamus* to discharge its statutory functions.

(iii) Labour Courts, Industrial Tribunals and National Tribunals

It is now well-settled that the functions of these adjudicatory authorities are of quasi-judicial nature.[93] Their orders and awards, therefore, are reviewable by the High Court in their jurisdiction under Art 226 and by the Supreme Court in its appellate jurisdiction under Art 136. However, whenever a reference is made by the appropriate Government to a tribunal, it has to be presumed ordinarily that there is a genuine 'industrial dispute' between the parties which requires to be resolved by adjudication. An attempt, therefore, should be made by the reviewing courts to sustain as far as possible the awards made by the tribunals instead of differing on trivial points in the awards and ultimately, frustrating the entire adjudicating process by striking down the awards on hyper-technical grounds.[94] However, it is open to a party to show that what has been referred to the tribunal for adjudication is not an industrial dispute at all and, therefore, the jurisdiction of the tribunal to make the award can be questioned even though the factual existence of a dispute may not be subject to a

party's challenge.[95] Therefore, when the orders and awards suffer from jurisdictional defects, errors of law apparent on the face of record or violation of the rules of natural justice, they may be quashed on *certiorari*. Section 10(4) of the Industrial Disputes Act prescribes the perimeter of the jurisdiction of the adjudicatory authorities by laying down that they shall confine their jurisdiction to the points specified in the order of reference and matters incidental thereto. If these authorities transgress these limitations, their orders again will be quashable on *certiorari* as *ultra vires*. Furthermore, if these authorities are constituted without complying with the requirements of ss 7 to 7B or their presiding officers suffer from any of the disqualifications envisaged by these provisions and s 7C, their continuance in office may be challenged by a writ of *quo warranto* and their orders and awards may be quashed on *certiorari* for want of jurisdiction and the proceedings before them may be arrested by a writ of prohibition. These authorities, for the purposes of this discussion, hereinafter are, compendiously referred to as tribunal.

(iv) Arbitrators

An award of an arbitrator under s 10A is amenable to judicial review by a writ court under Art 226. However, an arbitrator under this section is not 'tribunal' within the meaning of Art 136 or Art 227. Hence, an arbitral award under this section is neither amenable to the superintendence of a High Court under Art 227 nor appealable under Art 136.[96]

Judicial Remedies

The Act has not provided any statutory remedies against the orders or awards of industrial authorities. An aggrieved party, therefore, has to resort to non-statutory or Constitutional judicial remedies for seeking redress against such orders and awards. The principal Constitutional remedies are writs and appeals. Articles 32 and 226 empower the Supreme Court and the High Courts respectively to issue directions, orders or writs including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto*, and *certiorari* for enforcement of the fundamental rights or for any other purpose. Articles 133 & 136 vest the Supreme Court with ordinary and special appellate jurisdiction. The writs in the nature of *certiorari*, prohibition, *mandamus*, and *quo warranto* are generally resorted to in dealing with industrial matters while the writ in the nature of *habeas corpus* has no relevance in this branch of law. In case, where the complaint is 'for other purpose' than the breach of fundamental rights, an aggrieved person has to petition the High Court under Art 226 or Art 227 in whose territorial jurisdiction, the authority resides or the cause of action has taken place. In *Re Eastern Coalfields*, it was held that the Calcutta High Court has territorial jurisdiction to entertain a writ petition against the order of the Labour Court, Dhanbad which was served on the petitioner within the jurisdiction of the Calcutta High Court.[1] Likewise in *Vasudeva Rao*, the Karnataka High Court held that if not wholly, a substantial part of the cause of action had arisen in the State of Karnataka, therefore, it had jurisdiction to entertain the writ petition.[2]

In cases of complaints against the breach of fundamental rights, apart from approaching such a High Court, an aggrieved person may also directly approach the Supreme Court under Art 32. However, in cases where a person has petitioned the High Court under Art 226 or Art 227, the petition may be heard by a single judge Bench or a larger Bench. In case, the petition is decided by a single judge, a writ appeal,[3] will lie to a Division Bench. Such appeals are permissible under the relevant clauses of the letters patent of the various High Courts. In an appeal under cl 15 of the letters patent of the chartered High Courts from the judgment (within the meaning of the term as used in that clause) of a single judge of the High Court, an appeal lies to the Division Bench of that High Court and there is no qualification or limitation as to the nature of the jurisdiction exercised by the single judge while passing his judgment, provided an appeal is not barred by any statute and provided that the conditions laid down in that clause itself are fulfilled. An intra court appeal against the judgment of a single judge in a petition under Art 226 is permissible as an intra court appeal against the judgment of a single judge. In other words, under the letters patent clauses of the High Courts, the decision of a single judge in writ jurisdiction under Art 226 is appealable to the Division Bench of that High Court.[4] In a letters patent appeal against the decision of the single judge, there is no limitation that the letters patent appeal bench can hear only a question of law under s 100, CPC. The entire matter on the questions of fact and law is open before the appellate bench.[5] The Division Bench may interfere with the holding of the single judge if he has misdirected himself while considering the evidence and takes into consideration matters which were not germane to the issues involved.

A finding based on a proposition militating against a long line of judicial dicta of the Supreme Court would be liable to be interfered with by the Division Bench. Where the single judge upheld the view of the labour court that the main and substantial work of a medical representative falls under the categories manual, technical or clerical, was held to be wrong in view of his own observations that the main work was canvassing and promoting sales.[6]Against the order or judgment of the Division Bench or the larger Bench, an appeal by a certificate under Art 133 will lie to the Supreme Court as the proceedings of the High Court arising out of the actions, orders and awards of the authorities under the Industrial Disputes Act are civil proceedings. If the High Court refuses to grant certificate under Art 133, an aggrieved party may move the Supreme Court by a petition under Art 136 for special leave to appeal. A party aggrieved by an order or award of an industrial authority may also directly petition the Supreme Court under Art 136 for special leave to appeal. The scope of appeal under Art 136 directly against the orders and awards of the industrial adjudicator is much wider than that of the

High Court under Art 226. Hence, the jurisdiction of the Supreme Court in direct appeal, under Art 136, from the orders and awards of the industrial tribunal is much wider than its jurisdiction under Art 133 against the orders and judgments of the High Court in writ petitions against the orders or awards of such tribunals. In an appeal under Art 136, the Supreme Court can go into questions of facts as well as law in appropriate cases; whereas, the High Court in its writ jurisdiction and Supreme Court in its appellate jurisdiction under Art 133, can only consider questions which are strictly relevant for the writ court. An appeal, under Art 136, can succeed even if no case is made out for the issue of a writ.[7] However, if the appeal under Art 136 is against an order or judgment of the High Court in a writ petition, the jurisdiction of the Supreme Court will be the same as that of the High Court in dealing with the writ petition.

(i) Certiorari and Prohibition

(a) In General

In challenging the orders and awards of the authorities under the Industrial Disputes Act, a composite prayer asking for *certiorari* and prohibition is generally advantageous. Since these two writs have many common characteristics, they are discussed together. *Certiorari* is, historically, an extraordinary legal remedy and is corrective in nature. It is used in the form of an order by a superior court to an inferior civil tribunal which deals with civil rights of persons and which is a public authority, to certify the records of any proceedings of the latter, to review the same.[8] This remedy arises on principle from the superintending authority which the superior court possesses and exercises over the inferior jurisdiction as the delegate of the sovereign.[9] '*Certiorari* lies, on the application of a person aggrieved, to bring the proceedings of an inferior tribunal before the High Court for review so that the court can determine whether they shall be quashed, or to quash such proceedings. It will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record or breach of the rules of natural justice, or where the determination was procured by fraud, collusion or perjury'.[10] The dictum of Lord Atkin LJ, delineating the scope of *certiorari* and prohibition, [11] despite certain in-built incongruities, has become classic, and the subsequent law found its stem and branches from the roots in the phrases used in it. The statement reads:

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the king's bench division exercised in these writs.[12]

In the celebrated decision of the House of Lords in *Ridge v Baldwin*, Lord Reid pointed out how the gloss of Lord Hewart CJ was based on the misconception of the observations of Lord Atkin LJ and was inconsistent with the earlier dicta. Lord Reid observed:

> If Lord Hewart meant that it is never enough that a body has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it, a duty to act judicially, then that appears to be impossible to reconcile with the earlier authorities'.. .. the duty to act judicially may arise from the very nature of the functions intended to be performed as it need not be shown to be 'super-added.[13]

This decision broadened the area of application of the rules of natural justice and in the language of Professor Clark, this decision 'restored light to an area benighted by the narrow conceptualism of the previous decade'.[14] This development of law was followed in India.[15] In *Binapani Devi*, the Supreme Court observed, 'If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power'.[16] In *AK Kraipak*, the court observed that the concept of quasi-judicial power has been undergoing radical change and 'the dividing line between the administrative power and quasi-judicial power is quite thin, and is being gradually obliterated.[17] In the words of Bhagwati J:

> The net effect of these and other decisions was that the duty to act judicially need not be super-added, but it may be spelt out from the nature of the power conferred, the manner of exercising it and its impact on the rights of the persons affected...[18]

However, a writ of *certiorari* can never be issued to call for the records, papers and proceedings of an Act or Ordinance for quashing such Act or Ordinance.[19]*Certiorari* and prohibition may be issued to inferior statutory tribunals who do not claim to be and would not be recognised as courts of justice for controlling their proceedings.[20] The orders of the appropriate Government in making and refusing to make an order of reference under s 10 and s 12(5), appointing the authorities under ss 7, 7 A and 7B, transferring the proceedings from one tribunal to another under s 33B are amenable to writ of *mandamus* upon judicial review while the orders and awards of the adjudicatory authorities under ss 13, 15, 17, 17A 33, 33A, 33C, 36

and 36A are quashable on *certiorari*, if they are in excess of jurisdiction or suffer from an error of law apparent on the face of record or violate the rules of natural justice. These provisions vest these bodies with 'legal authority to adjudicate upon or otherwise decide' the questions of which they are seized. Furthermore, these authorities have 'to determine questions affecting the rights of the subjects'. They have, therefore, to comply with the basic procedural requirements. In *Western India Automobile Assn*, the federal court said that the industrial adjudicators have the discretionary jurisdiction to award the relief of reinstatement where they find that the services of industrial workers were illegally or wrongfully terminated.[21] This discretion of the tribunals is, however, reviewable.[22] Prohibition is 'a judicial writ, issuing out of a superior court to an inferior court, preventing the inferior court from usurping jurisdiction with which it is not legally vested' and it is issued to compel the courts entrusted with judicial duties to keep within the limits of their jurisdiction.[23] In the matter of granting prohibition, the court will not be fettered by the fact that an alternative remedy exists to correct the absence or excess of jurisdiction,[24] or that an appeal lies against the absence or excess.[25] However, an order in the nature of prohibition will not be issued unless there is a material question involved.[26] In cases of patent defects of jurisdiction or where the defect is apparent on the face of the proceedings, the order of prohibition is not discretionary, it issues *ex debito ustitiae*.[27] Prohibition cannot, however, be claimed as of right where the defect of jurisdiction is not clear. In other words, where the jurisdictional defect is-not patent, the court has a discretion and may decline prohibition, by reason of the conduct of a party.[28] In cases, where the proceedings before the inferior tribunal are partly within its jurisdiction and partly outside its jurisdiction, prohibition will lie against doing what is in excess of jurisdiction.[29] Likewise, where the inferior tribunal gives itself jurisdiction by an erroneous conclusion on a point of law, prohibition will lie. However, where the tribunal while determining the jurisdictional question, decides the question of fact on conflicting evidence,[30] the writ court will not interfere except on very strong grounds;[31] nor will prohibition be granted when it is clear that a question which might be raised in the proceedings, and which is not within the jurisdiction of the inferior tribunal will not be contested in those proceedings,[32] or because the inferior tribunal in the course of its judgment merely uses certain language relevant only to a cause of action outside its jurisdiction.[33] Prohibition will, however, issue as soon as an inferior tribunal proceeds to apply a wrong law, when deciding a fact on which the jurisdiction depends.[34] The power of the High Court to issue writs under Art 226 cannot be disputed where the tribunal is not duly constituted and is acting without jurisdiction.[35]In cases arising out of the jurisdiction of the adjudicatory authorities under the Industrial Disputes Act, the High Courts generally refuse to bypass the normal procedure prescribed by the Act and throttle an inquiry into the facts by issuing writs of prohibition without a clear-cut *prima facie* case of want of jurisdiction.[36]

In *Hari Vishnu Kamat*, it was observed that the writs of *certiorari* and prohibition have many common characteristics. Both the writs have, for their object, the restraining of inferior court or tribunal from exceeding their jurisdiction and they can be issued, not merely to courts but to all authorities exercising judicial or quasi-judicial functions. However, it has to be borne in mind that once an adjudication is over, it is only *certiorari* that can be invoked, as prohibition in such a case will be futile. However, if a tribunal decides a jurisdictional question erroneously, that decision may be quashed on *certiorari* and it may be further interdicted by prohibition from further proceedings to decide the matter on merits. Indian courts have, by and large, followed the English decisions in issuing writs of prohibition and *certiorari* though the other expression 'orders' or 'directions' used in Art. 226 and 32 have been liberally utilised in getting rid of the technicalities of the English Law. In other words, when an inferior court or tribunal takes up a matter over which it has no jurisdiction, for hearing, the person against whom proceedings are taken can move the writ court for an order of prohibition and that prohibition will forbid the inferior court from continuing the proceedings. On the other hand, if the court hears that cause or matter and gives a decision, the party aggrieved would move the superior court for a writ of *certiorari* and on that, an order will be made quashing the decision on the ground of want of jurisdiction.[37] One significant difference between them is that they are issued at different stages of the proceedings. Prohibition may, and usually must, be invoked at an earlier stage than *certiorari*. Prohibition will not lie unless something remains to be done that a court can prohibit. *Certiorari* will not lie unless something has been done that a court can quash. But it is sometimes appropriate to apply for both orders simultaneously - *certiorari* to quash an order made by a tribunal in excess of its jurisdiction, and prohibition to prevent the tribunal from continuing to exceed its jurisdiction.[38] In the words of Professor Wade: 'Prohibition stands in much the same relation to *certiorari* as injunction stands in relation to declaration. *Certiorari* and prohibition rest on common principles and frequently go hand in hand, as where an order is quashed by *certiorari*, and, at the same time, a prohibition is awarded to prevent any further irregularity being committed'.[39] In *Navinchandra Shah*, Desai J of the Gujarat High Court (as he then was), observed:

> The expansive and extraordinary power of the High Courts under Art 226 is as wide as the amplitude of the language used indicates and so can affect any person even a private individual-and be available for any other purpose...The Supreme Court has spelt out wise and clear restraints on the use of this extraordinary remedy and High Courts will not go beyond those wholesome inhibitions except where the monstrosity of the situation or other exceptional circumstances cry for timely judicial interdict or mandate. The mentor of law is justice and a potent drug should be judiciously administered. Speaking in critical retrospect and portentous prospect, the writ power has, been the people's sentinel by and large, on the *qui vive* and to cut back on or liquidate that power may cast a peril to human rights.[40]

In industrial adjudication, an order of reference itself may be challenged being beyond the competence of the 'appropriate Government'. There may be cases, where it is patent that the appropriate Government was not competent to make the reference. In such cases, a party aggrieved by the order of reference may directly invoke the jurisdiction of the writ court. In such a case, the writ court will quash the order of reference and issue a writ of prohibition to the tribunal directing it not to proceed with the adjudication of the reference. The scope of writ jurisdiction of the High Court under Art 226 is not the same as that of an adjudicatory authority on a reference under s 10 or on an application under s 33 or s 33C(2). The jurisdiction of the authorities under these provisions is much wider. For instance, while adjudicating a dispute relating to dismissal of a workman under s 10 or dealing with an application under s 33, the industrial authorities can go into the question whether the dismissal of a workman amounts to victimisation or unfair labour practice or whether the employer has acted *bona fide*. These questions cannot be gone into by the writ court.[41] The confines of the writ court are only to see whether the orders or awards of the industrial authorities are suffering from any jurisdictional errors or are violative of the rules of natural justice or are vitiated by errors of law apparent on the face of the record.[42]There may be cases where lack of jurisdiction is not patent but it is latent. For instance, where the jurisdiction of the tribunal to adjudicate upon a dispute referred to it depends upon the determination of the question, whether the reference is valid; the tribunal may have to determine the collateral questions, such as, whether what is referred is an industrial dispute or the activity in question is an industry or the workman concerned is a 'workman' within the meaning of the definitions ascribed to these terms in the Act, and so on. The tribunal cannot assume jurisdiction by erroneously deciding these questions. The decision of the tribunal on these questions may be impugned before the writ court. If the writ court comes to the conclusion that the decision of the tribunal on these collateral or jurisdictional question is erroneous, it will quash the decision and prohibit the tribunal from proceeding with the adjudication of the dispute on merits.

The adjudicatory authorities under the Industrial Disputes Act are vested with jurisdiction to decide and resolve industrial disputes. Primarily it is for these bodies to decide the disputes referred to them. However, the jurisdictional issues may have to be decided as preliminary issues, if facts are not in dispute or such issues can be decided independently of the merits of the case. However, facts of a particular case may not permit or enable such issues to be decided *de hors* the merits of the case. In such an event, the adjudicators may have to decide the points of reference and the question, whether they involve industrial dispute, simultaneously. Normally, a writ court will not entertain the challenge to the order of reference on the ground that the reference is not an industrial dispute. There may be rare cases when the writ court may be in a position to decide such question on the basis of admitted facts and having regard to the particular circumstances of a case, in such a situation, the writ court may intervene at the initial stage. Otherwise, it would be unwise for the writ court to interrupt the proceedings at the initial stage on a reference in every case. The normal rule is to allow the tribunal duly constituted for a specific purpose by the law to proceed with its inquiries unless on the face of it, a particular inquiry does fall within the scope of its powers.[43] For instance, a writ court will not quash a memo of charge-sheet unless there is a total want of jurisdiction or the action is motivated with mala fides.[44]

The remedies of *certiorari* and prohibition may be sought together or alternatively for the grounds in the writ petition for both the remedies will be the same. After quashing the impugned order, the High Court in its writ jurisdiction, has also the jurisdiction to modulate the relief to meet the exigencies of a situation.[45] However, the fact that the writ court has power to mould the relief to meet the requirements of each case, does not mean that the draftsman of a writ petition should not apply his mind to the proper relief which should be asked for and throw the entire burden of it upon the court.[46] Where the labour court directed the reinstatement of a workman dismissed for unauthorised absence for 62 days on the ground that certain other workmen who absented from duty were not dismissed, the High Court exercising its writ jurisdiction under Art 226 set aside the order of the labour court.[47] In *Panchanan Manna*, the Calcutta High Court held that where the punishment imposed by the disciplinary authority shocks the conscience of the High Court, it could appropriately mould the relief, either by directing the disciplinary/ appellate authority to reconsider the penalty imposed or, to shorten the litigation, it may itself impose appropriate punishment with cogent reasons therefor in some cases. In the facts and circumstances of the case, the workman was ordered to be reinstated but without backwages.[48] An award passed by the labour court, (i) without properly appreciating the questions of law and fact, (ii) without properly construing the wage register and attendance register produced by the management to show that the workman never worked in the establishment, and (iii) by merely relying on the oral evidence of the workman, is not sustainable and is liable to be quashed in a writ of *certiorari*.[49] In *PGIMER*, the Supreme Court observed:

> The labour court being the final court of facts came to a conclusion that payment of 60 per cent wages would comply with the requirement of law. The finding of perversity or being erroneous or not in accordance with law shall have to be recorded with reasons in order to assail the finding of the tribunal or the labour court. It is not for the High Court to go into the factual aspects of the matter and there is an existing limitation on the High Court to that effect. In the event, however, the finding of fact is based on any misappreciation of evidence, that would be deemed to be an error of law, which can be corrected by a writ of *certiorari.* The law is well settled to the effect that finding of the labour court cannot be challenged in a proceeding in a writ of *certiorari* on the ground that the relevant and material evidence adduced before the labour court was insufficient or inadequate though, however,

perversity of the order would warrant intervention of the High Court.[50]

In *Lakshmi Precision*, where the High Court upheld the order of labour court directing reinstatement of a workman whose services were terminated for unauthorised absence, on finding that his absence was on account of illness, the Supreme Court observed that interference by High Court is justified where it is found that the action was purely and surely arbitrary in nature. The Supreme Court further held that arbitrariness is an antithesis to the rule of law-equity, fair play and justice.[51] Where the employer offered reinstatement without backwages despite the fact that the workman had abandoned the service, and the workman did not opt for joining even after several reminders from the management, the High Court, while quashing the order of labour court, held that the employer had not terminated the services of the workman, the workman was indulging in vexatious litigation and that the labour court failed to consider what was wrong in ordering reinstatement with full backwages.[52] Promotion of the workman during the pendency of disciplinary proceedings does not mean that the charges against him were wiped out. At the most, it may be a factor while granting final relief to the workman. The award of the labour court that the workman was free from the charges on account of his promotion is wrong, and is set aside.[53] Where the labour court found that the charges of forgery and issue of fake certificates were not proved, and directed reinstatement of the employee after considering all the documents and evidence, the award of the labour court could not be said to be perverse.[54]Where the labour court ordered reinstatement of a worker dismissed for participating in an illegal strike, it was held that the labour court had power under s 11A to interfere with the quantum of punishment and that the High Court under Art 226 could not act as an appellate authority over the tribunal.[55] The tribunal has power under s 11A to reappraise evidence and satisfy itself whether the evidence relied upon by the employer establishes the misconduct alleged against the workmen. The writ would be justified in interfering with the order of the tribunal, only if it comes to the conclusion that the order of the tribunal is either contrary to some provisions of law or is based upon no evidence on record to substantiate the same or is based upon certain inadmissible evidence or the tribunal did not allow certain admissible evidence to be let in, or the conclusion of the tribunal was such which no reasonable person would arrive at.[56]

However, a single judge of Madras High Court went about reappraising the evidence and ordered reinstatement in a case where the workman was dismissed for being guilty of using indecorous language and the personnel officer of the company and the said dismissal was upheld by the labour court in an adjudication under s 11A.[57] Such exercise which borders on assuming appellate jurisdiction is not only unwarranted, but is a patent violation of the principles enunciated by the Apex Court. And this was certainly not one of those rarest of the rare cases falling within the ratio of *BC Chaturvedi*,[58] and *Mahesh Kumar Mishra*,[59] warranting the High Court to step in and undo the injustice. At any rate, it does not appeal to logic or common sense that judges should go about wrongfully interfering with disciplinary actions involving theft, fraud, dishonesty, misappropriation, or riotous, violent and disorderly behaviour, and set aside punishments on flimsy and questionable grounds. Another decision which falls in the same species as that of *Damodaran* is that of the same High Court in *Thangaraj*, in which Venkatachalam, J undertook the exercise of reappreciating the evidence, discussing and evaluating questions of fact, which he was not supposed to do in a petition under Art 226, and finally held that the dismissal for a misconduct involving giving of false complaint against his superior officer was disproportionate, quashed the order of labour court and ordered fresh appointment without attendant benefits.[60] In *Yogeshwar Raj*, the workman was charge-sheeted for submitting a bogus certificate to the effect that he belonged to a scheduled tribe at the time of employment for a post reserved for scheduled caste/scheduled tribe candidates. The workman did not submit any explanation despite extension of time sought for by him for submitting the explanation. An inquiry was conducted in the course of which the inquiry committee came to the conclusion that the caste certificate submitted by the workman was a bogus certificate. The inquiry committee, however, expressed the view that since the original caste certificate submitted by the workman in 1976 was subsequently affirmed by a certificate issued from the office of the Collector in 1999, the said action of the workman did not amount to delinquency on the part of the workman. It was also found that the caste certificate dated 4 February 1998, submitted by the workman was forged. The disciplinary authority rejected the findings of the inquiry committee duly supported by reasons and served a show-cause notice on the workman. The workman moved the High Court, which stayed the proceedings and issued a rule *nisi*. Allowing the appeal by special leave, Ruma Pal J observed:

> We are not aware as to the reason why the High Court was persuaded to issue a Rule *Nisi*, but its further observations, '*prima facie*, we are satisfied that the petitioner belongs to the scheduled caste/scheduled tribe' and also grant of an interim order staying the proceedings before the disciplinary authority, were erroneous. It appears from a copy of the writ petition that the respondent has not questioned the jurisdiction of the disciplinary authority to issue the impugned show cause notice. The two issues of the respondent's caste and whether he had adequately explained the production of the bogus certificate of October 4, 1998 are yet to be decided by the disciplinary authority. Both the issues are primarily issues of fact. The High Court should not have pre-empted a factual decision of the disciplinary authority on the issues. Nor should the High Court have stayed the proceedings on a *prima facie* finding on the subject matter of inquiry particularly when the competence of the disciplinary authority was not in doubt.[61]

It is difficult to appreciate as to under what law and authority, constitutional provisions not excluding, could the High Court exercise a power of this kind and stall the disciplinary proceedings at such an early stage of charge-sheet and inquiry. On what basis did the High Court proceed to draw a conclusion to the effect that *prima facie* it was satisfied that the petitioner belonged to scheduled caste/scheduled tribe, when the matter was yet to be investigated in order to prove or disprove the claim of the petitioner? This is a striking illustration of abuse of the power of judicial review conferred on the High Court, and the Supreme Court rightly quashed the order. In *Dharampal*, the Supreme Court held that the High Court should not interfere with the approval granted by the tribunal under s 33(2)(b) on the ground that the tribunal had committed an error while granting approval. The appropriate course for the workman was to invoke s 10 to work out his rights.[62]

(b) Bars to Certiorari and Prohibition

It is well-settled law that in its writ jurisdiction under Art 32, the Supreme Court or the High Court under Art 226 will not decide the disputed questions of fact. The area to decide the disputed questions of fact is in the jurisdiction of the trial courts who are competent to determine such questions on taking appropriate evidence. A priori, the writ courts do not embark upon the trial of disputed questions of fact. For instance, in *Surendra Prasad*, the dispute between the workmen and the employer with respect to the claim that the canteen workers be treated at par with the other employees of the corporation, involved disputed questions of fact, the Supreme Court held that it was not the appropriate forum in its jurisdiction under Art 32 to decide the dispute. The court, therefore, directed the 'appropriate Government' to refer the dispute for adjudication to the industrial tribunal under s 10(1)(b) of the Act. Even the writ jurisdiction of a High Court under Art 226 is not of an appellate nature, howsoever wide, it is only supervisory jurisdiction.[63] The writ of *certiorari* can be issued the only in cases where the orders or awards of the quasi-judicial authorities suffer from jurisdictional defects or are vitiated by errors of law apparent on the face of the record or violate the rules of natural justice. It is not that every wrong decision of an inferior tribunal is reviewable on *certiorari* by the writ court. In other words, the writ court cannot sit in appeal over the findings recorded by a competent tribunal by re-appreciating the evidence for itself, which would be outside its jurisdiction unless such findings are supported by no evidence or are otherwise perverse.[64] Hence, the writ court is not competent to review the evidence adduced before the inferior tribunal, its duty is merely to see whether its conclusion is supported by evidence. The question of sufficiency of evidence will not be open before the writ court.[65]Some of the cases where the writ court will not review the orders and awards of the tribunals, like the adjudicatory authorities under the Industrial Disputes Act, are discussed under the following heads. These heads, however, are neither exhaustive nor mutually exclusive, but they overlap one another in certain areas. However, they have been devised for the convenience of treatment.

In *Estrolla Rubber*, the Supreme Court held that Art 227 does not confer an unlimited prerogative upon the High Court to correct all wrong decisions or to prevent hardships caused thereby. Exercise of this power in interfering with the orders of courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of the fundamental principles of law or justice where, if the High Court does not interfere, a grave injustice remains uncorrected. The High Court acting under that article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error which is not apparent on the face of the record.[66] In *Madura Coats*, Padmanabhan J of the Madras High Court, while quashing the order of the labour court directing reinstatement of workmen, who were dismissed for absence without permission as they were held in judicial custody, observed that the management could not be held responsible for the workmen being absent for their own personal reasons and without permission. Having held thus, the learned judge directed the management to pay a lump sum compensation of Rs 1,60,000 to each of the dismissed workmen in lieu of their reinstatement. Once it is held that the punishment was in order and was preceded by a proper inquiry, question arises as to whether there is a need to shower generosity on the dismissed workmen at the expense of the employer. If the employer could not be held responsible for the continued unauthorised absence of the workmen for their personal reasons and was perfectly justified in imposing the punishment of dismissal, then, by the same token, no liability could be fastened on to him to pay any compensation in lieu of reinstatement. The learned judge observed:

> Taking into consideration the short period of service rendered by each one of them, instead of reinstatement, the labour court should have directed the management to pay a lumpsum compensation as the workmen have obviously no regard for discipline as well as no regard for their employment and have failed to report for duty for several months.[67]

The conclusion reached by Padmanabhan J is repugnant both to the facts as admitted by him and his reasoning, and is manifestly perverse. In *Mysore Sugar*, the facts were that in respect of a dispute about the date of birth, the management constituted a medical board which determined the age of the workman, and the workman accepted the same. After about 30 years, the workman raised a dispute questioning the date of birth as determined by the medical board, and the labour court directed the management to reinstate the retired workman. Quashing the order of the labour court, the High Court held that the opinion of the medical board could not be challenged after a lapse of over thirty years when the employee

himself had accepted it.[68]

Alternative Remedies:

Before the Constitution (Forty-second Amendment) Act 1976, the existence of an alternative remedy was not a bar to the exercise of the jurisdiction of the High Court under Art 226, though it was a relevant consideration upon which the High Court could refuse to exercise its jurisdiction.[69] However, cl (3) of Art 226 substituted for the earlier Art 226 by the Constitution (Forty-second Amendment) Act completely prohibited the High Courts from entertaining petitions for redress of any injury if any other remedy for such redress was provided for by or under any other law for the time being in force. This relegated the law to the pre-Constitution period when under s 45 of the Specific Relief Act 1877, the relief in the nature of *mandamus* was not available where the petitioner had any other specific and adequate legal remedy.[70] This amendment not only barred the writ of *mandamus*, but it also barred the writs of prohibition and *certiorari* as well, if any alternative remedy was available for redress, even in cases of patent excess of jurisdiction or error of law apparent on the face of the record or violation of the rules of natural justice. But cl (3) has now been omitted by the Constitution (Forty-fourth Amendment) Act 1978, the result of which is to restore the law to its pre-forty-second amendment with effect from 29 June 1979. After this amendment, a writ petition cannot be dismissed solely on the ground of existence of an alternative remedy.[71] Although there is no rule or provision of law to prohibit the extraordinary jurisdiction of the courts under Art. 32 and 226, the courts always insist upon recourse to ordinary remedy or the exhaustion of other remedies. A Constitution Bench of Supreme Court in *Thansingh Nathmal* dealt with the question as to how the discretionary jurisdiction of the writ court is required to be exercised with respect to a petition filed under Art 226 by a person before it by by-passing a statutory alternate remedy available to him for obtaining redressal of his grievance ventilated in his petition. The court reverberated the well-settled legal position that though the jurisdiction of the writ court is couched in wide terms and the exercise thereof is not subject to any restriction except the territorial restrictions which are expressly provided for in the article, the exercise of the jurisdiction is discretionary; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed restrictions. Speaking for the court, Shah J spoke thus:

> Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit, by entertaining a petition under Art 226, the machinery created under the statutory to be bypassed and will leave the party applying to it to seek resort to the machinery so set up.[72].

In the words of Hidayatullah CJI, 'this attitude arises from the acceptance of the salutary principle that extraordinary remedies should not take the place of ordinary remedies'.[73] The remedy under Art 226 being in general, discretionary, the High Court may refuse to grant it to a litigant when an equally convenient, beneficial and efficacious alternative remedy is open to him and he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ.[74] For instance, where for more than one year, the petitioner did not avail himself of the efficacious alternative remedy of appeal against his dismissal where he could appropriately canvass all questions of fact as to how the order of dismissal was improper or contrary to principles of natural justice, the writ court declined to exercise its jurisdiction.[75] However, in cases where the ordinary process of law appears to be inefficacious, the writ court would interfere even if other remedies are available. The existence of another remedy does not affect jurisdiction to issue a writ.[76] The rule requiring the exhaustion of statutory remedies, before a writ is granted, is however, a rule of policy, convenience and discretion rather than a rule of law. In the words SR Das CJI, 'There is no rule with regard to *certiorari* as there is with *mandamus*, that it will lie only where there is no other equally effective remedy.' Instances are numerous where a writ has been issued in spite of the fact that the aggrieved party had other legal remedies.[77] Where the order complained against is alleged to be illegal or invalid and being contrary to law, a petition at the instance of the person adversely affected by it, would lie to the High Court under Art 226 and such a petition cannot be rejected on the ground that an appeal lies to the higher officer of the state Government.[78]

The existence of an alternative remedy does not *per se* operate as an absolute bar to the exercise of the jurisdiction of the High Court under Art 226, though the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs and the writ court will be slow to exercise such jurisdiction where there is an adequate alternative remedy open to the party. Where the statutory remedy is neither effective nor efficacious, dictates of justice demand that, in appropriate cases, the remedy under Art 226 should not be denied to the aggrieved party.[79] In *Maharashtra GK Union*,[80] the petitioners had not approached the labour court with an application for setting aside the *ex parte* award on the basis of the legal advice to the effect that no useful purpose would be served by filing such application considering the view taken by the same labour court in similar other cases. Thus, though an alternative remedy was available to the petitioners, they had not availed themselves of the same. However, this was done by them on legal advice and due to the misapprehensions of the position of law. In these circumstances, the Bombay High Court did not think it fair at the stage of the final hearing of the writ petition to dismiss the writ petition on the ground of alternative remedy. The Allahabad High Court in

Nathaniel Masih, held that when the petition has been admitted, it would not be proper to dismiss it at the final hearing on the mere ground of availability of alternative remedy.[81]

In *Kailash Paswan,* the Patna High Court held that once a writ petition is admitted and parties have filed affidavits and counter-affidavits and the matter remained pending in the High Court for some years, unless there are disputed questions of fact to be gone into, the writ court should be very loath to dismiss the writ petition on the grounds of alternative remedy. It should not ordinarily do so. However, the court pertinently pointed out that where certain disputed questions of fact have to be decided for determining a point in dispute, such questions cannot be decided by a writ court. After all it is a self-imposed restriction. It is a matter of discretion not of jurisdiction.[82] The exercise of discretion depends upon the wrong and illegality alleged and complained against. For instance, where an order is without jurisdiction and no inquiry into facts is necessary, it is open to the writ court to interfere without driving the parties to resort to the alternative remedy.[83] The alternative remedy must be a specific remedy, particularly, provided under the statute itself An alternative remedy, on its plain reading, means a remedy which is available to the petitioner concerned and which is not dependent on the opinion of any other authority.[84] The general remedies like suits or the discretionary appeals under Art 136 are not efficacious alternative remedies.[85]The question as to whether or not alternative remedy, in a given case, is equally adequate, efficacious and speedy, must naturally depend upon the peculiar facts and circumstances of that case and no rigid and inflexible rules can be formulated to cover every case. For instance, where the complaint was that a direction made by the authority under the Payment of Wages Act was erroneous in law, the defect could have been cured in appeal under s 17 of the Act, it was held that the failure to appeal precluded the employer from invoking the jurisdiction of the writ court.[86] Likewise, *mandamus* cannot be granted for enforcing an award of an industrial tribunal which is not a law and the manner of enforcement has been provided in the Act itself.[87]

If the matter in controversy would require investigation of questions of fact, such investigation cannot obviously be undertaken in a writ proceeding under Art 226.[88]In view of the specific remedy under s 13A of the Industrial Employment (Standing Orders) Act 1946 being available for resolving the dispute as to whether on the materials found against the workman, the relevant Standing Order was applicable, the writ petition was held to be not maintainable.[89]On the question, whether the remedies provided by the Industrial Disputes Act constitute efficacious alternative remedies so as to bar the writ jurisdiction of the High Courts under Art 226, a single judge of the Madras High Court, observed that the provision of an alternative remedy is not always an absolute bar to the exercise of the jurisdiction vested in this court under Art 226, though the court should be slow to exercise such jurisdiction when there is an adequate alternative remedy open to the party. In the circumstances of the case, the court quashed the order passed by the tribunal in excess of its jurisdiction.[90] In *Hospital Mazdoor Sabha,* the Supreme Court affirmed the decision of Bombay High Court entertaining a writ petition against the order of retrenchment of certain workmen on the ground of breach of the provisions of s 25F of the Industrial Disputes Act.[91] In *Basant Kumar Sarkar,* a Constitution Bench, dealing with a notification issued under s 1(3) of the Employees' State Insurance Act 1948, observed that though the power of the High Courts under Art 226 is very wide, even this power cannot take within its sweep 'industrial disputes' of the kind which were sought to be raised before the High Court.[92] In *Rohtas Industries*, the Supreme Court observed that, if the industrial dispute relates to enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.[93] In *Bihar Rajya Vidyut Parishad,* the court dismissed the petition on the ground of alternative remedy as the question related to terms and conditions about the workmen, could only be adjudicated on evidence and a writ court would not enter into the question of fact.[94]

In *Mohd Yousufoddin,* the High Court of Andhra Pradesh did not entertain a writ petition without exhausting alternative remedy under the Industrial Disputes Act, where the workman kept silent for a number of years without challenging the determination of his date of birth either on account of the statement given by him or on account of the examination by the medical board.[95] The Karnataka High Court in *Visvesvaraya Iron & Steel*, held that the fact that there was a delay in disposal of proceedings before the labour court and that there was accumulation of a large number of cases was no cause to bypass alternative remedy by the writ court.[96] In *Aziz*, the court held that since the corporation was an authority within the meaning of Art 12, Arts 14 and 16 were applicable to the service conditions of the petitioners under the corporation. Therefore, it was open to the petitioners in a writ proceeding to enforce their right against the corporation on the ground that refusal to absorb them in the service of the corporation would be violative of the guarantees of Arts 14 & 16. The ground that the petitioners had an alternative remedy of raising an industrial dispute was of no avail.[97] Likewise, the employer took recourse to various measures in order to prevent the workmen from getting the bonus in terms of a settlement and the orders of the Supreme Court and the High Court. The Calcutta High Court in *Amalendu Gupta,* held that it is unlikely that the workmen will getquick and efficacious relief by taking recourse to the remedies provided in the Industrial Disputes Act.[1] But if the adjudication involves questions of fact which can be determined only by adducing relevant evidence in accordance with the procedure, the statutory remedy of s 10 and s 33C(2) should be treated as a bar to the writ jurisdiction.[2] Adjudication of the dismissal of a workman involves the questions of validity of domestic inquiry, justifiability of the punishment and bona fides of the management. These questions can appropriately be determined by an industrial tribunal on taking relevant evidence and hearing the parties and not by the writ court. Even from the point of

view of the workman, the remedy of adjudication under s 10 is better and more effective because he will have full opportunity of adducing and rebuttal of evidence before the tribunal whose jurisdiction is very wide under s 11A. In such cases, the alternative remedy of reference and adjudication under s 10 should normally bar the constitutional remedy of writs.[3]

A Full Bench of Punjab and Haryana High Court in *Manohar Lal*, has also held that the remedy of reference available under s 10 of the Act bars the filing of a writ petition. This remedy does not cease to be a remedy simply because the matter of reference depends upon the opinion of the Government.[4] A similar view has been taken by a Full Bench of Patna High Court in *Dinesh Prasad*, in which Sandhawalia CJ held that the suitor must exhaust the remedies under the Industrial Disputes Act before seeking relief in the writ jurisdiction unless the 'monstrosity of situation or other exceptional circumstances cry out for interference by the writ court at the very threshold'.[5] The bar of alternative remedy is more applicable to a writ of *mandamus* than to a writ of *certiorari*. It has been pointed out by the Supreme Court in *Mohammad Noor*, that though there is no rule with regard to *certiorari* as there is with regard to *mandamus* that it would lie only when there is no other equally effective remedy. It is well established that provided the requisite grounds exist, *certiorari* will lie although a right to appeal has been conferred by statute.[6] Since *mandamus* will be issued where there is a specific legal right and no specific remedy, it may be refused where there is an alternative remedy which is adequate, that is to say, equally convenient, beneficial and efficacious.[7] But the writ of *certiorari*, subject to certain exceptions, is granted to an aggrieved party even though there is an alternative remedy, unless of course his conduct disentitles him to relief.[8] In granting an order of prohibition, the court will not be fettered by the existence of an alternative remedy or the availability of an appeal.[9] From the decided cases, it can be summed up that the following are some of the circumstances in which relief under Art 226 could be granted despite the existence of an alternative remedy:

(1) the petitioner complains of violation of the fundamental rights. However the extraordinary remedy under Art 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defence legitimately upon any such actions. In such cases, it will be sound use of discretion to leave the aggrieved party to seek his remedy by ordinary mode of action in a civil court and to refuse to exercise in his favour the discretion to grant the remedy under Art 226;

(2) some mandatory provisions of the Constitution have been violated;

(3) rules of natural justice have been violated;

(4) the act complained of is contrary to law or without the authority of law;

(5) the alternative remedy is authorised by law which is *ultra vires* or the alternative remedy itself is unconstitutional or *ultra vires*;

(6) the act complained of is without jurisdiction and the state threatens coercive process for recovering the amount considered to be payable to it as an arrear of land revenue, if upon the facts established, the amount sought to be recovered is not payable even though the terms of the contract have to be construed. For instance, where the properties of a party are attached under the provisions of Revenue Recovery Act for recovering the sums said to be due under a certificate issued by the concerned authority under s 33C(1) of the Industrial Disputes Act, existence of a remedy of a suit, could not be considered to be effective alternative remedy to bar the issuance of a writ, if the person aggrieved could satisfy the court that it has got jurisdiction otherwise to deal with the matter;

(7) the writ petition raises some important questions of interpretation of statutory provisions or rules which public interest requires to be decided speedily; or

(8) the remedy itself is not adequate.

Following are some of the instances where the remedy itself is not adequate:

(1) where resort to it will not secure the relief which the action complained of demands; for instance where interim relief will not be available by reason of a statutory notice, such as, is required under s 80 of the Code of Civil Procedure;

(2) where it would be futile to drive a party to an alternative remedy, for instance when an appellate authority has pre-judged the issue and the authority whose order is impugned has acted under the general or special directions of the appellate authority;

(3) where the alternative remedy is not a matter of right; for instance a remedy under Art 136 is not an alternative remedy to what could be granted under Art 226, because the right to apply for leave to the Supreme Court, if it could be called a 'right' at all cannot be equated to a right of appeal;

(4) where the alternative remedy is onerous and burdensome; or

(5) where an alternative remedy is available under a statute but some grounds to be raised fall beyond the jurisdiction of an authority created under the statute then the writ petition is maintainable to agitate not only sued grounds but also the grounds which would within the particular jurisdiction of the statutory authority.

In *UP State Bridge Corporation*, the facts were: some 168 workmen of the corporation remained absent from duty *en bloc* from 12 October 1995 causingserious dislocation to the construction work that was in progress. The corporation issued a notice on 18 October 1995 directing them to report for duty immediately, failing which their names would be struck off from the rolls, as provided for in the standing order. Similar notices were published in the Hindi Newspaper on 22 & 28 December 1995, which also stated that if the workmen whose names were appended to the notice did not report for duty within a period of three days from the date of the publication of the notice, it would be presumed that they had abandoned their services with the Corporation without notice and their contract of service would come to an end and their names would be removed from the muster roll. According to the appellant despite the repeated notices the workmen continued to absent themselves and ultimately on 19 January 1996 an order was issued putting an end to the services of 168 workmen on the presumption that they had abandoned their services with the Corporation on their own. Thereafter, one of the workmen filed a writ petition before the Lucknow Bench of the High Court, which was dismissed with the endorsement that they could raise an industrial dispute, if they so desired. A second writ petition was filed, this time by the union, before the Allahabad High Court, which was allowed by a single judge, who came to the conclusion that the word "absence" did not by itself mean "abandonment of service" and when an employee went on strike it was not the intention to abandon service. It was said that "Resorting to strike" is neither misuse of leave nor over-staying of leave. Standing order does not provide for any provision as to how the question of strike is to be dealt with." It was further said that the strike was not illegal as no notice was required to be given to the respondent under Section 22 of the Industrial Disputes Act, 1947. It was also held that in any event - whether a strike was illegal or legal - it did not amount to abandonment of service justifying action under the standing orders of the company. Allowing the appeal filed by the Corporation, and quashing the order passed by the single judge, Ruma Pal J (for self and BP Singh J) of the Supreme Court held:

> We are of the firm opinion that the High Court erred in entertaining the writ petition of the respondent-Union at all. The dispute was an industrial dispute both within the meaning of the Industrial Disputes Act, 1947 as well the UPIDA, 1947. The rights and obligations sought to be enforced by the respondent-Union in the writ petition are those created by the Industrial Disputes Act. In *The Premier Automobiles Ltd.*. ., it was held that when the dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the claimant is to get adjudication under the Act. This was because the Industrial Disputes Act was made to provide
>
> > ... a speedy, inexpensive and effective forum for resolution of disputes arising between workmen and their employers. The idea has been to ensure that the workmen do not get caught in the labyrinth of civil courts with their layers upon layers of appeals and revisions and the elaborate procedural laws, which the workmen can ill afford. The procedure followed by civil courts, it was thought, would not facilitate a prompt and effective disposal of these disputes. As against this, the courts and tribunals created by the Industrial Disputes Act are not shackled by these procedural laws nor is their award subject to any appeals or revisions. Because of their informality, the workmen and their representatives can themselves prosecute or defend their cases. These forums are empowered to grant such relief as they think just and appropriate. They can even substitute the punishment in many cases. They can make and re-make the contracts, settlement, wage structures and what not. Their awards are no doubt amenable to jurisdiction of the High Court under Article 226 as also to the jurisdiction of this Court under Article 32, but they are extraordinary remedies subject to several self-imposed constraints. It is, therefore, always in the interest of the workmen that disputes concerning them are adjudicated in the forums created by the Act and not in a civil court. That is the entire policy underlying the vast array of enactments concerning workmen. This legislative policy and intendment should necessarily weigh with the courts in interpreting these enactments and the disputes arising under them.[10]
>
> Although these observations were made in the context of the jurisdiction of the Civil Court to entertain the proceedings relating to an industrial dispute and may not be read as a limitation on the Court's powers under Article 226, nevertheless it would need a very strong case indeed for the High Court to deviate from the principle that where a specific remedy is given by the statute, the person who insists upon such remedy can avail of the process as provided in that statute and in no other manner. (paras 12 & 13).

On the question of striking the names of 168 workmen, the learned judge observed:

> The final submission of the respondent was that the UPIDA provided for penalty after a departmental enquiry, in respect of the workman who may have gone on illegal strike and, therefore, there could be no termination of services on account of illegal strike. The submission is unacceptable as we have said there is no proof that the respondents were on strike at all. Besides, merely because the action is punishable does not mean that the consequence of an unauthorised absence is not available under the Certified Standing Orders if it so specifically provides. (para 26).. . In the circumstances, we have no hesitation in setting aside the decision of the High Court in dismissing the writ petition. This order will, however, not preclude the respondent-Union if it is otherwise so entitled to raise an industrial dispute under the UPIDA.[11] (para 27)

It is submitted that this case was rightly decided. It has to be stated that the misconceived decisions rendered by the Supreme Court in *Sukhdev Singh*,[12]*Ajay Hasia*,[13] and a few other cases - by which the apex court opened the floodgates to the litigants to discard statutory remedies provided by the law and to directly knock at the doors of High Courts and Supreme Court - were squarely responsible for the subsequent misuse and abuse of writ jurisdiction, not only by the High Courts, but by the Supreme Court itself during the past four decades.

Delay and Laches:

A writ court normally aids the vigilant. He who deliberately remains aloof or indifferent or recalcitrant cannot be heard to say that he is aggrieved.[14] It is well-established that the writ of *certiorari* will not be granted in cases where there is such a negligence or omission on the part of the applicant to assert his right as, taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party. This principle is to a great extent, similar to, though not identical with, the exercise of discretion in the Court of Chancery.[15] The principle has been stated by Sir Barnes Peacock in *Lindsay Petroleum*, as follows:

> Now the doctrine of laches in courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy. [16]

Unreasonable and inordinate delay on the part of the petitioner in coming to the High Court for relief under Art 226 without any satisfactory explanation as to such delay would disentitle him from obtaining any relief under this article.[17] For instance, in *Govindrao,* the employee was dismissed from service in October 1977 and his appeal against that order was also dismissed in July 1978. He did not challenge the appellate order in a writ petition but again filed a departmental appeal described as 'special appeal' which too was dismissed in May 1982. Subsequently, he challenged the validity of the dismissal order passed in October 1977. The Madhya Pradesh High Court quashed the order of dismissal. In appeal by special leave, the Supreme Court held that there was no reason for the High Court to entertain a writ petition after a lapse of 10 years, and should have dismissed it *in limine*.[18] However, the principle that ordinarily delay will defeat the writ petition is a proposition, not a rule of law but a rule of practice based on sound and proper exercise of discretion and there is no inflexible rule that whenever there is delay, there must necessarily be an order of rejection of the petition on that ground alone. The question whether the delay will defeat the writ petition depends on the facts and circumstances of each case. In a case where the delay has been reasonably explained and no right has accrued to others in the meantime, which is likely to be disturbed if the petition is entertained, it will be inconsequential.[19] The petition cannot be rejected on the ground of delay where the petitioner was pursuing other remedies before invoking the jurisdiction of the High Court under Art 226,[20] particularly when no inconsistent legal or equitable situation had arisen because of delay or laches on the part of the petitioner.[21] Where the writ petition has been admitted and a *prima facie* case has been made out, it would be unjust to deny the relief merely on the ground of laches.[22] The fact that the writ petition was admitted and delay having been explained, the petition cannot be thrown out merely on the ground of delay and laches at the final hearing.[23] In other words, a petition may not be thrown out merely on the ground of delay, but it will be one of the factors that will weigh with the court in deciding whether or not the case is a fit one for exercise of the special jurisdiction of the court.[24] However, a petitioner cannot exonerate himself from delay on the ground that he was engaged in pursuing non-statutory representations when he is governed by statutory rules particularly when the delay is unreasonable and inordinate.[25] The Allahabad High Court in *Board of Revenue*, laid down the rule of practice that a writ petition under Art 226 should be filed

as quickly as possible after the delivery of judgment. A period of 90 days, which is the period fixed for appeals to the High Court from the judgment of courts below, should be taken as the period for application for the issue of a writ of *certiorari*, and that time can be extended only when circumstances of a special nature, which are sufficient in the opinion of the court are shown to exist.[26] This rule has been explained by the Supreme Court in *Chandra Bhushan* thus:

> But in the absence of a statutory rule, the period prescribed for preferring an appeal to the High Court is a rough measure; in each case the primary question is whether the applicant has been guilty of *laches* or undue delay. A rule of practice cannot prescribe a binding rule of limitation; it may only indicate how discretion will be exercised by the court in determining whether having regard to the circumstances of the case, the applicant has been guilty of *laches* or undue delay...The rule which has been laid down in *Mongey's* case is at best a rule of practice, and not a rule of limitation.[27]

Though the Supreme Court thus recognised that normally the question whether a petition under Art 226 for the issue of a writ of *certiorari* has been presented without undue delay or laches is a question for the High Court to decide and it would not interfere with such discretion, in the circumstances of the case, it held that the High Court had erred in exalting a rule of practice to a rule of limitation and a departure from the rule of practice was justified. In this case, the attention of the court does not appear to have been drawn to its decision in *Bhailal Bhai*, holding that the maximum period fixed by the legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art 226 can be measured.[28] This principle will apply to delay in writ petitions both under Arts 32 and 226. In *Sadasivaswamy*, the court pointed out:

> It is not that there is any period of limitation for the courts to exercise their powers under Art 226, nor is it that there can never be a case where the courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the courts to refuse to exercise their extraordinary powers under Art 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the court to put forward stale claims and try to unsettle the settled matters.[29]

In *Balwant Singh*, the workman did not seek review of the High Court order, which was silent on payment of backwages nor did he move the Supreme Court against the order, with the result the said order became final. After a lapse of two years, he filed another writ petition in the High Court claiming monetary compensation also for the period during which he had not actually worked as well as for the termination of the service. The High Court allowed the writ petition granting the relief claimed. In appeal by special leave, the Supreme Court held that the High Court, in these circumstances, was not justified in entertaining the claim and allowing the same and quashed the order of the High Court.[30] The Orissa High Court in *Bishnu Charan Mohanty*, stated the following principles to be kept in mind while determining whether a writ application would be liable to be dismissed on account of laches and delay:

(1) The Limitation Act has no application to writ petitions. Where, however, a suit for identical relief would be barred by the law of limitation, the court would ordinarily refuse to exercise discretion to grant relief under Art 226.

(2) Even if a suit for the same relief is not barred by limitation under the Limitation Act, yet the High Court may refuse to issue a writ if otherwise the delay is not explainable by satisfactory reasons.

(3) Two important circumstances to be borne in mind in all such cases are: the length of the delay, and the nature of the acts done during the interval which might affect either party and strike balance of justice or injustice in taking one course or the other so far as relates to the remedy.

(4) Where, by the conduct of the party, the delay might fairly be regarded as equivalent to a waiver of the remedy, the relief under Art 226 would be refused.

(5) Even if the conduct or act is not equivalent to a waiver, if the neglect of the petitioner put the opposite party in a situation in which it would not be reasonable to place him if the remedy is afterwards granted, the relief under Art 226 should be refused on account of delay and laches.

(6) Utmost expedition is the essence for a claim under Art 226.

(7) No hard and fast rule can be laid down. Each case is to be determined on its own facts and circumstances.[31]

Discretion of Tribunals:

Since writ court is not an appellate court where the correctness of the order or award under review is to be canvassed, it has

no jurisdiction to substitute its own opinion for the opinion of the inferior tribunal,[32] even if it is satisfied that the decision is wrong. In other words, the writ court will not probe into the merits of the exercise of discretion of an authority unless the exercise of discretion is perverse. However, if the discretion has not been exercised in accordance with the principles recognised by law in this behalf-for instance where the power has been abused by exercising it capriciously, arbitrarily or improperly or the power is not used at all on account of abdication of power to someone else, or for any other reason, the writ court will quash the resulting order or award. It is well-settled that discretion must be exercised only by the authority to which it is committed. In the words of Professor SA de Smith:

> The authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must nor do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously.. .. These several principles can be grouped in two main categories:(i) failure to exercise discretion and (ii) abuse of discretionary power. The two classes are not, however, mutually exclusive. In other words, discretion may be improperly exercised when irrelevant considerations are taken into account; and where the authority hands over its discretion to another body, it acts ultra vires. Surrender of independent discretion in favour of the adoption of a policy pursued by a superior authority or to be guided by the dictates of a superior authority is no less improper. In some cases, authorities entrusted with statutory discretion are usually entitled to and occasionally obliged to take into account considerations of public policy, and in some contexts, the policy of the Government. Though it may be relevant to take these factors into consideration, these will not absolve the authorities from their duty to exercise their personal judgment in individual cases, unless explicit statutory provision has been made for them to give binding instructions by a superior. [33]

The tribunals cannot take any action incompatible with the due exercise of their powers and duties because to act so would be 'to renounce a part of their statutory birthright.[34] The principle that discretions must be exercised 'according to law' is, indeed, deeply entrenched in the common law, although the demarcation line between the legality and the merits of the exercise of discretion may very much depend upon the particular context in which the issue arises and upon the prevailing judicial climate of opinion on the proper role of the courts.[35] Yet discretion is not self-defining. Its ambit is usually established by judicial interpretation. It is, of course, plain that such an interpretation is not made in the abstract. It is made on the basis of a case. Broadly, it is the power which is given by the statute to make a choice among competing considerations. Most powers to act, of course, involve some element of choice even if it relates to mere details. Thus discretion implies power to choose between alternative courses of action.[36] The exercise of judicial discretion imports a duty to be, in the words of Lord Mansfield, 'fair, candid, and unprejudiced; not arbitrary, capricious, or biased; much less, warped by resentment, or personal dislike'.[37] The concept of discretion was elaborated by Lord Halsbury LC, as:

> a duty to act 'according to the rules of reasons and justice, not according to private opinion ...according to law, and not humour. .. not arbitrary, vague, and fanciful but legal and regular.[38]

Judicial discretion is always to be exercised, not capriciously or arbitrarily, but according to sound principles laid down for exercising it.[39] Desai J observed:

> Whenever, it is said that something has to be done within the discretion of the authority then that something has to be done according to the rules of reason and justice and not according to private opinion, according to law and not humour. It is to be not arbitrary, vague and fanciful but legal and regular and it must be exercised within the limit to which an honest man to the discharge of his office ought to find himself...It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful.[40]

It is well-settled that the role of a writ court is limited to ensure that discretion has been exercised by the authority in accordance with the law.[41] It is, however, clear that, despite such discretion, the writ court is competent to review the agency's use of discretion in order to determine whether it is within the permissible class of actions. Presumptively an exercise of administrative discretion is reviewable for legal error, procedural detect or abuse. One of the methods of vitiating the exercise of discretion is where the person entrusted with it exercises it at the dictation of some other person. In such cases, reasoning adopted is that although such a person is acting himself, it is not *his* own discretion which governs the act, as the legislature intended that it should be.[42] However, this is not an absolute rule to be blindly applied to each case. There are, at least, two exceptions to this general rule. The first is that where an explicit statutory provision has been made for a person to be given binding instructions by a superior, if that person, acts accordingly, the action would not be vitiated.[43] The second exception is where the instructions are issued by a person who in law can himself exercise the discretion, it would not vitiate the action of the inferior authority. In other words, both the authorities superior as well as

subordinate, if they have concurrent power to exercise administrative discretion then even if the inferior authority purports to exercise the discretion at the behest of such superior authority, such an exercise of discretion would not be bad in law.[44] But an authority who has a discretionary power, cannot be forced to exercise the discretion in a particular manner.[45] The exercise of discretion may be impugned directly or indirectly. The indirect method of challenge is more common. As SA de Smith wrote:

> A person aggrieved by the exercise of a discretionary power may, instead of attacking the merits of the exercise of the discretion, contend that the repository of the discretion has acted without jurisdiction or ultra vires because of the non-existence of the state of affairs upon which the validity of the exercise of the discretion depends. Or he may contend that the repository of the discretion has failed to observe the rules of natural justice (if they are found to be applicable) or other essential procedural requirements. If his contentions are successful the court will hold the discretionary act to be invalid and the fact that the true reasons for instituting proceedings will have been his dislike of the manner in which the discretion itself was exercised is not a valid objection to the proceedings.[46]

The discretionary power may be abused bona fide or mala fide. Mala fides can be a ground of invalidity *sui generis*. It can also be regarded as a quality which brings the exercise of power within one of the other recognised categories of invalidity. The writ court will generally review judicial discretion of administrative or quasi-judicial authorities;[47] but it will refrain from interfering when the discretion is purely of administrative nature, not measurable by reference to any objective standards.[48] A mere wrong decision cannot be corrected by the writ of *certiorari* as that would be using the writ jurisdiction as a cloak of an appeal in disguise. A writ of *certiorari* is generally granted in cases where a tribunal acts in flagrant disregard of the rules of natural justice when no particular procedure is prescribed. For instance, when it is brought to the notice of the court that in interpreting and appreciating the evidence on record the industrial tribunal forgot the principles of benevolent construction especially in a social welfare legislation, nothing will prevent it from interfering with the decision of such tribunal.[49] Likewise, the refusal of the labour court to grant normal relief of reinstatement with full backwages in a case of retrenchment without compliance with the provisions of s 25F would not be proper exercise of discretion.[50] A direction with regard to payment of subsistence allowance and backwages is a matter of discretion on the part of an industrial tribunal and such discretion cannot be interfered with in judicial review unless it is satisfactorily shown that the discretion has been exercised wrongly or without just grounds.[51] Likewise, the writ court cannot come to any definite finding as to actual increase in dearness allowance and substitute its own discretion in this connection for that of the tribunal.[52] The discretion exercised *by* the tribunal in fixing the age of retirement after taking the relevant factors into consideration cannot be interfered with in exercise of the power of superintendence under Art 227.[53] Similarly, the discretion exercised in fixing a gratuity scheme awarded by the tribunal taking into consideration the relevant factors in consonance with the law laid down by the Supreme Court could not be interfered with in judicial review.[54] Likewise, where the tribunal, taking the relevant facts of a case directs that its award in respect of wages, dearness allowance or any other matter will be operative from a date between the date of the demand and the date of the award, the reviewing court generally will not interfere with the discretion of the tribunal.[55] Discretion of the tribunal condoning delay or laches will also not be liable to be interfered with.[56]

In *Shaw Wallace*, a single judge of the Madras High Court held that the power of the High Court under Art 226 to interfere with the discretion exercised by the labour court under s 11A was very limited, and unless it was shown that the labour court had taken a perverse or shockingly unreasonable view, which no reasonable person with an obligation to judiciously determine a question would have come to, the exercise of power to interfere in the said discretion was not available.[57] In *PGI Medical Assn*, the Supreme Court held that the labour court has the discretion to restrict the quantum of backwages, while ordering the reinstatement of a workman whose services were terminated without complying with the provisions of s 25F. 'Where the interference of the High Court is sought against such an order of labour court, there exists an obligation on the part of the High Court to record in the judgment, the reasons before denouncing the order of tribunal. There ought to be available in the judgment itself a finding about the perversity or the erroneous approach of the labour court and it is only upon recording therewith that the High Court has the authority to interfere.[58] In *Balbir Singh*, the Supreme Court held that the tribunal has the discretion to mould the relief and if the discretion is exercised judicially, the order of the tribunal does not warrant interference.[59] Where the workman, who was dismissed from service for assaulting and using intemperate and foul language against superior officers, was directed by the tribunal to be reinstated with a lesser punishment, the award of the tribunal was quashed and the dismissal was upheld.[60]

Where the labour court upheld the dismissal of a workman for beating a co-worker, the High Court held that the labour court had exercised its jurisdiction properly in the matter.[61] In a case where a daily-rated workman did not join the place to where he was transferred and gave no satisfactory explanation, it amounts to the abandonment of service, and not a case of termination, yet he was awarded compensation for non-compliance with s 25F, but without reinstatement, a single judge of the Madras High Court held that the workman had no right to hold the position, and the compensation awarded by the labour court was to meet the ends of justice, and hence, the order of the labour court did not warrant interference by the

High Court.[62] Where the labour court directed reinstatement of an employee, terminated on grounds of abandonment for unauthorised absence from duties for two years, the High Court quashed the award and held that the labour court should not have exercised its discretion to interfere with the termination, in the face of admitted facts that the employee absented himself deliberately from duty without even a letter and that too for more than *two* years.[63] In *Ramanna*, the Karnataka High Court held that in a case, where a conductor was dismissed for not collecting fare from passengers and after taking into consideration the earlier default cases against him, the labour court while exercising its jurisdiction under s 11A ought not to have interfered with the punishment by modifying it as reinstatement with 50 per cent backwages.[64]

Findings of Fact:

A 'finding of fact' has been defined by Prof SA de Smith as 'an assertion that a phenomenon exists, has existed or will exist, independently of any assertions as to its legal effect'.[65] However, in analysing the nature of the process by which a tribunal has come to its conclusion on a question of fact, perplexing problems may arise. Every finding by an adjudicator postulates a process of abstraction and inference which may be conditioned solely by his practical experience and knowledge of affairs or partly or wholly by his knowledge of legal principles. He hears evidence and by satisfying himself as to its reliability, finds what were the 'true facts'; it may then be necessary for him to draw a series of inferences from these primary findings in order to determine what were the material facts on which he had to base his decision; in order to draw certain of these inferences correctly, he may need to apply his knowledge of legal rules.[66] However, a tribunal which has recorded a finding of a primary fact wholly unsupported by evidence or which has drawn an inference wholly unsupported by any of the primary facts found *by* it, will be held to have erred in point of law. The 'no evidence' rule is well-established because the writ courts will intervene where a manifest and gross error of this nature is revealed.[67] The jurisdiction of a writ court to issue a writ of *certiorari* under Art 226 has been succinctly stated by Gajendragadkar J in *Syed Yakoob*, in the following words:

> ... the jurisdiction to issue a writ of *certiorari* is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the tribunal, a writ of *certiorari* can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of Jaw which can be corrected by a writ of *certiorari.* In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the tribunal cannot be challenged in proceedings for a writ of c *ertiorari* on the ground that the relevant and material evidence adduced before the tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal, and the said points cannot be agitated before a writ court.[68]

It is now well-settled that the writ court can set aside an order in case of an error of law and not error of fact. In other words, it is not entitled to correct a finding of fact by the tribunal, as if it were a court of appeal, in its writ jurisdiction.[69] The tribunal is the sole judge of a fact and if there be some legal evidence on which its findings may be based, the adequacy or reliability of this evidence is not a matter which can be permitted to be canvassed in writ proceedings.[70] Thus, a finding of fact based on appraisement of evidence on record cannot be reappraised by a writ court.[71] The jurisdiction of the writ court under Arts 226 and 227 is to be most sparingly exercised and only in appropriate cases in order to keep the subordinate courts within the ambit and bounds of their authority and not for correcting mere errors.[72] In other words, interference by the writ court is not obligatory if facts of the case do not warrant such interference. Therefore, the power of the writ court to disturb the findings on question of fact in exercise of extraordinary powers is more than difficult.[73] It is only in matters when the tribunal acts without jurisdiction or in excess of or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in it by law or there is an error apparent on the face of the record and where all these aspects have resulted in manifest injustice.[74] It is now well settled law that the statement of facts recorded by a court or quasi-judicial tribunal in its proceedings, as regards the matter which transpired during the hearing, would not be permitted to be assailed as incorrect, unless steps are taken before the same forum. It may be open to a party to bring such statement to the notice of the court or tribunal and to have it deleted or amended. Further, it is not open to the parties to say that the proceedings recorded by the tribunal are incorrect.[75] The writ court cannot convert itself into an appellate court over the tribunals constituted under special legislation to resolve disputes of a kind qualitatively different from ordinary civil disputes and to readjudicate upon questions of facts decided by such tribunals.[76] Therefore, since the finding of fact is not ill-founded, unreasonable or perverse, the writ court will not interfere.[77]

The limitations on the exercise of writ jurisdiction in respect of matters based on findings of fact are too well known to be repeated. Therefore, the writ court cannot interfere with any finding of the adjudicatory authorities, only on the ground that

on the basis of the material and evidence before it, another view was also possible.[78] In the case of *Thonimudi Estate,* the Madras High Court declined to interfere with the award of the labour court reinstating the workman, while it held that the award of backwages with continuity of service was excessive and reduced payment of backwages only for a period of two years.[79] Likewise, where on the question of age of the workman, the industrial tribunal accepted the evidence of the doctors on the basis of clinical and radiological tests and came to a definite finding that the workman was to retire on a particular date, the finding of the tribunal is not liable to be interfered with being perverse or unreasonable.[80] So long as the finding stands, the award of the tribunal cannot be interfered with. However, if the tribunal omits to take into consideration the important evidence while arriving at such a finding which has a material bearing on the controversy, its order would be vitiated and would be liable to be quashed.[81] In other words, if it is found that the tribunal ignored the legal evidence on record, considered one part of the evidence and rejected the other part on extraneous considerations, in that case the findings of the tribunal would be perverse inasmuch as he failed to consider the material evidence on record. It cannot go into the question of insufficiency and credibility of the evidence.[82] However, the writ court cannot set aside the finding of the fact on the basis of the assessment of the evidence, unless it is a case of 'no evidence'.[83] Even a wrong appraisal of evidence by the inferior tribunal would not justify the writ court in weighing the evidence, as if it were sitting in appeal against the order of the tribuna1.[84] In some cases, it might not be correct to rule out certain instances altogether as irrelevant because they might specifically become relevant as *res gestae*. Whether they were so or not, is for the tribunal to assess and not for the writ court to re-assess.[85] If the decision of the inferior tribunal is not perverse, the possibility of a view other than the one taken by the tribunal is no ground for interference by the writ court.[86]

Where the labour court rejected the charge of disobedience against the workman on the ground of non-production of certain documents which was called by the workman from the management, findings of labour court cannot be dubbed as perverse.[87] Likewise, a finding of the court about the date of birth of an employee based on oral and documentary evidence of the parties is a finding of fact not amenable to interference in judicial review.[88] However, if the tribunal in awarding some relief, acts without jurisdiction, the writ court has ample jurisdiction to interfere, as it is not a question of reviewing the finding of fact arrived at by the inferior tribunal.[89] In a writ petition filed by the employer, the writ court will have no jurisdiction to grant relief of interest to the workman even though the claim is reasonable.[90] For the application of these principles to cases of industrial adjudication, reference may be made to the under-noted cases.[91] In *Navinchandra Shah*, Desai, J extended the principle enunciated by the Supreme Court in *Chitra Venkata Rao*, not only to the extent of reappraising the evidence and quashing the order of the tribunal, but also granting relief to the party on the basis of such independent appreciation of evidence.[92] First let us take a look at the principle propounded in *Chitra Venkata Rao*, where the Apex Court held:

> The jurisdiction to issue a writ of *certiorari* under Art. 226 is a supervisory jurisdiction. The Court exercises it not as an appellate Court. The findings of fact reached by an inferior Court or Tribunal as a result of the appreciation of evidence are not reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by a Tribunal, a writ can be issued if it is shown that in recording the said finding, the Tribunal, had erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Again if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of *certiorari.* A finding of fact recorded by the Tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the Tribunal is insufficient or inadequate to sustain a finding. The adequacy or insufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal.[93]

In *Navinchandra Shah,* Desai J raised the following 'leading' questions, which are rhetorical in nature and are themselves suggestive of the answers:

(i) Keeping in view our jurisdiction, namely that we can interfere with the order when the finding is completely baseless or perverse, could it not be said that before we say a finding is baseless or perverse that there was no misconduct at all on facts alleged and taken as admitted? (p. 67)

(ii) We are taking the evidence as produced to be wholly correct at the initial stage and feel that there is no misconduct. Can we not say that under Art 226? (p 67)

(iii) How do we expect a petitioner like the present one working as a weighman, more of a mechanical type of work, not calling for any educational attainment and ready to struggle for the whole of his life getting a meager wage of Rs 150 per month to understand the provisions of Standing Orders? (p 69)

(iv) Do we expect this petitioner to cross-examine witnesses on his own, unaided and unhelped by any one?

(v) If the petitioner says he was not employed and if that averment is not questioned in cross examination and if the employer does not lead evidence and does not say anything, it would indicate that the petitioner was not employed anywhere and the averment of the petitioner on oath must be accepted as trustworthy and reliable...The question then is should he not get his backwages?

(vi) What should be the approach in such a matter? The law of the land as pronounced by the Supreme Court is that in such cases, reinstatement must follow as a necessary corollary. Should he be denied wages? For what offence should the man be denied wages? Should he be visited with the further penalty by denying him wages? (p 73)

(vii) In such a case, for a writ of *certiorari* should the court content itself by merely quashing the order by which termination was provided for? In other words, is it a correct approach to the problem for in every case where a writ of *certiorari* is prayed for, the jurisdiction of the court under Art 226 (1) comes to an end as soon as the impugned order is quashed? (p 76)

(viii) The labour court completely overlooked the law of the land, namely, the decisions of the Supreme Court especially on the question whether before upholding the decision of the domestic tribunal, can it be said that what was alleged was misconduct within the relevant Standing Order and whether the prescribed mandatory procedure was followed or not and whether rules of natural justice is not in controversy. In such a case, the order is vitiated, the inquiry itself being illegal and defective. Now, what do we do? (p 80)

(ix) If Mr Nanavati is right, we quash the order and the matter goes back to the labour court. What has the labour court to do but merely to pass an order for reinstatement and backwages? (p 80)

(x) Even on the question of backwages, the relevant decisions of the Supreme Court which are binding have not been taken into consideration. Should we merely pay a lip sympathy to the form rather than the substance of the matter? (pp 80-81).

(xi) The injury is caused by not following the Standing Orders. Rules of natural justice govern every quasi-judicial inquiry. A contravention of it makes the order void is matter no more in dispute and what is the injury inflicted? (p 81)

Desai, J then proceeded to deal with them as follows:

It is not for a moment suggested that all errors must be overlooked as an error *simpliciter*. An error which has the consequence of leading to serious or atrocious consequences may be styled as negligence and it can only be gross provided the degree of culpability is very high (p 65)

This subsequent performance, therefore, clearly implies that the employer was actuated by an unfair motive in introducing facts subsequently so as to convert an accidental lapse or a slip of a. bona fide character into one of misconduct or were an element of mala fide as been introduced. Under these circumstances, the labour court could have interfered and should have interfered (p 68)

All these requirements are conspicuous by their very silence. This led us to make an observation, may be we are wrong, that at least apart from the petitioner, this manager of the institution was completely oblivious of the requirements of the Standing Orders. Possibly he did not know that there is something like Standing Orders (p 70)

We honestly feel that the labour court has completely missed the point and the order more or less reproduces the *ipse dixit* of the labour court. The court took the misconduct has proved without ever first examining, as was contended, whether the facts alleged constitute misconduct. It observed that on misconduct being proved, the other thing namely punishment must follow as a matter of course. It was open to the labour court to look at the inquiry and come to the conclusion whether it is vitiated or not. Not one word is to be found in the whole order of the labour court as to whether the inquiry was held consistent with the provisions of the Standing Orders (p 70)

The labour court then observed that the punishment of dismissal to a workman with clean record is too severe. Having so observed, the labour court converted the order of dismissal into an order of discharge...To say the least the labour court has practically approached the matter as if it was rubber-stamping the domestic inquiry. From a court of social justice, we expect much better approach. It must realise that dismissal in the life of a workman aged more than 50 means denial of further opportunity to work and when it converted the order of dismissal into discharge, we do not understand what was in the mind of the labour court. The mental process of the labour court is difficult to reconstitute. A termination of service with an averment of proved misconduct would

> hardly help the petitioner even in getting gratuity, provided he had put in that much length of service which would qualify for gratuity. (p 70)

> After recording the finding of misconduct as proved, the conversion of dismissal into discharge is a paper formality devoid of any meaning. Its consequences are never appreciated. When he applies for service again no one is asking for a certified copy of the judgment of the labour court. section 11A was not introduced for this purpose. It was introduced to confer vital jurisdiction on labour court and when there is a dismissal for misconduct, what is expected of the labour court is to first ascertain whether on facts alleged it constituted misconduct, whether the finding is perverse and whether the inquiry was in consonance with the principles of natural justice as reproduced in the Standing Orders. None of the three steps is taken. The proof of misconduct is taken for granted without examining the charge, the complaint, the subsequent foisting in of a cooked up witness Udesing and the non-observance of relevant provisions of Standing Orders (pp 70-71)

> The illegality committed by the labour court is patent on the record in the sense that it did not care to look at the problem according to the law laid down in this country and in force in this country. Therefore, after the introduction of cl (b) and (c) in Art 226, we have no doubt in our mind that we cannot be confined to the narrow grooves of old historical notions with regard to writs in England but in the context of socio-economic justice, we must mould the reliefs as to be effective. That is what we must do and, therefore, this cloud or doubt about our power must stand dispelled by the discussion herein and we must grant appropriate relief. (p 81).

The above observations of Desai J are grossly misconceived and militate against the overriding decision of Supreme Court in *Chitra Venkata Rao* on the scope of jurisdiction of High Courts while dealing with a petition under Art 226. It is well settled that the High Court cannot review the evidence or correct an error of fact. It is well-settled that the petitioner would be entitled to wages only when it is found that he was wrongfully dismissed, and not otherwise. The mere fact that he had not worked anywhere else is no qualification for being entitled to backwages in the case of a dismissal, which was found by the labour court to be in order. If the labour court converted the order of dismissal into one of discharge, it was clearly to help the workman get the terminal benefits, but there was no finding whatsoever recorded by the labour court against the domestic enquiry or the quantum of punishment. What is meant by the observation: 'should he be denied wages?' and weather the employer need to bear the liability of paying wages for the period of unemployment in the post-dismissal period, when the enquiry did not suffer from any infirmity, and when he was prepared to comply with the order of labour court converting the dismissal into one of discharge? A perusal of the facts of the case suggest that the right course would have been to remand the matter to the tribunal, if the case disclosed an error of law for disposing it off in accordance with the provisions of law and/or the principles of natural justice. In *Anil Vasant Marathe*, Daud J of Bombay High Court held:

> The plea that the petitioner could have moved for a reference under s 2A read with s 10 of the Industrial Disputes Act 1947 need not detain us for the existence of an alternative remedy is not always a bar to the invoking of the jurisdiction of the High Court under Art 226. More than five years have elapsed since the filing of the petition and it would be too late in the day to reject the petition on the ground of Petitioner not having exhausted the statutory remedies—assuming that these are available to him.[94]

The further observations of Daud J, in so far as the merits of the case are concerned, run thus:

> ...It is conceded that the petitioner's act of wrongfully confining Mrs Katdare was not motivated by any immoral or criminal considerations. He was annoyed with the refusal of Mrs Katdare to allow him to use the telephone board receiver. To give vent to his annoyance, he latched the cabin of the telephone reception from outside. This was a childish tantrum and should have been treated as such. It is said that the wrongful confining had a deleterious effect upon Mrs Katdare. Possibly *so* but reversion is too harsh a punishment. With respect to the Additional Municipal Commissioner he took an unusually severe view of the delinquency. Petitioner's so-called 'somewhat blemished record' has no bearing on the subject and should not lead to the imposition of the harsh punishment that is impugned in the present case. The question surviving is how the punishment is to be substituted. To my mind while a reprimand would have served in the normal circumstances. (at p 1085)

In the first place, *mens rea* is not a necessary pre-condition in respect of a misconduct of this nature, ie wrongful confinement of a co-employee, that too, of the opposite sex. Thus, the question of probing into the motive, ie whether it is with immoral intention or otherwise, becomes wholly irrelevant. Secondly, it is understandable if judges interfere with the punishment of dismissal on the ground that it takes away the livelihood of workmen but the High Court or Supreme Court cannot interfere with any punishment imposed under industrial law, except when it leads to severance of employer-

employee relationship. Municipal corporation is an 'industry' and is therefore governed by the provisions of the industrial relations legislation and not Art 311. Lastly, the ID Act does not contemplate raising of an 'individual' dispute except in the case of discharge, dismissal, retrenchment or termination otherwise (s 2A), which means that in the instant case, the workman in his individual capacity was not entitled even to move the machinery provided under the Act. No labour court or tribunal is empowered to entertain the dispute or to interfere with any punishment short of dismissal (s 11A). That being the legal position with regard to the remedies provided under the Act, question arises as to whether the High Court could, entertain a writ petition circumventing the procedure prescribed in the statute. In a significant departure from the dysfunctional trends unleashed by Desai, Daud JJ and a few others, the Supreme Court in *Mahendra Nissan*, re-stated the scope of power conferred under Art 226 consistent with *Chitra Venkata Rao* and other cases. The facts of the case were: A workman was dismissed from service for certain acts of misconduct. The labour court confirmed the dismissal. The Andhra Pradesh High Court in exercise of its jurisdiction under Art 226 modified the order of the labour court to reinstatement without backwages (fresh appointment) on the ground that the charges levelled against the workman were not serious enough as to warrant dismissal. Allowing the appeal, Bharucha and Misra JJ observed:

> We do not agree with the High Court. The charges are of a serious nature. The first respondent was found to have led out workmen from the factory premises regardless of the challenge by the security guard. Along with these workmen, the first respondent entered the administrative building of the appellant and the room of the Deputy General Manager. The Deputy General Manager and Manager (Personnel) were abused in filthy language and threatened, examples of which have been given. Misbehaviour was also proved against the first respondent in his conduct with five executives of the appellants. if these are not serious charges against a workman worthy of his dismissal from service, we do not know what can be. The High Court was quite wrong in the conclusion that it reached and in the order that it passed. The punishment imposed against the respondent must remain unaltered. [95]

The above ruling has restored to Art 226, the scope of which was enlarged - by the judges of the hue and shade of Ray CJI, Desai J and others during the mid-1970s and thereafter, for no convincing reason - beyond the contemplation of the founding fathers of the Constitution. Despite several authorities as laid down by the Supreme Court repeatedly during the 1950s and 1960s to the effect that the scope of power and jurisdiction of a High Court while dealing with a petition under Art 226 was limited, this has not been strictly adhered to. The uncalled for dynamism and misplaced activism displayed by the learned judges as disclosed in *Ajay Hasia*, *Sukhdev Singh* and a spate of others during the two decades commencing from mid-1970, resulted in virtual anarchy in the legal firmament with litigants directly approaching High Courts and Supreme Court in absolute disregard of the statutory remedy provided under different enactments, thereby feeding the fire of inordinate delays in disposing of the cases languishing in the Higher Courts for decades. In *Bhola Nath Singh*, the facts disclosed that the High Court examined the evidence as a first appellate court and reversed the findings of fact recorded by the enquiry officer and accepted by the disciplinary authority while exercising its jurisdiction under Art 226. The Supreme Court, setting aside the order of High Court, observed that, where no errors of law or procedure leading to manifest injustice or violation of principles of natural justice were found committed in the domestic enquiry, the exercise undertaken by the High Court was illegal and unsustainable.[96] Where the reference was in terms 'whether the retrenchment of workmen of contractors is justified', the tribunal was right in refusing to go behind the reference and decide the question whether the retrenched workmen belonged to the contractor or the principal employer. Further, the finding of the tribunal that the workmen concerned were the workmen of contractor cannot be interfered with by the High Court under Art 226.[97]

Where the reference made by the Government was in terms 'whether the workmen should be treated as plant assistants and given consequential benefits on par with a workman who was appointed along with them, but as plant assistant', the Supreme Court upheld the award of the tribunal to the effect that the said workmen having accepted the posts as trainee operators and having worked in those posts for a long time, it was not open to them to contend that they were entitled to higher emoluments; that only when their services were treated as plant assistants and from the date they were plant assistants they would be entitled to the enhanced benefits. The court quashed the order of High Court and held that, in the circumstances, there was no justification for the High Court to have interfered with the award of the tribunal.[1] When the Labour Court arrives at a finding overlooking the materials on record, it would amount to perversity and the writ Court would be fully justified in interfering with the said conclusion. The High Court exercising writ of certiorari would not assume the role of the appellate Court, however, the Court is well within its power to interfere if is shown that in recording the said finding, the Tribunal/Labour Court had erroneously refused to admit the admissible and material evidence or had erroneously admitted any inadmissible evidence which has influenced the impugned finding, the writ Court would be justified in exercising its remedy. If a finding of fact is based on no evidence that would be regarded as an error of law which can be corrected by a writ of certiorari.[2]

In *JK Synthetics*, the facts were that the company had closed a section of its plant for want of power and terminated the services of workmen. The government made a reference in terms 'whether the 'retrenchment' of workmen of four divisions of the company was justified'. The tribunal proceeded to decide the question whether or not there was a closure before dealing with the question of retrenchment and granting relief to the workmen. The Rajasthan High Court came to

the conclusion that there was no textile section and that there was no closure of it and hence, the tribunal would not have gone into the question of closure. Quashing the order and restoring the award of tribunal, the Supreme Court held that the High Court erred in drawing such a conclusion in the face of the fact that it was admitted before the tribunal and there was no dispute as to the existence of textile section as well as its closure, and observed that the tribunal was right in deciding that question in the first instance before going into the question of relief to the workmen.[3] In *Velayudhan*, the Supreme Court held that once the labour court examined the proportionality of the punishment to the gravity of the charge and came to the conclusion that the punishment of dismissal imposed by the management was justified and proper, it was not for the High Court to substitute its discretion for that of the labour court.[4] In *Cyril Emanuel*, Narayana J, of the AP High Court reappraised the evidence and directed that the dismissal, which was upheld by the industrial tribunal, be substituted with a lesser punishment.[5] The learned judge further imported his own conjectures into the case by holding that the workman might have become the victim of internal politics. In this case, the workman was dismissed for proved misconduct on charges *inter alia* of not working and sending petitions against superior officers, *etc*. This decision is a clear violation of the law laid down by the Apex Court in a battery of cases, and needs to be reviewed. In *IOB*, the canteen was closed, throwing the employees out of employment. This was challenged as violative of s 25-O. The tribunal ordered reinstatement of 33 employees of the canteen, which was set aside by a single judge of the High Court. The Division Bench in appeal restored the order passed by the tribunal. The Supreme Court observed:

> The learned single judge seems to have undertaken an exercise, impermissible for him in exercising writ jurisdiction, by liberally appreciating the evidence and drawing conclusions of his own on pure questions of fact, unmindful, though aware fully, that he is not exercising any appellate jurisdiction over the awards passed by a tribunal, presided over by a judicial officer. The findings of fact recorded by fact-finding authority duly constituted for the purpose and which ordinarily should be considered to have become final, cannot be disturbed for the mere reason of having been based on materials or evidence not sufficient or credible in the opinion of the writ court to warrant those findings, at any rate, as long as they are based upon some material which are relevant for the purpose or even on the ground that there is yet another view which can reasonably and possibly taken.[6]

Conduct of the Petitioner:

Writ remedies being of discretionary nature, a party may by his conduct preclude himself from claiming a writ *ex debito justitiae*, no matter whether the proceedings he seeks to quash are void or voidable.[7] A person whose conscience is not clear or whose hands are not clean or who has been guilty of laches and deliberate omission is not entitled to invoke the writ jurisdiction of the court for a writ of *certiorari*.[8] It is not open to a petitioner to pick and choose his own facts and to determine in advance, what is relevant material or omit to mention any material facts, proceedings and orders and then claim that he has acted bona fide.[9] In this extraordinary jurisdiction, the petitioner is expected to disclose all material facts, even if they go against him.[10] In *Vasant Vithal Palse*, an application for special leave to appeal filed by a trade union challenging the award was dismissed by the Supreme Court. Subsequently, an individual workman filed a writ petition before the High Court impugning the same award without disclosing the fact that the application of the trade union for special leave to appeal was rejected by the Supreme Court. The High Court took this fact into consideration for rejecting the writ petition and remarked:

> It is only fair that a citizen invoking the extraordinary jurisdiction of this court should place all the facts and circumstances in respect of the particular litigation before the court and if this obligation is not observed, the petitioner is certainly guilty of suppression.[11]

The High Court will not countenance a party taking a ground inconsistent with his own previous action, in granting relief in its writ jurisdiction.[12] Where the objection to the jurisdiction of a tribunal is latent, the acquiescence of the party who is aware of the assumption of jurisdiction, may disentitle him to a writ because of his conduct.[13] Where the petitioner failed to bring to the notice of the arbitrator under s 10A to entertain and decide the dispute in view of the efflux of time, the remedy of interference by a writ was declined on the ground of the conduct of the petitioner.[14] Where a party did not appear before the tribunal and allowed the matter to be decided uncontested and gave no explanation for its non-appearance, the writ court would be justified in refusing to entertain the writ petition because such a party will be deemed to have waived its rights.[15] The failure of the petitioner to file copies of his appointment and termination orders and his failure to prove, that the remedy before labour court is not efficacious, would disentitle him to invoke the jurisdiction of the writ court for violation of s 25F.[16] In *KN Dutt*,[17] the petitioner was a retired government officer and the government deducted certain amounts due to it, from his retiral benefits. His writ petition against the said deduction was dismissed. However, he again filed another writ petition without disclosing the previous writ petition and succeeded before a Division Bench. In appeal by the state, the Supreme Court strongly disapproved of the conduct of the officer as a serious lapse on his part.[18] In *N Palaniswami*, the tribunal refused to grant the relief of reinstatement of the workman on the ground that he was absent from service for a long time and the employer had made some alternative arrangement and, on this ground, it

ordered the payment of Rs 10,000/- in lieu of reinstatement. Accordingly, the employer sent a cheque covering the amount awarded by the labour court but the workman accepted the cheque under protest and without prejudice to his right of filing a writ petition against the award. The court held that the *principle of accord and satisfaction* will not apply and the conduct of the worker will not disentitle him to relief either by way of writ petition or by application under any provision of law.[19] In *Jayanta Nath Mazumdar*, the court also awarded a lump sum of Rs. 5000/- in lieu of reinstatement. This amount was accepted by the workman without any protest. A single judge of the Calcutta High Court held that the petitioner was disentitled to challenge the award of the tribunal in a writ petition.[20]

The High Court in its writ jurisdiction cannot interfere with legislative enactments or rules and regulations made thereunder.[21] Even if an order or award of the tribunal is vitiated by certain defects, the High Courts in their jurisdiction may not interfere unless there is any gross miscarriage of justice or flagrant violation of law calling for intervention.[22] On the same principles, the High Court will not entertain a writ petition for deciding merely technical and abstract questions.[23] Likewise, the court will also not issue writs where it will be futile to issue such writs or the interest of justice does not warrant or where there is no manifest injustice done to the petitioner. Similarly, where there is no infringement of any legal right or breach of any statutory rules, the extraordinary remedy under the writ jurisdiction will not be available to a petitioner.[24]Normally, the High Court will not be inclined to interfere where the petition involves disputed questions of fact. In such cases, if the High Court is of the view that the disputed questions of fact may not appropriately be tried in a petition for a high prerogative writ, it can refuse to try these questions and relegate the party to his normal remedy. The question whether an employee is a workman within the meaning of s 2(s) of the Act, cannot be adjudicated in writ proceedings and the employee has to raise an industrial dispute and get it referred under s 10.[25] The principle is that 'where basic facts are disputed and complicated questions of law and fact are involved, the writ court is not the proper forum for seeking relief. The right course for the High Court is to dismiss the writ petition on this preliminary ground without entering upon the merits of the case.[26] In *Biecco Lawrie*,[27] a single judge of the Calcutta High Court refused to interfere with a settlement which had been acted upon, and held that if a question of interpretation of the settlement was involved, the aggrieved party could have recourse to the provisions of s 36A. In *UPSEB*, a single judge of the Allahabad High Court refused to interfere with the order of the labour court under s 33C(2) of the Act as no manifest injustice had been done to the employer.[28] Where the labour court recorded a preliminary finding that the enquiry was vitiated and directed the management to let its evidence and the management filed a writ petition against the said direction, it was held that the High Court in exercise of its jurisdiction under Art 226 cannot interfere with the orders of the labour court at such a preliminary stage.[29]

(c) Judicial, Quasi-judicial and Administrative Functions

In the language of Griffith CJ:

> The words judicial power ...mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.[30]

However, a judicial decision is not always the act of a judge or a 'tribunal' invested with powers to determine questions of law and fact; it must, however, be the act of a body or authority vested by law with authority to determine questions of dispute affecting the rights of citizens under a duty to act judicially. A judicial decision always postulates the existence of a duty laid upon an authority to act judicially. Administrative authorities are often invested with authority or power to determine questions which affect the rights of citizens. The authority may have to invite objections to the course of action proposed by it; it may be under a duty to hear the objectors, and its decision may seriously affect the rights of citizens, but unless, in arriving at its decision, it is required to act judicially, its decision will be executive or administrative. Legal authority to determine questions affecting the rights of citizens, does not make the determination judicial; it is the duty to act judicially which invests it with that character. What distinguishes a judicial act from an administrative one is, therefore, the duty imposed upon the authority to act judicially.[31] For the purposes of *certiorari* and prohibition, judicial acts have to be distinguished from the discretionary acts which are ordinarily called administrative.[32]

In *Cooper*, the court of appeal indicated that it was not the character of an authority, but the character of the power exercised, that mattered. If it adversely affects the legal rights or interests, it must be exercised fairly.[33]Two especially important aspects are discernible from the judgments of this case; the universality of the principle, which makes it applicable to almost the whole range of administrative powers; and the presumption that it will always apply, however silent about it the statute may be. Thus, the courts justified their intervention by holding that every judicial act is subject to the procedure required by natural justice and then they denominated the great majority of administrative acts as 'judicial' for this purpose. The expression 'quasi-judicial' was coined as an epithet for powers which, though administrative, were

required to be exercised as if they were judicial, *i.e.*, in accordance with natural justice. By this device, the courts developed the system of fair administrative procedure.[34] Instead of saying that natural justice must be observed both in judicial and administrative acts, the courts stretched the meaning of 'judicial' in an unnatural way by treating 'administrative acts' as 'judicial' if they affected a person's rights or entailed penalty. A graphic example of this is a statement by Willis J in *Hopkins*.[35] However, *Cooper's* case played an important part in the recent revival of the 'right to be heard'. Thus, there was a complete overlapping of the expressions 'judicial' and 'administrative' where a person's rights were affected. For an illuminating exposition of the subject, reference may be made to the discussion by SA de Smith in *Judicial Review of Administrative Action*,[36] concluding on an optimistic note:

> At this point, terminological and conceptual problems may appear to be overwhelming. However, we shall see that to an increasing extent courts exercising powers of judicial review in administrative law are abandoning servitude to their own concepts and asserting mastery over them.[37]

In India also, the line of distinction between judicial and administrative functions is also equally blurred. In connection with the distinction between an administrative power and quasi-judicial power *in AK Kraipak*, the Supreme Court said:

> The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. In a welfare state like ours, it is inevitable that the organ of the state under our Constitution is regulated and controlled by the rule of law. In a welfare state like ours, it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its validity if the instrumentalities of the state are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate, if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What, was considered as an administrative power some years back is now being considered as quasi-judicial power...With the increase of the power of the administrative bodies it has become necessary to provide guidelines for the just exercise of their power. To prevent the abuse of that power and to see that it does not become a new despotism. Courts are gradually evolving the principles to be observed while exercising such powers. In matters like these, public good is not advanced by a rigid adherence to precedents: New problems call for new solutions. It is neither possible nor desirable to fix the limits of a quasi-judicial power.[38]

The question whether an act is a judicial act or an administrative one, arises ordinarily in the context of the proceedings of an administrative tribunal or authority. The fact that an order was issued or an act emanated from an administrative tribunal would not make it any less a quasi-judicial act, if the aforesaid tests are satisfied. The concept of quasi-judicial act has been conceived and developed by English judges, with a view to keep administrative tribunals and authorities, who are not courts and whose orders are not judicial *strictu sensu*, within their bounds. However, the term quasi-judicial has itself been used in several different senses.[39] In *Cooper v Wilson* , it was observed:

> A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (1) The presentation not necessary orally of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found, including, where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3) and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the minister's free choice. [40]

The distinction between quasi-judicial and administrative acts of tribunals has been succinctly stated by Parker J in *Manchester Legal Aid Commitee*, in the following words:

> The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed inadvisable, to attempt to define exhaustively...When, on the other hand, the decision is that of an administrative body and is actuated in whole or in part by questions of policy, the duty to act judicially may arise in the course of arriving at that decision. Thus if in order to arrive at the decision, the body concerned has to consider proposals and objections and

> consider evidence, then there is the duty to act judicially in the course of that inquiry.. . Further an administrative body in ascertaining facts or law may be under a duty to act judicially notwithstanding that its proceedings have none of the formalities of and are not in accordance with the practice of a court of law.. .. If, on the other hand, an administrative body in arriving at its decision at no stage has before it any form of *lis* and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty at any stage to act judicially. [41]

Halsbury's Laws of England states as follows:

> Potentially important legal consequences flow from the designation of a function as legislative, executive or administrative, judicial (or quasi-judicial), or ministerial. Precise definitions of these categories are, however, unattainable; one class of function tends to shade off into another, and in practice classification varies according to the context and the purpose for which classification is attempted.[42]

In India, *Ridge v Baldwin* has been followed by the Supreme Court in *PN Sharma*, in holding that the decision of an administrative authority required to act judicially without complying with the rules of natural justice will be a nullity. Gajendragadkar J held that in dealing with the questions whether any impugned order could be reviewed under Art. 226 of the Constitution, the test prescribed by Lord Reid in his judgment may afford considerable assistance.[43] The tests for distinguishing quasi-judicial functions from administrative functions were stated by the Supreme Court in *KS Advani*.[44] Those tests were reiterated in *Radheshyam*.[45] The industrial case in which these tests were approved is *Jaswant Sugar*, where speaking for the court, Shah J observed:

> A judicial decision is not always the act of a judge or a tribunal invested with power to determine question of law or fact: it must however be the act of a body or authority invested by law with authority to determine questions or disputes affecting the rights of citizens and under a duty to act judicially. A judicial decision always postulates the existence of a duty laid upon the authority to act judicially. Administrative authorities are often invested with authority or power to determine questions, which affect the rights of citizens. The authority may have to invite objections to the course of action proposed by him, he may be under a duty to hear the objectors, and his decision may seriously affect the rights of citizens but unless in arriving at his decision he is required to act judicially, his decision will be executive or administrative. Legal authority to determine questions affecting the rights of citizens, does not make the determination judicial: it is the duty to act judicially which invests it with that character. What distinguishes an act judicial from administrative is therefore the duty imposed upon the authority to act judicially.[46]

The following criteria for identifying a judicial decision or act were stated:

(1) it is in substance a determination upon investigation of a question by the application of objective standards to facts found in the light of pre-existing legal rules;

(2) it declares rights or imposes upon parties obligations affecting their civil rights; and

(3) that the investigation is subject to certain procedural attributes contemplating an opportunity of presenting its case to a party, ascertainment of facts by means of evidence if a dispute be on questions of fact, and if the dispute be on question of law on the presentation of legal argument, and a decision resulting in the disposal of the matter on findings based upon those questions of law and fact.

(d) Grounds for Issue of writs of Certiorari and Prohibition

Every wrong order cannot be quashed merely because it is wrong. It can be quashed by *certiorari* or injuncted by prohibition, only if it is vitiated by some fundamental flaw such as violation of the fundamental rights, jurisdictional failures, violation of the rules of natural justice, errors of law apparent on the face of the record and perversity resulting in gross miscarriage of justice. In the words of Krishna Iyer J:

> Art 226 is a sparing surgery but the lancet operates where injustice suppurates... and judicial power should not ordinarily rush in where the other two branches fear to tread, judicial daring is not daunted where glaring injustice demands even affirmative action.[47]

In *Harbans Lal*, Pathak J observed:

> The limitations on the jurisdiction of the High Court under Art 226 of the Constitution are well settled... and it is well-known that a writ in the nature of *certiorari* may be issued only if the order of the inferior tribunal or subordinate court suffers from an error of jurisdiction, or from a breach of the principles of natural justice or is vitiated by a manifest or apparent error of law. There is no sanction enabling the High Court to reappraise the evidence without sufficient reason in law and reach findings of fact contrary to those rendered by inferior court or subordinate court. When the High Court proceeds to do so, it acts plainly in excess of its jurisdiction.[48]

The grounds for issuance of a writ of *certiorari* or prohibition can be conveniently treated under the following sub-heads:

(i) Fundamental Rights:

It is now well established that the Supreme Court, in exercise of its jurisdiction under Art 32 and the High Courts in their jurisdiction under Art 226, will quash the orders, directions or awards of the quasi-judicial authorities when they contravene the fundamental rights or are ultra vires the fundamental rights.[49] A detailed survey of this topic, therefore, would be out of place here.

(ii) Constitutional Safeguards:

Though the breach of constitutional safeguards other than the guarantees of the fundamental rights may not be amenable to the jurisdiction of the Supreme Court under Art 32, they can be reviewed by the High Courts in their jurisdiction under Art 226. However, this topic also does not play any noticeable role in industrial law, hence this also is not being discussed in detail.

(iii) Jurisdiction:

Judicial control in Britain has grown out of the theory of jurisdiction, as applied through the old prerogative remedies, primarily *certiorari* and prohibition, hence excess or abuse of statutory jurisdiction will be quashed or prohibited as *ultra vires*, but power within jurisdiction cannot be controlled unless Parliament has provided a statutory appeal.[50] In other words, in writ jurisdiction, it is not possible for the High Court to examine an impugned award as if the court was hearing an appeal.[51] In the language of Diplock LJ, jurisdiction is an expression which is used in a variety of sense and takes its colour from its context.[52] Broadly speaking, jurisdiction means authority to decide.[53] The question whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to inquire, or upon the correctness of its findings on these facts but upon their nature, and it is determinable at the commencement, not at the conclusion, of the inquiry.[54] Hence, if a body has no such authority to decide a matter before it, its decision is either without jurisdiction or in excess of jurisdiction. In *Ebrahim Aboobakar*, the Supreme Court stated that want of jurisdiction may arise from:

(i) the nature of the subject matter; or

(ii) from the absence of some essential preliminary; or

(iii) upon the existence of some facts collateral to the actual matter which the court has to try and which are conditions precedent to the assumption of jurisdiction by it, *ie*, jurisdictional facts [55]

A more complete statement is by Sir James Coville in *Colonial Bank*, wherein he stated that these conditions may be founded either:

(i) on the character of the constitution of the tribunal;

(ii) upon the nature of the subject-matter of the inquiry; or

(iii) upon proceedings which have been made essential preliminary to the inquiry. [56]

The jurisdictional defects are dealt with under the following captions: (1) *Absence of Jurisdiction on Account of Constitution of the Tribunal*; (2) *Excess of Jurisdiction or Lack of Jurisdiction: Nature of Subject-matter of Inquiry*; (3) *Declining Jurisdiction*; (4) *Proceedings Essential to Preliminary Inquiry: Jurisdictional or Collateral Issues*; (5) *Error of Law Apparent on the face of Record*; (5) '*Jurisdictional fact' and 'Error of Law Apparent on the face of Record*'.

(1) Absence of Jurisdiction on Account of Constitution of the Tribunal:

There is complete absence of jurisdiction if the tribunal is 'improperly constituted' or the proceedings before it have been 'improperly instituted'.[57] An authority, which is not constituted in accordance with the statute creating it will be acting without jurisdiction.[58] Not only such an authority will be amenable to a writ of *quo warranto*, the proceedings before it may be injuncted by a writ of prohibition and any orders or awards made by it will be liable to be quashed on *certiorari*. Sections 7, 7A & 7B of the Act lays down the requirements of law for the constitution of the labour courts, Industrial tribunals and national tribunals and the qualifications for the appointment of their presiding officers, while s 7C prescribes disqualifications against the appointment of the presiding officers of these bodies. Hence, if any of these authorities is constituted without complying with the requirements of these provisions or their presiding officers do not possess the requisite qualifications or are disqualified under s 7C, their continuance in office and their orders and awards will be reviewable on the grounds of lack of jurisdiction.[59]

(2) Excess of Jurisdiction or Lack of Jurisdiction: Nature of Subject-matter of Inquiry:

A startling instance of excess of jurisdiction is illustrated in the decision of the High Court of Assam and Nagaland in *Kasojan Tea State*. The labour court after hearing the case on preliminary points, made an award on the merits of the issues referred for adjudication instead of recording its decision on those points, without even giving an opportunity to the parties to adduce their evidence on merits. The High Court quashed the award and remanded the case for trial and expressed its annoyance by directing the government to transfer the matter from the labour court which had made that award to some other court under s 33B of the Act.[60]

(3) Declining Jurisdiction:

Declining jurisdiction is another ground on which the orders and awards of the tribunals are liable to be quashed on *certiorari* and the authorities may be served with the writ of *mandamus* to hear and determine the dispute before them in accordance with law. As to when a tribunal declines or does not decline jurisdiction, has been succinctly stated by Professor SA de Smith in the following words:

> A refusal to exercise jurisdiction may be conveyed by express words or by conduct. Thus, a tribunal is deemed to have declined jurisdiction if it fails to decide the question before it and instead decides a different question; or if it decides under the dictation of another body; or if it decides by reference to a predetermined rule of policy without giving any genuine consideration to the individual merits of the case before it; or if it improperly delegates its power of decision to another person or body; or if it rejects relevant evidence on the erroneous ground that it has no jurisdiction to inquire into the matter which the evidence was designed to prove; or if, misconceiving the scope of its own powers, it disclaims competence to take other relevant factors into account; or if it postpones the hearing for an unreasonable length of time or on inadmissible grounds.. .. A tribunal does not decline jurisdiction by making an erroneous decision on the merits of a case; but it does decline jurisdiction if it refuses to enter into the merits because it holds that it has no power to do so. There arises the familiar problem of distinguishing between the merits of a case and preliminary jurisdictional questions. In the context of refusal of jurisdiction, as distinct from excess of jurisdiction, English courts have given comparatively little attention to analysis of this problem, but it can be assumed that essentially the same principles apply to both refusal and excess of jurisdiction.[61]

The decision of the Calcutta High Court in *Continental Commercial Co*, provides an instance where the tribunal failed to exercise jurisdiction. While adjudicating on an industrial dispute covering several demands, the industrial tribunal rejected certain demands which were covered by an earlier settlement on the ground that the settlement governed the parties, since it was not terminated in accordance with the relevant provisions of the Industrial Disputes Act. In writ proceedings, against the award of the tribunal, the High Court observed that the employer had waived the formal notice of termination of the settlement as required by s 19(2) of the Act. It was, therefore, held that the tribunal had failed to exercise jurisdiction vested in it by law and that part of the tribunal's award rejecting those demands of the workmen was quashed and a writ of *mandamus* was issued commanding the state government to place the remaining disputes before the same tribunal for fresh adjudication without taking the settlement into consideration.[62]

(4) Proceedings Essential to Preliminary Inquiry: Jurisdictional or Collateral Issues:

Broadly speaking, the existence of a fact which is a condition precedent to the operation of a statutory scheme has to be fully reviewed and independently determined as if it were a question of law by the reviewing court.[63] Such collateral facts are also commonly known as *jurisdictional facts*,[64] as they are collateral to the merits of the *main question*,[65] or the *very issue*,[66] which a tribunal has to decide in the proceedings before it. According to Prof. SA de Smith, the questions on the determination of which, the jurisdiction of the tribunal depends, are generally known as preliminary, jurisdictional or collateral questions. A preliminary or collateral question is said to be one that is collateral to the merits or to the very

essence of the inquiry, it is not the main question which the tribunal has to decide. No satisfactory test has ever been formulated for distinguishing findings which go to jurisdiction from findings which go to the merits; and in some cases the courts, impressed by the logical difficulties, have ignored the distinction altogether. The courts, therefore, have been generally drawing rough and ready distinctions in individual cases and to justify them by reference to principles and authority. The result is that many of the reported decisions on the jurisdiction of the tribunals appear to be contradictory. The learned Professor observed thus:

> In so far as the question of a tribunal's jurisdiction is conceived of as being determinable 'at the commencement, not at the conclusion' of its inquiry, it is to be expected that the following matters will be treated as preliminary to the merits or as conditions of jurisdiction: whether the tribunal is properly constituted; whether the proceedings have been properly instituted by person entitled to initiate them; whether process has been duly served; whether a period of limitation has expired; whether the cause lies within the tribunal's territorial competence; whether the value of the subject-matter lies within prescribed monetary limits. None of these matters has been uniformly treated as jurisdictional; but it is clearly proper for a superior court to hold that an inferior tribunal lacks jurisdiction to embark on an inquiry unless the stage has been properly set.[67]

In this sense, in India, the theoretical distinction made between 'jurisdictional facts' which are collateral and the proof of which confers jurisdiction on the special tribunals and facts which are left to the decision of the tribunal is no doubt well settled,[68] but the demarcating line is as hazy as in England. In the former case, the correctness of the conclusion can be reviewed by the High Court acting under Art 226 of the Constitution, regardless of the fact whether the incorrect conclusion is a question of fact or a question of law,[69] while in the latter case, the power to interfere by the superior court will be limited to errors of law apparent on the face of record or errors of jurisdiction. In *Commissioners of Income Tax*, Lord MR Esher observed:

> When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature is establishing such a tribunal or body with limited jurisdiction, they also have to consider whether jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned, it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction.[70]

By and large, the above dictum of Lord MR Esher has been followed by the Indian courts. If the tribunal proceeds to assume jurisdiction over an invalid reference or a non-industrial dispute, it can be successfully impugned before a writ court and the court will have the power to issue an appropriate writ in that behalf. The answer to the question whether or not the jurisdictional facts should be tried by a High Court in a writ petition or the tribunal, would depend upon the facts and circumstances of each case and upon the nature of the preliminary issues raised between the parties.[71] Conversely, the tribunal cannot decline to exercise jurisdiction by erroneously holding that the dispute in question is not an industrial dispute. It is now well-settled that the superior court can review even the findings of fact relating to jurisdictional issues arrived at by an inferior tribunal.[72] In *Sadhu Ram*, the facts were: the employer had raised a preliminary objection that no industrial dispute was raised by the workman. The labour court had recorded a categorical finding that the union had raised a demand with the management. The High Court of Delhi quashed the award by issuing a writ of *certiorari*. In appeal, the Supreme Court observed that the jurisdiction under Art 226 had to be exercised with great circumspection. The fact that the questions decided pertain to jurisdictional facts does not entitle the High Court to interfere with the findings on jurisdictional facts which the tribunal is competent to decide. Where the circumstances indicate that the tribunal has snatched at the jurisdiction, the High Court may be justified in interfering. However, where the tribunal gets jurisdiction on a reference made to it, it was not proper for the High Court to substitute its judgment for that of the labour court and hold that the workmen had raised no demand with the management.[73]

The preliminary issues, such as whether on the facts of a case, the dispute is an 'industrial dispute' within the meaning of s 2(k) or whether the concerned persons are 'workmen' as defined in s 2(s) of the Industrial Disputes Act, can be validly

examined and adjudicated upon by the tribunal itself, as it is the determination of such collateral issues which confers jurisdiction upon it to deal with the main reference entrusted to it.[74] Hence, a writ of *prohibition* would not be issued to a tribunal prohibiting it from proceeding with adjudication proceedings.[75] Absence of an 'industrial dispute' would obviously be sufficient to negative the jurisdiction and in such a case, the validity of the order of reference is open to examination by the High Court to decide whether the tribunal had jurisdiction.[76] Likewise, the question as to whether the reference is competent or not on the ground that previously the government had refused to refer the same dispute for adjudication, can be decided by the tribunal, hence a writ of *prohibition* cannot be issued restraining it from proceeding with the adjudication of such reference.[77]But if the vires of an Act creating a tribunal is challenged, such a question cannot be brought before the tribunal constituted under that Act.[78]Likewise, the validity of a notification under the Act constituting the tribunal can also not be challenged before that tribunal. Such questions, undoubtedly, have to be decided by the High Court in its writ jurisdiction without being agitated before the tribunals. In *Express Newspapers*, Gajendragadkar J observed:

> The High Court undoubtedly has jurisdiction to ask the industrial tribunal to stay its hands and to embark upon the preliminary inquiry itself. The jurisdiction of the High Court to adopt this course cannot be, and is indeed not, disputed. But would it be proper for the High Court to adopt such a course unless the ends of justice seem to make it necessary to do so? Normally, the questions of fact, though they may be jurisdictional facts, the decision of which depends upon the appreciation of evidence, should be left to be tried by the special tribunals constituted for that purpose. If and after the special tribunals try the preliminary issue in respect of such jurisdictional facts, it would be open to the aggrieved party to take the matter before the High Court by a writ petition and ask for an appropriate writ. Speaking generally, it would not be proper or appropriate that the initial jurisdiction of the special tribunal to deal with these jurisdictional facts should be circumvented and the decision on such a preliminary issue brought a High Court in its writ jurisdiction.. .. We wish to point out that in making these observations, we do not propose to lay down any fixed or inflexible rule; whether or not even the preliminary facts should be tried by a High Court in a writ petition, must naturally depend upon the circumstances of each case and upon the nature of the preliminary issue raised between the parties. Having regard to the circumstances of the present dispute, we think the court of appeal was right in taking the view that the preliminary issue should more appropriately be dealt with by the tribunal. The appeal court has made it clear that any party who feels aggrieved by the finding of the tribunal on this preliminary issue may move the High Court in accordance with the law.[79]

More often than not, the employers make it a practice to raise all sorts of preliminary objections, invite decisions on those objections in the first instance and then carry the matter to the High Court under Art 226 of the Constitution and then to the Supreme Court under Art 136 of the Constitution and then delay the decision of the real disputes for years, sometimes for decades. This situation was noticed by the Supreme Court in *PP Mundhe*, wherein it observed that when a case of dismissal or discharge of an employee is referred for industrial adjudication, the tribunal should first decide as a preliminary issue whether the domestic inquiry has violated the principles of natural justice when that matter is in controversy between the parties. However, with a view to obviate undue delay in adjudication of the real disputes caused by moving the writ courts against the decisions of the adjudicators on preliminary issues, the court made it clear that there will be no justification for any party to stall the final adjudication of the dispute by the labour court by questioning its decision with regard to the preliminary issues when the matter, if worthy, can be agitated even after the final award. It will be also legitimate for the High Court to refuse to intervene at this stage.[80] In *Standard Pottery Works*, it was held that the writ court should take into account that the decision on a preliminary issue is a matter concerning the jurisdiction of the tribunal whose further jurisdiction depends on the decision on the preliminary issue.[81]

In *DP Maheshwari*, speaking for a three-judge bench, Chinnappa Reddy J observed that with a view to avoid exploitation by the stronger parties of the weaker ones by dragging the latter from court to court for adjudication of peripheral issues, thus avoiding a decision on the main issues, the policy of deciding preliminary issues first must be reversed. He advised the tribunals to decide all issues in dispute at the same time without trying some of them as preliminary issues. He further advised the High Courts exercising writ jurisdiction under Art 226 of the Constitution against staying proceedings before the tribunals so that preliminary issues may be decided by them in the first instance. And further exhorted that Arts 226 and 136 should not be used to break the resistance of workmen by stifling the industrial tribunals by all manner of preliminary objections and journeying up and down. In exercise of the jurisdiction under these Articles, the High Courts and the Supreme Court are not required 'to be too astute to interfere with the exercise of jurisdiction by special tribunals at interlocutory stages and on preliminary issues. [82] These sentiments were again reverberated by the learned judge in *SK Verma*, wherein he pointed out that it has become quite a fashion to raise preliminary objections such as that if there is no 'industry', there is no 'industrial dispute' or the workman is not a 'workman', by the employers, whenever a dispute is referred for adjudication, thus avoiding the decision on the main issues referred for adjudication. Apart from discouraging the practice of interference by the High Courts and the Supreme Court by staying the proceedings before the industrial tribunals pending the decision on preliminary issues, the learned judge particularly and pertinently pointed out that the public sector undertakings must abjure the practice of arresting the decision on the main issues of the dispute under

reference by raising preliminary objections.[83] In *SD Singh*, Khalid J deprecated the practice of the employers to stifle the efforts of workmen in their legitimate claims seeking benefits under the industrial law, by tiring them out in adjudication proceedings raising technical and hyper-technical pleas and thus, dragging on litigation for years altogether on such pleas. He exhorted the employers to meet the case of the workmen squarely on merits and get it adjudicated quickly.[84] In *Chhatia Weaving Mills*, the management had filed an application and undertook to substantiate its action through documentary and oral evidence at the time of hearing. But they led evidence only on the validity of the inquiry and not on the question of substantiating the allegations being under the impression that they would be called upon by the tribunal to adduce evidence after holding that the inquiry was not fair and proper. The High Court held that in coming to the conclusion that the management failed to justify its action of dismissing the workman, the tribunal did not commit any error. Patnaik J observed:

> Where piece-meal dismissal has not been directed by the tribunal or labour court and all controversies are to be disposed of simultaneously, there is no scope for the industrial tribunal or the labour court disclosing its mind to the parties. Furthermore, it is not obligatory on the tribunal to frame a preliminary issue on the question whether the inquiry was fair and proper because the law does not obligate the adjudicator to hear the matter piece-meal and to decide if the inquiry was fair and proper initially and then to grant an opportunity to the management if the finding went against it to adduce evidence on the delinquency of the workmen and the punishment imposed. [85]

On the other hand, a single judge of the Karnataka High Court in *Binny*, observed:

> It is clear that if in a given case, the decision on the preliminary issue given in favour of the party, who has come to the High Court in a petition under Art 226 of the Constitution, is not likely to end the main dispute and would unnecessarily prolong the dispute pending before the tribunal, it is appropriate for this court not to entertain the writ petitions. But in a case where the preliminary issue decided by the labour court is such that any decision in favour of the party approaching the High Court in a petition under Art 226 would end the dispute itself finally or would curtail unnecessary proceedings before the tribunal, the entertaining of the writ petition would be expedient in the interest of speedy final decision of the dispute itself.[86]

An Analysis of PP Mundhe, DP Maheswari & HD Singh cases

In *PP Mundhe*, the case turned on the question 'whether the Labour Court should decide, as a preliminary issue, whether the domestic enquiry violated the principles of natural justice, particularly, where the parties are at variance on that issue'. The main question was rightly decided by Goswami J by holding that it is for the employer to take a stand and seek permission to adduce additional evidence before the Labour Court; that if it chooses not to adduce any evidence, it would not thereafter be permissible for the management to raise the issue in any proceeding. But the further gloss added by the learned judge, to the effect that *'there would be no justification for any party to stall the final adjudication of the dispute by the Labour Court by questioning its decision with regard to the preliminary issue when the matter, if worthy, can be agitated even after the final award'*, is capable of producing great public mischief to the detriment of justice itself. In the first place, the said observation was more in the nature of *obiter* and, by no means was part of the *ratio decidendi*, as can be seen from his own statement: *'We are making these observations in our anxiety that there is no undue delay in industrial adjudication'* (in para 22). In this connection, it should be noted that the above case was decided long before s. 17B was inserted in IDA.

According to the then prevailing legal position, it made no difference in terms of the legal consequences for employer, whether the Labour Court decided the preliminary issue first or decided both the preliminary issues and merits together. The insertion of s. 17B changed the complexion of the Act insofar as the employer is required to pay the last drawn wages, in the event he chooses to challenge the order of reinstatement, which means the final order of the Labour Court on merits gives rise to certain legal and financial consequences to the employer. Whatever may be the considerations that weighed with Goswami J in *PP Mundhe*, as regards the power to decide preliminary and merits together, they ceased to have any application the moment s. 17B was enforced. In *HD Singh*, Khalid J (for self and Reddy J) of the Supreme Court, held that the employer was prohibited from raising preliminary objections touching upon fundamental questions of law or jurisdiction of the court, and that the High Court should not interfere under Art 226.[87] In *DP Maheshwari*, Reddy J who was a member of the Bench that decided *HD Singh*, added further gloss, which runs thus:

> There *was a time when it was though prudent and wise policy to decide preliminary issues first*. But the time appears to have arrived for a reversal of that policy. *We think it is better that Tribunals*, particularly those entrusted with the task of adjudicating labour disputes where delay may lead to misery and jeopardise industrial peace, *should decide all issues in dispute at the same time without trying some of them as preliminary issues*. Nor should High Courts in exercise of their jurisdiction under Article 226 of the

Constitution stop proceedings before a Tribunal so that a preliminary issue may be decided by them.[88] (Italics supplied).

The above observations of Khalid and Reddy JJ, are not only misconceived but are positively unconstitutional. The need for determining the preliminary issue is not merely confined to s. 33, but extends to the adjudication of disputes referred u/s. 10 as well. Order XIV, r 2 of CPC, runs thus:

2. Court to pronounce judgment on all issues—

(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

Rules 10B to 29 of IDCR (Industrial Disputes (Central) Rules 1957) prescribe the procedure to be followed by the Labour Courts and Tribunals, which is to a large extent similar to that of a civil court. Reading the provisions of CPC and IDCR together, it becomes clear that where the issue raised is one of jurisdiction or of law, and if the proceedings can be disposed of on that issue alone, the court should try that issue as a preliminary issue before going into the merits. It would be futile for the court to go into the merits of the case, if it has no jurisdiction at all to try the matter or if the issue involves a question of law. In the face of this legal position coupled with the lethal effect of s. 17B, to say that the Tribunals would be justified in short-circuiting the adjudication process by arrogating jurisdiction wrongfully, merely because the trying of preliminary issues would lead to misery to one party, is outrageous. His further observation that the time had changed so much, warranting the trying of preliminary issues and merits together, is no less misplaced. Even assuming so, yet the letter and spirit of Arts 226 and 32 have certainly not changed to such an extent as to justify cutting corners by Tribunals. It is not as if the Constitution is meant exclusively for the benefit of one section of society to the detriment of others. This country has not yet decided to patronise communism as an ideology to be pursued at the national level so as to dispense the kind of lop-sided justice advocated by Reddy J. The said issue 'whether the Tribunals should decide preliminary issues first or decide them together with merits' was not raised at any forum below or even before Supreme Court. In these circumstances, should the above observation be taken as the '*ratio decidendi*' or an uncalled for '*obiter*' coming from an over-speaking judge?

Chief Justice Sethi of the Karnataka High Court followed the anarchic view of Reddy J, and held that the practice of framing preliminary issues in industrial disputes was contrary to 'law' and if permitted would defeat the very purpose for which the IDA was enacted.[89] It is doubtful as to which 'law' the learned Chief Justice was referring to—is it the law of jungle or of a civilised democracy governed by a Constitution of its own? If it were contrary to the so-called 'law', what prevented him from enlightening the Bar and Bench by citing the relevant legal provision? In the first place, whatever may be the legislative intent as regards 'speedy disposal' of industrial disputes, no provision of IDA prescribes 'summary procedure' of the kind provided for under O XXXVII of CPC. Section 11(3) of the IDA clearly states that the Labour Courts, *etc*, shall have the same powers as are vested with the civil court under CPC when trying a suit in respect of enforcing attendance, examination on oath, production of documents, issuing commissions, and other matters. It further stipulates that every investigation by Labour Court, *etc*., shall be deemed to be a judicial proceeding within the meaning of s s 193 and 228 of IPC. Rule 10B of the IDCR prescribes the powers of, and procedure to be followed by, Labour Courts,*etc*, which are analogous to that of a civil court. The observation of Reddy J, in *Maheswari*, though does not deserve to be elevated to the status of a sound, much less a sane, legal proposition, suffers from the further vice of being repugnant to the Constitution, given that it comes from a Supreme Court Judge, who is supposed to be the custodian of the Constitution. Even assuming that it was right, without conceding in the least, still its validity stood expired with the insertion of s 17B in IDA. Examples of gross abuse of power, self-misdirection, jurisdictional lapses and excesses on the part of Labour Courts far outnumber those which had been, and are being, decided in accordance with the law. A glance at the ever-inflating volumes of law journals in this branch bears eloquent testimony to this fact. If, in a chaotic dispensation bordering on licentiousness, the trial courts were to be directed not to frame preliminary issues that touch upon questions of jurisdiction and law, it would produce great public mischief to the detriment of the very concept of justice. To illustrate, where the preliminary issue touches upon questions such as -

(i) *whether the Labour Court has jurisdiction at all to try the dispute; or*

(ii) *whether the person raising the dispute was the employee of the principal employer or of the contractor; or*

(iii) *whether the person answers at all to the definition of 'workman' u/s. 2(s); or*

(iv) *whether it is a case of abandonment on the part of the workman or a positive act of termination by the employer; or*

(v) *whether a workman can be said to be a 'workman concerned in the dispute' u/s. 33; or*

(vi) *whether the dispute referred for adjudication is an 'industrial dispute' u/s. 2(k) -*

If the Labour Courts were to decide preliminary issues along with merits, it corrupts the judicial process and reduces it to what may be called '*unadulterated gambling*'. Should the employer go on paying last drawn wages to the employee u/s. 17B on the basis of an award, which is *prima facie* incompetent, absurd and outside the competence of the Labour Court? *Could it be said that s. 17B is meant for imposing such a preposterous obligation on the employer with no recourse in the event of the Labour Court arrogating to itself jurisdiction beyond the contemplation of the law?* The decisions rendered in *Maheshwari, HD Singh* and *Senapathy* deserve to be condemned in the strongest possible language and terms as being insipid, perverse and repugnant to CPC, apart from being *ultra vires* the Constitution.

In the midst of judicial chaos of this magnitude, the decision of the Supreme Court in *Hussain Mhasvadkar* comes very refreshing in that the apex court made an attempt to undo the damage done by the likes of Reddy J. Two points were urged in the said case: (i) Whether the Bombay Iron and Steel Labour Board constituted under the provisions of the Maharashtra Mathadi, Hamal and Other Manual Workers (Regulation of Employment and Welfare) Act 1969 (MMHOMWREWA) falls within the definition of 'Industry' u/s 2(j) of IDA; and (ii) Whether the appellant, working at the relevant point of time as an Inspector, discharging duties, powers and obligations envisaged u/s 15 of the said Act answers to the description of 'workman' u/s 2(s) of IDA. Justice Raju (for self and Rajendra Babu J) of the Supreme Court, held that, in view of the fact that the court below entertained doubts about the status of the workman u/s 2(s) of IDA, they should have refrained from embarking upon adjudication on merits, and that the larger issue should have been entertained for consideration only if it was absolutely necessary, and not when the claim could have been disposed of otherwise without going into the nature and character of the undertaking itself.[90] This decision is consistent with the principles laid down in *Motipur*, *Tata Iron* and *DCM* as against the bankrupt rulings given in *Maheshwari* and other cases. Reverting to judicial remedies, it goes to the credit of the Karnataka High Court in so far as the learned judge admittedly rejected the insolvent decisions rendered by Chinnappa Reddy and Khalid JJ, and ordered that preliminary issues should be decided before going into the merits of the cases, as can be discerned in *DV Jagadish*. In this case, the employee had disputed the termination of his service as null and void, which was contested by the management on the ground that the concerned employee was not a 'workman' as defined in the Act. The Karnataka High Court quashed the order of the labour court which granted the interim relief without deciding the preliminary issue whether the employee was a 'workman' or not with the observation that the labour court ought to have decided the preliminary issue before considering the question of interim relief.[1]

(5) Error of Law Apparent on the Face of Record

In England though the application of *certiorari* to correct jurisdictional errors was never doubted, the efficacy of the writ to correct errors of law committed by inferior tribunals in exercise of their jurisdiction was for sometime diminished.[2] It was in *Northumberland CAT*, that the court of appeal revived the original scope and reach of the writ. The court of appeal held that *certiorari* could be issued to quash a decision of an inferior court on the ground of error of law apparent on the face of the record.[3] The development and the growth of law, making the *error apparent on the face of record* as a ground for quashing the decisions of quasi-judicial and administrative bodies in England,[4] is beyond the scope of this work. In *TC Basappa*, the Supreme Court accepted the view that *error of law apparent on the face of record* is a ground upon which a writ could be issued.[5] In *Hari Vishnu Kamath*, the court stated the law with more clarity by holding that it might be taken as settled that writ of *certiorari* could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The court observed that an error of law on the face of record cannot be defined and must be left to be determined on the facts of each case and, hence, it did not lay down any principles on which it was to be determined. It rather, expressed the apprehension that if caution is not exercised, *certiorari* might be issued as cloak of an appeal in disguise.[6] In *Nagendra Nath Bora*, Sinha J held that one of the grounds on which the jurisdiction of the High Court on *certiorari* may be invoked, is an error of law apparent on the face of record.[7]

(6) 'Jurisdictional fact' and 'error of law apparent on the face of record':

For the purpose of reviewing the wrong decisions of quasi-judicial authorities, a distinction is drawn between '*errors of*

law going to jurisdiction' and '*errors of law within jurisdiction*', *viz*, going to the merits of the case. Normally, the excess of jurisdiction will invalidate a decision while an error within the jurisdiction will not.[8] In the latter type of cases, a tribunal has jurisdiction to go right, as much as it has jurisdiction to go wrong.[9] It is inherent in discretionary power that it includes the power to decide wrongly. The law on this subject has been succinctly stated in *Halsbury's Laws of England,* in the following words:

> Where the proceedings are regular on their face (emphasis added) and the inferior tribunal has jurisdiction to decide a matter, it ought not to be deemed to exceed its jurisdiction, merely because it goes wrong in law, for instance, if it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the burden of proof or the weight of the evidence, or even arrives at a decision without any supporting evidence. Nevertheless, the area within which an inferior tribunal remains free to err on a question of law without committing a jurisdictional error must now be regarded narrow for such a tribunal may be held to exceed jurisdiction by taking legally irrelevant considerations into account or by failing to take relevant considerations into account or by asking itself and answering the wrong question, and there are but few errors of law which fall clearly outside these categories of jurisdictional error.[10]

This statement of law postulates that where 'the proceedings are regular on their face' there is immunity from judicial review. Conversely, if the proceedings are not regular on their face or there is some error or irregularity on the face of the proceedings, the case will be exceptional. In such cases, the power to decide wrongly does not extend to errors which are manifestly apparent or self-evident on the face of the record because it would be an affront to law.[11]

What is error of law apparent on the face of record?:

The expression 'error of law apparent on the face of record' is not capable of a precise definition as indefiniteness is implicit in its very nature. In *R v Medical Appeal Tribunal, ex p Gilmore* , Lord Denning LJ suggested that when a tribunal comes to a conclusion which could not reasonably be entertained by it, if it properly understood the relevant enactment, then it falls into error in point of law because, when the primary facts appear on the record, an error of this kind is sufficiently apparent for it to be regarded as an error on the face of the record such as to warrant an intervention of the court by issuing a writ of *certiorari*.[12] Later, in *Baldwin & Francis*, on an illuminating review of the earlier cases as an instance of 'error of law' he further said:

> ...if a tribunal bases its decision on extraneous considerations which it ought not to have taken into account, or fails to take into account a vital consideration which it ought to have taken into account, then its decision may be quashed on *certiorari* and a *mandamus* issued for it to hear the case afresh.[13]

In *Anisminic*, Lord Reid observed:

> But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that if failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. [14]

An error of law must be a manifest error apparent on the face of the proceedings. In other words, it should be a patent error.[15] Gajendragadkar J observed:

> In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provisions that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record.[16]

But an error apparent on the face of the record does not mean a mere accidental or formal error which can be set right by the amendment, but it must be a substantial error which goes to the root of the matter.[17] In *Satyanarayan*, Das Gupta J attempted a negative test by stating what is not an error of law apparent on the face of record. The learned judge held:

> An error which has to be established by a long drawn process of reasoning on the point, where there may conceivably be two

> opinions, can hardly be said to be an error apparent on the face of the record. Thus the complex nature of argument was adopted as a test of an error of law apparent on the face of record.[18]

In *Ambica Mills,* Gajendragadkar J observed:

> Sometimes it is said that it is only errors which are self-evident, that is to say, which are evident without any elaborate examination of the merits, that can be corrected, and not those which can be discovered only after an elaborate argument. In a sense it would be correct to say that an error of law which can be corrected by a writ of *certiorari* must be self-evident; that is meant by saying it is an error apparent on the face of the record, and from that point of view, the test that the error should be self-evident and should not need an elaborate examination of the record, may be satisfactory as a working test in a large majority of cases; ... Judicial experience, however, shows that though it cannot be easy to lay down an unfailing test of general application, it is usually not difficult to decide whether the impugned error of law is apparent on the fact of the record or not.[19]

In *KM Shanmugam,* Subba Rao J observed that this test also may not be successful:

> .. . for what is complex to one judicial mind may be clear and obvious to another. It depends upon the equipment of a particular judge. In the ultimate analysis the said concept is comprised of many imponderables. It is not capable of precise definition, as no objective criterion can be laid down, the apparent nature of the error, to a large extent, being dependent upon the subjective element. So too, in some cases the boundary between error of law and error of fact is rather thin. A tribunal may hold that 500 multiplied by 10,000 is 5 lakhs (instead of 50 lakhs); another tribunal, may hold that a particular claim is barred by limitation by calculating the period of time from 1956 instead of 1961; and a third tribunal may make an obvious error deciding a mixed question of fact and law. The question whether the said errors are errors of law or fact cannot be posited on *a priori* reasoning, but falls to be decided in each case. We do not, therefore, propose to define with any precision the concept of error of law apparent on the face of the record, but it should be left, as it has always been done, to be decided in each case.[20]

The Bombay High Court too, though in a more striking and emphatic language, echoed the test of self-evident error in *New Gujarat Cotton,* wherein it observed:

> ...the error must be so blatant, so obvious, so manifest or so palpable that when attention is invited to it, no elaborate argument is needed to support the contention that the conclusion is erroneous. Where, however, by elaborate argument and detailed reference to evidence a particular conclusion may be demonstrated to be erroneous, we do not think that the conclusion can be regarded as disclosing an error apparent on the face of the record.[21]

Error of law and error of fact:

In the language of Prof. Wade:

> Findings of fact are the domain where a deciding authority or tribunal can fairly expect to be master in its own house. Provided only that the facts are not collateral or jurisdictional, the finding will in general be exempt from review by the courts, which will in any case respect the decision of the body that saw and heard the witnesses or took evidence directly. Just as the courts look jealously on decisions by other bodies on matters of law, so they look indulgently on their decisions on matters of facts. However, the questions of law must be distinguished from the questions of fact. This is one of the situations where the rules have taken different forms under judicial manipulations. There could be no subject on which the courts act with such total lack of consistency as the difference between the fact and law.[22]

There is, however, an important exception. If an inferior tribunal records a finding of fact without taking into consideration the relevant materials or the finding is based on no evidence or is based on irrelevant or extraneous considerations, it will be an affront to the law which cannot be overlooked, and the order stands self-condemned even though it may be within jurisdiction.[23] In *Dharangadhra Chemical Works,* the court said that where the tribunal having jurisdiction to decide a question comes to a finding of fact, such a finding of fact is not open to question, under Art 226 unless it could be shown to be wholly unwarranted by the evidence.[24] It is, therefore, not only difficult but indeed it would be inexpedient to lay down any general test to determine which error of law can be described as errors of law apparent on the face of record.[25] However, this can safely be taken as settled law that the jurisdiction of a High Court to issue the writ of *certiorari* under Art 226 is of supervisory nature. Also, while exercising this jurisdiction, the writ court is not entitled to act as an appellate

court which necessarily means that the findings of fact by inferior courts or tribunals, as a result of appreciation of evidence cannot be reopened or questioned. An error of law which is apparent on the face of record can be corrected by a writ court but not an error of fact, however grave it may appear to be. If a finding of fact is based on no evidence or if the tribunal has admitted inadmissible evidence which has influenced the finding, that would be regarded as an error of law which may be corrected by a writ of *certiorari*.[26]

The writ court can and must inquire whether there is any evidence at all in support of the impugned conclusion.[27] In *Parry & Co*, the Supreme Court observed that though the finding of fact by a tribunal having jurisdiction to decide a question is not open to judicial review unless it could be shown to be wholly unwarranted by the evidence, where the tribunal has disabled itself from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or where its conclusions on the very face of it is wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, interference by judicial review would be justified.[28] The case of *Rajinder Kumar Kindra*, provides an illustration of this point where the award of the arbitrator under s 10A was quashed by the Supreme Court being arbitrary and perverse with the observation that where a quasi-judicial tribunal or arbitrator records findings based on no legal evidence and the findings are either *ipse dixit* or based on conjectures and surmises and his findings suffer from the further infirmity of non-application of mind, such findings will be vitiated.[29] Where the finding of mala fide, unfair labour practice or victimisation arrived at by the tribunal is based on no material, the award will be quashable on *certiorari*.[30] In *Radhakrishna Murthy*, the workman had claimed medical reimbursement towards the treatment of his wife on the basis of a false medical certificate where, in fact, she had not undergone any treatment at all. The doctor who issued the certificate when contacted by the company informed that the certificate issued by him was not true and that he never treated the woman and that he issued the certificate under pressure brought on him by the workman. He also made an endorsement on the obverse of the medical certificate stating that 'this bill is hereby withdrawn'. When confronted with this endorsement, the workman admitted that he had submitted a false claim, regretted his action and requested the company for pardon. In the course of the domestic inquiry, the management produced four witnesses who testified the correctness of the endorsement of the doctor. But the doctor could not be examined as he was away in USA. A single judge of the AP High Court held that the inquiry was vitiated for non-examination of the doctor who was a material witness. Quashing the order of the Single judge, Jeevan Reddy J observed:

> May be the doctor's evidence was material; may be his evidence was important; but that is the question touching upon the adequacy of the evidence, which this court cannot go into under Art 226 of the Constitution. This court can interfere if there is no evidence in support of the charges or in a case where the finding or the conclusion is such that no reasonable person would have arrived at it, to wit, perverse; but this court cannot sit as an appellate authority and weigh the evidence. [31]

Where the charge levelled against the delinquent worker was that he had attempted to molest one female worker and whereas the tribunal found that the worker had actually molested the girl, it could not be said that the finding was perverse.[32] Similarly, where the *en masse* transfer of workmen from one factory to another owned by the same employer was found to be illegal, the order of the tribunal directing payment of certain amounts at certain rates as travelling allowance to the transferred place instead of nullifying transfers, was held not to be perverse or arbitrary in view of the fact that the workmen had already joined the place of transfer acting on the faith of the assurance extended to them by the employer in writing to arrange for transport or in the alternative to pay travelling allowance particularly so when the factory from which they were transferred was almost closed down.[33] On the other hand, upholding of the validity of a perverse report of the inquiry officer was held to constitute an error of law apparent on the face of record.[34] In *Dayaram*, the employer terminated the services of certain employees for being involved and prosecuted for alleged theft, for loss of confidence and for security reasons even though they were acquitted by the court. The award of the labour court ordering compensation in lieu of reinstatement was upheld by the High Court of Madhya Pradesh as there was no error of law or fact committed by the labour court in exercising its judicial discretion.[35]*In Jila SK Bank*, a single judge of the Madhya Pradesh High Court held that the employer cannot challenge a compromise award passed by the tribunal, on the ground that its counsel engaged in the labour court had no authority to file compromise of the dispute, in view of the settlement arrived at between the parties.[36] In *HC Goel*, Gajendragadkar J pointed out that the findings of fact, recorded by the tribunal cannot be reviewed on the ground that the relevant material evidence adduced before the tribunal was insufficient or inadequate.[37] If a tribunal disables itself from reaching a fair decision by some extraneous considerations or where its conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, interference by the writ court would be justified.[38] Similarly an award which does not state reasons for its conclusions will be quashable on *certiorari*.[39]

37 Subs by Act 36 of 1956, s 12, for s 16 (wef 10-3-1957).

38 *Sirsilk Ltd v Government of Andhra Pradesh* (1963) 2 LLJ 647 [LNIND 1963 SC 70], 649 (SC), per Wanchoo J.

39 *Workmen of Swadeshi Cotton Mills Co Ltd v Mgmt.* 1973 Lab IC 711, 715 (All), per KN Singh J.

40 *Sirsilk Ltd v. Government of Andhra Pradesh* (1963) 2 LLJ 647 [LNIND 1963 SC 70] (SC), per Wanchoo J.

41 *Remington Rand of India v Workmen* (1967) 2 LLJ 866 [LNIND 1967 SC 226] (SC).

42 Government of India (2002), Report of NCL-II, Chapter 13, pp 45-46, para 6.95.

43 *Kannan Devan Hill Produce Co Ltd v A Varughese* (1962) 2 LLJ 158, 161 (Ker), per Vaidialingam J.

44 *Bihar SEB v CP Singh* 1990 Lab IC 788, 800 (Pat) (DB), per Uday Sinha J.

45 *Asbestos Cement Ltd v PD Sawarkar* (1970) 2 LLJ 129 [LNIND 1970 SC 65] (SC), per Shelat J.

46 HWR Wade, *Administrative Law*, 3rd ed, p 151.

47 *SA de Smith, Judicial Review of Administrative Action*, 3rd ed, p 320.

48 *Mafatlal Engg Industries Ltd v Mafatlal EIE Union* (1992) 2 LLJ 657, 671-73 (Bom), per Saldanha J.

49 *Smith v East Elloe Rural District Council*, [1956] AC 736 (HL).

50 *R v Medical Appeal Tribunal ex p Gilmore* [1957] 1 QB 574, 583, per Lord Denning LJ.

51 *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208.

52 HWR Wade, *Administrative Law*, third edn, p 152.

53 *HWR Wade, 'Constitutional and Administrative Aspects of the Anisminic Case'*, [1969] 85 LQR, p 198.

54 *R v Murray, ex p Proctor* [1949] 77 CLR 387 (HC).

55 *Queen v Members of CSCP Board ex p MSF Member Ltd* [1959] 101 CLR 246.

56 *Coal Miners' IU of Workers of Western Australia v Amalgamated Collieries of WA* [1960] 104 CLR 437.

57 *Toronto Newspapers Guild v Globe Printing Co* [1953] 3 DLR 561.

58 *Estep v US* 327 US 114.

59 *HWR Wade, Constitutional and Administrative Aspects of the Anisminic Case*, [1969] 85 LQR pp 198, 201-03.

60 *Bharat Bank Ltd v Employees* (1950) LLJ 921 [LNIND 1950 SC 4] (BC), per Kania CJI.

61 *Muir Mills Ltd v Suti Mill Mazdor Union* (1955) 1 LLJ 1 [LNIND 1954 SC 159] (SC), per Bhagwati J.

62 *Indian Law Institute Studies, Judicial Review through Writ Petitions*, p 11.

63 Cf *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574, 583, per Lord Denning LJ.

64 *FACT Employees Assn, Cochin v FACT Ltd* (1977) 1 LLJ 182 [LNIND 1996 MAD 736], 189 (Ker), per Thommen J.

65 *Grindlays Bank Ltd v CGIT* (1978) 2 LLJ 371 : 82 CWN 643 (Cal), per Sabyasachi Mukharji J.

66 *Grindlays Bank Ltd v CGIT*, (1981) I LLJ 327 : AIR 1981 SC 606 [LNIND 1980 SC 484]: [1981] 2 SCR 341 [LNIND 1980 SC 484] : 1981 (1) SLJ 510 (SC) (SC), per AP Sen J.

67 *Anil Sood v PO, Labour Court*, (2001) I LLJ 1113(1114) (SC) : (2001) 10 SCC 534.

68 *Ajit Singh v PO, LC.*, (2001) 4 LLN 1165 (P&H), *per* Sudhakar J.

69 *Sangam Tape Company v Hans Raj* AIR 2004 SC 4776 [LNIND 2004 SC 996]: (2005) 9 SCC 331 [LNIND 2004 SC 996] : 2004 (8) JT 109 : 2004 (8) SCALE 267 [LNIND 2004 SC 996] : (2004) 3 LLJ 1141 [LNIND 2004 SC 996] : 2004 LIC 4039, per Sinha J.

70 Rao, EM (2015), *Industrial Jurisprudence: A Critical Commentary*, 2nd ed, Lexisnexis, pp. 377-380.

71 *Radhakrishna Mani Tripathi v LH Patel* (2009) 1 LLJ 549 (SC), per Aftab Alam J.

72 *South Seas Distillaries & Breweries Pvt Ltd v DR Patne* (2003) 4 LLJ 48 [LNIND 2002 BOM 400] (Bom), per Rebello J.

73 *Tamil Nadu Khadi and Village Industries Board v P Subramaniam* (2009) 1 LLJ 267 [LNIND 2008 MAD 2796] (Mad), per FMI Kalifulla J.

74 *Mgmt of Stallion Garments v PO, LC & Ors.*, (2010) 3 LLJ 156 (Mad).

75 *Andhra Handloom WCS v. State of AP* (1963) 2 LLJ 488 (AP), per Gopalakrishna Nair J.

76 *United Transformers Mfg. Co v State of UP* (1964) 1 LLJ 722 (All), per Seth J.

77 *Mgmt, Janakiram Mills Ltd v PO, LC* (2014) 2 LLJ 213 : [2014 (141) FLR 891] (Mad), per Vaidyanathan J.

78 *Kapra ME Union v Birla Cotton Spg & Wvg Mills Ltd* AIR 2005 SC 1782 [LNIND 2005 SC 279]: (2005) 2 LLJ 271 [LNIND 2005 SC 279] : (2005) 13 SCC 777 [LNIND 2005 SC 279], per BP Singh J.

79 *State of Orissa v Madan Gopal Rungta* AIR 1952 SC 12 [LNIND 1951 SC 59], per Kania CJI.

80 Section 38 of the Constitution (42nd Amendment) Act 1976 (wef 1-2-1977).

81 Came into force with effect from 13 April 1978.

82 Came into force with effect from 20 June 1979.

83 *Tilokchand Motilal v HB Muushi* [1969] 2 SCR 824 [LNIND 1968 SC 353], per Hidayatullah J.

84 *Carlsabad Mineral Water Manufacturing Co Ltd v HM Jagtiani* AIR 1952 Cal 315 [LNIND 1950 GAU 1], 318, per Mitter J.

85 *Iyyappan Mills Pvt Ltd v Iyyappan Mills Workers' Union* (1962) 2 LLJ 84 (Ker) (DB), per Raghavan J.

86 *Ananthanarayanan v GM, Southern Rly* (1956) 1 LLJ 29 (Mad), per Balakrishna Ayyar J.

87 *East Asiatic & Allied Companies v BL Shelke* (1961) 1 LLJ 162 (Bom), per Mudholkar J.

88 *Workmen of VM Bus Service v LC* (1970) 2 LLJ 95 (Mad), per Alagiriswami J.

89 *DCM Chemicals ELC Union v Delhi Administration* (1983) 1 LLJ 306 [LNIND 1982 DEL 121]-07 (Del), per NN Goswami J.

90 *Krishnarajendra Mills Workers' Union v ALC* (1968) 1 LLJ 504, 507-08, 513 (Mys) (DB), per Tukol J.

91 *Jaswant Sugar Mills Ltd v Lakshmi Chand* (1963) 1 LLJ 524 [LNIND 1962 SC 308] (SC), per Shah J.

92 *Testeels Ltd v NM Desai* (1970) 1 LLJ 210 (Guj) (FB), per Bhagwati CJ.

93 *Bharat Bank Ltd v Employees of Bharat Bank Ltd* (1950) LLJ 921 [LNIND 1950 SC 4], 930 (SC), per Mahajan J.

94 *Calcutta Port TS Union v Calcutta RT Assn* (1989) 1 LLJ 223 [LNIND 1988 SC 447], 227 (SC), per Venkataramiah J.

95 *Newspaper Ltd v IT* (1957) 2 LLJ 1 [LNIND 1957 SC 28], 8 (SC), per Kapur J.

96 *Engineering Mazdoor Sabha v Hind Cycles Ltd* (1962) 2 LLJ 760 [LNIND 1962 SC 337], 768 (SC), per Gajendragadkar J.

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2 *Canara Bank v Vasudeva Rao* (1986) 1 LLJ 211, 213 (Kant), per Rama Jois J.

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4 *Umaji Keshao Meshram v Radhikabal* AIR 1986 SC 1272 [LNIND 1986 SC 77], 1317-18, per Madon J.

5 *Asha Devi v Dukhi Sao* AIR 1974 SC 2048 [LNIND 1974 SC 219], 2050, per Jagan Mohan Reddy J.

6 *SGP Divn. of AS Enterprises Ltd v VD Padamwar* 1990 Lab IC 24, 33 (Bom) (DB), per Deshpande J.

7 *PD Sharma v State Bank of India* (1969) 1 LLJ 513 [LNIND 1968 SC 33], 515 (SC), per Hegde J.

8 *R v St Elmundsbury and Ispwich Diocese, ex p White* [1947] 2 All ER 170, per Scott LJ.

9 *AT Markose, Judicial Control of Administrative Action in India*, p 184.

10 *Halsbury's Laws of England* Vol 1, fourth edn, p 150, para 147.

11 *R v Electricity Commissioners* [1924] 1 KB 171, 204-05, per Lord Atkin LJ.

12 *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864, 870-81, 892.

13 *Ridge v Baldwin* [1964] AC 40 (HL), per Lord Reid.

14 *'Natural Justice, Substance of Shadow'—published in Public Law Journal*, 1975.

15 *Associated Cement Cos. Ltd v PN Sharma* (1965) 1 LLJ 433 [LNIND 1964 SC 346], 439 (SC), per Gajendragadkar J.

16 *State of Orissa v Binapani Devi* (1967) 2 LLJ 266 [LNIND 1967 SC 37], 269 (SC), per Shah J.

17 AIR 1970 SC 150 [LNIND 1969 SC 197], per Hegde J.

18 *Maneka Gandhi v Union of India* AIR 1978 SC 597 [LNIND 1978 SC 25], 626-27, per Bhagwati J.

19 *Prabodh Verma v State of Uttar Pradesh* CA No 694 of 1980 (27-7-1984) (SC), per Madon J.

20 *R v Electricity Commr* [1924] 1 KB 171, 205, per Lord Atkin LJ.

21 *Western India Automobile Assn v IT* (1949) LLJ 245 (FC), per Mahajan J.

22 *Lalit Gopal v MV Hirway* (1973) 2 LLJ 22, 25 (Bom) (DB), per KK Desai J.

23 *Re Clifford & O'Sullivan* [1921] 2 AC 570.

24 *Channel Coaling Co v Ross* [1907] 1 KB 145.

25 *R v Comptroller-General of Patents, ex p Parke, Davis & Co* [1953] 1 All ER 862, 866.

26 *Butterworth v Walker* [1765] 3 Burr 1689.

27 *Express NPEU v Express Newspapers Pvt Ltd* (1960) 1 LLJ 351 [LNIND 1959 MAD 130], 359 (Mad) per Ananthanarayanan J.

28 *Re Birch* [1855] 15 CB 743.

29 *Mackonochi v Lord Penzance* [1881] 6 App Cas 424, 444, HL, per Lord Blackburn.

30 *Joseph v Henry* [1850] 1 LM & P 388.

31 *R v Fulham, Hammersmith and Kensington Rent Tribunal ex p Aerek* [1951] 2 KB 1.

32 *Dutens v Robson* [1789] Hy Bl 100.

33 *Chivers v Savage* [1855] 5 E & B 697.

34 *R v Kent JJ* (1889) 24 QB D 181, DC.

35 *Jagannath Vinayak Kale v MI Ahmadi* (1958) 2 LLJ 50 (Bom), per KT Desai J.

36 *MK Textile Mills v Punjab State* (1962) 1 LLJ 560 -61 (Punj), per Dua J.

37 *Hari Vishnu Kamath v Ahmad Ishaque* AIR 1955 SC 233 [LNIND 1954 SC 174], per Venkatarama Ayyar J.

38 *SA de Smith, Judicial Review of Administrative Action, third edn*, p 337.

39 HWR Wade, *Administrative Law* third edn, p 130.

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41 *GM, Security Paper Mill v Hari Shanker Namdeo* 1980 Lab IC 367 (MP) (DB), per GP Singh CJ.

42 *JD Jain v Mgmt of State Bank of India* (1982) 1 LLJ 54 [LNIND 1981 SC 465], 56 (SC), per Baharul Islam J.

43 *Bangalore BH Society v State of Kamataka* 1988 Lab IC 1225, 1228 (Kant), per Shivashankar Bhat J.

44 *N Subbiah v Indian Bank* (1992) 1 LLJ 752, 755 (Mad), per Govindasamy J.

45 *Navinchandra S Shah v Ahmedabad CDS Ltd* (1979) 1 LLJ 60 [LNIND 1977 GUJ 35] (Guj) (DB), per DA Desai J.

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48 *Indian Oil Corporation Ltd v Panchanan Manna* (1999) 2 LLJ 66 [LNIND 1998 CAL 193] (Cal) (DB), per Jain J.

49 *Nazir Ahmed v A Ramachandran* (2000) 4 LLN 948 (Mad), per Venkatachalam J.

50 *Post Graduate IMER v Raj Kumar* (2001) 1 LLN 804, 806 (SC).

51 *Lakshmi Precision Screws Ltd v Ram Bagahat* (2002) 4 LLN 25 (SC), per Banerjee J.

52 *Competition Printing Press v SJ Singh* (2002) 1 LLN 727 (Bom), per Kochar J.

53 *GM, North-West KRTC v MH Talwar* (2002) 1 LLN 992 (Kant), per Gururajan J.

54 *Mgmt of VPAC Bank Ltd v PO, LC* (2002) 2 LLN 707 (Mad), per Sirpurkar J.

55 *Mgmt of Kongarar Spinners Ltd v PO, LC*, (2002) 2 LLN 734 (Mad), per Kulasekaran J.

56 *Bennet Coleman & Co Ltd v Third IT* (2002) 2 LLN 1073 (Cal), per Ansari J.

57 *Damodaran v PO, Second Addl LC* (2002) 3 LLN 314 (Mad), per Sathasivam J.

58 *BC Chaturvedi v Union of India* (1997) 4 LLN 65 (SC).

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62 *Dharampal v National Engg Industries Ltd* (2002) 1 LLN 691 (SC).

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64 *State of Orissa v Murlidhar Jena* AIR 1963 SC 404 [LNIND 1961 SC 545], per Gajendragadkar J.

65 *AG Basavarajappa v State of Mysore* (1968) 2 LLJ 455, 458 (Mys) (DB), per Hegde J.

66 *Estrolla Rubber v Dass Estate (P) Ltd*, (2001) 8 see 97.

67 *Madura Coats Ltd v PO, LC* (2001) 2 LLN 1132 (Mad), per Padmanabhan J.

68 *Mysore Sugar Co Ltd v Mohanraj* (2002) 1 LLN 283 (Kant), per Kumar J.

69 *State of Uttar Pradesh v Mohammad Nooh* AIR 1958 SC 86 [LNIND 1957 SC 99], per SR Das CJI.

70 *Commr of Police v Gordhondas Bhanji* [1952] SCR 135 [LNIND 1951 SC 63], 156, per Bose J.

71 *V Vellaswamy v IG of Police, Tamil Nadu* 1982 Lab IC 356 [LNIND 1981 SC 465] (SC), per Desai J.

72 *Thansingh Nathmal v A Mazid Superintendent of Taxes* [1964] 6 SCR 654 [LNIND 1964 SC 26], 662, per Shah J.

73 *Tilokchand Motichand v HB Munshi* [1969] 2 SCR 824 [LNIND 1968 SC 353], 830, per Hidayatullah CJI.

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4 *Manohar Lal v State of Punjab* 1983 Lab IC 1763 (P&H) (FB), per PC Jain CJ.

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16 *Lindsay Petroleum Co v Prosper. .. Kemp* 5 PC 221, 239, per Sir Barnes Peacock J.

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31 *Bishnu Charan Mohdnty v State of Orissa* , (1973) 2 LLJ 528 -29 (Ori) (DB), per GK Misra CJ.

32 Cf *Pratap Singh v State of Punjab* AIR 1964 SC 72 [LNIND 1963 SC 211], 83, per Ayyangar J.

33 SA de Smith, *Judicial Review of Administrative Action*, fourth edn, pp 285, 298-356.

34 *Birkadale District Electricity Supply Co Southport Corpn* [1926) AC 355, 377.

35 SA de Smith, *Judicial Review of Administrative Action, fourth edn*, p 279.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

Error of law and mala fides:

The infirmity of mala fide and the infirmity of error of law apparent on the face of record are separate and distinct, though conceivably both may be present in the same case. There may be cases of 'no evidence' even where the authority is acting bona fide as well as when the authority is acting mala fide. In the latter case, the conclusion of the authority not supported by any evidence may be the result of mala fide. If it is shown that there is no evidence to support a conclusion of the authority, a writ of *certiorari* will be issued without further proof of mala fides.[40] To find a plea of mala fides, the court must be in a position to hold positively that the authority whose act is impugned could have been acting only with a dishonest motive. It is not sufficient to find that it was probably so.[41] It is established that 'the record' includes the documents in the case which are the basis of the decision as well as the statement of decision itself.[42]

Rules of Natural Justice:

In administrative law, rules of natural justice are foundational and fundamental concepts and are part of legal and judicial procedures. Since the rules of natural justice are not embodied rules, it is not possible and practicable to precisely define the parameters of natural justice.[43] In *Ranjit Thakur*, Venkatachaliah J said:

> It is the essence of a judgment that it is made after due observance of the judicial process; that the court or tribunal passing it observes, at least the minimal requirements of natural justice, is composed of impartial persons acting fairly and without bias and in good faith.[44]

In the words of Bhagwati J:

> Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action.[45]

By developing the principles of natural justice the courts have devised a kind of code of fair administrative procedure. Through the principles of natural justice, the courts, therefore, control the procedure of the administrative authorities. Natural justice plays much the same part in British law as does 'due process of law' in the Constitution of the United States.[46] In America, natural justice has been described as the 'distillate of due process of law'.[47] In other words, it is 'the quintessence of the process of justice inspired and guided by 'fair play' in action'.[48] 'Natural justice', said Lord MR Esher, in *Voinet v Barrett* , 'is the natural sense of what is right and wrong'.[49] Harman LJ in *Ridge v Baldwin* , described natural justice only as 'fair play in action'.[50] Lord Morris of Borth-y-Gest, elaborated that 'fair play in action' is 'fair in all circumstances'.[51] According to Lord Morris, natural justice is but fairness writ large and judicially.[52] But as pointed out by Lord MR Evershed, the principles of natural justice are easy to proclaim but their precise extent is far less easy to define.[53] The expression is sadly lacking in precision,[54] and there really is very little authority indeed as to what it does mean.[55] In the language of V Ramaswami J:

> ... the extent and application of the doctrine of natural justice cannot be imprisoned within the strait-jacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case.[56]

In its broadest sense, natural justice may mean simply the natural sense of what is right and wrong, and even in its technical sense it is now often equated with fairness. But in administrative law, natural justice is a well defined concept which comprises two fundamental rules of fair procedure; that a man may not be judge in his own cause; and that a man's defence must always be fairly heard.[57] Marshall has formulated these two essential elements of natural justice as follows:

(i) no man shall be judge in his own cause or *nemo debet esse judex in propria causa;* and

(ii) both sides shall be heard or *audi alteram partem*.[58]

The rules of natural justice were formulated by the committee on ministers' powers in England in 1932, by enunciating the following three rules:

(i) that no man shall be judge in his own cause, *nemo debet esse judex in propria causa*;

(ii) that no man shall be condemned unheard, *audi alteram partem*; and

(iii) that a party is entitled to know the reasons for the decision.[59]

Other principles that have been stated to constitute the elements of natural justice are, that the parties must have due notice of when the judge or tribunal will proceed, that the tribunal should not act under the dictation of other persons who have no authority and that if the tribunal consists of several members all must sit together all the time, that there should be orderly course of procedure and that the decision must be made in good faith.[60] The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules.[61] In the course of years many more subsidiary rules came to be added to the rules of natural justice. These and many other rules are merely extensions or refinements of the two main principles which are the essential characteristics of natural justice and are the twin pillars supporting it,[62]*ie*, (i) no man shall be judge in his own cause; and (ii) both sides shall be heard or *audi alteram partem.*[63] The Romans put them in two maxims *nemo judex in causa sua* or *nemo debet esse judex in propria causa* and *audi alteram partem.* These principles have been described by Lord Denning with remarkable precision in the phrase, 'impartiality and fairness'. These two rules are separate concepts and are governed by separate considerations.[64] The sole purpose of these rules is to ensure fairplay.[65]

Bias:

'The rule against bias' means that no man shall be a judge in his own cause *i.e. Nemo debet esse judex in propria suo causa.* This legal maxim, rooted in natural justice, is of ancient verity and has remained undoubted through the years. It forms the broad foundation upon which the doctrine against bias is based.[66] In the words of Bowen LJ, 'Judges, like Caeser's wife, should be above suspicion'.[67] In *Manaklal,* Gajendragadkar J observed that the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of tribunal.[68] In *Dimes*, Lord Campbell observed that this rule is not to be confined to a cause to which the (judge) is a parry, but even applies to a cause in which he (judge) has an interest.[69] In *Arlidge,* Lord Haldane referred to it as the rule against bias.[70] This principle is based on the twin requirement, *viz*, (i) no man should be a judge in his own cause, and (ii) justice must not only be done but seem to be done.[71] There is, however, a distinction between 'interest' (bias) and 'favour'; and 'favour' should not be presumed in a judge.[72] An illustration of personal interest is to be found in *AK Kraipak,*[73] where the selection of certain officers made by a special selection board constituted by the Central Government in which one of the candidates himself was a member, was, quashed by the Supreme Court. Bias, broadly may be classified into three kinds:

Bias Due to Pecuniary Interest:

At common law no man who is himself a party to proceedings or who has any direct pecuniary interest in the result of the proceedings is qualified to adjudicate in those proceedings, so that the public confidence in the administration of justice may be maintained.[74] In the words of Blackburn J, 'there is no doubt that any direct pecuniary interest, however, small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter'.[75] For instance, even a negligible shareholding of £ 5 held by a judge in a company of five million pounds has been held to be pecuniary interest vitiating his judgment and it has been observed, 'where a pecuniary interest exists, the law does not allow any further inquiry as to whether or not the mind was actually biased by the pecuniary interest. The fact is established from which the inference is drawn that he is interested in the decision, and he cannot act as a judge.[76] In *DV Vyas*, the facts disclosed that the chairman of a Committee of Arbitrators was held to have rendered himself incompetent to decide the cause before him since he had obtained for himself and his wife, free

passage from Bombay to New York and back and free hospitality during their stay in USA during the inaugural flight of the 'Boeing' sponsored by the Air Corporation which was one of the parties. The High Court pointed out that the hospitality of the corporation accepted by the chairman could not be considered to be too formal or niggardly not to merit attention. Holding that the payment in kind to an arbitrator appointed under s 10A is not an appropriate mode of payment of fees, Chandrachud J observed that the courts had always zealously upheld the principle, 'it is not merely sufficient that justice is done but that justice must seem to be done'.[77]

Personal Bias or Non-pecuniary Bias:

'Personal bias' is the inclination of the adjudicator in favour or against one of the parties to the proceedings before him. Hence, where his partisan attitude towards the persons or the matter before him is reflected by words or deeds or his association with a party who is instituting or defending the proceedings before him, he may be said to be personally biased in favour of or against a party. In such cases, the reviewing courts will not inquire whether bias in fact has been shown by a Judge and will not hold him to be disqualified unless the circumstances point out to a real likelihood or reasonable suspicion of bias.[78] In order to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary in the subject-matter of the proceedings), a real likelihood of bias must be shown.[79]*AK Kraipak* is a case, which fell in the twilight zone of pecuniary interests and personal interests. In this case the Central Government constituted a special selection board for selecting persons in the senior scale as well as in the junior scale from those serving in the forest department of the State of Jammu and Kashmir. This board included one Shri Naqishbund who was also one of the candidates seeking to be selected to the All India Forests Services. Though he did not sit in the selection board at the time when his name was considered for selection, he did sit and participate in the deliberations of the board when the names of his rival candidates for the same post were considered for selection. He also did not participate in the deliberations of the board while preparing the list of selected candidates in order of preference. The Supreme Court struck down the selection with the observations that under the circumstances it was improper to include Naqishbund as a member of the board because he was one of the persons to be considered for selection. Speaking for a Constitution Bench, Hegde J observed:

> It is against all canons of justice to make a man judge in his own cause. It is true that he did not participate in the deliberations of the committee when his name was considered. But then the very fact that he was a member of the selection board must have had its own impact on the decision of the selection board. Further, admittedly he participated in the deliberations of the selection board when the claims of his rivals particularly that of Basu was considered. He was also a party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberations of the selection board there was a conflict between his interest and duty. Under those circumstances, it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned attorney-general that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct. It was in the interest of Naqishbund to keep out his rivals in order to secure his position from further challenge. Naturally he was also interested in safeguarding his position while preparing the list of selected candidates.. .. In a group deliberation, each member of the group is bound to influence the others, more so, if the member concerned is a person with special knowledge. His bias is likely to operate in a subtle manner. It is no wonder that the other members of the selection board are unaware of the extent to which his opinion influenced their conclusions. We are unable to accept the contention that in adjudging the suitability of the candidates, the members of the board did not have any mutual discussion. It is not as if the records spoke of themselves. We are unable to believe that the members of the selection board functioned like computers. At this stage it may also be noted that at the time the selections were made, the members of the selection board other than Naquishbund were not likely to have known that Basu had appealed against his supersession and that his appeal was pending before the state government. Therefore, there was no occasion for them to distrust the opinion expressed by Naquishbund. Hence the Board in making the selections must necessarily have given weight to the opinion expressed by Naquishbund.[80]

A priori, when such a bias is proved, then the entire exercise of conducting an inquiry by a body or a board with the biased member would be rendered futile as the procedure would not conform to the rules of natural justice.[81] It is now well settled that close relationship of the adjudicator with any of the parties to the proceedings before him, or interested in the subject-matter of such proceedings will disqualify him.[82] In the case of family relationship, the challenge to the proceedings need only establish so close a degree of relationship as to give rise to 'reasonable likelihood' of the judge espousing the cause as his own.[83] Some cases are of personal prejudice and hostility,[84] and family relationship.[85] A judge would be disqualified if he were a friend of the mother of one of the parties and that party made it to be known that the judge would be on her side.[86] In *MLL Kumar*, the inquiry officer was subordinate to the officer who was complainant as well as the witness in the inquiry. In this situation a single judge of the Andhra Pradesh High Court held that the inquiry should not have been conducted by the officer because the employee did not have a fair trial. The court further held that the mere fact that the objection to the inquiry was not raised before the inquiry officer, would have vitiated the enquiry because there is no material to show that the workman was aware

that he could raise such an objection at the inquiry though the plea of bias could be waived, there must be evidence that there was such a waiver by conscious understanding of the situation and particularly the awareness that the employee was entitled to raise the objection.[87] In *Manaklal*, a complaint alleging professional misconduct against an advocate of a High Court was filed by the respondent. The Chief Justice appointed a bar council tribunal consisting of a chairman and two other members to inquire into the allegations. But the chairman had earlier represented the complainant in a case. It was held that the chairman was disqualified on the application of the principle '*justice should not only be done, but must appear to be done*' to the litigating public. It was further observed that actual proof of prejudice was not necessary. The possibility of bias was sufficient.[88]

In *Ranjit Thakur*, the court pointed out that as to the test of 'likelihood of bias' what is relevant is 'the reasonableness of the apprehension in that regard in the mind of the party'. Speaking for the court, Venkatachaliah J, held that the proper approach for the judge is not to look at his own mind and ask himself, however honestly, 'am I biased?'; but to look at the mind of the party before him.[89] Personal hostility or animosity towards a party disqualifies an adjudicator from adjudicating, if it gives rise to real likelihood of bias. In *Mineral Development*, the proceedings cancelling the petitioner's licence for the lease of certain land was quashed as it was found that there was a political rivalry between the petitioner and the revenue minister who also had filed a criminal case against the petitioner. It was held that the minister was disqualified from taking part in cancelling the licence in view of his personal hostility.[90] However, in the absence of compelling evidence of personal hostility or animosity, the courts would be reluctant to conclude that any adjudicator's decision is likely to be warped by personal feeling.[91] In *NS Dhamankar*, two members of the inquiry committee holding inquiry against the delinquent employee for contravention of the building rules of the cantonment were prosecuted at the instance of that employee. It was held that these members had sufficient motivation of being biased. In the circumstances, it was held that the entire proceedings of the inquiry were vitiated for violation of the rules of natural justice. The legal effect of personal hostility by members or presiding officers of quasi-judicial tribunals or administrative authorities exercising quasi-judicial functions in general, has 'to be determined by reference to the same criteria as those adopted for courts of justice subject to the proviso that it may sometimes be reasonable to disregard the hostility of a small number of members of a large public body.[92]

Mala Fides:

Personal animosity or hostility towards any of the parties to the proceedings apart from disqualifying the authority on the ground of personal bias may also fall under the head of mala fides. These several forms of abuse of power not only overlap to a very great extent but also run into one another, [93] and the task of separating them analytically in particular fact situation may be almost insuperable. Mala fides, apart from bringing the proceedings within the ambit of one of the recognised categories of invalidity, is *sui generis* a ground for invalidating the proceedings.[94] The concept of mala fides, though may not be capable of precise definition, may be said to comprise of dishonesty, fraud and malice. A power is exercised fraudulently if its repository intends to achieve an object other than that for which he believes the power has been conferred. For example, a local authority committee would exercise in bad faith its power to exclude interested members of the public if it deliberately chose to hold the meeting in a small room. The intention may be to promote another public interest or private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise.[95] Such an exercise of power is always liable to be quashed on the main ground that it is not a bona fide exercise of power. The decisions of the Supreme Court in *Mineral Developments* case and *Kraipak's* case illustrate the point.

Official Bias:

Markose has explained 'official bias' in following terms:[96] In the case of official bias, the officer is not actuated by personal ill-will. He is so imbued with the desire to promote the departmental policy that he becomes blind to the existence of the interest of the private individuals. An administrator imbued with a fervour to push through government programmes may be an ideal official. But he will be a bad judge, his defeat is bias of a very subtle variety called 'official bias'. Official bias is now tolerated in England as 'some risk of bias is inseparable from the machinery which Parliament has set up'.[1] In India 'official bias' is not tolerated by courts even if it is sanctioned by statute. In this connection the following observations of Subba Rao J in *Gullapalli Nageswararao*, are noteworthy:

> It is not out of place here to notice that in England the Parliament is supreme and, therefore, statutory law, however repugnant to the principles of natural justice, is valid; whereas in India, the law made by Parliament or a state legislature should stand the test of fundamental rights declared in P art 3 of the Constitution. [2]

The relevant question is whether the officer, when he comes to make his decision, genuinely addresses himself to the question with a mind which is open to persuasion.[3] Normally, the quasi-judicial and administrative bodies have some predisposition or interest with regard to the special matters which they administer. In the language of Schwartz:

> The prime aim of administrative justice is, paradoxically, not justice at all, but the execution of the legislative policy embodied in the enabling Act. The administrative agency cannot weigh disputes coming before it with the virgin mind of the judge. It is responsible for the accomplishment of the policy embodied in the legislative scheme, and this may often predispose it in favour of certain results in the cases which come before it.[4]

The Supreme Court drew a distinction between the policy bias where an official, who is the repository of the power concerned with policy making, hears the matter, and where the matter is heard by a minister. The proceedings will be vitiated in the former case and not in the latter case, because in the former case the official is a part of the department, whereas the minister is only primarily responsible for the disposal of the business pertaining to that department. This is illustrated in two decisions known as *Gullapalli Nageswara Rao's* cases. In *Gullapalli Nageswara Rao v APSRTC* (the first case), the inquiry into the objections of the aggrieved persons against the scheme of nationalisation of road transport service by the home secretary of the state (though the final decision was taken by the chief minister) was held to have been conducted in substance by one of the parties to the dispute and was, therefore, violative of the principle against bias.[5] In the latter case, *viz*, *Gullapalli Nageswararao v State of Andhra Pradesh* (the second case), which was a sequel to the first case, the chief minister himself heard the representatives of the objectors and the Road Transport Corporation and then passed the orders approving the scheme as originally published. However, in this case, the same judge held that the position of the chief minister was quite distinct from that of the secretary of the department because while the secretary was the head of the department and so a part of it, the minister-in-charge was only primarily responsible for the disposal of the business pertaining to the department and he was not a part of the department.[6] This view does not appear to be correct. Another instance of departmental or official bias is where first a person takes part in instituting the proceedings and then he sits to adjudicate upon the same proceedings. In such a case, he will be combining the functions of a prosecutor and a judge. A typical instance of this is *Mohammad Nooh*, where in a departmental trial against a police constable before a deputy superintendent of police, the deputy superintendent of police, who conducted the inquiry, himself gave testimony. In other words, having pitted himself against, a witness of the constable, the deputy superintendent of police vacated the judge's seat and entered the arena as a witness. Having played the role of a witness, he again sat as a judge on the proceedings. The Supreme Court invalidated the proceedings because the two roles could not obviously be played by one and the same person. Speaking for the court, SR Das CJI held:

> If it shocks our notions of judicial propriety and fair-play, as indeed it does, it was bound to make a deeper impression on the mind of the respondent, as to the unreality and futility of the proceedings conducted in this fashion ... the rules of natural justice were completely discarded and all canons of fair-play were grievously violated, by the deputy superintendent of police, 'continuing to preside over the trial. [7]

Yet another instance of official bias is where any actions or utterances of the adjudicator savour of a pre-judgment. However, a distinction may have to be made in this connection between pre-judgment of facts specifically relating to a party and pre-conceptions or pre-dispositions about the questions of law, policy or discretion. Normally, in the former case the adjudicator will be disqualified, while in the latter a greater leeway may be permissible. Another brand of official bias is where the mind of the adjudicator abdicates its seat in favour of another's mind. In other words, when instead of bringing his own mind to bear on the subject for deciding the question before him, an adjudicator acts on the dictation of another, his decision will be tarnished and shall be invalidated on the ground of official bias. It is with a view to obviate the possibilities and probabilities of official bias that s s 7 to 7B of the Industrial Disputes Act provide that persons with judicial experience, either retired District Court judges or High Court judges shall be appointed as the presiding officers of labour courts, industrial tribunals and national tribunals and s 7C(a) provides that these officers must be 'independent' persons.

Audi Alteram Partem:

Hearing both the sides: The phrase *'audi alteram partem'* was first formulated by St Augustine.[8] This maxim means 'hear the other side'. Another maxim rendering the same idea is *audiatur et altera pars* which means 'no man should be condemned unheard.[9] In the language of Prof. Wade:

> It is fundamental to fair procedure that both sides should be heard: *audi alteram partem*, 'hear the other side'. This is the more far-reaching of the principles of natural justice, since it can embrace almost every question of fair procedure, or due process, and its implications can be worked out in great detail. It is also broad enough to include the rule against bias, since a fair hearing must be an unbiased hearing. .. [10]

In its application to administrative law, as a ground for *certiorari*, this rule has had its own ebbs and flows. The classic statement of this rule was formulated by Lord Loreburn in *Board of Education*, wherein he stated:

> The departments or officers of state who are under the duty of deciding or determining questions of various kinds...must act in good faith and fairly listen to both sides, for that is a duly lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial...they can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. [11]

These dicta, however, were not free from snags because the duty to observe *audi alteram partem* rule could still be subject to important qualifications as the rules of natural justice are not rigid norms of unchanging content and their ambit may vary according to the context. Some of these trends were reflected in a decision from Ceylon, *viz*, *Nakkuda Ali*. The judicial committee of the Privy Council held that the controller of textiles although enjoined to act on 'reasonable grounds' while revoking a licence was under no duty to act judicially; hence, compliance with the rules of natural justice was not necessary. This view was founded on two reasons, (i) that *certiorari* could only be issued to an authority that was required to follow a procedure analogous to judicial in arriving at its decision, and (ii) that the controller was not determining a question affecting the rights of subjects, but was merely 'taking executive action to withdraw a privilege.[12] In *Maneka Gandhi*, Bhagwati J, observed:

> The *audi alteram partem* rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise.[13]

The scope of 'the right to be heard' has been discussed by the Privy Council in a case from Malaya, wherein Lord Denning graphically stated the law:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidences have been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them.[14]

The rule of *audi alteram partem* is not confined only to conduct of strictly legal tribunals but is applicable to every tribunal or body of persons invested with the authority to adjudicate matters involving civil consequences to individual.[15] Hence, in industrial adjudication the rule of *audi alteram partem* has not only been appliedto the orders or awards of the adjudicatory authorities under the Industrial Disputes Act but has also been extended to domestic inquiries in the nature of disciplinary proceedings as well.[16] The requirements of *audi alteram partem* are : (a) Notice; (b) Reasonable Opportunity:

Notice:

The first requirement of the rule of *audi alteram partem* is that the persons who are likely to be directly affected by the decision or proceedings should be given adequate notice of the proceedings so that they may be able to (i) effectively prepare their case and to answer the case of the opponent, if any; (ii) make their representations; and (iii) appear at the hearing. Any proceedings commenced without notice to the parties are likely to vitiate the resulting decision.[17] The law requires that every person whose civil rights are affected must have a reasonable notice of the case he has to meet.[18] Notice must be real and definite,[19] and must give ample time to the parties without which they cannot be said to have been given a reasonable opportunity of being heard.[20] Notice should, therefore, intimate the parties of the date and time of commencement of proceedings and also of the venue of the proceedings.

Reasonable Opportunity:

The second requirement of the rule is that the parties whose civil rights are to be affected by a quasi-judicial authority must have a reasonable opportunity of being heard in their defence. In the words of Lord Tucker LJ, in *Russel*,[21] 'whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case'. What opportunity may be regarded as reasonable would necessarily depend on the practical necessity of a situation. It may be a sophisticated full-fledged hearing or it may be hearing which is very brief and minimal; it may be a hearing prior to the decision or it may even be post-decisional remedial hearing. The rule is sufficiently flexible to permit modifications and variations to suit exigencies of myriad kinds of situations which may arise.[22] In *TR Varma*, Venkatarama Ayyar J, observed:

> Stating it broadly and without intending it to be exhaustive ...rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him

> without his being given an opportunity of explaining them.[23]

This statement of law postulates the following three requirements of fair opportunity or reasonable opportunity:

(i) the adjudicator should receive all the relevant material which a party wishes to produce in support of its case;

(ii) the evidence of the opponent, whether oral or documentary, should be taken in his presence; and

(iii) each party should have the opportunity of rebutting the evidence of the other by cross-examination or explanation.

Even if the provisions of the Indian Evidence Act or the technical rules of general law of evidence do not apply to the proceedings before industrial tribunals, they are required to observe the rules of natural justice in the conduct of the proceedings before them and if they do so, their decisions are not liable to be impeached on the ground that the procedure followed was not in accordance with that which obtains in a court of law.[24]In other words, though these tribunals are not bound by technical rules contained in the Indian Evidence Act, yet they cannot ignore the substantive rules which would form part of the principles of natural justice. An instance where the proceedings before an industrial tribunal were held to be violative of the rules of natural justice on account of the refusal of the tribunal to take evidence of a party is *Technological Institute*, in which it was found that the tribunal had adjourned the case from time to time to enable the workmen to produce their evidence and had allowed the case to drag on for about two years even after the union's case was closed. Yet it sternly refused to give an opportunity to the management to adduce evidence in support of its case and closed the case of the management *suo motu* and proceeded to give its award. Furthermore, during the course of examination-in-chief of the accountant of the company by the workmen, the statements produced by him were found to be incomplete and unsatisfactory and in that situation the management undertook to furnish the necessary statements in order to enable that witness to give proper evidence before the tribunal and those statements were supplied the very next day. Setting aside the award of the tribunal for violation of the rules of natural justice, Vaidialingam J, deprecated this attitude of the tribunal and held:

> Inspite of this helpful attitude adopted by the management it is rather regrettable that the tribunal should have closed the proceedings very abruptly ...without permitting the appellant to produce evidence on its behalf, to say the least, this attitude of the tribunal is highly arbitrary and unjust.[25]

Whether an adjournment in the circumstances of a case should or should not be granted, is in the discretion of the adjudicator.[26] However, if in refusing to grant adjournment, the tribunal acts arbitrarily, it will be a violation of the rules of natural justice and the award will be quashable on *certiorari*.[27] Likewise, if the tribunal refuses to give an opportunity to a party to adduce evidence, it would constitute violation of the rules of natural justice justifying judicial review of the resulting decision.[28] Refusing to summon a witness as required by a party and arbitrarily closing the case, would tantamount to breach of the rules of natural justice.[29] If a party is not allowed to lead his evidence, there will be gross violation of the rules of natural justice and the resulting order will be liable to be quashed. The reviewing court has to look to what actual prejudice has been caused to a person by the supposed denial to him of a particular right. If no real injustice has been done to the petitioner,[30] or where in spite of the hearing given to the person concerned, the answer to the question involved is the same and cannot be altered by any amount of persuasion or reasoning, the giving of so-called opportunity or giving a notice to that person would only be an empty formality or an exercise in futility.[31] In such cases the writ court will not interfere.

Even if all technicalities of the Evidence Act are strictly not applicable except in so far as s 11 of the Industrial Disputes Act and the rules prescribed therein permit, it is inconceivable that the tribunal can act on what is not evidence such as hearsay. Nor can a tribunal be justified in basing its award on copies of documents when the originals which are in existence and are not produced and proved by anyone of the methods either by affidavit or by witnesses who have executed them, if they are alive and can be produced. Again, if a party wants an inspection, it is incumbent on the tribunal to allow inspection, in so far as that is relevant to the inquiry. The applicability of these principles is well recognised and admits no doubt.[32] A mere leaning towards the principles of natural justice will not justify the interference by the reviewing court.[33] It is, therefore, not in every case that failure to record all evidence sought to be tendered by the party would vitiate the proceedings. If, some evidence immaterial or irrelevant to the inquiry is disallowed by the authority, the principles of natural justice will not be held to be violated.[34] For instance, where the tribunal did not take into consideration a document which was not placed on record, it was held that there was no illegality requiring interference by the writ court.[35]

Fraud and Collusion:

The reviewing courts have an inherent jurisdiction to quash the orders or awards of tribunals if they have been procured by fraud or collusion.[36] In the words of Lord Denning, no judgment of a court, no order of a minister, can be allowed to stand if it has been obtained by fraud.[37] Hence, an order which has been obtained by fraud or on the strength of perjured evidence may be

quashed by a writ of *certiorari*.[38] However, the allegations of fraud are to be specifically pleaded and proved by relevant evidence because normally the writ court will decline to quash unless it is satisfied that the fraud was clear and manifest and was instrumental in procuring the impugned order.[39] Fraud and collusion must, therefore, be established by way of an affidavit as an evidence.

(e) Procedure and Practice

Power to Dismiss In Limine:

The High Court possesses the power to dismiss an application under Art 226 of the Constitution*in limine* when it discloses no substance. If the petition makes a claim which is frivolous, vexatious or *prima facie* unjust and may not be properly triable in a petition invoking the writ jurisdiction, the court may decline to entertain the petition.[40] Likewise, the court may also reject an application *in limine* if it takes the view that the authorities whose acts were called in question had not acted improperly or if it feels that the petition raised complicated questions of fact for determination, which could not be properly adjudicated upon in writ proceedings. However, the discretion is judicial. The court, therefore, should not throw out a petition *in limine,* if a *prima facie* case for investigation is made out.[41] Where the order of the inferior tribunal is sought to be quashed as prima facie violation of the rules of natural justice,[42] or an order is impugned on the ground of violation of certain provisions of the Constitution,[43] or where a substantial question as to the interpretation of some of the provisions of the Constitution is involved,[44] or where there is an allegation of mala fides against the government or any of its officers,[45] the High Court should not dismiss the application without hearing on the point. Similarly, where prima facie it appears that a fundamental right has been infringed, the petition should not be rejected *in limine* merely because evidence has to be taken on some disputed questions of fact.[46] In such cases, even if the affidavit filed by the petitioner is defective, the court should, instead of rejecting the petition *in limine*, give the petitioner a reasonable opportunity to file a better affidavit.[47] The writ court should generally consider the materials which were made available to the tribunal and normally should not allow to place fresh or further materials before it.[48]

Res Judicata:

In *MSM Sharma*, the Supreme Court held that the rule underlying the principle of *res judicata* is to give finality to a decision arrived at after contest and after hearing the parties interested in the controversy. The question whether the previous decision is right or wrong is absolutely immaterial in applying the doctrine of *res judicata* to a subsequent proceeding.[49] In *Daryao*, it was held that if a writ petition filed by a party under Art 226 is considered on merits as a contested matter and is dismissed, the decision would continue to bind the parties unless it is otherwise modified or reversed in appeal or other appropriate proceedings. In such a case, the Supreme Court will refrain from acting under Art 32 as it constitutes a comity between the Supreme Court and the High Court. Hence where a party has already moved the High Court with a similar complaint and for the same relief and failed, the Supreme Court would insist on an appeal to be brought before it and would not allow fresh proceedings to be started under Art 32.[50] From the decision rendered in *Devilal Modi*, the following principles emerge on the circumstances in which the proceedings under Art 226 would operate as *res judicata* in a subsequent petition filed before the High Court under the said Article:

(i) the principle of constructive *res judicata* applies with equal force to writ petitions under Art 226;

(ii) finality of decisions rendered by a court of competent jurisdiction is to be emphasised;

(iii) parties should not be made to fight twice over the same kind of litigation; and

(iv) a plea which could have been taken by a party in proceedings between him and his opponent, if not taken at the appropriate time, that party should not be permitted to take the plea against the same party in a subsequent proceeding on the same cause of action. [51]

Though the principles of *res judicata* are not applicable to writ petitions, a plea cannot be barred on the principles of *res judicata* in a subsequent proceeding, if the point was not expressly decided in the earlier petition which was founded on a different cause of action, particularly when the subject-matter in the earlier proceedings was different.[52] If a writ petition filed by a party is considered on merits as a contested matter and is dismissed, the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed in appeal or other appropriate proceedings permissible under the Constitution. It would not be open to a party to ignore that judgment. If the writ petition is dismissed not on merits but on some preliminary point such as laches or alternative remedy *etc*, then the dismissal of the writ petition would not constitute a bar to a subsequent petition.[53] In *Hoshnak Singh*, the first writ petition of the petitioner was dismissed by a non-speaking order on the ground that the petitioner had an alternative remedy by way of an appeal or revision under the statute. The petitioner filed a second writ petition after pursuing the alternative remedy, which was again dismissed by the High Court on the ground that it was barred by principles analogous to *res judicata*. The Supreme Court held that the second petition was not barred by *res*

judicata, as the cause of action was entirely different and the earlier dismissal could not stand in the way of the petitioner invoking the jurisdiction of the High Court.[54] In *Lal Chand*, Venkatachala J, stated the law thus:

> When a judge of single judge bench of High Court is required to entertain a second writ petition of a person on a matter, he cannot as a matter of course, entertain such petition, if an earlier writ petition of the same person on the same matter had been dismissed already by another single judge bench or a Division Bench of the same High Court, even if such dismissal was on the ground of laches or on the ground of non-availing of alternate remedy. Second writ petition cannot be so entertained not because the learned single judge has no jurisdiction to entertain the same, but because entertaining of such a second writ petition would render the order of the same court dismissing the earlier writ petition redundant and nugatory, although not reviewed by it in exercise of the recognised power. Besides, if a learned single judge could entertain a second writ petition of a person respecting a matter on which his first writ petition was dismissed in limine by another learned single judge or a Division Bench of the same court, it would encourage an unsuccessful writ petitioner to go on filing writ petition after writ petition in the same matter in the same High Court, and have it brought up for consideration before one judge after another. Such a thing, if is allowed to happen, it could result in giving full scope and encouragement to an unscrupulous litigant to abuse the process of the High Court, exercising its writ jurisdiction under article 226 of the Constitution in that any order of any bench of such court refusing to entertain a writ petition could be ignored by him with impunity and relief sought in the same matter by filing a fresh writ petition. This would only lead to introduction of disorder, confusion and chaos relating to exercise of writ jurisdiction by judges of the High Court for there could be no finality for an order of the court refusing to entertain a writ petition. It is why, the rule of judicial practice and procedure that a second writ petition shall not be entertained by the High Court on the subject matter respecting which the first writ petition of the same person was dismissed by the same court even if the order of such dismissal was in limine, be it on the ground of laches or on the ground of non-exhaustion of alternate remedy, has come to be accepted and followed as salutory rule in exercise of writ jurisdiction of courts. [55]

On a parity of reasoning, the principle of constructive *res judicata* would also apply to writ proceedings,[56] when the subsequent writ petition is based on the same cause of action on which the earlier petition was based.[57] Normally, where a writ petition is allowed to be withdrawn without going into its merits, the decision would not constitute *res judicata*. However, while allowing the withdrawal of the petition, the court renders a decision on a consideration of the merits of the case, such a decision would constitute *res judicata*.[58] This principle is applicable when the order is a speaking order and on merits, even if the petition is dismissed in motion without hearing the other side.[59] In *Gulabchand*,[60] the issue as to the circumstances in which a decision rendered under Art 226 would operate as res judicata in a subsequent suit was considered. It was held that the decision in an earlier writ petition on merits would bar a subsequent suit involving the same question and for the same relief on general principles of *res judicata*. The question, whether the decision of a High Court on a certain point in a writ petition under Art 226 would constitute *res judicata* in a subsequent appeal under Art 136 was considered by the Supreme Court in *Northern Rly CCS*, where Bhargava J observed:

> When exercising jurisdiction under article 226 of the Constitution, the High Court does not hear an appeal or revision. The High Court is moved to intervene and to bring before itself the record of a case decided by or pending before a court or tribunal or any authority within the High Court's jurisdiction. A petition to the High Court invoking this jurisdiction is a proceeding quite independent of the original controversy. The controversy in the High Court, in proceedings arising under article 226, ordinarily is whether a decision of, or a proceeding before a court or tribunal or authority, should be allowed to stand or should be quashed for want of jurisdiction or on account of errors of law apparent on the face of the record. A decision in the exercise of this jurisdiction, whether interfering with the proceeding impugned or declining to do so, is a final decision in so far as the High Court is concerned because it terminates finally the special proceeding before it. [61]

The technical rule of *res judicata*, although a wholesome rule based upon public policy, cannot be stretched too far to bar the trial of identical issues in a separate proceeding merely on the assumption that the issues must have been decided. When a writ petition is dismissed either at the threshold or after contest without expressing any opinion on merits, no issue could be deemed to have been decided and any other remedy of suit or other proceedings will not be barred by *res judicata*. In the absence of a speaking order, it would not be easy to decide what factors weighed in the mind of the court, and that it would be unsafe to hold that such a summary dismissal would constitute a bar of *res judicata* against a similar petition filed under Art 32.[62] In this regard, *Ahmedabad Mfg Co*, is an authority for the proposition that an order of the Supreme Court permitting to withdraw a petition for special leave unconditionally, would not amount to its dismissal.[63] In *Paschimbanga TMKS*, the Calcutta High Court has stated the following principles:

(1) the power of the principles of *res judicata* does not affect the jurisdiction of the court and the plea of *res judicata* can never be a jurisdictional question;

(2) the plea of *res judicata* can be waived and if a party does not put forward the plea of *res judicata* in a suit or proceeding, he must be taken to have waived it; and

(3) in the case of conflicting decrees, orders or decisions between the parties occasioned by non-raising of the plea of *res judicata* in the subsequent suit or proceeding, the last of the two conflicting decrees or decisions shall prevail on the ground that in the eye of law, the last one is binding between the parties.[64]

Where the writ petition filed by a workman whose services were terminated was dismissed granting liberty to the workman to take his grievance before the appropriate forum, it could not be said that the writ petition was decided on merits, and hence such summary dismissal of writ petition does not constitute *res judicata* so as to bar the reference of dispute.[65] In *Thiagarajan*, the facts were: An application filed by the employee under s 33C(2) was dismissed by the sixth labour court as not maintainable on the ground that, on the basis of oral and documentary evidence adduced, he was not a workman within the meaning of s 2(s). The management thereafter filed the aforesaid order before the first labour court, which was trying a reference made for the reinstatement of the said employee, and contended that in view of the fact that the employee had not challenged the said order of the sixth labour court holding that he was not a workman, the said issue had become *res judicata*, and that the first labour court was bound by the said decision. The first labour court accepted the said order of the sixth labour court and recorded its findings that the question of workman had become *res judicata* and rejected the reference on that point as not maintainable. The Bombay High Court upheld the view of the first labour court and observed that the issue was finally determined between the same parties by a competent forum and that the first labour court could not have taken any other view.[66] Where a reference pertaining to promotion, pay-scale fixation, orientation, *etc*, was decided against the workmen and another reference was made on similar issues, which was opposed on grounds of *res judicata*, it was held that the tribunal dealing with the second reference was in error to have decided the matter after having found it to be barred by *res judicata*.[67]

Parties:

In *Charanjit Lal*, the Supreme Court held that the rights that could be enforced under Art 32 must ordinarily be the rights of the petitioner himself who complains of infraction of such rights.[68] A writ is issued in favour of a person who has some right and not for sake of roving inquiry leaving scope of manoeuvring.[69] Hence, the aggrieved party has to show that he has a legal right which entitles him to any of the directions, orders or writs, *etc* mentioned in Art 226 and that such right has been infringed.[70] But different considerations arise when a trade union moves under Art 226 of the Constitution against an award made by an industrial tribunal.[71] Where a trade union espouses the cause of workmen, it will be entitled to file a writ petition when the award goes against the workmen.[72] A minority trade union aggrieved by a settlement arrived at between the management and the majority union which will be affected by the settlement in view of s 18(3), will be an aggrieved party and have locus standi to challenge the settlement by a writ petition.[73] A writ petition against illegal retrenchment of workman by a service association representing the employees has been held to be maintainable.[74] Likewise, a writ petition by the Association of Tehsil Mohurrirs vindicating rights or claims on behalf of or common to Tehsil Mohurrirs has been held to be maintainable.[75] However, where the grievances of the members of a 'trade union or an association' are of individual and personal nature, it would not give the union or association the locus standi to move the High Court by a writ petition.[76] Labour courts, industrial tribunals and national tribunals are amenable to *certiorari*.[77] Hence, *certiorari* can be issued to a High Court judge acting as a special industrial tribunal constituted under the Industrial Disputes Act.[78] An arbitrator under s 10A is amenable to the writ jurisdiction of the High Court.[79] A conciliation officer acting under s 12 is not amenable to the writ jurisdiction,[80]but the order of the conciliation officer acting under s 33 of the Industrial Disputes Act being a quasi-judicial order, would be amenable to judicial review by the writ court. A necessary party is one without which no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the questions involved in the proceedings.[81] But a party is a necessary party only if he is likely to be aggrieved or his right prejudicially affected by grant of relief to the petitioner and the relief cannot, therefore, be granted without hearing such party.[82] The following are necessary parties to a proceeding for *certiorari*:

(1) The inferior tribunal or an authority against whose order or award relief is sought.[83]

(2) Any other authority in whose possession the record remains.[84]

(3) Any person who is interested in maintaining the regularity of the proceedings out of which the petition arises or would be affected by the decision of the court.[85]

(4) Where the order of an authority is subject to confirmation by another body, the latter is not a party, for, on confirmation, it is the order of the initial authority which becomes effective.[86] But the position would be otherwise, where the final order has been passed on review or appeal by a superior authority. In such a case, if the superior authority is not impleaded, no relief can be given to the petitioner.[87]

(5) Where apart from the order or award of the tribunal, the order of reference is challenged, the appropriate government would also be a necessary party.

A writ cannot be issued against a person who is not impleaded as an opposite party to the proceedings,[88] and no party other than those who are impleaded would be bound by an order of the High Court made in the writ proceedings.[89] Therefore, in an application under Art 226, all persons must be made parties who are or likely to be affected by the issue of a writ or order.[90] The fact that the number of persons likely to be affected is large is no ground to dispense with their being impleaded.[91] For instance, in *Teen Ali Tea Estate*, the petitioner had challenged the order of reference of a dispute relating to the termination of some workmen as illegal and mala fide, but the workmen whose termination was the subject-matter of the dispute were not made parties. The Gauhati High Court held that the writ petition was not maintainable.[92] Where the workmen demands some benefits from the management, the management will be widely affected by an order of the court. Therefore, the management in such a case would be a proper party and any relief obtained by the workmen having a bearing on the interests of the management, in its absence, will not bind the management as the absence of the management would vitiate the proceedings.[93] The authorities whose orders are sought to be quashed and also persons interested in maintaining legality or regularity of proceedings of authorities should be added as parties to a writ petition.[94] Where there are allegations of mala fides or bias against some persons or officials in a writ petition, such allegations cannot be heard unless such persons are made parties to the petition and thus given opportunity to rebut those allegations.[95]

Any party likely to be affected by a writ or order may appear at the hearing (or make a prior application) and ask for leave to join the proceedings or for rule *nisi* to be served upon it. The court in appropriate case may order that the writ petition be amended by addition of parties, if a necessary party or a party likely to be affected by the writ or order or a party whose presence may be necessary to make the writ effective, is not before the court, either on an application made for that purpose, or of its own motion. The court may direct that such a party be added and the rule *nisi* be served upon him, or simply that rule *nisi* be served upon him or even that he may be permitted to be present at the hearing without being served with a rule *nisi.* Such amendments, should, however, ordinarily be done upon a notice to the party proposed to be added. And upon an amendment of this nature being affected, directions should be given for the use of affidavits or additional affidavits.[96] However, merely because certain questions will have to be determined incidentally in giving or not giving the reliefs asked for, the court does not make each and every person interested in such questions as necessary parties to such proceedings.[97] For instance, in *Vijay Singh Mehta*, the Rajasthan High Court held that the trustees of the provident fund and the gratuity fund were not necessary parties. They could only be proper parties because on account of the relevant regulations of the bank, the liability of the bank could not cease on transfer of the fund to the trust and the bank was bound to discharge its solemn obligation to see that the payment of the provident fund and gratuity are made to its employees.[98] In challenging the award of an Industrial tribunal before a writ court, no doubt such tribunal will be a necessary party but the appropriate government will not always be a necessary party to the writ proceedings.[99]

The appropriate government will, however, be a necessary party when apart from the validity of any order or award of the tribunal, the order of reference is also challenged. When an order of assistant labour commissioner under r 61(4) of the Industrial Disputes (Central) Rules 1957, directing recognition of some workers as 'protected workmen' is challenged by a writ petition, without asking for any relief against those workmen, and the trade unions on whose representations that order has been passed are parties to the writ petition, the petition can be decided in the absence of those workmen as the unions are already parties; such 'protected workmen' are not necessary parties to the petition.[1]Likewise, when the writ court is not examining the competence of the appropriate government directly or of the subjective satisfaction of the government before it exercises the power conferred upon it under s 10 of the Industrial Disputes Act, but the correctness of a finding given by the tribunal on the question of jurisdictional facts, it is not necessary to make the concerned government a party to a writ petition.[2] Similarly, the non-joinder of Union of India would not be fatal to the petition where the general manager of the railway who is an 'employer' within the meaning of s 2(g) has been made a respondent.[3] But a joint application would lie where the applicants are aggrieved by a common order.[4] The number of writs to be filed against an order or award of an authority or tribunal will depend upon the nature of the order or award and its effect on the parties. The rule is that persons having a common joint interest in the subject-matter in controversy may be joined as relators while those having separate and district rights may not.[5] However, each aggrieved person must file independent petitions for relief. Joint petitions by several aggrieved persons for relief although based on a common objection to an order or award of an authority would not lie.[6]

Where similar disputes between several establishments and their workmen were referred by a single notification to an industrial tribunal for adjudication, a single writ petition by the establishments for a writ of prohibition was held not to be maintainable. Likewise, where the interests of the petitioners though similar, are not joint or the same, a single writ petition would not lie.[7] On the other hand, where the service of the petitioners were terminated by one and the same order, a single writ petition would be maintainable.[8]Similarly, a single writ petition against the order refusing to approve the action of the management dismissing a number of its workmen under s 33(2) of the Industrial Disputes Act, would be maintainable because the action is one and the same. Therefore, the cause would also be the same.[9] In *Transport Corpn*, against a common award of the industrial tribunal, 28

employers filed separate writ petitions while certain other employers covered by the award, did not file petitions though notices of the 28 petitions were given through the newspapers by the petitioners. In the circumstances, the Bombay High Court held that the petitions before it were not valid simply because other employers had not filed writ petitions.[10]

Pleadings:

The allegations and averments in the petition should not be vague or indefinite.[11] A person, taking one position in his pleadings before lower authorities against the impugned order, will not be allowed to take inconsistent stand in his petition for a writ.[12] The allegations of fraud must be specifically stated and full particulars in clearest possible terms must be furnished.[13] Bad faith or ill-will is not to be held established except on clear proof thereof, even though such proof need not necessarily be by direct evidence alone but may be deduced as a reasonable and inescapable inference from proved facts.[14] The grounds, which were taken before the tribunal and dealt with, can only form the subject-matter of a writ petition under Art. 226 and 227 of the Constitution.[15] After setting out the grounds, the petitioner must make the prayer in specific and precise form showing as to what writ, order or direction he seeks for redressing a wrong which affects him.[16] In reply to the writ petition, the opposite party or parties have to file the return in the form of a counter-affidavit. The counter-affidavit has to be filed by a person who dealt with the matter in dispute and not by any other person having no concern with the matter. In other words, it should be a person in a position to speak from personal knowledge.[17] If the counter-affidavit denies the facts stated and averments made in the writ petition on the basis of some material, the petitioner has to controvert such averments by a rejoinder affidavit. If, however, the averments or allegations made in the writ petition, are not specifically denied or traversed in the counter-affidavit, the presumption will be in favour of the correctness of such averments *etc*.[18] But if the petitioner does not file any rejoinder affidavit challenging the correctness of the statements in the counter-affidavit nor files any documents in support of the petition, the High Court may accept the uncontroverted statements made in the counter-affidavit to be correct.[19] The law allows a party to take any defence which is open to him. In exercise of its jurisdiction in a writ petition, the court can look into any of the documents referred to in the order itself or the pleadings which initiated the proceedings.[20]

New Plea:

The jurisdiction of the High Court under Art 226 is not of appellate nature. Hence, it will not permit a party to raise an entirely new point which was not canvassed before the lower tribunal, for the first time before it.[21] It is well-settled that an allegation which is not pleaded cannot be examined because the other side has no notice of it, and if entertained, it would tantamount to granting unfair advantage to the other side.[22] Even if a point involving a question of fact is raised before the tribunal but has not been proved by leading relevant evidence before it, it cannot be permitted to be raised before the writ court for decision.[23] Likewise, where the point, that the workman was not given adequate opportunity to examine certain witnesses before the inquiry officer was not pleaded nor was it argued before the industrial tribunal, the High Court would not permit to urge this point in the writ petition.[24] On the same principle, a plea which was raised before the tribunal, but not pressed before it, cannot be raised before the High Court in its writ jurisdiction.[25] Hence, the High Court will not upset the award of a tribunal on a point not raised or argued before it which it had no occasion to decide.[26] Similarly, if an objection that could be validly raised before an industrial tribunal was not raised, it cannot be raised in the writ petition.[27] Likewise, the question of maintainability of the reference based on the contention that the dispute was not espoused by the union, being a question involving the termination of service was not permitted to be raised before the writ court for the first time.[28] Similarly, the question of loss of confidence which involves the questions of fact, if not pleaded before the industrial tribunal, cannot be deemed to be raised before the writ court.[29] 'When a party does not claim any privilege with respect to certain documents, the plea of privilege cannot be allowed to be raised at the stage of the argument.[30] A new point, which the opposite side had no opportunity to meet, cannot be allowed to be taken in the writ petition.[31] A pure question of law which arises on the admitted or proved facts, though not specifically raised, may be permitted to be canvassed by the High Court.[32]For instance, where the objection relates to the constitutional validity of a provision of the Act or the rules thereunder or affects the petitioners' fundamental rights, such a point can be raised for the first time in the High Court.[33]

The objections to the jurisdiction are generally of two types, *viz*, latent lack of jurisdiction and patent lack of jurisdiction. The former are those objections which depend upon the determination of certain facts by the tribunal which are known as jurisdictional facts. For instance, where the plea is that the activity of a particular establishment is not 'industry' or the dispute in question is not an 'industrial dispute' or the workman concerned is not a 'workman' or the government making the reference is not the 'appropriate government' *etc*, such points must be raised before the tribunal in the first instance. If these points have not been raised before the tribunal, they cannot be validly raised before the writ court. If this type of objection is not taken before the tribunal, the party raising them has to satisfy the High Court that he was unaware of the defects in jurisdiction and that is why it was not taken,[34] and the High Court in its discretion may refuse relief if the party by its own conduct had disentitled itself to it.[35] The latter type of objections relate to the inherent lack of jurisdiction, for instance, the constitutional validity of the Act or the rules thereunder or the constitution of the tribunal itself. Such points cannot be validly raised before or decided by a tribunal. Therefore, such points can always be taken before a writ court.[36] Similarly, where on the uncontroverted facts on record, the authority has no jurisdiction to deal with the matter, the petitioner cannot be debarred from raising the point

of jurisdiction in the writ petition.[37] In such cases, the omission by a party to raise the objection as to jurisdiction will not clothe the tribunal with jurisdiction.[38] For instance, an objection that the government making the reference is not the 'appropriate government', can always be raised before the High Court for the first time.[39] Neither submission to jurisdiction nor acquiescence of the parties nor their taking part in the proceedings will debar them from taking the plea, before the High Court, that the award of the tribunal is without jurisdiction.[40] In other words, where the question of jurisdiction goes to the root of the jurisdiction of a tribunal, the absence of jurisdiction cannot be waived by any amount of consent of the litigant. Therefore, the business of a supervisory court, whether under Art 226 or Art 227, is to keep the statutory tribunal within its limits. Moreover, it cannot throw out a petition on the ground that such objection was not taken before the tribunal.[41]

Evidence:

The writ court normally will not go into disputed questions of fact. However, the basic facts have to be established by the petitioner. The opposite parties may admit or traverse such facts. The court will proceed on the basis of the uncontroverted facts. The facts, generally, are averred to by the petitioner by swearing an affidavit in support of them.[42] When a person swears an affidavit in a case which does not concern him, he must explain how he became acquainted with the events and the happenings which ordinarily did not appear to concern him.[43] The facts stated and averments and allegations made should be admitted or controverted by the opposing parties by filing return counter-affidavits and where no counter-affidavit is filed, the facts stated and the averments and allegations made in the writ petition supported by an affidavit will have to be accepted as true.[44] Where the return filed by the opposing party is not in the form of an affidavit, such return will not be a valid return and it need not be taken into consideration.[45]

Costs:

The normal principle of law is that costs must follow the event.[46] This rule would apply to proceedings under the writ jurisdiction as well unless of course some special reason can be shown for making an order otherwise.[47] The conduct of the parties is an important factor in making the order of costs.[48] For instance, in *RK Anand*, the Delhi High Court awarded costs of litigation against the Central Government as it found that the government was to be blamed for its inaction.[49] Where the petitioner himself is partly at fault resulting in the impugned order being quashed by the High Court and the authorities acted bona fide, the court will usually order the parties to bear their own costs.[50] In *Sophia Reuben*, where the collector, who had a statutory duty under s 33C(1) of the ID Act to recover the amounts due under a certificate issued by the labour court, did not take any steps for the recovery of the amount for nearly a year in the matter until the workmen were driven to file a petition for a writ of *mandamus*, after which he collected the amount; in these circumstances, the High Court ordered the collector to pay the costs of the writ proceedings personally.[51]

Appeals:

It is now well settled that an appeal will lie to a Division Bench from the order of a single judge in an application/petition under Art 226 provided such order constitutes a 'judgment' within the meaning of the letters patent.[52] The writ-appeal is limited in scope. The appeal court has the same jurisdiction as the single judge while dealing with the petition in the first instance in issuing or refusing to issue a writ, direction or order under Arts 226 or 227 on the basis of well recognised principles. The appellate court normally will not interfere with the discretion of the single judge unless it finds that the exercise of the discretion is erroneous or improper and not consistent with the well recognised principles of law in issuing the writs.

Relief:

The jurisdiction of the writ court under Arts 226 & 227 is confined not only to the narrow precincts of quashing the impugned order on *certiorari* but it can also modulate its order so as to grant the appropriate relief because the jurisdiction of the court does not come to an end as soon as the impugned order is quashed.[53] In a case where the service of the workman has been terminated by a verbal order and there is no such order in writing, the court can direct the employer to reinstate the workman in service on finding the termination of the service to be illegal.[54] It will be open to the writ court to pass proper order under s 11A, in a case where the tribunal did not consider the facts of the case and refused to exercise its powers under s 11A resulting in failure of justice.[55]

(ii) Mandamus

Mandamus literally means a command. It differs from the writ of prohibition or *certiorari* in its demand for some activity on the part of the body or person to whom it is addressed.[56] The order of *mandamus* is of most extensive remedial nature, and is, in form, a command issued by the High Court of justice, directed to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and, in the nature of a public duty. Its purpose is to remedy defects of justice; and accordingly it will be issued, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may be issued in cases where,

although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual'.[57] In other words, *mandamus* is a coercive and not a corrective writ; it stimulates the lethargic into action; it commands performance, not resistance. It cannot lie to restrain action.[58]*Mandamus* is the most valuable and essential remedy in the administration of justice, but it can only be resorted to, to supply the want of some more appropriate ordinary remedy. Its purpose, as generally used, is to compel corporations, inferior tribunals or public officers to perform their functions, or some particular duty imposed upon them, which in its nature is imperative, and to the performance of which the party applying for the writ has a clear legal right. The process is extraordinary, and if the right be doubtful, or duty discretionary, or of a nature to require the exercise of judgment, or if there be any ordinary adequate legal remedy to which the party applying could have recourse, this writ will not be granted. The application for the writ being made to the sound judicial discretion of the court, all the circumstances of the case must be considered in determining whether the writ should be 'allowed unless the court is satisfied that it is necessary to secure the ends of justice, or to subserve some just or useful purpose'.[59] It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need to be a public official or an official body. A *mandamus* can be issued, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out the duties placed on them by the statutes authorising their undertakings.[60] But the writ court cannot, by *mandamus* compel an inferior tribunal to exercise a jurisdiction which it does not possess.[61] Normally, a writ of *mandamus* is not issued to or an order in the nature of *mandamus* is not made against a private individual. Such an order is made against a person directing him to do some particular thing, specified in the order, which appertains to his office and is in the nature of a public duty.[62] So long as the duty that is sought to be performed is in the nature of a public duty, it is not necessary that the person or the authority on which the duty is imposed should be a public official or an official body.[63] A writ, order or direction in the nature of a writ of *mandamus* can be issued in the case where there is a statutory duty imposed upon an authority and there is a failure on the part of that authority to discharge that statutory obligation.[64]

Requirements of Mandamus:

Mandamus cannot be issued unless the following requirements are satisfied:

(1) The applicant must have a legal right to the performance of a legal duty.[65]

(2) The applicant must further have the legal right to enforce performance of the duty.[66]

(3) The duty should be imposed by law on the respondent and such duty should be of an imperative ministerial character involving no judgment or discretion on the part of the respondent.[67]

(4) The applicant must have made a definite demand of justice and there should be a definite refusal by the respondent and the fact of such demand and refusal must be set out in the petition.[68]

(5) The applicant must act in good faith and not for some ulterior purpose or for the benefit of a third party,[69] and should not suppress or mis-state material facts in the application.[70]

(6) The applicant should not have been guilty of laches or unexplained delay.[71]

(7) Remedy of *mandamus* should not have become futile or ineffective.[72]

(8) The applicant should not have approached the court in mere anticipation of an authority doing something to his prejudice.[73]

(9) Irregularity complained of, not affecting jurisdiction, should have resulted in failure of justice.[74]

(10) The petition should not involve complicated question of fact in respect of title to property.[75]

Alternative Remedy:

Judicial remedies are not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of the extraordinary situations as, for instance, where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of the public injury and the vindication of public justice requires it, then recourse may be had to such remedies. But the court must have good and sufficient reason to bypass the alternative remedy provided by the statute.[76] Normally, if the petitioner has no other specific legal remedy which is adequate to afford complete relief and if there would be failure of justice if the aid of the writ court is not extended, remedy by way of *mandamus* may be invoked.[77] Likewise, when a party alleges the breach of his fundamental rights, his way will not be barred by the rule that when there is an adequate remedy, a prerogative writ will not issue.[78] The person claiming the relief by a writ of *mandamus* must plead and prove that the remedies available under the Industrial Disputes Act are not adequate and efficacious. In the absence of such plea and proof, a writ petition for *mandamus* will not be maintainable.[79] The basic rule is that only a person who has the right to enforce performance of public duty may apply for *mandamus*.[80] In other

words, it is necessary, that the person claiming a writ of *mandamus* must have a legal right to the performance of a legal duty by the one against whom the writ is sought.[81]

In the words of Prof. de Smith, '*Mandamus* lies to secure the performance of a public duty, in the performance of which the applicant has a sufficient legal interest'.[82] Hence, an application for *mandamus* will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure the performance of obligations owed by a company towards its workmen or to resolve private disputes.[83] But once the dispute relating to termination of service of a workmen claiming reinstatement is resolved by an award of the Industrial tribunal ordering his reinstatement with backwages, it confers a legal right on the workman to be so reinstated and a corresponding obligation is imposed on the employer to take steps to implement the award. Therefore, the workman has the right to seek a writ of *mandamus* against the employer to implement the award of reinstatement with continuity of service and backwages.[84] The words 'any person or authority' are not confined to the statutory authorities and instrumentalities of the state, but include any other person or body discharging public duty. There are, however, two exceptions to this rule, *viz*, if the rights are purely of a private nature, no *mandamus* can be issued and similarly if the authority is purely a private body with no public duty, *mandamus* cannot be issued. The public duty is to be judged in the light of the obligation, whether statutory or otherwise, imposed upon the person or authority for the benefit of the affected party.[85] In this connection Shetty J, speaking for the Supreme Court in *Anandi Mukta Trust*, has stated the law with clarity and precision:

> The words 'any person or authority' used in Art 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the state. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of the positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists *mandamus* cannot be denied...Here again we may point out that *mandamus* cannot be denied on the ground that duty to be enforced is not imposed by the statute...judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartments. It should remain flexible to meet the requirements of variable circumstances. *Mandamus* is a very wide remedy which must be easily available 'to reach injustice wherever it is found.[86]

A single judge of the Andhra Pradesh High Court in *Gattaiah*, has held that a writ of *mandamus* can be issued to a company registered under the Companies Act to compel it to carry out the statutory requirements of s 25N of the Industrial Disputes Act. He further observed that the requirements of chapter V-B are in the nature of 'public duty' in laying-off or retrenching workmen.[87] In a later case, in *EID Parry*,[88]another single judge of the same High Court observed that s 33 of the Act creates a statutory mandatory obligation upon the employer not to-alter the conditions of service of the workmen concerned in a dispute pending before the conciliation officer, board, arbitrator, labour court, tribunal or national tribunal, to their prejudice. Hence, if such alteration is proposed or is likely to take place, the writ court would be 'perfectly justified in issuing a writ of *mandamus* commanding the employer to abide by the said statutory mandatory obligation'. However, in view of the fact that there was no pendency within the meaning of s 33(1)(a), the court held that there was no occasion for issuing a writ directing the enforcement of the statutory mandatory obligation. But in this case, the court did not give any reasons for its view. Nor did it even suggest that a public duty is cast on the employer by the provisions of s 33 of the Act. Another single judge of the same High Court in *IDL Chemicals* held that a writ petition against a company is maintainable, even though it is not 'state', if there is a violation of the statutory duties under s 33 of the Act. Accordingly, the court issued a writ of *mandamus* to the company for breach of s 33 and declined permission to the company to justify its action resulting in breach of s 33 in the writ proceedings.[89] Even in this case, the court did not give any reasons for the maintainability of a writ petition against a company except relying on *Gattaiah*.

Similarly, the Gujarat High Court held that the word 'person' in Art 226(1) and also in s 3(42) of the General Clauses Act 1897, as provided by Art 367 of the Constitution would cover the companies, who are required to comply with the requirements of s 25FFA, s 25FFF or s 25O which are the statutory obligations or public duties and not private duties or obligations. In this case, the court held that the wholesale termination of service of the employees without complying with the requirements of s s 25FFA and 25FFF of the Industrial Disputes Act was ineffective, inoperative and invalid in law.[90] On the other hand, the Delhi High Court in *National Seeds*, held that non-compliance of the statutory requirements of s 9A of the Act did not entitle the workman to claim a writ of *mandamus* against the company. The court observed that there is no statutory obligation on a company incorporated under the Companies Act to follow s 9A in the manner in which there will be a statutory obligation on a company to comply with the provisions of the statute which brings it into existence.[91] The Bombay High Court in *Scindia Steam Navigation*, did not lay down any new principle but only gave effect to the established principle that if there is any statutory duty cast upon an individual that will be enforced under Art 226. The Bench observed:

> It is now well-established that the *mandamus* lies to secure the performance of the public or statutory duty though it is not necessary that the person or authority on whom the statutory duty is cast need be a public official or an official body. If it is found that the company has some obligation to perform a statutory or a public duty, then it may not be possible to contend that no writ can be issued to the

company merely because it is a company registered under the Companies Act to enforce the performance of the public duty or the statutory duty.[92]

In view of the fact that the 'settlement' as defined in s 2(p) though binding under s 18 of the Act, is not an instrument creating a statutory right or obligation, the High Court declined to issue a writ of *mandamus*. It further observed that when it is said that *mandamus* will issue for the enforcement of a public duty, then as observed by Garner,[93] 'the duty which it is sought to enforce by order of *mandamus* must be of a public nature'. In *Ganesh Dutt*,[94] it was held that Maruti Udyog Ltd was not an instrumentality of the state, and hence was not amenable to writ jurisdiction. Where the Union challenged the closure of a textile mill under s 25FFA by filing a writ petition under Art 226, it was held that the employer, not being a State within the meaning of Art 12, was not amenable to writ jurisdiction and no relief could be granted in a petition under Art 226.[95] A single judge of Calcutta High Court held that the refusal of the application for approval of dismissal under s 33(2)(b) does not have the effect of transforming a contractual liability into a statutory liability, and hence no writ can lie against the employer.[1] In *Narkesari Prakashan*, the Supreme Court held that the appellant could have availed of the remedy of a reference as provided in sub-s (6) of s 25N, against an order granting permission to retrench under s 25N ; that the appellant, having chosen the remedy of moving the High Court under Art 226, could not therefore be heard to make a grievance that the High Court should not have gone into the merits of that contention.[2]

In *Anaimalai NEW Union*, Sivasubramaniam J of the Madras High Court held that a writ could be issued against a private company, if it violates statutory or public duties or indulges in monstrous activities.[3] This decision induces grave misconceptions about the writ jurisdiction of High Courts *vis-`a-vis* the distinction (or, the absence of it) between a 'statutory duty' and a 'public duty', as the above observation has placed statutory duties on the same footing as 'public duties' alongside 'monstrosities'. In the words of Prof. de Smith, '*Mandamus* lies to secure the performance of a public duty, in the performance of which the applicant has a sufficient legal interest'.[4] In *Gattaiah* (supra), where similar question arose in relation to chapter V-B, PA Chowdary J of Andhra Pradesh HC issued a writ of *mandamus* directing the company to reinstate the workmen, as the management did not obtain prior permission under s 25N before retrenching the workmen.[5]

A contractual obligation between the employer and an employee can hardly be said to have the character of a public nature. It is purely a private contract between two parties to the agreement, namely, the employer and the employee. In *Roche Anglo-French*,[6] the Bombay High Court held that the company had no public duty in complying with the requirements of s 33(2) and non-observance of the provisions of that section would not entitle the High Court to issue a writ of *mandamus*. The crux of the law relating to the writ of *mandamus* is that mere breach of statutory duty will not entitle the aggrieved party to a writ of *mandamus*. The statutory duty must also be a 'public duty'. If a duty though statutory, is not a 'public duty', no *mandamus* can be issued. If the view of the Andhra Pradesh High Court that mere breach of statutory obligation will call for a writ of *mandamus* is accepted, then every breach of the Contract Act or the Companies Act or any other statute by private individuals or companies will call for issuance of a writ of *mandamus*. The following observations of Shah, J in *Roche Anglo-French*, in a direct reference to *Gattaiah*, deserve special mention:

> Now, it is well settled that where the applicant seeks to enforce the performance of duty of public character, a writ of *mandamus* can be issued. It is equally well settled that normally a writ of *mandamus* cannot be issued against a private person, though in proper cases where the performance of duties of a public nature is involved, such a writ can be issued even against a private individual. It is also equally well settled that the writ of *mandamus* can be issued against public officials and public bodies failing to perform any public duty with which they have been charged ... s 33(2) undoubtedly makes a statutory provision imposing an obligation on the employer with regard to the matters mentioned in the provisions as regards the conditions of service or employment of different employees. Merely because the statute provides for certain service conditions which are binding on the employer notwithstanding the conditions of service which may be agreed upon between the employer and employees and merely because the provisions relate to a dispute which is common to the several employees of the company, it is difficult to accept the contention that they involved performance of duties of a public nature. The provision is obviously in the nature of regulating the terms of employment of the employees who have raised the dispute which is pending before the conciliation officer. In other words, the rights involved are of a private nature and cannot be given the status of public duty imposed on the employer. ()...It appears that the learned Judge was of the view that the limitations on the powers of the employers imposed by the provisions of the Industrial Disputes Act being not merely on the interests of individual workman but in the general interest of industrial peace, a writ of *mandamus* could be issued. *With respect, it is not possible to agree with the view taken by the learned Judge. Merely because the enactment prescribes certain statutory restrictions in the matter of retrenchment of workmen it would not follow that thereby a public duty is cast upon the employer. Such provisions merely regulate the relationship between the employer and the workmen and put limitations on the exercise of the right of the employer. Such statutory provisions cannot be likened with public duties, performance of which can be directed by issuing* a writ of *mandamus.* It is *not possible to agree with the view expressed by the Andhra Pradesh High Court, which, in our view, runs counter to the law laid down by the Supreme Court.*...()

In *Madras Labour Union*, Srinivasan, J of Madras High Court, referring to the decision in *Gattaiah*, held:

> ...A perusal of the entire judgment would show that *mandamus* would issue against a private individual or an incorporated company provided the private individual or the company is enjoined by law to perform a duty of a public nature. If the *learned judge has meant that a writ could be issued against a private person or an incorporated company even for the purpose of enforcing a contractual right without reference to the question. whether the writ that is sought for would lie against that private individual or company under the established principles, then we must confess, with great respect to the learned judge, that we are unable to subscribe to that view and we see no justification for holding that 'person' referred to in Art* 226 *would take in every private individual with respect to every private act or a mission of his.*[7] (Italics supplied)

The decisions rendered by Bombay and Madras High Courts are consistent with the law laid down by a host of authoritative decisions of Supreme Court and are right. It is a judicial misconception of rudimentary nature on the part of Chowdary J that, being a judge at the level of the High Court, he grossly failed to distinguish a '*statutory duty*' of contractual nature from a '*public duty*' having a public law element therein. While it is conceded that in the event of violation of '*public duty*' a writ could be issued even to a private person or party, every '*statutory duty*' cannot be classified as a 'public duty'. In order for a duty to partake the character of a public duty, it should be shown that it is a duty, which, though directed at the moment towards a private party, has implications for the general public. Paraphrasing, the effect of non-performance of such a duty by the authority concerned is not confined to the party alone, but has implications extended to the public at large. *What public duty could presumably have been violated in a case where an employer retrenches a few of his workmen? Could it be said that a retrenchment of this kind would have far reaching implications for the community in the sense that the fundamental rights guaranteed to the members of the public get infringed?* Chowdary J grossly misdirected himself and handled the case without applying his mind to the facts and without following the settled principles and binding precedents. The reasoning and conclusions reached by Prakash Narain J of the Delhi High Court in *National Seeds*, Srinivasan J of the Madras High Court in *Madras Labour Union,* and that of Shah J of the Bombay High Court in *Roche Anglo-French* are consistent with the legal principles governing *mandamus* laid down by the Apex Court and are right. On the other hand, the decision of PA Chowdary J of AP high Court in *Gattiah* reflects nothing worthwhile except a manifest abuse of judicial power on his part, is *clearly misconceived, wholly perverse and absolutely wrong*, and deserves to be condemned outright and rejected without a second look.

In *Bharat Petroleum*, the Madras High Court comprising Subhashan Reddy CJ and Murugesan J had proceeded to issue a writ of mandamus against the trade union for resorting to a strike which presumably was illegal within the meaning of s 22 of the Industrial Disputes Act.[8] With great respect, the Chief Justice had no less misdirected himself than PA Chowdary J of AP High Court in *Gattaiah* (supra). What public duty is involved in a strike called out by a trade union which calls for interference by the High Court by way of a *mandamus*, albeit in a public utility service, more so, when the ID Act read with standing orders provide for elaborate process and an effective alternative remedy as to the manner of treating and handling an illegal strike or illegal lockout? Yes, it is conceded that the workmen staging an illegal strike in a public utility strike cause serious inconvenience to the public apart from financial loss to the employer. It is also admitted that there is no statutory right, much less a fundamental right, to strike regardless of the fact that strikes and lockouts are an intrinsic part of the collective bargaining process. The fact that the combined focus of sections 22, 23 and 24 of the ID Act is on prohibition - and not promotion - of strikes and lockouts is also taken note of. But these facts *per se* do not by any stretch of imagination give rise to an inference that the High Court and the Supreme Court can misuse and abuse the power conferred on them under the Constitution by issuing writs of the kind of *mandamus* in a reckless manner, more so, when the Act itself provides for an efficacious remedy to treat the said industrial actions of contractual nature and also the consequences ensuing therefrom. Could it be said that a trade union or, for that matter, an industrial employer carrying on a particular business, howsoever critical it might be for the general public, is performing a statutory duty of public duty character having a public law element in it? In this connection, it will do well to recall what JC Shah J had to say about the expression 'authority' appearing in Art 12 in *Rajasthan State Electricity Board*. The learned judge in his concurring judgment observed:

> I am unable, however, to agree that every constitutional or statutory authority on whom powers are conferred by law is "other authority" within the meaning of Article 12. *The expression "authority" in its etymological sense means a body invested with power to command or give an ultimate decision, or enforce obedience, or having a legal right to command and be obeyed... Those authorities which are invested with sovereign power, i.e., power to make rules or regulations and to administer or enforce them to the detriment of citizens and others fall within the definition of "State" in Article 12, and constitutional or statutory bodies which do not share that sovereign power of the State are not in my judgment, "State" within the meaning of Article 12 of the Constitution.*[9] (Italics supplied).

In the face of this candid observation, is it possible by any stretch of imagination to brand a trade union of workmen as an 'authority' invested with the State's sovereign power in the sense of making rules and enforcing their obedience by the citizens,

etc.? *It is both amusing and disgusting to hear Subhashan Reddy CJ with decades of experience at the bar and the bench, travelling to the length of holding that a trade union of workmen was an 'authority', within the meaning of Art 12, performing a public duty*![10] The contentions raised by counsel in the case (at Para 17 of the judgment), that the trade unions could not be termed as 'other authorities' within the meaning of the said Article and that no writ was maintainable, were right, whereas the reasoning and conclusion reached by Reddy CJ are trite and misconceived. In another case involving the same company and the same cause, the Bombay High Court comprising Khanwilkar and Gyanoo JJ decided the case on the same lines as its Madras counterpart.[11] Both the High Courts apparently followed the decisions of the Supreme Court, inter alia, in *Som Prakash Rekhi*,[12] and *Shri Anandi Mukta Trust*,[13] which are themselves finished products of grave misconceptions on the part of the learned judges. This dysfunctional trend, which had its disquieting beginning in *Sukhdev Singh*,[14] and *Ajay Hasia* (infra), at the hands of a team of over-zealous judges headed by AN Ray CJI during the black days of 'Emergency' and is continuing unabated for over 40 years now, needs to be curbed sooner than later, for the good of the country as well as for upholding the reputation and standing of the Supreme Court. In this connection, it is considered expedient to devote some space to the decisions in *Som Prakash Rekhi and Shri Anandi Mukta Trust* and other cases, prefaced by *Ajay Hasia. In Ajay Hasia*, Bhagwati J contributed his own share of misconceptions and proceeded to hold that even companies incorporated under the Companies Act and Societies registered under Societies Registration Act would fall within the expression of 'Authority' in Art 12, as can be seen from the following passage:

> We may point out that it is immaterial for this purpose whether the corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory corporation created by a statute or it may be a Government company or a company formed under the Companies Act 1956 or it may be a society registered under the Societies Registration Act 1860 or any other similar statute. Whatever be its genetical origin, it would be an 'authority' within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the Government is not limited to a corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression 'authority in Article 12. [15]

It is this kind of intellectual myopia, which afflicted the judicial vision of a few 'activist-populist' judges of the 1970s & 1980s, that was largely responsible for the docket explosion and unmanageable workload in higher courts, as the litigants were given a green signal to circumvent the ordinary and more effective remedies provided under the respective statutes and directly knock at the doors of higher courts in every trivia. In *Som Prakash Rekhi*, the judicial perversions touched their zenith in so far as Iyer J held that Bharat Petroleum Corporation was 'State' within the enlarged meaning of Art 12, and further observed that the commonsense signification of the expression '*other authorities under the control of the Government of India*' was plain and there was no reason to make exclusions on sophisticated grounds such as that the legal person must be a statutory corporation.[16] In striking contrast, the decision in *Tekraj* made a refreshing departure from the insolvent trends noticed *Ajay Hasia, Sukhdev Singh* and *Som Prakash Rekhi*. In *Tekraj*, counsel relied on *Sukhdev Singh* to press his argument that the Institute of Constitutional and Political Studies which was a voluntary society formed under Societies Registration Act, but comprising members of the two Houses of Parliament, was an agency or instrumentality of the state within the meaning of 'other authorities'. Justice Misra repelled the contention and held that objects of the society were not governmental business, but aspects which were expected to equip Members of Parliament and the state legislatures with the requisite knowledge and experience for better functioning. Many of the objects adopted by the society were not confined to the two Houses of Parliament and were intended to have an impact on society at large, and hence it could not be said to fall within the meaning of 'other authorities'.[17] In *Shri Anandi Mukta Trust*, Shetty J held that the words 'any person or authority' used in Art 226 may cover any person or body performing public duty, and not confined only to statutory authorities and instrumentalities of the state.[18] The rendition of Mishra J is right and those of Bhagwati, Iyer and Shetty JJ are repugnant to the Constitution, and are patently wrong.

Reverting to *Bharat Petroleum*, the decisions of Madras and Bombay High Courts disclose nothing worthwhile except judicial high-handedness and a gross and unadulterated abuse of judicial power on the part of the learned judges. If the High Court chooses to interfere with contractual actions and statutory violations in this manner, then what is the sanctity of s s 26, 27 & 28 of the ID Act and of the acts of misconduct enumerated in the Standing Orders, which provide for the machinery and procedure for handling such contraventions? Can the High Court assume the direct responsibility of managing industrial undertakings over the heads of the employers themselves? It is this kind of misplaced judicial activism, bordering on perversion, that is responsible for encouraging litigants to cut corners by discarding the more effective remedy provided in the respective enactments, and invoking the writ jurisdiction of High Courts. At a more basic level, what is the sanctity of *mandamus* issued *against a few thousand workmen and what sense does it make even to a layman*? Could it be enforced in any meaningful way, if the whole body of workmen defies the order with impunity? Is it possible to arrest and try some 60,000-70,000 employees spread across the country or to initiate contempt proceedings against them for flouting the misconceived *mandamus*? Assuming

that it can be done, how does the *mandamus* get enforced in so far as it commands the party *to do its duty* vis-à-vis *the consumers who are adversely affected by the strike!?* And assuming further that the employees could be arrested and tried, what would be the fate of production operations of the company? The remedy would be worse than the disease, as it renders the supply of essential products to the community even more remote and impossible. What practical considerations did prevail with, and what kind of intellectual exercise was pressed into service by, the learned judges while deciding the case in such a desolate manner? And, strangely, the judges at the level of High Courts and Supreme Court appear to be content with issuing writs, in all and sundry cases, while millions of cases are languishing for decades waiting for disposal, nay, parturition. That is the abysmal level to which the standard and quality of judicial decisions have taken a plunge! The above decisions are reckless, mediocre and insipid and deserve nothing short of an outright condemnation in the strongest possible language and terms!

In *Eagle Rolling Mills*, a Constitution Bench presided over by Gajendragadkar, CJI, held that though the power of the High Court under Art 226 is very wide, even this power cannot take within its sweep 'industrial disputes' of the kind which were sought to be raised before the High Court.[19] In *Rohtas Industries*, Krishna Iyer J, speaking in the same strain, held that if the industrial dispute relates to enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get it adjudicated under the Act.[20] In *Bihar RVPFK Union*, Pathak CJI dismissed the petition on the ground of alternative remedy being available to the workmen which could only be adjudicated on evidence and that the writ court would not enter into questions of fact.[21] Viewed against this backdrop, the relationship between IDL Chemicals (the 'employer' in this case) and the temporary workmen who were retrenched, was purely contractual and private in character, and the question raised therein fell squarely within the definition of 'industrial dispute'. At any rate, it could never be considered at par with the relationship that exists between the state or its instrumentality, on the one hand, and the citizens, on the other. If, in the opinion of the court, there was a violation of the relevant provisions of the ID Act, the right course would have been to direct the party to approach the appropriate tribunal provided for under the Act, instead of assuming jurisdiction wrongfully and granting a writ under the wrong pretext that it was a public duty. Adverting to *Animal National Estate*, could it be said that the non-issue of a notice of change under s 9A would have an adverse affect on the public at large? If, as averred by the learned judge, the non-compliance of s 9A could be considered as a violation of 'statutory duty' and, therefore, a 'public duty, *then what class of duties imposed under various labour laws or, for that matter, in any law of any branch, would possibly fall outside the class 'public duty'?* It is also not a case where the Act conferred a particular right with no specific remedy to enforce it, which circumstance alone could justify the issue of a writ. If the management had changed the conditions of service without notice and without permission during the pendency of a proceeding, there is a specific remedy provided under s 33A of the Act itself. What was the warrant for the learned judge to issue a writ in the face of an equally or more efficacious remedy available to the workman? The learned judge turned a blind eye to what Prof. Schwartz and Prof. Wade peremptorily observed about prerogative writs:

> The important aspect of the prerogative remedies is that they belong exclusively to public law (with the exception of habeas corpus), their primary object being to make the machinery of government work properly rather than to enforce private rights. This introduces a valuable 'public interest' element. An application for *certiorari* is, as the title of the case indicates, a proceeding by the Queen to call some public authority to account for exceeding or abusing is power. Similarly in a suit for mandamus the Queen is calling for the proper discharge of some public duty. Although private persons are of course the real plaintiffs, the public character of the proceedings is more than a mere form.[22] (Italics supplied).

According to Halsbury:

> The order of *mandamus* is an order of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to supply defects of justice; and accordingly, it will issue, to the end that justice may be done in all cases where there is a specific legal right and no specific legal remedy for enforcing that right..[23]

The writ of *mandamus* is not a '*writ of course*' or a '*writ of right*', but is discretionary. But where the right, which the applicant seeks to enforce, is the performance of duties of a public nature which are merely ministerial and cannot be secured at all if a *mandamus* is refused, the issue of the writ is not discretionary.[24] In exercising its discretion, the court will refuse the writ, if there is an alternative remedy at law, but the alternative remedy must be equally convenient, beneficial and effectual. In England, such alternative remedies include a petition of right (replaced by proceedings under the Crown Proceedings Act 1947); an appeal to a court or tribunal; an election petition; an execution; and an action at law.[25] The above authorities eloquently demonstrate that the issue of *mandamus* is inalienably linked to duties of public nature and not to enforce private rights *inter partes*, whether conferred by a statute or otherwise; that even in the case of non-performance of a public duty by an authority, the issue of a writ is discretionary, if there is an alternative remedy at law which is equally convenient, beneficial and effectual. It cannot be denied that the Indian Constitution adopted these writs on an as-is-where-is basis from English law and,

by the same token, they cannot acquire a connotation different from that of English jurisprudence, which implies that Indian judges are not free to transgress their legitimate confines while exercising the writ jurisdiction. In *VST Industries*, the facts were, the VSTI Employees' Union filed a petition in the Andhra Pradesh High Court seeking for a writ of *mandamus* directing the company to treat certain contract workers engaged in the canteen (who were members of the union) as the employees of the company and for grant of certain monetary and other consequential benefits. Despite the contention of the management that no writ would lie against a company in view of the fact it was not an authority or a person within the meaning of Art 12 of the Constitution and that it was not discharging any public duty, both a single judge and the Division Bench of High Court apparently following *Parimal Chandra Raha*, and *Gattaiah*, and held that a writ would lie against a company under a private management. The High Court further held that s 46 of the Factories Act 1948 imposed on the company a public duty to establish and maintain a canteen; and that inasmuch as the members of the union were working in the canteen they were entitled to seek a *mandamus*. Rejecting the view of the High Court, the Supreme Court held:

> Manufacture and sale of cigarettes will not involve any public function. Incidental to that activity there is another obligation under Section 46 of the Act to set up a canteen when the establishment has more than 250 workmen. That means, it is a condition of service ... In other words, it is only a labour welfare device for the benefit of its work-force *unlike a provision where Pollution Control Act makes it obligatory even on a private limited company not to discharge certain effluents. In such cases public duty is owed to the public in general and not specific to any person or group of persons.* Further the damage that would be caused in not observing them is immense. If merely what can be considered a part of the conditions of service of a workman is violated, then we do not think there is any justification to hold that such activity will amount to public duty. Thus, we are of the view that the High Court fell into error that appellant is amenable to writ jurisdiction.[26] (,)

Viewed in this background, it is difficult to escape the conclusion that the decision of Sivasubramaniam J in *Anaimalai NEW Union*, coming, as it were, after the decision of Supreme Court in *VST Industries* amounts to a blatant defiance of a binding precedent and constitutes judicial indiscipline of grave magnitude. In *Mukul Kumar Shukla*, Sikri J of the Delhi High Court, while repelling the argument of counsel for petitioner for issuing a writ against the respondent for reason of non-compliance with the mandatory provisions of s 25F of the ID Act, observed:

> A Constitution Bench of the Supreme Court in the case of *Eagle Rolling Mills*,[27] has categorically held that in relation to an industrial dispute, a writ petition under Art 226 of the Constitution of India cannot be entertained and the Writ Court shall not convert itself into an Industrial Court. The petitioner, in the instant case, has failed to show that any public law character is involved in the writ petition. Even assuming that the respondent has not complied with the mandatory requirements of s 25F of the Act, its remedy would be to take recourse to the provisions of the said statute in terms whereof its service conditions are protected. In the *Sain Steel Products* case,[28]. .. relied upon by the petitioner no contention had been raised as to whether a writ petition would be maintainable nor the earlier binding precedents of the Supreme Court had been cited. It is now a well established principle of law that a judgment cannot be relied upon for the proposition which had not been canvassed before the Court. Having regard to the facts and circumstances of the case, we are of the opinion that it is not a fit case where this Court should exercise its discretionary jurisdiction under Art 226 of the Constitution of India. This writ petition is, therefore, dismissed with liberty to the petitioner to avail alternative remedies available to him. [29]

Sikri J declined, and very rightly so, to issue a writ against Hindustan Times, which decision is consistent with the ratio laid down by the Apex Court in several cases. Speaking in the same vein, the Allahabad High Court in *Pepsico*, held that the respondent-company was a private company and not state or an instrumentality of the state under Art 12, and hence the writ petition filed by the workmen seeking relief against termination of their services by the company was not maintainable.[30] In *PNB Employees*, where the settlement entered into with one union was challenged by another union in a writ petition, Menon J dismissed the writ petition and directed the petitioners to approach the tribunal/labour court under the provisions of the ID Act, and further held that the remedy under Art 226 was not to supersede completely the remedy of obtaining relief by civil suit or any other statutory provision.[31] The decisions of the Bombay, Madras, Delhi, Allahabad and Madhya Pradesh High Courts in *Roche Anglo-French*, *Madras Labour Union*, *Hindustan Times*, *Pepsico* and *PNB*, respectively, should be accepted as propounding correct law consistent with the ratio evolved by the Apex Court in *Eagle Rolling Mills*, *Rohtas Industries* and other cases. In *Nirmalendu Roy*, the Calcutta High Court held that the grant of relief under Art 226 is discretionary and should be exercised only in exceptional circumstances and where the dismissed workman in a public sector undertaking has efficacious alternative remedy available under s 2A, he must be relegated to avail of the said remedy before invoking the extraordinary jurisdiction of the High Court.[32]

In *Maruti Udyog*, the facts were, as a consequence of industrial relations, problems coupled with go-slow, tool-down strike, and threats of total strike, *etc*, the management demanded that the workers should sign a 'good conduct' undertaking that they would not resort to go-slow, *etc*, in breach of the Standing Orders. The union of workmen, having been unsuccessful to get an injunction issued by the civil court on jurisdictional grounds, filed a writ petition in the High Court praying *inter alia* for an

injunction against the management from enforcing the good conduct undertaking. The High Court held, following several decisions of the Apex Court, that Maruti Udyog Ltd, was not a 'State', and that the union cannot invoke the writ jurisdiction of High Court for obtaining the same relief, which it could not obtain from the civil court. That the union does not satisfy the three conditions necessary for the grant of an injunction, namely, (i) that it had a *prima facie* case; (ii) that the balance of convenience was in its favour; and (iii) that irreparable loss would be caused to it, if the injunction was not granted, and therefore the petition should be dismissed.[33] In *Balakrishna Transport*, pending the conciliation proceedings in the labour court, the union of employees of stage carriage operator resorted to violence and destructive activities by damaging the vehicles to force the employer to agree to the charter of demands. A single judge of the Kerala High Court directed the police to take effective steps to protect the vehicles from the highhanded destructive activities of the union and its followers to give protection to the employer in plying its vehicles. The court observed:

> If the workmen resort to force and their actions amount to commission of offences under the ordinary law of the land, police will have to take effective steps to prevent the same and to bring the offenders to due process of law. Under the guise of the labour agitation, no one can be permitted to take the law into his own hands. Any laches on the part of the police in this direction will affect the industrial peace in the state.[34]

Accordingly, the court directed the police authorities to give protection to the employer in plying his vehicle and it also directed the labour court to settle the dispute pending before it expeditiously.

(iii) Quo Warranto

(a) Nature of

A writ in the nature of *quo warrnato* would lie 'against a person who claimed or usurped an office, franchise or liberty, to inquire by what authority he supported his claim, in order that right to the office or franchise might be determined'.[35] The leading case on *quo warranto* is *Speyer*, in which Lord Reading CJ traced the evolution of the writ of *quo warranto* and enunciated the following principles:

(1) A stranger whose motives are not proper cannot apply for a writ of *quo warranto*;

(2) *Quo warranto* will lie if there is a public office of subordinative character, even if such office is held at pleasure;

(3) Even if an appointment to the office is made by the Crown, the court even in semblance, cannot command the Crown, the writ of *quo warranto* will operate on the occupier of the office;

(4) It is not to be supposed that the Crown would reappoint the person to an office from which he has been ousted on a writ of *quo warranto*; and

(5) Even, where a public office is held at the pleasure of the Crown, a writ of quo warranto will lie against the usurper of that office.[36]

This decision has been followed in most of the Indian cases. The law on the subject has been stated with precision by Gajendragadkar J in *University of Mysore*, thus:

> Broadly stated, the *quo warranto* proceeding affords a judicial inquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid tide to it, the issue of the writ of *quo warranto* ousts him from that office. In other words, the procedure of *quo warranto* confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of *quo warranto* is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of *quo warranto*, he must satisfy the court, *inter alia*, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the inquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not.[37]

(b) Quo warranto: When Will Issue?

A writ in the nature of *quo warranto* would lie in respect of an office, if:

(1) such office was created by a statute or the Constitution;

(2) the duties of such office are of public nature;

(3) the office is of a permanent nature; and

(4) the occupier is in its possession and user as a usurper.

(c) Who can Petition?

The writ in the nature of *quo warranto* differs from other writs, *viz*, certiorari, prohibition and *mandamus*, where it is necessary that the petitioner has been prejudicially affected by any wrong act of a public nature or that he is denied any legal right, or a fundamental right of his, has been infringed or that any legal duty is owed to him. In otherwords, the petitioner must be a person aggrieved, in other words, a proceeding for *quo warranto* is, thus, an exception to the general rule that only the person who has been individually aggrieved can apply for the writ. A writ of *quo warranto* can be issued at the instance of any member of the public who acts bona fide and is not a mere pawn in the game having been set up by others.[38] But in the case of *quo warranto*, even a stranger acting bona fide, can petition a writ court.[39] In other words, any member of the public may apply for a writ of *quo warranto* challenging the right of a person to hold a public office, provided he is not a man of straw, set up by others and provided that it is in public interest that the legal position regarding the office should be declared.[40] It is not necessary that the petitioner should be a person who himself claims the office. For instance, even a rate-payer can challenge the right of a person to sit on a local government board.[41]

(d) Quo warranto: Against whom can be Issued?

It is clear from the wide scope of Art 226 that the High Court has power to issue an order restraining any person acting in an office in which he is not entitled to act, and also if the case so requires, declare the office vacant, where the office has been created by the Constitution itself [42] The remedy of *quo warranto* is generally regarded as an appropriate and adequate remedy to determine the right or title to a public office and to oust an incumbent who has unlawfully usurped or intruded into such office or is unlawfully holding the same.[43] A writ in the nature of *quo warranto* will lie against a person who claims or usurps an office[44] or is otherwise unfit to hold it. However, *quo warranto* cannot be issued unless the respondent is in actual possession of the office and exercises the office in fact.[45] The person exercising the powers of the office is a necessary party. When the approval of another person is necessary to the validity of an appointment, that other person is also a necessary party.[46] For instance, where a person is appointed to an office by a government, such government is generally made a party to the proceedings. ID Act contemplates certain public offices under ss 4 to 7B. The conciliation officers are to be appointed by the government under s 4 while the chairman and the members of the Board are to be appointed under s 5. The court of inquiry is to be appointed under s 6. The labour courts, industrial tribunal and national tribunals are to be constituted and their presiding officers to be appointed under ss 7, 7A and 7B. These provisions specify certain requirements for the appointment of the presiding officers to these adjudicatory offices. Furthermore, s 7C imposes certain disqualification on the appointment of the presiding officers of the adjudicatory authorities. The appointment of any person, to these offices which is not consistent with these provisions; will be void and amenable to a writ in the nature of *quo warranto*. In *HR Deb*, Hidayatuallah CJI observed that, in a *quo warranto* proceeding, the High Court should be slow to pronounce upon the matter unless there was a clear infringement of the law. Hence, where there is clear infringement of the provisions of ss 7 to 7C in the appointment of the presiding officers of the adjudicatory authorities, such an appointment will be vulnerable to a writ of *quo warranto*.[47] In *Joginder Pal*, a Full Bench of the Punjab and Haryana High Court held that since the appointment of the presiding officers of the industrial tribunal and the labour court in the State of Haryana was not in compliance with the requirements of cl (aa) inserted in s 7A(3) of the Industrial Disputes Act, by the State of Haryana read with Art 233 of the Constitution, the appointments were bad in law. The court, therefore, quashed the appointments on a writ of *quo warranto*.[48]

(e) Alternative Remedies

Quo warranto is a discretionary remedy. Normally therefore, *quo warranto* will be declined if there is another equally convenient and effective remedy available.[49] However, the existence of a statutory remedy will be no bar to *quo warranto* if the objection of the petitioner is outside the scope of the statutory remedy.[50] Likewise, the existence of another remedy will not bar the exercise of the writ court to issue *quo warranto* if the circumstances of the case demand interference.[51] In *V Sasitharan v State of Tamil Nadu* , a writ petition was filed by some advocates and a social worker as a public interest litigation seeking a writ of *quo warranto* to the chief secretary to show that he was competent to hold the said office. In response to the application, it was pleaded on behalf of the state that in view of the provisions of the Administrative Tribunals Act 1985 which provided suitable efficacious remedies for redressing the grievances of the aggrieved petitioners, a writ of *quo warranto* would not lie. A single judge of the Madras High Court discountenanced the plea holding that a public interest litigant could not go before the

tribunal because he could not be construed or equated with a person aggrieved by any order pertaining to any matter within the jurisdiction of the tribunal. Therefore, a public interest litigant could only approach the High Court questioning the legality of the appointment by filing a writ of *quo warranto*.[52]

(f) Delay or Laches

Delay and laches on the part of the petitioner may bar the remedy of *quo warranto*.[53] Whether the High Court should issue a writ in such a case would depend upon the facts and circumstances of each case. However, the English rule, that *quo warranto* is not available against an incumbent who held office for a number of years, has no application in India.[54]

(g) Acquiescence

Acquiescence of the petitioner in the act alleged in the petition impugning the right of office will make the application liable to be dismissed. However, in cases under the Industrial Disputes Act, though an award made by a tribunal may not be quashable on *certiorari*, on the application of the doctrine of *de facto*, the incumbent can undoubtedly be made to vacate the office by a writ of *quo warranto*.[55] At this point, it is considered necessary to devote some space to the 'doctrine of *de facto*', for the ready reference of the readers. Simply stated, the said doctrine means "*the acts performed by a person acting under the colour of official title would be valid, even though it is later discovered that the legality of that person's appointment or election to the office was deficient.*" In *Gokaraju Rangaraju*, the facts were: An Addl. Sessions Judge, West Godavari, heard a criminal appeal filed by the accused-appellant under s 6C of the Essential Commodities Act, and rejected the same. Thereupon, the accused filed a Criminal Revision Petition before the High Court. While the petition was so pending, the Supreme Court, in another case relating to the legality of the appointment of judges, quashed the appointment of a few judges, which included that of the Addl. Sessions Judge, West Godavari, with the result he had to vacate the post. The contention raised by the appellant was that, in the light of the fact that the appointment of the Addl. Sessions Judge was quashed by the Supreme Court, the order passed by the judge rejecting his appeal should be treated as invalid and *non est*, for the reason that his appointment itself was subsequently declared illegal by the apex court. Rejecting the contention, Chinnappa Reddy J (for self, Sen and Islam JJ) held:

> The doctrine is now well established that "the acts of the officers de facto performed by them within the scope of their assumed official authority, in the interest of the public or third persons and not for their own benefit, are generally as valid and binding, as if they were the acts of officers de jure" (*Pulin Behari v King Emperor*).[56] ... the doctrine is founded on good sense, sound policy and practical experience. It is aimed at the prevention of public and private mischief and the protection of public and private interest. It avoids endless confusion and needless chaos. An illegal appointment may be set aside and a proper appointment may be made, but the acts of those who hold office de facto are not so easily undone, and may have lasting repercussions and confusing sequels, if attempted to be undone. Hence the de facto doctrine."[57]

(h) Futile Writ

A *quo warranto* writ will not be issued where it will be futile[58] nor will the court grant a writ of *quo warranto* in cases of mere technical irregularities.[59]

(iv) Superintendence of the High Court under Art 227

(a) Nature and Scope of

Article 227 of the Constitution corresponds to s 107 of the Government of India Act 1915, which was reproduced in the Government of India Act 1935, as s 224. This section, however, introduced new a sub-s (2), providing that nothing in the section should be construed as giving the High Courts any jurisdiction to question any judgment of an inferior court which was not otherwise subject to appeal or revision. Section 224 of the 1935 Act has been reproduced with certain modifications as Art 227 in the Constitution, *inter alia*, omitting the sub-s (2). This significant omission has been regarded by all High Courts in India, before whom this question has arisen, as having restored the power of judicial superintendence it had under s 15 of the Indian High Courts Act 1861, and s 107 of the Government of India Act 1915 to the High Courts.[60] The power of superintendence has been extended by Art 227 to superintendence over the inferior tribunals as well. The Constitution has conferred two types of jurisdiction on the High Courts: one, under Art 226 and the other under Art 227, which is supervisory jurisdiction. When the executive discharges a judicial function under the provisions of certain laws, then it acts as a tribunal and in that capacity, it is amenable to the jurisdiction of the High Court under Art 227. The scope of these two jurisdictions is not identical.[61] The power of superintendence conferred by Art 227 has to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts or inferior tribunals within the bounds of their authority and not for correcting mere errors.[62] It is thus clear that the power of judicial interference under Art 227, with orders of judicial or quasi-judicial nature, are not greater than the powers under Art 226.

Under Art 226, the power of interference may be extended to quashing an impugned order on the ground of errors of law apparent on the face of the record. However, the power of interference is limited to seeing that the tribunal functions within the limits of its authority.[63] In appropriate cases, Art 227 may be employed to correct at least errors of jurisdiction, to wit, assumption of excessive jurisdiction or illegal or irregular exercise of it or the refusal or failure to exercise the same—to put the matter at its lowest—and it would certainly cover cases of non-exercise of jurisdiction in as much as cases of excessive jurisdiction, the one, pointing to the lower limit, and the other to the higher, of the phrase 'keeping within the bounds of authority'.[64] For instance, the High Court will quash the award of an industrial tribunal, where it decides the question not referred to it.[65] Likewise, the High Court will be justified in interfering with the order of an industrial adjudicator where he has transgressed his authority or jurisdiction conferred by s 11A, particularly in cases where the order is arbitrary and tantamounts to abuse of discretionary jurisdiction.[66] Howsoever, wide the power of the court under Art 227 it may be compared to the provisions of s 115 of the Code of Civil Procedure 1908, it is well established that the High Court cannot assume appellate powers to correct every mistake of law in exercise of this power. An error not being apparent on the face of record, cannot be corrected by the High Court in revision under s 115 of the Code of Civil Procedure or under Art 227 of the Constitution.[67] Likewise, merely erroneous decisions cannot be corrected under Art 227. In other words, in exercising jurisdiction, under Art 227, the High Court cannot sit in appeal over the decision, of an industrial tribunal, which is brought before it and it cannot upset the discretionary orders on the ground that if the matter had been raised before it, it might have exercised its discretion differently.[68] However, the High Court will not go into the averments or allegations involving disputed questions of facts[69] nor will it normally interfere with interlocutory orders[70] but it may intervene, if the exercise or discretion is capricious or perverse or *ultra vires*.[71]

In exercise of supervisory jurisdiction under Art 227, the High Court has undoubtedly the power not only to quash the orders made by inferior courts or tribunals, but also to pass substantive orders in place of the orders it has quashed or set aside.[72] In other words, it can not only annul the decision of the tribunal but it can also issue further directions in the matter.[73] However, this jurisdiction being of a discretionary nature will be exercised only where grave miscarriage of justice or flagrant violation of law calling for intervention takes place.[74] While reviewing the decisions of the labour courts, industrial tribunals and national tribunals, the superintending jurisdiction of the High Court under Art 227 is to be confined to correcting the jurisdictional errors. Where the conclusion of the tribunal has been based on some acceptable evidence, however inadequate it might be, the High Court would generally not interfere with such finding in an application under Art 227. However, where the finding is based on evidence which is *ascintilla* as to be practically non-existent, or the evidence is such which no reasonable man will accept, interference with such finding is called for.[75] In some High Courts, Art. 226 and 227 are invoked together for impugning the orders of quasi-judicial authorities for seeking relief on the same grounds. The courts also generally do not adopt hyper technical rules in granting relief. However, in some High Courts, Art 227 alone is utilised for the purpose of securing relief by way of writs or directions in the nature of writs, more accurately contemplated by Art 226 of the Constitution.[76] In some cases, this article is invoked for getting orders of inferior tribunals revised just as s 115 of the Code of Civil Procedure 1908 is utilised for revision of orders of subordinate courts.[77] However, this practice has been rebuked by the Supreme Court in *Ahmedabad Mfg*, Dua J observed:

> We should, however, not be understood to express our approval of the use of article 227 for seeking relief by way of writs or directions in the nature of writs for which purpose article 226 is expressly and in precise language designed. [78]

(b) Tribunals

Adjudicatory authorities under the Industrial Disputes Act,*viz*, labour courts, industrial tribunals and national tribunals are not 'courts' *strictu sensu.* Hence, they will not fall within the meaning of the expressions 'courts' used in Arts 136 or 227 of the Constitution. However, after the decision of the Supreme Court in *Bharat Bank*, it is well-settled that these authorities will fall within the ambit of the expression 'tribunals' used in Art 136 of the Constitution. On the parity of reasoning, they will fall within the expression 'tribunal' used in Art 227.[79] The Bombay High Court in *Air Corporation*, held that an arbitrator under s 10A of the Industrial Disputes Act also would fall within the meaning of the expression 'tribunal' used in Art 227.[80] This view, however, was pronounced by the High Court before the decision of the Supreme Court in *Engineering Mazdoor Sabha*, holding that an arbitrator under s 10A is not a tribunal within the meaning of Art 136 though in a proper case, a writ may lie against his award under Art 226 because his functions are of a quasi-judicial nature.[81] Thus, *Air Corporation* was expressly overruled by the Supreme Court.

(c) Procedure and Practice

General: It has been seen that the jurisdiction of a High Court under Art 227 is of supervisory nature limited to the extent of keeping the courts and tribunals within their jurisdiction. In other words, in this jurisdiction, a High Court, will go into the question of jurisdictional defects. To that extent, the jurisdiction of the court under Art 227 is more or less the same as that of

the court under this Art 226. The general procedure and practice of the court under this Article will also be the same as under Art 226.

New Plea: A point not taken before the original authority cannot be allowed to be raised before the High Court in application under Art 227 of the Constitution.[82]

Laches: There is no rule of limitation fixing a period of limitation for preferring an application/petition under Art 227. Such a rule could not be fixed because this right, which is an important right, is given to a party under Art 227. But generally the accepted rule is that a party must come to the court as expeditiously as possible. However, the filing of a petition with utmost expedition is not absolute rule. Exceptional circumstances might arise where notwithstanding the delay, it would be open to the court to entertain a petition and deal with the matter on merits.[83] In *Harnam Singh*, the facts were that a reference of a dispute relating to termination of service without complying with s 25F was challenged by the employer by way of a writ petition 12 years after the reference. The High Court accepted the contention of the management that the workmen were not their employees and that s 25F was not applicable, and quashed the said reference. The Supreme Court, while setting aside the order of the High Court and directing the labour court to adjudicate the reference, held that the High Court failed to take notice of the inordinate, unexplained delay on the part of the employer in filing the writ petition and that it was surprising that the employer took 12 years to approach the Court.[84]

Adjournment: In the under-noted case,[85] the prayer for adjournment of hearing of an appeal being rejected, the labour appellate tribunal dismissed the appeal before it, without going into its merits. The Bombay High Court, set aside the order of the labour appellate tribunal as being incompetent and unjustified in the exercise of its power under Art 227.

CONSTITUTIONAL APPEALS

(i) Appeals under Article 133 of the Constitution

From any judgment, decree or final order of a High Court in a writ petition against orders or awards of the industrial authorities under the Act, an appeal shall lie to the Supreme Court if the High Court grants a certificate of fitness under Art 133 of the Constitution. For the purposes of granting a certificate, the High Court is required to consider as to whether the case raises a substantial question of law of the kind mentioned in this constitutional provision. Even if a single such question of law is found to arise in the case, a certificate must be granted. A certificate of fitness under Art 133 is a pre-condition to the maintainability of an appeal to the Supreme Court. The stage at which the High Court considers the grant of certificate under Art 133(1) and the stage at which the Supreme Court hears the appeal, are two distinct stages, and different jurisdictions are exercised with respect to each stage. Considerations pertaining to the grant of a certificate are not identical with the considerations which govern the hearing of the appeal. Accordingly, even if some of the points raised by the appellant in the High Court in support of the petition for a certificate are found insufficient for grant of leave, they can be considered as grounds during the hearing of the appeal. Thus, the certificate is an open one enabling the appellant to urge all the points arising in the appeal in the Supreme Court.[86] However, a successful party may question the maintainability of the appeal on the ground that the certificate was issued by the High Court, in contravention of the provisions of Art 133 of the Constitution.[87]

In an appeal, under this Article, the Supreme Court undoubtedly has the power to review the concurrent findings of the fact arrived at by the lower court in appropriate cases. The Supreme Court will not ordinarily interfere with concurrent findings of fact except in exceptional cases. For instance, where the finding is such as it shocks the conscience of the court or by disregard to the forms of legal process or some violation of some principles of natural justice or otherwise substantial and grave injustice has been done, the Supreme Court will be justified to interfere with the findings. It is not possible nor advisable to define the circumstances in which the court will interfere with such concurrent findings of facts and it is in the discretion of the Supreme Court to decide having regard to the facts of a particular case.[88] However, the orders and awards of industrial authorities are impugned before the High Courts by writ petitions under Arts 226 and 227 of the Constitution. It is, therefore, against the orders and judgments of the High Courts in such writ petitions that an aggrieved party can approach the Supreme Court in appeal, on a certificate under Art 133 of the Constitution. In such an appeal, the scope of the jurisdiction of the Supreme Court is exactly the same as that of the writ court. It will interfere only if the writ court has failed to exercise its jurisdiction. In granting a certificate under Art 133, the High Court must state as to under what particular clause of this Article the leave is granted, otherwise the certificate would be invalid and the appeal would not be maintainable.[89] An objection to the validity of the certificate should be taken at the earliest possible moment and the respondent's failure to do so would not be allowed to prejudice the appellant, making it impossible for him to resort to the proper remedy of special leave under Art 136, as he could have done if the objection had been taken at an early stage. Thus, the appellant will not be made to suffer for the failure of the respondent and the court will not simply dismiss an appeal on the ground that the leave obtained was not a proper one and leave the matter to rest there. In such cases, if the circumstances of a case warrant, the court would go to the length of granting special leave to the appellant on oral application.[90]

(ii) Appeals under Article 136 of the Constitution

Article 136 of the Constitution empowers the Supreme Court to entertain an appeal by special leave from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. The non obstante clause in the beginning of this Article indicates that very wide discretion has been conferred on the Supreme Court in the matter of entertaining appeals under this Article and this discretion is not hedged by other Articles in chapter 4 of P art 5 of the Constitution. In *Rajkrushna Bose*, referring to the language of cl (1), the Supreme Court observed that it was sufficient to say that the power conferred on us by Art 136 could not be taken away or whittled down by the legislature. So long as these words remain, discretion of Supreme Court and High Courts remains unfettered.[91] This view was affirmed in *Sangram Singh*, where it was held that the jurisdiction which Art 136 confers, entitles the Supreme Court to examine the decisions of all tribunals to see whether they have acted illegally. The following passage from the judgment of Bose J, who spoke for the court is fascinatingly illuminating:

> That jurisdiction cannot be taken away by a legislative device that purports to confer power on a tribunal to act illegally by enacting a statute that its illegal acts shall become legal the moment the tribunal chooses to say they are legal. The legality of an act or conclusions. is something that exists outside and apart from the decision of an inferior tribunal. It is a part of the law of the land which cannot be finally determined or altered by any tribunal of limited jurisdiction. [92]

The extraordinary power, conferred by Art 136 on the Supreme Court cannot therefore, be taken away by any legislation short of a constitutional amendment.[93] The power of the Supreme Court to grant special leave to appeal from the decision of any court or tribunal in the territory of India, save military tribunals, is not subject to any constitutional limitation, and is left entirely to the discretion of the Supreme Court. An appeal under Art 136 is not a matter of right but it is in the discretion of the Supreme Court to grant special leave to appeal or not.[1] In *Bengal Chemicals*, dealing with an industrial case specifically, Subba Rao J held:

> Though article 136 is couched in widest terms, it is necessary for this court to exercise its discretionary jurisdiction only in cases where awards are made in violation of the principles of natural justice, causing substantial and grave injustice to parties or raises an important principle of industrial law requiring elucidation and final decision by this court or discloses such other exceptional and special circumstances which merit the consideration of this court.[2]

In *Shambhu Nath Mukherji*, the Supreme Court declined to interfere with the decision of the High Court because the High Court in its writ jurisdiction had refused to interfere with the award of the tribunal in view of the fact that there was no manifest error of law on the face of the record nor was there any error of jurisdiction.[3] Likewise, in *Fuel Injection*, the court did not find any merit in the plea to interfere with the judgment of the High Court. Speaking for the court, Krishna Iyer J pointed out that the jurisdiction of the Supreme Court in entertaining an appeal by special leave under Art 136 must ordinarily be confined to what the High Court could and would have done under Art 226 and this limitation must be borne in mind while dealing with the judgment under appeal.[4] Article 136(1) refers to a 'tribunal' in contradistinction to a court.[5]The Supreme Court has jurisdiction to grant special leave from the determination of a tribunal which is a body that has been invested with a part of the judicial power of the state. The tribunals which fall within the purview of Art 136 occupy a special position of their own under the scheme of the Constitution as special matters and questions are entrusted to them for their decisions. The labour courts, industrial tribunals and national tribunals constituted under the Industrial Disputes Act have been held to fall within the ambit of the expression 'tribunal' used in Art 136(1) of the Constitution as they have many trappings of a court and exercise quasi-judicial functions, though they are not full-fledged courts in the strict sense of exercising judicial powers.[6]However, a body which derives its authority to decide matters by the consent of parties and is not invested with the judicial power of the state cannot be a 'tribunal' with the meaning of Art 136. An arbitrator acting under s 10A of the Act has, therefore, been held to be *de hors* the purview of, tribunal' as postulated by Art 136(1) of the Constitution.[7] In *Jaswant Sugar Mills*, the facts, in brief were: the management filed an application before the conciliation officer for permission to dismiss 52 workers for having resorted to an illegal strike. The conciliation officer granted permission to dismiss only 11 out of the 52 workmen in exercise of the powers conferred on him under cl 29 of the Order promulgated by the Governor under the UP Industrial Disputes Act1947. The said clause corresponds to s 33 of the Central Act. Two issues fell for the consideration of a Constitution Bench of the Supreme Court, i.e. (1) Whether an appeal may be entertained in exercise of powers under Art 136 of the Constitution against a direction of the Conciliation Officer issued in disposing of an application under cl. 29 of the Order promulgated by the Governor of Uttar Pradesh under the U P Industrial Disputes Act, 1947 and (2) Whether against the direction issued by the Conciliation Officer exercising authority under cl. 29 of the Order an appeal lay to the Labour Appellate Tribunal under the Industrial Disputes (Appellate Tribunal) Act, 1950. Counsel for the workmen contended that the appeal against the direction given by the Conciliation Officer was not maintainable because that the officer exercising authority under cl. 29 of the said Order was neither a 'Court' nor a 'Tribunal' within the meaning of Art 136 of the Constitution and, hence, no appeal could lie to the Supreme Court against the impugned direction. Upholding the contention of the workmen, Shah J observed:

> .. . The Conciliation Officer is again not capable of delivering a determinative judgment or award affecting the rights and obligations of parties. He is not invested with powers similar to those of the Civil Court under the Code of Civil Procedure for enforcing attendance of any person and examining him on oath, compelling production of documents, issuing commissions for the examination of witnesses and other matters. He is concerned in granting leave to determine whether there is a prima facie case for dismissal or discharge of an employee or for altering terms of employment, and whether the employer is actuated by unfair motives; lie has not to decide whether the proposed step of discharge or dismissal of the employee was within the rights of the employer. His order merely removes a statutory ban in certain eventualities, laid upon the common law right of an employer to dismiss, discharge or alter the terms of employment according to contract between the parties. The Conciliation Officer has undoubtedly to act judicially in dealing with an application under cl. 29, but he is not invested with the judicial power of the State: he cannot therefore be regarded as a 'tribunal' within the meaning of Art 136 the Constitution.. .. it is thus manifest that the conciliation officer does not hold the status of an industrial tribunal in exercising powers under s 33 of the Industrial Disputes Act or clause 29 of the Uttar Pradesh Order. It must therefore be held that an appeal under Art 136 of the Constitution, to this court is not competent against the direction given by the conciliation officer exercising power under clause 29 of the order issued by the Governor of Uttar Pradesh under the Uttar Pradesh Industrial Disputes Act 1947."[8]

It is not necessary that an authority must be given the nomenclature 'tribunal'. It is sufficient if it satisfies the requirements of law for an authority to fall within the ambit of a 'tribunal' as used in Art 136(1) of the Constitution. For instance, the state government exercising authority under rr 6(5) & 6(6) of the Punjab Welfare Officers (RCS) Rules framed under s 49(2) of the Factories Act 1948, was held to be a 'tribunal' within the meaning of Art 136(1).[9] In *Bharat Bank*, the Supreme Court laid down the following principles for interference with the orders and awards of tribunals:

(i) excess of jurisdiction;

(ii) approach to the question referred to in a manner which is likely to result in injustice; or

(iii) adoption of a procedure which runs counter to the well established rules of natural justice, ie:

  (a) denial of hearing to a party;

  (b) refusal to record evidence of a party; and

  (c) acting in any other manner in any arbitrary or despotic fashion.[10]

However, in *Calcutta Tramways*, the court classified rather too widely the necessary pre-requisites for interference with the orders and awards of the industrial tribunal whose conclusions on questions of fact are generally final. Speaking for the court Govinda Menon J enunciated the following circumstances for the interference of the court:

(i) where the tribunal acts in excess of jurisdiction conferred upon it under the statute or regulation creating it or where it ostensibly fails to exercise a patent jurisdiction;

(ii) where there is an apparent error on the face of the decision; and

(iii) where the tribunal has erroneously applied the well-accepted principles of jurisprudence.[11]

In *Bengal Chemicals*, Subba Rao J further broadened the scope of appeal against the awards of industrial tribunals by laying down the following requirements for the exercise of the discretionary jurisdiction of the court, namely:

(i) that there is violation of the principles of natural justice, causing substantial and grave injustice to parties;

(ii) that the appeal raises an important principle of industrial law requiring elucidation and final decision by the Supreme Court; or

(iii) that the appeal discloses such other exceptional or special circumstances which merit consideration of the Supreme Court.[12]

In *Meenakshi Mills*, the Supreme Court observed that though the appropriate government or the specified authority is required to act judicially while granting or refusing permission for retrenchment of workmen under sub-s (3) of s 25N of the Industrial Disputes Act, it is not invested with the judicial power of the state and it cannot be regarded as tribunal within the meaning of Art 136 of the Constitution and no appeal would, therefore, lie to the Supreme Court against the order passed under that provision.[13] In *Sarathy*, Saghir Ahmed J held that the Deputy Commissioner of Labour (Appeals), Madras, which was notified as the authority under the Tamil Nadu Shops and Establishments Act 1947, had the jurisdiction to adjudicate upon an order

terminating the services of an employee. The Deputy Commissioner could exercise jurisdiction to decide whether the order of dismissal passed by the employer was valid or it was passed in violation of any statutory rule or principles of natural justice. Under s 41(3), the order passed by him is binding on the employer as also on the employee. Ahmed J further held that the Deputy Commissioner of Labour (Appeals) might not be a 'Civil Court' within the meaning of the Code of Civil Procedure, but was definitely a court.[14] The nature of jurisdiction being essentially of a discretionary character and not being fettered by any rules or principles, the court has dealt with each case on its own merits depending upon its peculiar facts and circumstances. As such, no hard and fast rules are discernible from the decided cases.

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41 *KK Ramankutty v State of Kerala* 1973 Lab IC 496, 506 (Ker), per Subramanian Poti J.

42 HWR Wade, *Administrative Law*, third edn, p 96.

43 *Rattan Lal Sharma v MC, Dr Hari Ram HS School* 1993 Lab IC 1808 [LNIND 1993 SC 471], 1812 (SC), per GN Ray J.

44 *Ranjit Thakur v Union of India* (1988) 1 LLJ 256 [LNIND 1987 SC 697], 260 : AIR 1987 SC 2386 [LNIND 1987 SC 964]: (1987) 4 SCC 611 [LNIND 1987 SC 964] (SC), per Venkatachaliah J.

45 *Maneka Gandhi v Union of India* AIR 1978 SC 597 [LNIND 1978 SC 25], 625, per Bhagwati J.

46 HWR Wade, *Administrative Law*, fifth edn, p 413.

47 *American Journal of International Law*, Vol 67, p 479, per Megarry J.

48 *Fontaine v Chastam* [1968] 112 Sol Gen 690.

49 *Voinet v Barrett* [1885]15 LJQ 39, 41, per Lord MR Esher.

50 A much quoted remark of Harman LJ, in *Ridge v Baldwin* [1963] 1 QB 539, 578.

51 *Current Legal Problems*, 1973, Vol 26, p 16.

52 *Fumell v Whangarei High Schools Board* [1973] AC 660, 679, per Lord Morris.

53 *Abbott v Sullivan* [1952] 1 KB 189, 195, per Lord MR Evershed.

54 *R v Local Government Board, ex p Arlidge* [1914] 1 KB 160, 199, per Hamilton LJ.

55 *Robinson v Fenner* [1913] 3 KB 835, 842, per Channell J.

56 *Union of India v PK Roy* AIR 1968 SC 850 [LNIND 1967 SC 320], 858, per V Ramaswami J.

57 HWR Wade, *Administrative Law*, fifth edn, p 414.

58 HH Marshal, *Natural Justice*, p 5; *Maneka Gandhi v Union of India* AIR 1978, SC 597, 625, per Bhagwati J.

59 Report of the Committee on Ministers' Powers, pp 65-80.

60 Marshal, *Natural Justice*, p 5.

61 *AK Kraipak v Union of India* AIR 1970 SC 150 [LNIND 1969 SC 197], 156 per Hegde J.

62 *Kanda v Government of Malaya* [1962] AC 322, 337, per Lord Denning.

63 Marshal, *Natural Justice*, p 5.

64 *Kanda v Government of Malaya* [1962] AC 322, 337, per Lord Denning.

65 *Andhra Scientific Co Ltd vA Seshagiri Rao* (1961) 2 LLJ 117 [LNIND 1960 SC 340], 120 (SC), per Das Gupta J.

66 *DK Khanna v Union of India* 1973 Lab IC 582, 586-87 (HP) (DB), per Pathak CJ.

67 *Bonaham's* case [1610] 8 Co Rep 113b.

68 *Manaklal v Prem Chand Singhvi* AIR 1957 SC 425 [LNIND 1957 SC 154], 429, per Gajendragadkar J.

69 *Dimes v Grand Junction Canal* [1852] 3 HLC 759, per Lord Campbell.

70 *Local Government Board v Arlidge* [1915] AC 120, 132.

71 *Frame United Breweries Co v Bath Justices* [1926] AC 586, 590, per Viscount Cave LC.

72 *Brookes v Earl of Rivers* [1668] Hardes' 503.

73 *AK Kraipak v Union of lndia* AIR 1970 SC 150 [LNIND 1969 SC 197], 154-55 : (1969) 2 SCC 262 [LNIND 1969 SC 197], per Hegde J.

74 *Serjeant v Dale* (1887) 2 QBD 558, 567.

75 *R v Rand* [1866] LR 1 QBD 230, per Blackburn J.

76 *Lesson v General Council of Medical Education* (1889) 43 Ch D 366, 384, per Bowen LJ.

77 *Air Corpn Employees' Union v DC Vyas* (1962) 1 LLJ 31 [LNIND 1961 BOM 46], 44 : AIR 1962 Bom 274 [LNIND 1961 BOM 46] (Bom) (DB), per Chandrachud J.

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84 *R v Handley* [1921] 61 DLR 656.

85 *R v Rand* [1886] LR 1 QB 230, 232-33.

86 *Cottle v Cottle* [1939] 2 All ER 535.

87 *MLL Kumar v Divisional Manager, APSRTC* (1990) 2 LLJ 23, 25 : (1969) 2 SCC 262 [LNIND 1969 SC 197] (AP), per Jagannadha Rao J.

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89 *Ranjit Thakur v Union of India* (1988) 1 LLJ 256 [LNIND 1987 SC 697], 260 : AIR 1987 SC 2386 [LNIND 1987 SC 964] (SC), per Venkatachaliah J.

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2 *Gullapalli Nageswararao v State of AP,* AIR 1959 SC 1376 [LNIND 1959 SC 143] (1379) : [1960] 1 SCR 580 [LNIND 1959 SC 143], per Subba Rao J.

3 *Creednz v Governor General* [1981] 1 NZLR 172.

4 Schwartz, *American Administrative Law,* 1962, p 92.

5 *Gullapalli Nageswara Rao v APSRTC* AIR 1959 SC 308 [LNIND 1958 SC 139]: [1959] Supp 1 SCR 319 : (1959) II MLJ 156, Subba Rao J.

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7 *State of Uttar Pradesh v Mohammad Nooh* AIR 1958 SC 86 [LNIND 1957 SC 99]: [1958] 1 SCR 595 [LNIND 1957 SC 99], per SR Das CJI.

8 Dc Daubusanimabus, 14, 22, J-P Migne, PI 42 110.

9 Marshal, *Natural Justice,* pp 17-20.

10 HWR Wade, *Administrative Law,* fifth *edn,* p 441.

11 *Board of Education v Rice* [1911] AC 179, 182 (HL), *per* Lord Loreburn J.

12 *Nakkuda Ali v Jayaratne* [1951] AC 66 (PC).

13 *Maneka Gandhi v Union of India* AIR 1978 SC 597 [LNIND 1978 SC 25], 629-30, per Bhagwati J.

14 *Kanda v Government of Malaya* [1962] AC 322, 327, per Lord Denning.

15 *Lapointe v L' Assn* [1906] AC 535, 539 (PC), per Lord Macnaughtan.

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17 Cf *Hari v Deputy Commr of Police* AIR 1956 SC 559 [LNIND 1956 SC 42], per Sinha J.

18 *Mukhtar Singh v State of Uttar Pradesh* AIR 1957 All 297 (DB), per Agarwala J.

19 *Lakshmi Narain Gupta v AN Puri* AIR 1954 Cal 335 [LNIND 1953 CAL 29], per Bose J.

20 *Lalta Prasad v Inspector General of Police* AIR 1954 All 438 [LNIND 1953 ALL 311] (DB), per Mootham J.

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22 *Maneka Gandhi v Union of India* AIR 1978 SC 597 [LNIND 1978 SC 25], 630, per Bhagwati J.

23 *Union of India v TR Varma* (1958) 2 LLJ 259 [LNIND 1957 SC 91], 264 : AIR 1957 SC 882 [LNIND 1957 SC 91] (SC), per Venkatarama Ayyar J.

24 Cf *Union of India v TR Verma* (1958) 2 LLJ 259 [LNIND 1957 SC 91], 263, per Venkatarama Ayyar J.

25 *Technological Institute of Textiles v Workmen* (1972) 1 LLJ 654 [LNIND 1972 SC 141] : AIR 1972 SC 1933 [LNIND 1972 SC 141] (SC), per Vaidialingam J.

26 *Dr SK Barman Dabur Pvt Ltd v Workmen* (1967) 2 LLJ 863 [LNIND 1967 SC 214] (SC), per Bhargava J.

27 *Elite Engineering & General Works v LC* 1969 Lab IC 58, 61 (P&H), per Pandit J.

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29 *Punjab Woollen Textile Mill v ITL* 1968 Lab IC 763 (P&H), per Pandit J.

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33 *Janki Nath Sarangi v State of Orissa* (1970) 1 LLJ 356 [LNIND 1969 SC 115], 358 (SC), per Hidayatullah CJI.

34 *Western India Match Co Ltd v IT* (1962) 1 LLJ 629 (SC), per Gajendragadkar J.

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37 *Lazarus Estates Ltd v Beasley* [1956] 1 All ER 341, 345, per Denning LJ.

38 *R v Leicester Recorder* [1947] 1 All ER 928, per Lord Goddard CJ.

39 SA de Smith, *Judicial Review Administrative Action*, fourth edn, p 409.

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41 *Exen Industries:v CCIE* AIR 1971 SC 1025, 1027-28, per Mitter J.

42 *Punjab National Bank Lid v IT* (1957) 1 LLJ 455 [LNIND 1956 SC 113] (SC), per Ghularn Hasan J.

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44 *Jatish Chandra Ghosh v Hari Sadhan Mukherjee* AIR 1961 SC 613 [LNIND 1961 SC 19], per Sinha CJI.

45 *British India Corpn v IT* AIR 1957 SC 354, 356, per Bhagwati J.

46 Cf *KK Kochunni v State of Madras* AIR 1959 SC 725 [LNIND 1959 SC 27], per SR Das CJI.

47 *Dwarka v ITO* (1965) 2 SCA 868 [LNIND 1965 SC 107], 879.

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55 *State of Uttar Pradesh v Lal Chand* (1993) 2 LLJ 724 [LNIND 1993 SC 109], 730-31 (SC), per Venkatachala J.

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57 *Sone Singh v State Industrial Court* 1974 Lab IC 784 -85 (MP) (DB), per GP Singh J.

58 *Bishnu Charan Mohanty v State of Orissa* (1973) 2 LLJ 528, 535-36 (Ori) (DB), per GK Misra CJ.

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70 *Samrath Transport Co v Regional Tpt Authority* AIR 1961 SC 93 [LNIND 1960 SC 383], 95, per Subba Rao J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

[15][S. 17A. Commencement of the Award.—

(1) An award (including an arbitrational award) shall become enforceable on the expiry of thirty days from the date of its publication under section 17 :

Provided that—

(a) if the appropriate Government is of opinion, in any case where the award has been given by a Labour Court or Tribunal in relation to an industrial dispute to which it is a party; or

(b) if the Central Government is of opinion, in any case where the award has been given by a National Tribunal,

that it will be inexpedient on public grounds affecting national economy or social justice to give effect to the whole or any part of the award, the appropriate Government, or as the case may be, the Central Government may, by notification in the Official Gazette, declare that the award shall not become enforceable on the expiry of the said period of thirty days.

(2) Where any declaration has been made in relation to an award under the proviso to sub-section (1), the appropriate Government or the Central Government may, within ninety days from the date of publication of the award under section 17, make an order rejecting or modifying the award, and shall, on the first available opportunity, lay the award together with a copy of the order before the Legislature of the State, if the order has been made by a State Government, or before Parliament, if the order has been made by the Central Government.

(3) Where any award as rejected or modified by an order made under sub-section (2) is laid before the Legislature of a State or before Parliament, such award shall become enforceable on the expiry of fifteen days from the date on which it is so laid; and where no order under sub-section (2) is made in pursuance of a declaration under the proviso to sub-section (1), the award shall become enforceable on the expiry of the period of ninety days referred to in sub-section (2).

(4) Subject to the provisions of sub-section (1) and sub-section (3) regarding the enforceability of an award, the award shall come into operation with effect from such date as may be specified therein, but where no date is so specified, it shall come into operation on the date when the award becomes enforceable under sub-section (1) or sub-section (3), as the case may be].

LEGISLATION

Section 17A was inserted in the Act by s 34 read with the Schedule to the Industrial Disputes (Appellate Tribunal) Act 1950. That section again was repealed and in its place the present s 17A was substituted by s 12 of the Industrial Disputes (Amendment & Miscellaneous Provisions) Act 1956.

SECTION 17A - STRUCK DOWN AS *ULTRA VIRES* THE CONSTITUTION

This entire section together with sub-sections (1) to (4) was struck down by a single judge of Andhra Pradesh High Court as being *ultra vires* the Constitution in *Telugunadu WES Federation v Union of India* , in which the learned judge observed:

> The Constitution has assigned the Courts the function of determining as to whether the laws made by the legislature are in conformity with the provisions of the Constitution. In adjudicating the Constitutional validity of the statutes, the Courts discharge an obligation which has been imposed on them by the Constitution. *The Courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional, even though those provisions are found to be violative of constitutional scheme or the provisions.* In view of what is stated *supra* and as I have come to the clear and unmistaken conclusion that the impugned provision encroaches upon the judicial power of the State, as it violates the basic concept of rule of law and democratic pattern envisaged by the Indian Constitution, unhesitatingly, I strike down the impugned provision as being *ultra vires* the Constitution and consequently the provision contained under Sec. 17(2) of the Act to the extent of the words "subject to the provisions of Section 17-A " and whole of Section 17-A with sub-sections 1 to 4 thereof are *non-est* under law. As an inevitable corollary, G.O.Ms.No.2 Labour Department, dated 20.1.1994 is quashed as being unsustainable in view of what is held above. Now, the award which has been published in G.O.Rt.No.2761, Women's Development, Chief Welfare and Labour Department, dated 23.12.1993 shall be operative and the same be implemented by respondents 3 to 5 within a period of one month from the date of receipt of a copy of this order.[16]

The above decision of the single judge of AP High Court, which can be described as a revolutionary rendition, was reiterated by a Division Bench of the AP High Court. and further the said judgment was neither reversed nor set aside by the apex court. Moreover, so far the position remains the same despite the fact that nearly 20 years have rolled on. Thus, the said decision holds good. Referring to the said decision of AP High Court, another Division Bench of the Madras High Court expressed a similar view as expressed by the single judge of the said High Court in *Textile Technical Tradesmen Assn*, in which Vasant Kumar J (for self and Ravichandra Babu J) observed:

> In this case, a competent Special Industrial Tribunal, constituted under the Industrial Disputes Act, 1947, rendered a decision/award and if the parties to the award are aggrieved about the findings rendered or directions issued, they can only approach the appellate Court to challenge the award and exercising power under Section 17-A(1) of the ID Act, 1947, which was already declared as unconstitutional by the Andhra Pradesh High Court in the year 1997 itself.. .. The said position, viz., declaration of unconstitutionality of Section 17-A with sub-sections (1) to (4) of the Industrial Disputes Act, 1947 holds good even today as the Division Bench of the Andhra Pradesh High Court reiterated the said position in W.A.No.403 of 2004 dt. 26.11.2004 and the said judgment has not been reversed or set aside by the Hon'ble Supreme Court. Hence the learned single Judge was perfectly justified in allowing the writ petition and no ground is made to interfere in the order of the learned single Judge.[17]

It is submitted that the decision of the AP High Court striking down s 17A as being violative of the basic structure of the Constitution is right. It is rather surprising that this section remained alive in the Act for four decades. Once it is conceded that an award passed by the labour court or an industrial tribunal is appealable under Art 136,[18] notwithstanding the fact that the State's Judicial Power has not been delegated to these quasi-judicial tribunals in full flow, the conclusion that the awards of labour courts, *etc.*, stand on the same footing as the orders and decrees passed by civil courts is inescapable. That being so, to stipulate that the award of labour court and tribunal is subject to the scrutiny of the appropriate government and, not only scrutiny, but are also subject to modification and rejection by the appropriate government, militates against the very concept of adjudication and judicial process. The AP High Court rightly struck down the entire section. The learned single judge, the Division Bench of AP High Court and the Division Bench of Madras High Court deserve full compliments for striking down a retrogressive provision of the Industrial Relations Law. In the final analysis, and for the above reasons, s 17A is as good as non-existent.

SUB-SECTION (1): WHEN THE AWARD BECOMES ENFORCEABLE

Sub-section (1) of s 17A makes the award of any of the adjudicatory authorities, *ie*, the labour court, the industrial tribunal or the national tribunal, including the award of an arbitrator under s 10A, enforceable on the expiry of 30 days from the date of its publication under s 17. A single judge of the Madras High Court observed that the expression 'an award shall become enforceable on the expiry of 30 days', means that the reinstatement, on the dismissal being found to be wrongful, must be given effect to by the time the award becomes enforceable, *ie*, within 30 days of the publication of the award.[19]A single judge of the Bombay High Court held that no award, therefore, is enforceable before the expiry of 30 days and therefore, no obligation is to be discharged before the expiry of the said period. There is no obligation at all on the employer to implement the award before the expiry of 30 days from its publication and if he does not implement the

award, it cannot be said that he has committed an offence under s 29 of the Industrial Disputes Act.[20] This is the correct view of law.

PROVISO: DECLARATION

Sub-section (1) of s 17A lays down the general rule that an award of an adjudicator or an arbitrator, on the expiry of 30 days from the date of its publication under s 17, shall become enforceable. The proviso to it lays down the conditions under which the appropriate government or the Central Government may declare that the award shall not become enforceable on the expiry of the period of 30 days from the date of its publication. Before making the declaration under the proviso, the appropriate government or the Central Government, as the case may be, must form its opinion that it will be inexpedient to give effect to the whole or part of the award on public grounds affecting national economy or social justice. It cannot be gainsaid that the opinion of the government should be formed on the basis of some material before it that the requirement of national economy or social justice makes it inexpedient to give effect to a part or the whole of the award. Any opinion formed by the government without any material before it or taking into account irrelevant or extraneous considerations in deciding that it will be inexpedient to give effect to the award will be vulnerable. But if the government has formed its opinion after applying its mind to the material before it and without taking any irrelevant or extraneous considerations into account, the declaration made by the government being an administrative action will not be reviewable. The declaration is to be made by a notification in the Official Gazette.

SUB-SECTION (2): POWER TO MODIFY OR REJECT THE AWARD

This provision empowers the appropriate government or the Central Government, as the case may be, by an order to reject or modify an award. The requirements for the exercise of this power are:

(i) a declaration under proviso to sub-s (1) should have been made;

(ii) the order rejecting or modifying the award should be made within 90 days from the date of publication of the award under s 17 ; and

(iii) on the first available opportunity, a copy of the order rejecting or modifying the award along with the award should be laid before the legislature of the state, if the order has been made by the state government and before Parliament, if the order has been made by the Central Government.[21]

All these requirements are cumulative. If anyone of them has not been complied with, the order modifying or rejecting the award will be invalid. The government in exercise of its power under sub-s (2) might reject the award as a whole or any part thereof or modify the award. In other words, the rejection of the award may be total or partial. The word 'modified' will cover not only a partial rejection of the award but would also include any alteration or amendment of the award as well.

SUB-SECTION (3): WHEN AN AWARD AFTER DECLARATION, MODIFICATION OR REJECTION BECOMES ENFORCEABLE

This sub-section is in two parts. The first part deals with the point of time when a rejected or modified award becomes enforceable and the second part deals with the point of time when an award, which has not been rejected or modified under sub-s (2) but has only been deferred by a declaration under the proviso to sub-s (1) becomes operative. In the latter case, the operation of the award as a result of the declaration is merely deferred and the award, as it is made by the adjudicatory authority, comes into force after the expiry of the period of 90 days. In the former case, the modified award shall become enforceable on the expiry of 15 days from the date on which it is laid before the legislature of a state or the Parliament, as the case may be, under sub-s (2). But in case the government rejects the award in its entirety, the effect of such rejection will be that the award will be a nullity. It is, therefore difficult to understand how a nullity can become enforceable. The words 'any award as rejected...shall become enforceable', if refers to an award rejected in entirety appear to be incongruous-perhaps the result of carelessness in drafting.

SUB-SECTION (4): 'ENFORCEABILITY' AND 'OPERATION' OF AN AWARD

This sub-section lays down that subject to the provisions of sub-s (1), which fixes the time for enforcement, the award of the tribunal shall come into operation with effect from such date as may be specified therein, but where no date is specified, it shall come into operation from the date when the award becomes enforceable under sub-s (1). Ordinarily an award would come into operation from the time when it becomes enforceable *i.e.*, on the expiry of 30 days from the date of its publication or on the expiry of the periods prescribed in sub-ss (3) and (4). But an industrial tribunal has the discretion to order that its award shall be operative from another date.[22] Thus, the Act recognises the distinction between 'operation'

and 'enforcement' of an award. Though normally, the date of enforceability and the date of operation may be identical, yet there may be cases where the two dates may be different. The date from which the award of a tribunal shall be operative is the date specifically mentioned in the award itself. But the date of enforceability of the award is the date which follows on the expiry of 30 days from the date of its publication under s 17 of the Act.[23]

Retrospective Operation of Award

An adjudicator can specify the date from which an award given by it shall come into operation and that date may be one prior to the date of reference itself, and in such a case the award takes effect retrospectively. Where a demand for arrears of increment was for the first time made collectively in August 1957, the tribunal could not direct the benefit of such arrears for the period prior to August 1957 as it would amount to entertainment of stale claims.[24] There is no conflict between the provisions of ss 17A and 19 of the Act.[25] No general rule can be laid down as to the date from which an award should be made effective.[26] The annual financial burden which an award is likely to cast upon a concern is one of such relevant considerations. Likewise, in giving retrospective effect or in determining the extent of retrospective operation of an award fixing wage-structure, the adjudicator should take into consideration the fact that on other occasions it increased the wages of workmen and it should be immaterial whether the increase was referable to the actual matter in dispute before it or not. In any event, no retrospective operation can be given to an award for any period prior to the date on which any demands in question were made.[27] There is no vested right in any party as to from what particular date an award should be given effect to.[28] Within the two extreme points, *viz*, the date of demand and the date of award,[29] it is open to the tribunal to fix, in its discretion, a date from which an award passed by it shall come into operation, even without a specific reference being made on the question of retrospective operation of the award.[30]

The normal rule, however, is that for justifying the retrospective effect of an award, some special case should be made out. For instance, it should be shown that there was some deficiency or deprivation caused to employees. Thus, where employees are getting more salary as compared with the employees of other concerns, there is no just reason for any grievance on that score and the award should not be given retrospective effect.[31] In some cases, the Supreme Court itself in exercise of its appellate jurisdiction under Art 136 of the Constitution made awards effective from the date when the demand was first made. In other cases, it declined to interfere with the date fixed by the tribunal. It does not, however, appear that any general criterion, in this connection, has been laid down.[32] Whether or not an award should be given retrospective effect, is a question to be determined by the tribunal in its discretion, and the discretion exercised on judicial principles by the tribunal about the commencement of an award cannot be reviewed by courts.[33] If the tribunal has exercised its discretion and no substantial ground is made out to show that it was unreasonably exercised, the mere fact that it has made its award operative retrospectively from the date of the demand is hardly a ground for interference with the award. But the tribunal has to exercise its discretion in a judicial manner. The courts in judicial review of the award will interfere with the discretion of the tribunal if it is exercised unreasonably or arbitrarily in fixing the date of operation of the award.[34]

Illustrations

Where the tribunal in the award directed that the minimum wages fixed under it should be given retrospective effect from the date of the demand and not from the date of the reference, as by that time the cost of living index had already gone up considerably and not to have done so would have been to deprive the workmen of the minimum wages commensurate with the rise; it was held that there was no reasonable ground made out to show that the tribunal had unreasonably exercised its jurisdiction and the mere fact that the award was retrospectively enforced from the date of the demand would hardly be a ground for interference with the award.[35] Where the tribunal in fairness to both the parties felt that an intermediate date between the date of demand and the date of reference was the proper date from which the award should come into operation and the ground for selecting this date according to the tribunal was that the prices of commodities began to rise steeply in the region from that date and this ground was not controverted by any material to the contrary; it was held that there could barely be any ground for interference by the Supreme Court.[36] Where the tribunal after taking note of the rise in the cost of living index and also adverting to the fact that though the cost of living had increased considerably, the company did not choose to adjust the dearness allowance suitably and after having regard to all the circumstances, awarded that the workmen should get dearness allowance commensurate with the cost of living index from the date of reference, the court declined to interfere with the award.[37] Where the tribunal directed that the revised wage structure should take effect retrospectively and as a result of which the company had to pay arrears of wages for a long period of five to six years; it was held that the award was justified in view of the fact that since that date there had been a very considerable rise in the price index and the labour had not so far raised a fresh dispute for a further revision of wages.[38] Where the tribunal chose an intermediate date with a view to be fair to both the sides for giving effect to its award revising the wage structure, it was held that there was nothing illegal or unfair in the choice of the date.[39] Where the tribunal gave effect to the award from the date of reference rejecting the claims of both the sides, *viz*, the claims of the workmen to give effect from the date of the demand and the claim of the employer from the date of the award, it was held that the award could not be interfered with.[40]

Where on consideration of the circumstance that there will be a considerable increase in the burden of expenditure on the company as a result of the revision of wage scales and the rates of dearness allowance, the tribunal decided that the award should be effective with effect from the usual date when it comes into force, *ie*, one month after the date of its publication, it was held that the discretion exercised by the tribunal could not be interfered with as it could not be said to be arbitrary or unreasonable.[41] Where the tribunal chose an intermediate date between the order or reference and the award for enforcing the scheme of gratuity framed by it, the direction in the award was upheld.[42] Where bearing in mind the fact that there was a good deal of go-slow practised by the workmen during the period between the demand and the award, the direction of the tribunal to give effect to the increase in wages from a date between the date of the reference and the date of the award; it was held that there was no reason for interference as in the circumstances of the case, the award could hardly be called retrospective.[43] But, where the labour appellate tribunal modified the original award of the industrial tribunal and gave direction that the benefit of increments awarded to the employees should take effect from a date prior even to the demands, the direction was set aside as it was a clear error of law.[44]

APPEAL UNDER ARTICLE 136 OF THE CONSTITUTION

Whatever finality may be claimed under the provisions of the Act in respect of an award by virtue of ss 17 and 17A of the Act, it must necessarily be subject to the result of determination of an appeal by special leave.[45] However, it is only by virtue of specific orders made by the Supreme Court under Art 136 of the Constitution, staying operation of an award, or some such order that operation or enforcement of an award can be stayed and the employer can be made immune from the operation of the provisions of s 29 which impose penalties for infringement of terms of an award.[46]

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15 Subs by Act 36 of 1956, s 12, for s 17A (wef 10-3-1957). Earlier, S 17A ins. by Act 48 of 1950, s 34 and Sch.

16 *Telugunadu WES Federation v Union of India*, CDJ 1997 APHC 752 : (1997) 3 ALT 492.

17 *Union of India v Textile Technical Tradesmen Assn* (2014) 4 LLJ 683 : 2014 Labic 4615(Mad), per Vasantha Kumar J.

18 *Bharat Bank Ltd v Employees* AIR 1950 SC 188 [LNIND 1950 SC 4]: (1950) I LLJ 921: [1950] 1 SCR 459 [LNIND 1950 SC 4] (SC), per Kania CJI.

19 *Public Prosecutor v Mettur Industrials Ltd* (1960) 2 LLJ 351, 352 : AIR 1961 Mad 20 (Mad), per Somasundaram J.

20 *State of Maharashtra v Ajit Maneklal Choksia* 1979 Lab IC 59 (Bom), per Jahagirdar J.

21 *Workmen under DHS v Dir. of Health Services* (1973) 1 LLJ 512 -13 (Ori), per RN Misra J.

22 *All India RBI Employees' Assn v Reserve Bank of India* (1965) 2 LLJ 175 [LNIND 1965 SC 146], 198 (SC), per Hidayatullah J.

23 *South Travancore EW Workers' Union v NES Copn* (1954) 1 LLJ 16 [LNIND 1953 KER 140] (TC) (DB), per MS Menon J.

24 *Howrah Municipality v Second IT* (1965) 1 LLJ 382, 385 (Cal), per Banerjee J.

25 *Bangalore Woollen, Cotton & Silk Mills Co Ltd v State of Mysore* (1958) 2 LLJ 613, 618 (Mys) (DB).

26 *Workmen of New Egerton Woollen Mills v New Egerton Woollen Mills* (1969) 2 LLJ 782 [LNIND 1969 SC 96], 791 (SC), per Shelat J.

27 *Jhagrakhand Collieries Pvt Ltd v CGIT* (1960) 2 LLJ 71 [LNIND 1960 SC 41] (SC), per Gajendragadkar.J.

28 *Nellimarla Jute Mills Co Ltd v Staff Union* (1955) 1 LLJ 167, 176 (LAT).

29 *Workmen of New Egerton Woollen Mills v New Egerton Woollen Mills* (1969) 2 LLJ 782 [LNIND 1969 SC 96], 791 (SC), per Shelat J.

30 *Hindustan Times Ltd v Workmen* (1963) 1 LLJ 108 [LNIND 1962 SC 431], 120 (SC), per Das Gupta J.

31 *Vasant Industrial & Engineering Works v Workmen* [1954] LAC 816, 7 FJR 682 (LAT).

32 *Hindustan Times Ltd v Workmen* (1963) 1 LLJ 108 [LNIND 1962 SC 431], 120 (SC), per Das Gupta J.

33 *Workmen of NEW Mills v New Egerton Woollen Mills* (1969) 2 LLJ 782 [LNIND 1969 SC 96], 791 (SC), per Shelat J.

34 *Hydro (Engineers) Pvt Ltd v Workmen* (1969) 1 LLJ 713 [LNIND 1968 SC 133] (SC), per Shelat J.

35 *Hydro (Engineers) Pvt Ltd v Workmen* (1969) 1 LLJ 713 [LNIND 1968 SC 133], 718 (SC), per Shelat J.

36 *Workmen of NEW Mills v New Egerton Woollen Mills* (1969) 2 LLJ 782 [LNIND 1969 SC 96], 791 (SC), per Shelat J.

37 *Bengal Chemical & Pharmaceutical Works Ltd v Workmen* (1969) 1 LLJ 751 [LNIND 1968 SC 279], 760 (SC), per Vaidialingam J.

38 *Workmen of Orient Paper Mills Ltd v Orient Paper Mills Ltd* (1969) 2 LLJ 398 [LNIND 1968 SC 205], 405 (SC), per Bhargava J.

39 *Kamani Metals and Alloys Ltd v Workmen* (1967) 2 LLJ 55 [LNIND 1967 SC 18], 61 (SC), per Hidayatullah J.

40 *Hindustan Times Ltd v Workmen* (1963) 1 LLJ 108 [LNIND 1962 SC 431], 120 (SC), per Das Gupta J.

41 *Workmen of NTC of India Ltd v National Tobacco Co of India Ltd* CA No 852 of 1966 (SC), per Bhargava J.

42 *Delhi Cloth & General Mills Co Ltd v Workmen* (1969) 2 LLJ 755 [LNIND 1968 SC 298], 774 (SC), per Shah, J.

43 *Bharat Barrel and Drum Manufacturing Co Pvt Ltd v GG Waghmare* (1960) 2 LLJ 241 [LNIND 1960 SC 91]-42 (SC), per Wanchoo J.

44 *Jhagrakhand Collieries Pvt Ltd v CGIT* (1960) 2 LLJ 71 [LNIND 1960 SC 41], 77 (SC), per Gajendragadkar J.

45 *India General Navigation & Rly Co Ltd v Workmen* (1960) 1 LLJ 13 [LNIND 1959 SC 182], 18 (SC), per Sinha CJI.

46 *India General Navigation & Rly Co Ltd v Workmen* (1960) 1 LLJ 13 [LNIND 1959 SC 182], 18 (SC), per Sinha CJI.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

[47][S. 17B. Payment of full wages to workman pending proceedings in higher courts.—

Where in any case, a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employers prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court.

Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be.]

OBJECT AND REQUIREMENTS

Before the enactment of this section, the awards of tribunals directing re-instatement were often contested by the employers in the High Courts or the Supreme Court. Hence, it was felt that the delay in implementation of such awards caused hardship to the workman. It was, therefore, felt necessary to provide payment of 'wages last drawn by the workman from the date of the award till the date it is finally decided in the Supreme Court or the High Court'. This provision, therefore, codifies the right of the workmen to get their wages, which they could not get in time, on account of long drawn litigation. This provision gives a mandate to the courts to order wages if its conditions are satisfied.

In *Bharat Singh*, the Supreme Court noted that even before this section was enacted, the courts were, in their discretion, awarding wages to workmen when they felt such a discretion was necessary but that was only a discretionary remedy depending upon court to court.[48] This provision is a piece of social-welfare legislation and aims at ameliorating the hardship caused to the workman who were deprived of the benefits of re-instatement awards during the protracted litigation in which awards were injuncted by the High Courts or the Supreme Court. The object of introducing this provision is, therefore, to enable the workman to receive the 'full wages last drawn' by him to sustain himself to resist the litigation carried to the High Courts or the Supreme Court by the management.[49] More often than not, the employers, as a matter of routine, would prefer proceedings before a High Court or the Supreme Court challenging such awards and obtain stay of their operation. Instances are legion where workmen have been dragged by the employers into an endless mire of litigation with preliminary objections and other technical pleas to tire them out. Though occasionally, in their discretion, the courts subjected the stay orders to certain conditions, such as payment of certain amounts to the workmen during the pendency of the proceedings before them. There was no standard formula quantifying the payment during the pendency of the proceedings. Nor could such payments be claimed by the workmen as a matter of right because the conditions of payment were imposed on the facts and in the circumstances of each case. Therefore, by and large, during the pendency of such proceedings, workmen were deprived of their legitimate right to wages upon reinstatement. Now this section, at once, codifies the right of a workman to get the wages and quantifies the amount of such wages payable to him during the pendency of the proceedings before a High Court or the Supreme Court where the award of his reinstatement is challenged by the employer. In the language of Kamat J:

> Normally, no party has or gets any vested right in the life of the litigation in this or any other court ... However, s 17B of the Industrial Disputes Act is a statutory exception and creates liability in favour of the workman and against the employer and the inevitable elongated life of the litigation in such a case becomes necessary to be watched and controlled by the parties and the system by a process of expedition or characterisation of such petitions as a separate priority-category having preceding position as compared to other pending proceedings.[50]

This right is a separate and independent right available to a workman during the pendency of the proceedings before a High Court or the Supreme Court, where the proceedings have been preferred by the employer, against the award of reinstatement in his favour. The pre-requirements for invoking this section are:

(i) the award of the tribunal should have directed reinstatement of the workmen on setting aside the order of his dismissal or unfair termination of service;

(ii) the employer should have preferred proceedings against such award before a High Court or the Supreme Court;

(iii) the workmen should not have been gainfully employed in any establishment during the pendency of the proceedings; and

(iv) as a proof of that, the workman should have filed an affidavit before the court before which the proceedings have been preferred.

Once these requirements are satisfied, the workman becomes entitled to the wages as contemplated by this provision and no order of the court, before which the proceedings are pending, is necessary for entitling him to such wages, as the statute itself creates the right. If, after the workman has filed the affidavit of non-employment, the employer fails to pay wages to the workman, as required by this section, the workmen may file an application before such court for direction to the employer to make such payment. Non-compliance with the requirement to pay such wages to the workman should block further hearing of the proceedings before the court. Any interim payment made to the workman under the order of the industrial tribunal, in the course of adjudication proceedings, will not bar the claim of the workman to the wages as contemplated by this section, though the payment so made by the employer may become deductible out of the payments to be made to him under the provisions of this section, depending upon the nature of the orders of such payment and the facts and circumstances of each case.[51] In *Bharat Petroleum*, a single judge of the Calcutta High Court held that once it is shown that all the three ingredients stipulated in s 17B, namely, (i) the labour court directed reinstatement of the workman; (ii) the employer preferred proceedings against the award in the High Court or the Supreme Court; and (iii) the workman had not been employed in any establishment during such period, the employer would be liable to pay the last drawn wages to the workman. The liability under s 17B continues during the whole period of the pendency of proceedings in higher courts, even if the workman has in the meantime crossed his normal age of superannuation and would have retired, had he not been dismissed or discharged.[52]Section 17B is mandatory in character and it gives a mandate to the court to award full wages if the conditions enumerated in s 17B are fully satisfied. Delay in making the application will not affect the powers of the court.[53] In *CM Saraiah*, the order of a single judge staying the reinstatement order of the labour court with a direction to the employer to comply with the provisions of s 17B was reversed by the Division Bench on the ground that the very dispute itself was raised after inordinate delay. The Supreme Court, while setting aside the order of the Division Bench, held that the court had no jurisdiction to direct non-compliance with s 17B when the condition precedent for passing an order in terms of s 17B was satisfied.[54]

In *Commandant, Defence Security*, a single judge of the Kerala High Court held that the wages paid under s 17B are in the nature of subsistence allowance and, hence, not refundable even if ultimately the award is set aside by the court.[55] While dealing with an application under s 17B for payment of last wages drawn, the High Court has no discretion to impose conditions or to add rider to the order, though it may be open to the High Court to deny the benefit completely, if the conditions set out in the said section are not satisfied.[56] Payment under s 17B continues only so long as the workman is in service. Once he reaches the age of superannuation, he loses the right to get the last drawn wages under the section. In such a case, his right is confined only to backwages as per the award.[57] An employee cannot continue to get the benefit of full wages by taking recourse to s 17B after attaining the age of superannuation.[58] In *U Cheralu*, the Supreme Court directed the college to make *ad hoc* payment of Rs 500/- per month to the respondent who was to be reinstated as per the labour court's order, in lieu of such reinstatement till the disposal of the writ petition filed by the petitioner in the High Court.[59] In *Nagar Panchayat*, the Madhya Pradesh High Court held that the proceedings commence when the petition is filed before the High Court or the Supreme Court, as the case may be, and that the Court can pass an order in favour of the workman from the date of pendency of such proceedings but not from the date of the award.[60] In *Ghanshyam*, the Supreme Court observed:

> .. . in the event of an employer not reinstating the workman and not seeking any interim relief in respect of the award directing reinstatement of the workman or in a case where the court is not inclined to stay such award in toto, the workman has two options, either to initiate proceedings to receiving the full wages last drawn by him without prejudice to the result of the proceeding referred by the employer against the award till he is reinstated or proceedings are terminated in his favour, whichever is earlier.. .. s 17B does not preclude the High Courts and the Supreme Court from granting better benefits, more just and equitable, on the facts of the case, and that the management would be eligible to seek refund of payment of such additional sums in the event the case is decided in its favour, and hence the payment of any such amount over and above the amounts payable under s 17B was ordered to be paid on such terms and conditions as would enable the employer to recover the same.[61]

Last drawn wages are payable from the date of initiation of writ proceeding before the High Court and not from the date of award.[62] The benefit of s 17B must continue until the employer by positive assertions files an affidavit that the employee has been employed somewhere else. However, the employee is not required to file such an affidavit at every point of time.[63] Where reinstatement has been ordered, backwages will be payable from the date of the award till the date of the proceedings. Orders under s 17B can be passed even when reinstatement has taken place. The employer is directed to pay the wages last drawn by the workman, which should not be less than the minimum wages applicable from time to time.[64] Where a single judge of the High Court, on application by the management, stayed the operation and implementation of the award of reinstatement passed by the labour court, a Division Bench held that the learned single judge was not justified in granting stay without requiring the employer to make payment of last drawn wages as contemplated by s 17B, and accordingly modified the order passed by the single judge.[65] Where the High Court refused to go into the merits of the writ petition filed by employer against the order of tribunal directing reinstatement of the workman, on the ground that the employer had not complied with the order made under s 17B, the Supreme Court observed that the High Court ought to have dealt with the merits of the case and decided the case instead of declining to go into the merits because of non-compliance with the order made under s 17B. The Supreme Court had set aside the order of the High Court and remitted the matter back to the High Court for fresh consideration and to decide the case on merits in accordance with law.[66]The liability of the employer under s 17B has to be enforced through the court, and there is provision in the Act that unless the wages of the workmen were paid, the petition would not be maintainable. There is no obligation on the part of the employer to pay without the orders of the court. The workman has to claim and satisfy the court before being entitled to an order for payment under s 17B.[67]

In *Hindustan Vegetable Oils*, the Supreme Court held that an application under s 17B should be disposed of by the High Courts with great promptitude before the principal petition and that the former should be disposed of most expeditiously.[68] In *MP Laghu Udyog*, a workman was terminated prior to the transfer of the undertaking from the State Industries Department, the labour court ordered reinstatement and directed the transferee-employer to pay full back wages even though the transferee-company was not made party to the dispute. The workman filed an application under s 33C(2) claiming payment under s 17B and made the transferee employer the respondent for the first time despite the defence of the transferee-company that as the transferee of the establishment, it was not liable to discharge the liability under the award of reinstatement, which was executable against the Industries Department of the Government. The labour court, exercising its jurisdiction under s 33C(2), held that the workman was deemed to have continued in the services of the transferee-company and directed it to make payment under the provisions of s 33C(2). Kulsreshtha J of the Madhya Pradesh High Court held that (a) s 17B came into operation only when proceedings were preferred before a High Court or the Supreme Court against the award directing reinstatement and it would not apply if the award of reinstatement was not challenged; (b) in the present case, what was in issue was whether the transferee-company was not the employer in relation to the workman and, hence, was not liable to satisfy the award directing reinstatement; (c) the award could not be enforced against the transferee who was not a party to the dispute in which the award was passed; and (d) that it was not a case covered by s 25FF, the ratio of *Anakapalle CAIS*,[69] had no application, and hence the workman could only enforce the claim against the transferor and not against the transferee.[70] The learned single judge further held that the workman was not precluded from claiming the benefit under the award in accordance with law from the party liable thereunder. This decision is very refreshing in so far as it reflects high standards of judicial analysis and reasoning. In *Mideast India*, a single judge of the Delhi High Court held that the pendency of proceedings before the BIFR and invocation of s 22 of the Sick Industrial Companies (Special Provisions) Act 1985 would not come in the way of relief granted and payable under s 17B.[71]

In *KNM Hospital*, the facts disclosed that the management had established before the High Court by adducing ample evidence that the dismissed clerk enrolled himself as an advocate and was a busy practitioner with a decent professional income during the period of his unemployment. Despite this factual position, the High Court ordered payment of last drawn wages u/s 17B. Quashing the order, Pasayat J held that the High Court reached the conclusion contrary to the materials on record. The learned judge, however, held that if any amount had already been paid in the peculiar facts of the case, the workman would not be liable to refund the same.[72] In *North East Karnataka RTC*, the facts were: the workman,

during the period of unemployment, resulting from his dismissal, was engaged in cultivation and was receiving income from agricultural operations. The labour court held that the income generated from agriculture could not be treated as 'gainful employment' within the meaning of s 17B and, on this view of the matter, awarded full back wages. Both the single judge and the division bench of the Karnataka High Court were of the opinion that the workman was not gainfully employed and, hence, upheld the order of the labour court. Quashing the orders of the courts below, Altamas Kabir J (for self and Lakshmanan J) held:

> .. . we are unable to accept the reasoning of the Labour Court that the income received by the respondent from agricultural pursuits could not be equated with income from gainful employment in any establishment. In our view, "gainful employment" would also include self-employment wherefrom income is generated. Income either from employment in an establishment or from self-employment merely differentiates the sources from which income is generated, the end use being the same. Since the respondent was earning some amount from his agricultural pursuits to maintain himself, the Labour Court was not justified in holding that merely because the respondent was receiving agricultural income, he could not be treated to be engaged in "gainful employment" (para 17). .. The single Judge of the High Court without looking into this aspect of the matter merely observed that the management had not established that the workman was engaged in any gainful employment during the period of dismissal and on such finding, the learned single Judge chose not to interfere with the award as passed by the Tribunal after remand. (para 18). .. The Division Bench which heard the Writ Appeal did not also consider the aforesaid aspect of the matter and mechanically disposed of the appeal with the observation that after going through the order of the learned single Judge and the award of the Tribunal, it found no ground to interfere with the findings recorded therein. (para 19). .. . regarding the income received by the respondent for the period of his dismissal from service till the date of the award, we are of the view that the award passed by the Tribunal after remand and affirmed by the High Court. .. is liable to be modified and the earlier award of the Labour Court dated 23rd February, 1998 is liable to be restored. (para 20). .. We, accordingly, allow the appeal and restore the award passed by the Labour Court dated 23rd February, 1998 and direct the respondent to give effect to the same expeditiously, if the same has not already been implemented. (para 21). .. In the event full back wages from the date of dismissal till the date of the award has already been paid to the respondent, the appellant-Corporation will be entitled to recover the same from the respondent.[73] (para 22).

In *Talwara CCSS*, Sinha, J held that neither the grant of relief of reinstatement nor the grant of back wages could be automatic. The learned judge further held that the Industrial Courts while exercising their power u/s 11A of the IDA were required to take into consideration certain relevant factors as, for example, the nature of service, the mode and manner of recruitment, *viz*., whether the appointment had been made in accordance with the statutory rules so far as a public sector undertaking is concerned, *etc*.; and that for the purpose of grant of back wages, one of the relevant factors would indisputably be as to *whether the workman had been able to discharge his burden that he had not been gainfully employed after termination of his service*.[74]

It is submitted that the last part of the above decision in *Talwara CCSS*, *i.e*., "*the workman should discharge the burden that he had not been gainfully employed"* does not seem to be consistent with the law relating to the burden of proof. *A person who denies a thing cannot admittedly prove it*. It is one thing to say that he should file an affidavit to the effect that he was not employed during the period of forced unemployment, and quite another to direct him to discharge the burden that he was not employed during that period. In view of the fact that the liability to pay full back wages (if awarded by the labour court) lies on the employer, it is for the employer to prove that the workman was gainfully employed during the period between the date of dismissal and of reinstatement, in order that he can be entitled to the benefit of '*reduced liability*' or '*no liability*' to pay back wages. This burden can never be fastened to the workman. If the employer fails to prove to the satisfaction of the court that the workman was gainfully employed, he cannot escape the liability to pay back wages.[75] Where there was no stay of the reinstatement order, and the workman failed to take up the offer of reinstatement by the employer, and had not enforced the order of reinstatement passed by the labour court, he would not be entitled to invoke s 17B for wages last drawn by him.[76] Where the workman failed to produce any document to the effect that he was employed by the company or the receipt of salary or the letter terminating his service, he will not be entitled to any relief under s 17B.[77]

In *Rajasthan Gramin Bank*, both the tiers of the High Court proceeded to decide the case in favour of the workman on the sole ground that the management did not counter the specific plea of the workman that he was not gainfully employed, whereas the facts disclosed that the management, in its reply to the application of the workman, specifically stated that he worked in two transport companies subsequent to his dismissal and the copies of vouchers showing the salaries paid by the two companies were also placed on record in its supporting affidavit. Quashing the orders of the High Court, a Division Bench comprising Jain and Lodha JJ remanded the matter to the single judge for fresh adjudication.[78]Section 17B cannot be invoked by a workman in case the impugned award is for regularisation of service, and not for his reinstatement.[79] The workman is not required to produce evidence that he was not gainfully employed. It is enough if he files an affidavit to that effect in order to be entitled to 17B payment.[80] Last drawn wages under s 17B are payable from 30 days after the

publication of the award.[81] Unless employer proves that workman was receiving adequate remuneration, during pendency of proceedings before the High Court or the Supreme Court preferred by employer against award of labour court directing reinstatement of workman, the benefit under s 17B cannot be denied to the workman.[82]

In *Bharat Coking Coal*, the facts were: an industrial dispute raised by workmen for regularization was referred for adjudication. While the proceedings were pending, one of them was transferred. Being aggrieved, a complaint was lodged under s 33A alleging that the transfer was in violation of Section 33. While the said application was pending the company issued a charge sheet for alleged wilful absence, resulting in termination of service. The tribunal set aside both the order of transfer and dismissal, and ordered reinstatement with full backwages, which was challenged by the company by writ application. During the pendency of the writ petition, the workman filed an application under Section 17B for full wages. The company alleged that application under Section 17B was not maintainable as it was not an award. A single judge of the Calcutta High Court held that, if a complaint was lodged under s 33A on the ground that the employer contravened the provisions of s 33, the complaint was in nature of a dispute and the tribunal would be within power to order reinstatement, and accordingly s 17B gets attracted. The learned judge further observed that where the award directing reinstatement of any workman was challenged by the employer, the workman would be entitled to relief under Section 17B till the disposal of writ application.[83] In a case involving a dispute relating to date of birth and the consequential retirement, the labour court found that the retirement was illegal and ordered reinstatement with full back wages. A single judge of the Jharkhand High Court stayed the operation of the award in so far as it related to back wages. The question before the Division Bench was '*whether the last drawn wages were to be paid from the date of the award or from the date the employer filed the writ petition*'. The Bench comprising Patel and Gupta JJ held that the last drawn wages were payable from the date of the award and not from the date of filing writ petition by the employer, as such a rendition would operate to the disadvantage of the workman in that the employer would file the writ petition belatedly and deprive the workman of the last drawn wages that are due from the date of the award.[84] It is submitted that this case was rightly decided.

LIABILITY *PENDENTE LITE*

Before this section was inserted, the High Courts and the Supreme Court used to give interim relief of some payments to the workers while granting stay of the operation of the awards ordering reinstatement. However, the workmen had no right to claim any wages *pendente lite*. This provision now recognises the right and gives it mandatory force. In *Bharat Singh*, the facts disclosed that the labour court directed reinstatement of the workman with continuity of service and backwages in September 1983. Writ petitions followed in the High Court and the matter finally came up before the Supreme Court. The Court held that this section could operate retrospectively and would apply even to those awards which were passed prior to 21 August 1984, if they had not become final. Speaking for the court, Khalid J said:

> .. . there are no words in the section to compel the court to hold that it cannot operate retrospectively ... to construe it in a manner detrimental to workmen would to be defeat its object.[85]

A single judge of the Calcutta High Court has correctly held that the liability cannot be deferred till the conclusion of the 'proceedings' because that would make the provision illusory and nugatory and would turn out to be mere otiose.[86]The expression 'wages' has to be construed to mean 'wages' as defined in s 2(rr) of the Act. In *IAAI*,[87] the Madras High Court directed that the payment as quantified in terms of s 17B should be paid every month. Therefore, the basis of the payment of monthly wages to the workman during the pendency of such proceedings will be 'full wages' [as defined in s 2(rr)] drawn by him at the time of termination of his service which will also include any maintenance allowance admissible to him under any rule. In *Kiritikumar Patel*, the Gujarat High Court, while exercising its powers under s 17B directed payment of wages as revised, including the increments, DA *etc.* which were granted to the employees under two settlements. The Supreme Court held that the expression 'full wages last drawn' must be given the plain and grammatical meaning and declined to construe the words 'full wages last drawn' in a manner which would cast additional burden on the employer and set aside the directions of the High Court. In appeal, the Supreme Court categorised the interpretations placed by various High Courts on the expression 'full wages last drawn' under three heads:

(i) Wages only at the rate last drawn and not at the same rate at which the wages are being paid to the workmen who are actually working.

(ii) Wages drawn on the date of termination of the services plus the yearly increment and the dearness allowance to be worked out till the date of the award.

(iii) Full wages which the workman was entitled to draw in pursuance of the award and the implementation of which is suspended during the pendency of the proceedings.

The court then commented that the first construction gives plain and grammatical meaning to the expression 'full wages last drawn' while the second as well as the third constructions read something more than their plain and grammatical meaning in the words used in the expression. These constructions read the words 'full wages which would have been drawn' instead of the words 'full wages last drawn'. This extended meaning is not warranted either by the language of or the object underlying the statute. The court observed:

> The object underlying the provision is to relieve, to a certain extent the hardship that is caused to the workman due to delay in the implementation of the award. The payment which is required to be made by the employer to the workman is in the nature of subsistence allowance which would not be refundable or recoverable from the workman even if the award is set aside by the High Court or this court. Since the payment is of such a character, the Parliament thought it proper to limit it to the extent of the wages which were drawn by the workman when he was in service and when his services were terminated and, therefore, used the words 'full wages last drawn'. To read these words to mean 'wages which would have been drawn by the workman if he had continued in service' if the order terminating his service had not been passed since it had been set aside by the award of the labour court or the industrial tribunal would result in so enlarging the benefit as to comprehend the relief that has been granted under the award that is under challenge. Since the amount is not refundable or recoverable in the event of the award being set aside, it would result in the employer being required to give effect to the award during the pendency of the proceedings challenging the award before the High Court or the Supreme Court without his being able to recover the said amount in the event of the award being set aside.[88]

The above decision placed the law in the correct perspective consistent with the legislative intent coupled with the plain language of the provision. As a matter of fact, the language used in s 17B is so clear and unequivocal that it excludes uncalled for interpretational gymnastics. Despite this, a few High Courts went about placing wild and weird interpretation on the provision to mean '*the wages he would have drawn had he not been dismissed*', which was clearly warranted. At last, the apex court denounced this expansionist approach of High Courts and rightly delineated the contours of the said provision in crystal clear terms.

In view of the observations of the court that the payment made under the provisions of this section to a workman is in the nature of subsistence allowance, such payment would not be refundable or recoverable from him if the award is set aside by the High Court or the Supreme Court. But if the award is finally affirmed by the High Court or the Supreme Court, the workman would not only be entitled to be reinstated in service, but he will also be entitled to other attendant benefits including the backwages from the date of dismissal to the date of reinstatement. This will comprise of two parts, namely (a) period between the date of dismissal to the date of initiation of the proceedings in a High Court or the Supreme Court; and (b) the period from the date of initiation of such proceedings and the date of reinstatement on the conclusion of the litigation. *Prima facie*, it may appear that for the period between initiation of litigation against the reinstatement award by the employer and the factual reinstatement of the workman, he will be getting double the back wages, *viz*, (i) in terms of the award; and (ii) as paid under the provisions of this section. However, a little reflection would show that it is a mere illusion. The payment of backwages in terms of the award is *sequitur* to the award of re-instatement while the payment under this section is the statutory recompense to the workman for the expenses incurred by him on the litigation before a High Court or the Supreme Court and the harassment and hardship suffered by him during the pendency of such litigation. The former type of payment will be available to the workman only in case the award of re-instatement is upheld by the High Court or the Supreme Court and not when the award is set aside. But the latter type of payment is unrefundable and irrecoverable from the employee even if the award is set aside. The provisions of this section relate to the period during which proceedings are pending before a High Court or the Supreme Court. The liability of the employer, to pay wages as contemplated by this section, commences from the day he prefers proceedings before a High Court or the Supreme Court. This does not take into account the period prior to preferring of the proceedings before the High Court or the Supreme Court.[89]

If the employer prefers proceedings against the award after unreasonable delay, it is open to the writ court or the Supreme Court, in its judicial discretion, to compensate the workman with wages for the period between the date of the award and the initiation of the proceedings before it. Where the employer filed a writ petition against the award of labour court ordering reinstatement and the workman also filed an application for payment of last drawn wages under s 17B, it was held that the mere disposal of writ petition does not render the application of the workman infructuous, and the management was liable to pay wages from the date of filing the writ petition till it was finally disposed of.[90] The word 'pending' in s 17B has been used without any qualification. A petition is pending before the court under Art 226 once it is filed. The benefit under s 17B is payable to the workman from the date of filing of the writ petition and not from the date of its admission by the High Court.[91] In *Rajasthan SRTC*, a single judge of the Rajasthan High Court disposed of the application filed by the workman under s 17B by directing the Corporation to pay back wages at the rate of last drawn wages together with increments and revisions of pay. In appeal, the High Court quashed the order of the single judge and held that the Act does not provide for back wages along with annual increments and periodical revisions of pay; and that it simply meant wages drawn at the time of dismissal. However, in view of the fact that the Corporation had reinstated the said workmen

while continuing the proceedings in higher courts, they would be entitled to their normal wages and increments, only from the date of their reinstatement.[92]

REINSTATEMENT

This section can only be invoked if there is a direction in the award of the tribunal to 'reinstate' any workman. The relief of reinstatement is normally granted by the industrial adjudicators when the discharge, dismissal, retrenchment or termination is set aside as being illegal, unfair or mala fide. The effect of the direction of reinstatement is merely to set at naught such illegal, unfair or mala fide determination of service of the workman and to restore him to his former position and status as if the contract of employment originally entered into has been continuing.[93] In other words, 'reinstatement' postulates that the workman should be put back in the position in which he was before the termination of his service, as if his service was never terminated. He should be restored to the work which he was doing before the termination of his service with all the attendant benefits. Once the direction of reinstatement is carried out, nothing further remains to be done. The liability of the employer to pay and the corresponding right of the workman to receive wages under this section arises as soon as the High Court or the Supreme Court orders stay of operation of the award during the pendency of the proceedings preferred by the employer before it. The extraordinary powers of judicial review under Art l36 or Art 226 of the Constitution cannot be used to destroy the statutory right of a workman under this section because the right *pendente lite* has been statutorily recognised by the legislature to remove the hardship to workmen and to protect their interests.[94]In case the High Court or the Supreme Court declines to grant stay, the provisions of this section will not come into operation because in that event the employer would be bound to reinstate the workman forthwith. The failure of the employer to reinstate the workman, in the absence of an order of stay of operation of the award granted by a High Court or the Supreme Court, will expose him to the penal consequences of s 29 of the Act apart from recovery proceedings under s 33C of the Act. In *VA Unnis,* the award of the labour court directed reinstatement of the workman with backwages which was challenged by the employer in the Madras High Court. During the pendency of the writ petition, the workman claimed the benefits of s 17B which was rejected by the single judge with the observation that 'there was nothing in that provision to suggest that the High Court should direct the management to pay full wages last drawn by the workman, and that the workman will be at liberty to work out his remedies for obtaining relief presumably under s 33C(2) of the Act. Quashing the order of the single judge, a Division Bench observed:

> Forcing the employee to work out his rights by a separate proceeding would be contrary to the spirit and the purpose of s 17B of the Act. In view of the plain language, the court observed that this provision is 'intended to be invoked in the course of the proceedings in the High Court and the High Court is entitled to make an order as contemplated by s 17B in the proceedings, taken by the employer challenging the order of the labour court in the High Court. It is thus clearly permissible for the High Court to make an order requiring the employer to comply with the provisions of s 17B of the Act. It would be extremely hard and contrary to the spirit of s 17B to force an employee to seek remedy elsewhere separately to recover wages permitted to be claimed under s 17B of the Act by an application under s 33C(2) of the Act.[95]

In *Samser Ali*, the Calcutta High Court had taken the view that the order of an industrial tribunal refusing the 'approval' to the dismissal of a workman would fall within the definition of the 'award' and, therefore, the provisions of s 17B would be applicable and the workman would be entitled to wages as contemplated by this provision during the pendency of the writ proceedings in which the order of the tribunal was challenged.[1] But subsequently, in *Bata India*, a single judge of the same High Court took a diametrically opposite view that an order of the tribunal refusing approval of the action of dismissal under s 33(2)(b), is neither an award nor an order of reinstatement.[2] A similar view was taken by the Orissa High Court in *IDL Chemicals*,[3] In which the court observed that even though the provisions of s 17B would not be attracted where an order passed under s 33(2)(b) refusing approval was challenged by the employer. It is open to the workman to move the High Court and the High Court has the jurisdiction to grant him wages in accordance with the formula embodied in s 17B. This holding is correct law because refusal to grant approval under s 33(2)(b) is not an award. The effect of such order is simply that the dismissal of the workman is *non est*. Therefore, the question of reinstatement does not arise. *A priori*, the provisions of s 17B are not attracted. But that does not mean that an employer can be permitted to frustrate the right of the workmen to wages by initiating proceedings in the High Court or the Supreme Court against such order of the tribunal and by not permitting him to continue to work during the pendency of such proceedings. The courts have ample power to give relief to the workman analogous to s 17B while injuncting the operation of such order. In *GSRTC*, a single judge of the Gujarat High Court held:

> The legislature has restricted the scope of the beneficial provision under s 17B to the awards of these judicial authorities. It is possible to extend the same benefit to the orders of these authorities under s 33(2)(b) of the Act...However, the same logic cannot be extended further to the determination of the conciliation authorities under s 33(2)(b) of the Act, in the absence of specific provisions in that behalf under s 17B of the Act.[4]

An order of a conciliation officer passed under s 33(5) cannot come within the meaning of the phrase 'award directing reinstatement' under s 17B, having regard to the nature of limited jurisdiction of authorities under s 33, and they cannot direct reinstatement although the consequence of a refusal to grant approval may render the order of dismissal void. Even if an employer contravenes s 33(2)(b), the employee cannot claim reinstatement. He must invoke s 33A of the Act.[5] In *Hotel Mansingh*, a single judge of the Rajasthan High Court held that an application under s 17B for payment of wages could be made and allowed even in cases of rejection by the industrial tribunal of the approval sought by the employer for removal of a workman under s 33(2)(b).[6] In *Air India*, Shah, J, having observed that where the employer challenged the order of tribunal refusing to grant approval of the action of dismissal under s 33(2)(b), held that, even though the workman was not entitled to invoke s 17B as there was no existing right vested in him, the High Court was competent to direct payment of wages to the workman in exercise of its jurisdiction under Art 226.[7]

'PROCEEDINGS IN THE HIGH COURTS OR IN THE SUPREME COURT'

Section 17(2) of the Act makes the adjudicator's award, after publication under s 17(1), 'final' and not liable to be called 'in question by any court in any manner whatsoever'. The jurisdiction of the ordinary civil courts to entertain challenge to such awards has thus been ousted by this legislative device. Even the Act does not provide for any appeal or revision against the orders or awards of the industrial adjudicators. The expression 'any proceedings' in the High Court or the Supreme Court, therefore, can refer only to the 'proceedings' through extraordinary constitutional remedies of judicial review by way of a writ petition to the High Court under Arts 226 and 227 and an appeal to the Supreme Court under Art 133 or Art 136 of the Constitution. The discretion to grant stay orders injuncting the operation of the industrial awards is a necessary concomitant of the powers exercisable by these courts. In *Vysya Bank*, the services of the employee were terminated on completion of the probationary period during which her services were not found to be satisfactory and she was found to be inefficient in her work. On consideration of the material on record, the tribunal found that the work of the employee 'could not be said to be satisfactory by any stretch of language'. Furthermore, it held that the termination order was a case of discharge simpliciter because the overall performance was not satisfactory. Despite these findings, the tribunal not only directed her reinstatement with continuity of service, but also directed that after reinstatement she should be put on probation for another period of 9 months from the date of joining the duty and from that period, the employer shall be entitled to ascertain her suitability. The Karnataka High Court held that the order was purely on compassionate grounds which is not permissible or warranted under the provisions of s 11A of the Act. Therefore, *prima facie*, there was sufficient material on record to ignore the effect of s 17B and decline the relief thereunder by the writ court when the matter is before it. Since it was a rare case, the court in its writ jurisdiction was justified in declining the relief of payment of wages under s 17B *pendente lite*.[8]

AFFIDAVIT OF NON-EMPLOYMENT IN ANY ESTABLISHMENT

The main object of this provision is to remove the economic hardship to a workman where the award directing his reinstatement is checkmated by the employer by preferring proceedings before a High Court or the Supreme Court against such award, during the pendency of such proceedings. But the benefit of this section will be available to the workman only if he is 'not employed in any establishment' during the period of pendency of the proceedings before a High Court or the Supreme Court. This provision, therefore, requires the workman to file an affidavit before such court as a proof of the fact that he is not so employed. In the absence of such affidavit, the presumption will be against the workman that he is gainfully employed in some establishment. Hence, he will not be entitled to the benefits of this provision. The purport of this provision is that during the pendency of such proceedings, the workmen should not have been gainfully employed in any other establishment from which he receives adequate remuneration. If the workmen is not employed in any other establishment and is carrying on some work to make both ends meet to sustain himself and his family, he will not be disentitled to get the benefits provided by this provision. For instance, in *HMT*, where the workman was running a tea shop and earned some amount, a single judge of the Rajasthan High Court held that the workman was not employed as envisaged by this section and he was, therefore, not disentitled to get the benefits provided by it.[9]

PROVISO: BURDEN OF PROOF

The workman in whose favour the industrial tribunal has made an award directing his reinstatement is required by the main part of this section to file an affidavit before the court where the employer has preferred proceedings against such award to the effect that he 'had not been employed in any establishment' during the pendency of such proceedings. Once such affidavit has been filed by the workman, he has discharged the burden cast upon him. Then, by virtue of the proviso, the burden of proof shifts to the employer. Thereafter, it is for the employer to satisfy the court that the workman, in fact, had been employed and he had been receiving adequate remuneration during such period or part thereof. If the employer successfully satisfies the court that the workman had been so employed, the court must direct that wages as contemplated by s 17B, shall not be paid by the employer to the workman for the period or part thereof, as the case may be. In the absence of such proof, payment of wages as contemplated by this section must automatically follow on the workman

having filed his affidavit. The employer has to place sufficient and cogent material before the court for satisfying it that the workman had, in fact, been employed in any establishment and had been receiving adequate remuneration. The court must pass an order that the employer shall not be liable to pay wages as required by this section, for the period of pendency or part thereof, as the case may be, during which the workman was so employed. But if the employer fails to prove to the satisfaction of the court that the workman was so employed, he has to continue to pay wages as required by this section.[10] In *Oriental Containers*, instead of placing any material before the court, the employer referred to the report of some detective agency without filing an affidavit stating that the report had been accepted as correct. The Bombay High Court held that the report of the detective agency *per se* is not any evidence and evidence has to be led in proof thereof. As no such evidence had been placed before the court, it did not entertain the plea.[11]

CONSTITUTIONAL VALIDITY

The question of the constitutional validity of this section came before the Supreme Court in *Dena Bank*, wherein it affirmed that a High Court under Art 226 and the Supreme Court under Art 136 is not precluded by s 17B from passing an order directing payment of a higher amount to the workman, if such higher amount is considered necessary in the interest of justice. The court may also give directions regarding refund or recovery of the excess amount in the event of the award being set aside. Such directions, however, would be *de hors* the provisions of this section. Conferment of the right on the workman under s 17B cannot be regarded as a restriction on the powers of the High Court or the Supreme Court under Arts 226 and 136 of the Constitution.[12]

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47 Ins by Act 46 of 1982, s 11 (wef 21-8-1984).

48 *Bharat Singh v Mgmt of ND Tuberculosis Centre* 1986 Lab IC 850 : AIR 1986 SC 842 [LNIND 1986 SC 105] (SC), per Khalid J.

49 *Dena Bank v Kiritikumar T Patel*, 1998 (1) LLN 375, 381-82 (SC), per Agrawal, J.

50 *WHD' Cruz & Sons v ME Thomas* (1996) 1 LLJ 706, 712-13 (Ker), per Kamat J.

51 *Workmen rep. by India Cements EU v IT* (1991) 2 LLJ 141, 143 (Mad), per Natarajan J.

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53 *Rajasthan SRTC v LC* (1998) 1 LLJ 831, 834 (Raj) (DB), per Arora J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

S. 18. Persons on whom settlements and awards are binding.—

13[(1) A settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement.

(2) [14][Subject to the provisions of sub-section (3), an arbitration award] which has become enforceable shall be binding on the parties to the agreement who referred the dispute to arbitration.]

15[(3)] A settlement arrived at in the course of conciliation proceedings under this Act[16][or an arbitration award in a case where a notification has been issued under sub-section (3-A) of Section 10-A] or [17][an award [18][of a Labour Court, Tribunal or National Tribunal] which has become enforceable] shall be binding on—

(a) all parties to the industrial dispute;

(b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board, [19][arbitrator,] [20][Labour Court, Tribunal or National Tribunal] as the case may be, record the opinion that they were so summoned without proper cause;

(c) where a party referred to in clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates;

(d) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part.

LEGISLATION

This section was enacted in the original Industrial Disputes Act 1947. It has since undergone numerous amendments which have been indicated in the footnotes to the body of the section. Section 18 divides settlements and awards into two categories. The first category consists of settlements which are arrived at otherwise than in the course of any conciliation proceedings and the arbitration awards under s 10A. This category is envisaged by sub-ss (1) and (2). The second category consists of settlements which are arrived at 'in the conciliation proceedings' before a conciliation officer or the Board and the awards of the adjudicatory authorities,*viz*, the labour courts, tribunals or the national tribunal. The binding effect of settlements and awards falling under these two categories is also different. The employer, of course, is a common party in both types of settlements and awards, but workmen who get bound by settlements and awards falling under the first category are only those workmen, who were parties to the agreement in the case of settlement or were parties to the reference made to a private arbitrator. The case, however, is different in respect of settlements and awards falling under the second category.[21]

The Right to Represent and Bargain Collectively:

In *State Bank of India*, Srikrishna J (for self and Balakrishnan J), while setting aside the order of the Orissa High Court, dealt with the issue of '*general right of a union to bargain*', and observed:

The review petitioner [*State Bank of India*] has urged two points in support. First, that even the majority union does not have the right of negotiation or representation with respect to individual grievances and denial of this right to a union, which was admittedly a minority union, could hardly be said to be discriminatory as the High Court seems to have assumed. On the contrary, it is urged that conferring such a special right on the minority union would amount to reverse discrimination. Secondly, it is contended that in Common Law there is no obligation on an employer to confer upon a union the right to represent individual employees and unless such a provision is expressly made by any statute or statutory rules, the employer is not obliged to grant any such right. The High Court has found that the 1994 Verification Rules do not apply. In any event, the State Bank as a public sector bank had created its own efficacious grievance settlement machinery and there was no justification for the High Court to import the principle, if any, from Rule 24 of inapplicable rules to override the grievance redressal machinery which was already in place. The petitioner contends that these submissions have been lost sight of in the judgment, which is sought to be reviewed. Hence, the review petition.. .. For the respondent association [*All Orissa SBI Officers Association*], however, it is contended that there is no law under which the representative character of the majority association has been determined. It is also contended that there is no statutory provision, which could decide as to which of the contending trade unions really represents the concerned employees. In these circumstances, it is urged that the judgment of the High Court took a reasonable view, namely, that the non-recognised trade unions should also be accorded the right of representing individuals and ventilating their grievances by holding discussions with the employer which is precisely what has been accepted, and reiterated in the judgment of this Court dated May 6, 2002. It is, therefore, contended that there is no scope whatsoever, much less any need, to review the judgment.. .. In our view, the contention urged by the counsel for the Review Petitioner has merit and needs acceptance. There is no Common Law right of a trade union to represent its members, whether for purposes of collective bargaining or individual grievances of members. This is an inroad made into the Common Law by special statutes. Either the special statute operates *proprio vigore*, or it does not. In the situation before us, it is undisputed that Rule 24(a) on which the respondent association and the High Court placed reliance, has no application. This is accepted even in the judgment under review. Nonetheless, on general principles of equity, justice and fair play the judgment under review holds that the minority trade union should also be afforded an opportunity of ventilating individual grievances of its members. It appears to us that, in doing so, the attention of this Court was not adverted to the elaborate grievance procedure machinery which is in existence and the details of which are placed on record.[22]

SUB-SECTION (1): BINDING EFFECT OF A PRIVATE SETTLEMENT

This sub-section was introduced by the Amending Act of 1956, with a view to remedy a defect in the then existing law. Prior to this amendment, there was no provision to make such settlements binding even on the parties thereto, with the result that the workmen notwithstanding, such a settlement could raise an 'industrial dispute' on the identical matter agreed upon by their union.[23]By the same amending Act, the definition of 'settlement' was also amended, as the original definition contemplated only a settlement arrived at in the course of conciliation proceedings, so as to include written agreements between the employer and workmen arrived at otherwise than 'in the course of conciliation proceedings' where such agreement has been signed by the parties thereto in the prescribed manner and a copy thereof has been sent each to the 'appropriate government' and the conciliation officer.[24] This sub-section provides that a settlement arrived at by agreement between the employer and the workmen 'otherwise than in the course of conciliation proceedings', as is apparent from the language of this provision, shall be binding only 'on the parties to the agreement. In order to make such a settlement binding on them, it should be arrived at by agreement between the employer and the workmen.[25] Normally, it is the union or the representatives of the employees who enter into agreement with the employer. All the employees do not, as a matter of fact, become parties, to the agreement but the settlement signed by such representatives binds all those whom they represent. Therefore, the terms of the settlement become a part of the contract of employment of each individual workman represented by such representatives.[26] In *Herbertsons*, the Supreme Court held that, where a union claims that a substantial number of workmen were not a party to the settlement entered into with the majority union and hence they would not be bound by such settlement, it has to establish that fact before the tribunal by adducing relevant evidence. Even if a few workers were not members of the majority union, if it is a just and fair settlement arrived at otherwise than in the course of conciliation proceedings, it should not be disturbed particularly when a recognised and registered union enters into a voluntary settlement.[27]

In *Tata Chemicals*, the court held that a settlement in relation to industrial disputes between the employer and the union representing the majority workmen will not bind the minority union, who was not a party to the settlement.[28] Construed in the light of the other provisions of s 18, the definition of the term 'settlement' and the relevant statutory Rules, this sub-section does not appear to vest in the employer and the workmen 'freedom to settle a dispute as they please and clothe it with a binding effect on all workmen' or even on all member-workmen of the union to which they belong. The settlement has to be in compliance with the statutory provisions.[29] For instance, an agreement which is by acquiescence and is not in writing or is not signed, is not a settlement as defined in the Act and cannot, therefore, bind even the parties to such an agreement.[30] Rule 58 of the Industrial Disputes (Central) Rules 1957, provides that a settlement arrived at in the course of

the conciliation proceedings or otherwise shall be in Form H, and prescribes the persons by whom the memorandum of settlement can be signed on behalf of the employer and the union respectively. However, a reading of this rule clearly shows that it pre-supposes the existence of a settlement already arrived at between the employer and the workmen and it only prescribes the form in which the memorandum of settlement should be signed and by whom it should be signed. It does not deal with the entering into or arriving at a settlement. Thus, where a settlement is alleged to have been arrived at between an employer and one or more office bearers of the union, and the authority of the office bearers, who signed the memorandum of settlement, is challenged or disputed, the said authority has to be established as a fact.[31]

Affidavits filed by workmen before the industrial tribunal stating that they had effected the settlement of their disputes with the employer would not constitute a 'settlement' of their dispute within the meaning of the term as defined in the Act.[32] The validity of a settlement arrived at under s 18(1) of the Act cannot be gone into by the authority, under the provisions of a state statute like the Shops and Establishments Act.[33] Any memo of the employer subsequent to the settlement to the contrary cannot override the settlement.[34] In *DN Ganguly*, the Supreme Court observed that it would be unreasonable to assume that the industrial tribunal would insist upon dealing with the dispute on merits even after it is informed that the dispute has been amicably settled between the parties.[35] In *Sirsilk*, a settlement was arrived at between the parties on the same dispute in respect of which the tribunal had sent its award to the government for publication. However, before the publication of the award, the parties jointly wrote to the government intimating it of the settlement and requesting it not to publish the award. In view of the mandatory provisions of ss 17(1) and 18(1), the government refused to withhold the publication. The employer, therefore, filed a writ petition in the AP High Court praying for a writ restraining the government from publishing the award. The High Court rejected the writ petition. In appeal by special leave, the Supreme Court held that, though the requirement of s 17(1) to publish the award is mandatory, in the special circumstances of the case and with a view to avoid conflict between a settlement binding under s 18(1) and an award binding under s 18(3) on publication, the only solution was to withhold the publication of the award and that would not in any way have affected the mandatory requirement of s 17(1) of the Act. Wanchoo J observed:

> Therefore, as soon as an agreement is signed in the prescribed manner and a copy of it is sent to the government and the conciliation officer, it becomes binding at once on the parties to it and comes into operation on the date it is signed or on the date which might be mentioned in it for its coming into operation. In such a case, there is no scope for any inquiry by government as to the bona fide character of the settlement which becomes binding and comes into operation once it is signed in the manner provided in the rules and a copy is sent to the government and the conciliation officer. The settlement having thus become binding and in many cases having already come into operation, there is no scope for any inquiry by the government as to the bona fides of the settlement.[36]

In *Amalgamated Coffee*, the dispute in question was compromised by agreement between the employer and his workmen during the pendency of the appeal by special leave in the Supreme Court against the award of the industrial tribunal. Consequently, the employer moved the court for disposing of the appeal in terms of the settlement. This motion was resisted by some of the workmen on the ground that they were not parties to the agreement and the agreement, therefore, was not binding on them. The court in the circumstances, remitted the case to the tribunal calling for a finding on the facts whether actually a large number of the workmen employed by the employer had accepted payments consistent with the terms of the agreement set up by the employer. The tribunal returned the finding that in every estate, payments were made in terms of the settlement, that such payments were voluntarily and knowingly accepted by the workmen and that the settlement was a fair settlement, having regard to the basic facts of the dispute between the parties. In view of these findings, the Supreme Court observed that the settlement was a fair one, hence the objection by the dissenting workmen could not be sustained.[37] This decision goes even further than the *Sirsilk* case, preferring a private settlement between the parties even to an award which had, in fact, been published and become binding under s 18(3) and was the subject-matter of appeal before the Supreme Court. In *Delhi Cloth Mills*, the court appears to have taken a diametrically opposite view holding that during the conciliation proceedings or after the failure of the conciliation proceedings, the parties cannot arrive at a private settlement and clothe it with a binding effect even on the members of the union which entered the settlement. In this connection, Dua J who delivered the opinion of the court said:

> We do not think the management and the union can, when a dispute is referred to the conciliation officer, claim, absolute freedom of contract to arrive at a settlement in all respects binding on all workmen, to which no objection whatsoever can ever be raised by the workmen feeling aggrieved. The question of a valid and binding settlement in such circumstances is, in our opinion, governed by the statute and the rules made thereunder. Reliance was next placed on section 18(1) to support the binding character of the settlement. This sub-section for its proper construction must be read with the other sub-sections and the relevant rules, in the light of the definition of 'settlement' as contained insection 2(p) of the Industrial Disputes Act. 'Settlement' as defined therein means a settlement arrived at in the course of conciliation proceedings and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties

> thereto in such manner as may be prescribed and a copy thereof has been sent to the appropriate government and the conciliation officer. In the light of these provisions we do not think that section 18(1) vests in the management and the union unfettered freedom to settle the dispute as they please and clothes it with a binding effect on all workmen or even on all member workmen of the union. The settlement has to be in compliance with the statutory provisions.[38]

These observations are clearly contradictory to the ratio of *Sirsilk* and *Amalgamated Coffee* to which the attention of the court does not appear to have been drawn. In *Sirsilk* case, it was pointedly stated that 'as soon as an agreement is signed in the prescribed manner and a copy of it is sent to the government and the conciliation officer, it becomes binding at once on the parties to it and comes into operation on the date it is signed. Applying this rule, it would appear that the settlement became binding on the day it was signed. The requirement of s 2(p) to send a copy of the settlement to the conciliation officer was also obviously complied with. Hence, the settlement was in accordance with law and was binding under s 18(1) on the workmen who were parties to it, particularly the concerned workman himself who was the president of the union at the time of the settlement. In this connection, it is relevant to note that s 18(1) makes an 'agreement between the employer and workman otherwise than in the course of conciliation proceedings', binding on the parties to the agreement. In other words, if the workman concerned himself enters into a private agreement with the employer that will make the agreement binding on him. The workman in this case, therefore, who was a party to the settlement was also bound by the settlement. The observations of the court, that 'when a dispute is referred to the conciliation officer', the parties cannot 'claim absolute freedom of contract to arrive at a settlement', is not borne out by the statute. The Act does not postulate any 'reference' to a conciliation officer of any 'industrial dispute'. The conciliation proceedings in a public utility service, as in this case, commence when a notice of strike is received by the conciliation officer, and where no settlement is arrived at, they are deemed to have concluded when the failure-report of the conciliation officer is received by the 'appropriate government'. It is nowhere provided in the Act or the Rules that during the pendency of the conciliation proceedings or after the failure of such proceedings, the parties are barred from arriving at a private settlement. If there is no bar to a private settlement after the award has been made, as in *Sirsilk*, and even after the publication of the award as in *Amalgamated Coffee*, much less can there be a bar to such a settlement during the pendency of conciliation proceedings or after the failure of such proceedings. The view of the court that the parties cannot arrive at a private settlement during, or after the failure of, the conciliation proceedings, is neither warranted by the statute nor by precedent. The further observation of the court that the provisions of s 18(1) do not vest in the parties 'unfettered freedom to settle the dispute as they please and clothe it with a binding effect', is no less misconceived. The court found a further flaw in the settlement on the ground of non-compliance of r 58(4). This rule requires the parties to the settlement to send a copy thereof jointly to the appropriate government. The memorandum of settlement in this case was sent along with a letter from the management to the government. The court took the view that since the settlement in question was not jointly sent to the government, the rule was not complied with in order to clothe the settlement with a binding character on all the workmen. This view is equally misplaced, because the requirement of jointly sending a copy of the memorandum of settlement to the government is merely directory and not mandatory. The decision of Dua J in *Delhi Cloth Mills* is replete with a host of infirmities of rudimentary nature, such as, misreading of provisions, misapplication of law and perverse analysis, and deserves to be rejected outright as being repugnant to the time-tested canons of collective bargaining and s 18 of the Act.

The Patna High Court in *Rohtas Industries*, held that the tribunal had complete jurisdiction to decide whether the settlement arrived at between the parties was bona fide and as also its binding effect on the workmen concerned. It was further observed that the tribunal would take into consideration the settlement while passing the final award by it.[39] In *Sirsilk*, the Supreme Court prohibited the publication of the award with a view to avoid a likely conflict between a binding award and a binding settlement covering the same subject matter. The High Court does not appear to have appreciated the ratio of that decision of the Supreme Court and contented itself merely by saying that the said decision had no application to the present case. The legal position is very clear in so far as a settlement, if arrived at genuinely and bona fide, would be binding on the parties under s 18(1) and the tribunal should accept it as it is. In *Blue Star*, pending adjudication, the parties had jointly filed an application bringing to the notice of the labour court that a private settlement had been arrived at between them to the effect that the workman will be reinstated without backwages or allowances. As a matter of fact, pursuant to the settlement, the workman had even joined duty. However, the labour court did not pass an order on the application for a period of two years. Then, the workman filed an application before the labour court seeking the relief of backwages based on an alleged oral agreement and the labour court proceeded to inquire into the claim. In a writ petition filed by the employer for prohibiting the labour court from proceeding with the inquiry, a single judge of the Delhi High Court held that the labour court could not adjudicate upon the question which stood settled by the settlement because after the settlement, the adjudication had become infructuous. The learned judge further observed that since there was no explanation from the workman regarding the delay of two years in seeking the relief of backwages, the workman had acquiesced and was estopped from raising any dispute.[40]

In *WIMCO*, on behalf of the employer, a novel point was addressed to the Supreme Court, that the letter of appointment of a probationer was in the nature of a privatesettlement binding under s 18 of the Act. In fact, the case was not governed by s

18 of the ID Act but was governed by s 6B of the UP Industrial Disputes Act which is somewhat similar to s 18 of the ID Act. On a construction of the provisions of that section, the court held that 'any privately negotiated settlement should be submitted for registration to the conciliation officer'. In this view of law, the contention was rejected.[41] In *Veeramani*, a single judge of the Karnataka High Court held that a settlement under s 12(3) read with r 59 of ID (Mysore) Rules 1959, which had been signed by a person who was not an authorised agent of the party, has no binding effect on the party whom he seeks to represent.[42] A settlement under s 18(1) between the management of the bank and the union, which stipulates that a candidate should secure minimum percentage of marks in English to qualify in the written test for promotion, is not violative of any of the provisions of the Constitution or of the Official Languages Act 1963 or for that matter any public policy. The said settlement is binding on both the parties unless revoked in accordance with law.[43] Where the management withdrew the facility of treating the office-bearers of recognised trade union as on duty for the purpose of doing trade union work, a single judge of the High Court, having dismissed the writ petition filed by the workmen on the ground that the matter involved disputed questions of fact, yet directed the Corporation to continue the facility duly scaled down from what it had been agreed in the settlement.[44]

In *Hindustan Lever*, Savant J of Bombay High Court held that a settlement as understood by s 2(p) must necessarily be with the union since the dispute before the court was not concerning either discharge, dismissal, retrenchment or termination of the service of a workman.[45] The decision rendered in *Hindustan Lever* merits analysis, if for nothing else, *to highlight the spate of misconceptions that Savant J brought to bear upon the concept of collective bargaining* as well as the *provisions of the ID Act*. A look at the ID Act unfolds that there is nothing either in s 2(p) or in s 18(1) to suggest that an individual workman is prohibited from entering into a settlement with the management or that there should necessarily be a trade union in every industrial establishment to represent workmen in negotiations. At least in India, no enactment has so far mandated compulsory unionisation of industrial establishments. On the contrary, the law permits a group of workmen or even an individual workman to enter into a settlement with the management, whether or not there is a union and whether or not he/they are the members of it. Section 18(1) stipulates in terms: 'A settlement arrived at by agreement between the *employer* and *workman* otherwise than in the course of...' The singular noun '*workman*' - and not plural '*workmen*' - occurring in the above sub-section clearly points to the fact that an individual workman is as much entitled to negotiate with management and arrive at a settlement just as any other group of workmen or a trade union is. The learned judge relied, *inter alia*, on *Ram Prasad Vishwakarma* (infra), and *Brooke Bond* (infra), in support of his decision. Strangely, however, neither of the two decisions touches upon the question that was substantially at issue in *Hindustan Lever*. For a complete appreciation of the misplaced comparison drawn by Savant J, it is necessary to briefly discuss both the cases. The first case was *Ram Prasad Vishwakarma*, in which the facts were:

(a) It was a case of dismissal of a workman; it had nothing to do with either collective bargaining or with s 18 of the Act.

(b) At the time of deciding the case (1961), s 2A of the ID Act did not take its birth, which section was inserted some four years later in 1965

(c) Hence, in the pre-1965 dispensation, there was no provision for an *individual dispute* in terms of the ratio of *Central Provinces Transport Services*,[46] even in the event of discharge, dismissal etc., and such a dispute had to be necessarily *espoused by a union or a group of workmen*, in order to bring it within the ambit of the definition of *industrial dispute* under s 2(k).

(d) The general secretary of the union espoused the dispute relating to the dismissal of the appellant-workman, which was pending before the tribunal for adjudication. The tribunal granted several adjournments as the union and management represented that talks were going on at the bipartite level and that a compromise was likely to be reached in the matter.

(e) In the meantime, the appellant-workman filed an application before the tribunal stating that he had not authorised the general secretary to represent his case; that he had no faith in him; and any agreement or compromise filed by him should not be accepted by the tribunal.

(f) The tribunal rejected the said application and passed an award in terms of the compromise reached between the management and the union. Having lost the case in the High Court, the workman filed an appeal in the Supreme Court.

The issue raised before the Supreme Court was whether the appellant was entitled to separate representation in spite of the fact that the Union, which had espoused his cause, was being represented by its Secretary. Rejecting the contention of the workman, Das Gupta J (for self, Gajendragadkar and Wanchoo JJ) held:

> It is now well-settled that a dispute between an individual workman and an employer cannot be an industrial dispute as defined in section 2(k) of the Industrial Disputes Act unless it is taken up by a Union of the workmen or by a considerable number of workmen.. .. it cannot be said that the Tribunal committed any error in refusing the appellant's prayer for representation through

representatives of his own choice in preference to Fateh Singh, the Secretary of the Union.[47]

What is the relevance of the above decision to the facts of Hindustan Lever? The second case relied upon was Brooke Bond, in which the issue was 'what would be the effect if the office bearers signing the settlement had no authorisation from the executive committee of the union'. The Apex Court held that in the absence of an authorisation from the executive committee, an agreement between any office-bearer and the management cannot be called a settlement as defined in s 2(p).[48]Here again, there is nothing which could throw any light on the issues canvassed in Hindustan Lever, in which the facts disclosed that the individual workmen signed settlements with the management, which were undoubtedly binding on them. It is one thing to say that a settlement, in order to be binding on the workmen in general, should be signed by the union which represents them, and quite another to suggest that an individual workman is wholly debarred from entering into a settlement in a matter concerning his service conditions. It is also not disputed that where a union ostensibly represents the workmen, the office-bearers should submit the authorisation in Form 'F' without which the settlement so arrived at cannot bind the workmen whom the union claims to represent. Where, however, the individual workman himself signs the settlement touching upon his own conditions of service, the law does not require him to furnish any such authorisation. In the face of unambiguous language used in s 18(1), to hold that 'settlement' means 'a settlement arrived with the union' is a misreading of the provisions, and amounts to rewriting the enactment. Both the finding recorded by the tribunal and the conclusion reached by Savant J are contrary to the letter and spirit of the ID Act. In striking contrast, another single judge of the same High Court, Kochar J, in another case involving the same company, ie, Hindustan Lever, ruled that, where all but one field-force employee arrived at individual settlements on identical lines with the management during the pendency of the dispute raised by the union on their behalf, it was not reasonable on the part of the tribunal to proceed further with the reference, and that it should make an award in terms of the settlement between the parties as laid down by the Supreme Court in DN Ganguly.[49] The above decision of Sawant J in Hindustan Lever betrays his inability to understand the provisions of ID Act in their proper perspective, is wholly misconceived and absolutely wrong. Between these two decisions, the view taken by Kochar J is consistent with the objects and scheme of the Act and is right, whereas that of Savant J is repugnant to the law and deserves to be rejected outright without a second look.

In *Karnataka SRTC,* the Supreme Court held that the management, having entered into a settlement under s 18(1) recognising the union as the sole bargaining agent for four years and extending the same for another four years coupled with the facility of check-off, cannot unilaterally withdraw the check-off facility during the subsistence of the settlement and even after the expiry of the period, until the said settlement is validly terminated under s 19 and a new settlement is arrived at modifying the terms thereof. The court further held that the order passed by the state government for withdrawal of the check-off facility during the currency of a valid settlement was totally *ultra vires* and uncalled for.[50] Where a workman is aggrieved against the bipartite settlement arrived at under s 18(1) between the management of the bank and the recognised union is not binding on him because he was not a party to the settlement, it is always open to him to challenge the same in a manner known to law, and he is not entitled to any relief in a writ appeal.[51] In *Dena Bank,* the Supreme Court held that, where the bank acted in accordance with the settlement reached under s 18(1) providing for two channels of promotion-one by seniority-cum-merit and the other by merit alone—it would not be proper for the High Court to direct the management to consider the cases of candidates, who were unsuccessful in the test prescribed for promotion through 'merit', as long as the settlement itself has not been challenged.[52] The very fact that the All India Union is representing the workmen employed all over the country in the establishments of the company and substantially large number of workmen have accepted the settlements, there has to be legitimate inference that the settlements are reasonably acceptable to the workmen. There is no reason for the minority union not to accept the settlements, after having accepted the benefits flowing from the said settlements. The will of the majority of the workmen has to be accepted by the petitioner-union and it cannot persist to have independent and separate adjudication of its own demands when all such demands have been covered by the settlements with the All India TC Employees Union and the company.[53] Where the settlement between the management and union provided for the employment of a dependent of an employee who died while in service, the denial of appointment to the son of deceased workman on the ground that the wife of deceased employee was already employed in the company, goes against the spirit of the settlement, and the tribunal's order upholding the management's contention is contrary to law.[54]

The intention of the parties to the settlement has to be gathered by the words used by the parties to the settlement. Having regard to the context in which it was used, even if there is any ambiguity, the court should look at all the parts in the settlement to ascertain what was really intended by the parties. In this context, the word 'defect' in the settlement, which refers to a disease suffered by the workman making him unfit for work and disentitling him for absorption, has to be construed, not technically, but liberally so as to advance the right to livelihood. When an employee was disabled by a disease to perform the duties of his post, the employer should make all attempts to see the final result and make allowances to get treatment since it promotes reasonableness in employment, otherwise, it amounts to taking away the employment construing in a technical sense in a manner not reasonable, fair and just.[55] In a case where, consequent upon the taking over of a dairy run by the Municipal Corporation by Dairy Development Corporation, a settlement was reached between the

transferor, transferee and the employees otherwise than in the course of conciliation proceedings providing for regulating the service conditions of the erstwhile dairy employees of the Municipal Corporation, such settlement is binding only on the parties to the agreement in accordance with s 18(1). It does not confer any benefit on the *badli* workmen who came to be subsequently employed in the dairy under the transferee-corporation. It is only the settlement, which is arrived at in the course of conciliation proceedings, *ie*, under s 18(3), which is binding on the workmen in employment at the time of settlement as also all those who subsequently become employed in that establishment.[56]

Where the employees solemnly entered into an agreement with the management under s 18(1) agreeing to scale down the gratuity amount payable under the Payment of Gratuity Act 1972 in the background of the sickness of the undertaking and the need for its revival, such an agreement is valid and is not violative of s 14 of the Payment of Gratuity Act. The workmen, having received the amounts in full, cannot question the lesser payment later.[57] The union and workmen, who are not parties to a settlement reached under s 18(1) between the management and another union, cannot be said to be aggrieved persons as regards the said settlement, and the writ petition filed by them against the settlement is not maintainable.[58]Once an agreement under s 18(1) was entered into which provided for pension and other benefits, and the said agreement was acted upon by the employer, he cannot turn round and say that it was not an agreement within the meaning of s 2(p) of the Act as the copy thereof was not sent to the authorities concerned. Once the agreement is acted upon, there was a performance of the terms and once it is so performed, even in pain, would attract the principle of equitable estoppel.[59] A settlement arrived at under s 18(1) with the recognised union is binding on its members and an individual workman of the union cannot be permitted to contend that it was not binding on him, merely because he did not agree to the terms of the settlement or that he was not a signatory thereto.2[60] In *Sarva Shramik Sangh*, the facts were, out of the two unions which submitted charter of demands, the management entered into a settlement with one, which was the majority union. The minority union did not accept the terms of settlement and raised an industrial dispute which was referred for adjudication. The industrial court recorded its opinion that the settlement arrived at between the management and the majority union was just and fair and passed an award in terms of the said settlement. Repelling the contention challenging the validity of the said award by the minority union, the High Court held that the award of the industrial court did not warrant interference.[61]

A settlement reached between the employer and employees under s 18(1) implies that they are the employees of the employer. It acquires statutory status and the engagement made as a result of such settlement, may be, by way of a job contract, cannot be said to be a job contract and the employees cannot be said to be contract labourers. In fact, they are workmen in view of their engagement being the result of statutory settlement under the ID Act. That being so, 'cessation of work' and the consequent non-employment of the workmen amounts to retrenchment within the meaning of s 6N of the UP Industrial Disputes Act. On this view of the matter, a single judge of the Allahabad High Court upheld the award of the labour court that the cessation amounted to retrenchment in contravention of the UP Act.[62] Once a workman has accepted the VR Scheme and entered into a settlement with the management under s 18(1), he cannot turn round and complain that his signature was obtained under coercion. There is no scope to construe that there was an industrial dispute under s 2A and, by the same token, the order passed by the single judge of the High Court in favour of the workman cannot be sustained and has to be set aside.[63] In *HMT*, the facts disclosed that a settlement was arrived at between the management and the union in April 1995 in terms of which, the wages and allowances were revised substantially. The settlement was to be in operation for a period of five years from 1 January 1992 to 31 December 1996. Clause 13 of the settlement provided that the payment of arrears from 1 January 1992 to 31 March 1995 would be discussed based on a periodic review of the financial performance of the company. The question before the Supreme Court was in respect of arrears, which were not paid as the company was on a downhill course. The financial figures showed a net loss of Rs. 3657 lakhs during the year 1998-99 and net earnings Rs. 2441 lakhs during the year 2000-01. The net worth of the company rose from Rs. 2410 lakhs to Rs. 5414 lakhs during the same period. On behalf of the company, however, the attention of the court was drawn to accumulated losses, which were Rs. 139.60 lakhs in 1998-99, Rs. 436.51 lakhs in 1999-2000 and Rs. 379-99 lakhs in 2000-01. The figures for the year 2001-02, the net earnings of this year were Rs. 1024 lakhs and the accumulated losses as on 31st March, 2002 were Rs. 368 crores. As on 31st March, 2003 the accumulated losses would be about 403.33 crores. Allowing the appeal in part, Srikrishna J (for self and Balakrishnan J) held:

> .. . Clause 13 does not say that the disbursement of arrears would be made only after all accumulated losses are completely wiped out. It merely says that it would be done on periodical review of the improvement in the financial performance. In our view, therefore, the appellant was not justified in taking the rigid stand of refusing to disburse any of the arrears on the ground that accumulated losses persisted. This was obviously an unreasonable stand and the High Courts were justified in exercising their writ jurisdiction in directing the appellant to make the disbursements. However, we are not satisfied that the High Courts were justified in directing full disbursement of arrears at one go. We are conscious of the fact that there has been improvement in the financial performance, yet at the same time, we are also not satisfied that the financial performance had improved to such extent that the entire liability needs to be discharged at one go. In our view, it would be necessary to give some more breathing time to the appellant to ensure that the trend of financial improvement does not get reversed.. .. In the result, we allow the appeals partly and modify the judgments of the Karnataka and Andhra Pradesh High Court as under :

(A) It is held that there is some improvement in the financial performance of the appellant company subsequent to the settlement dated 23-4-1995 and its implementation.

(B) It is held that the appellant's obligation to discharge the liability towards arrears under Clause 13 of the said settlement has partly arisen.

(C) It is directed that the appellant shall disburse 55% of the arrears payable during the period from 1-1-1992 to 31-3-1995 to all eligible employees, to the extent of their eligibility, within three months from today.

(D) The balance amount of the arrears payable as aforesaid shall be computed and disbursed to all eligible employees in three equal annual installments on or before 31st of March, 2005, 31st of March, 2006 and 31st of March, 2007 respectively.[64]

In *Satheeshchandran*, the facts related to the promotions in UCO Bank. The employee was employed as a clerk in the Bank. He was promoted as Assistant Manager with effect from 1 August 1997. The promotion order stipulated that he would be on probation for one year, which was likely to be extended up to a total period of two years as specified in the Promotion Policy Settlement (PPS) dated 13 April 1988. While he was on probation, he was transferred to Mavoor where he had joined the service. A few days later, he requested the management to revert him to his original post, which was acceded to by the Bank on the following conditions :-

(1) You shall forfeit permanently your chance for promotion to officer's cadre;

(2) You shall be posted in the capacity of a Clerk notwithstanding your occupying any functional special allowance post prior to your promotion;

(3) Your name will be included in the common seniority list of eligible employees in the clerical cadre for selection to functional special allowance posts under bipartite settlements after five years from the date of such reversion;

(4) On reversion, you shall work in both Cash and Accounts Department; You will not be eligible for stagnation increments.

This order was challenged by the employee by way of writ petition, and later in appeal to the Supreme Court. Allowing the appeal in part, and *quashing that part of the order which disentitled him to all future promotions*, Naolekar J (for self and Panta J) held:

> 11. Under sub-clause (b) of Clause 3.8.3 of the Bipartite Agreement, when an employee seeks reversion after the expiry of probation period, he may be allowed reversion on his request in the discretion of the Bank and if such a request is acceded to by the Bank, the employee shall have to forfeit permanently his chances for promotion to officers' cadre. Therefore, if the promoted officer has made a request after the expiry of the probation period, he has to give up all chances of future promotions to the officers' cadre. Thus, to forfeit chances of promotion to the officers' cadre, the request for reversion is to be made after expiry of the probation period. In the present case, the request for reversion, which was made by the appellant on 3.3.1999, was although after a period of one year but was during the period of probation. The appellant's case will be governed by sub-clause (a) of Clause 3.8.3 of the Bipartite Agreement and, thus, he can be denied future promotion only for a period of two years from the date the order of reversion is made effective. The order of the Bank debarring the appellant of all future promotions to the higher rank of Officer beyond the period of two years is, therefore, illegal and requires correction.. .. the appeal is partly allowed. *The order of reversion imposing a condition that the appellant shall forfeit permanently his chances for promotion to the officers' cadre is set aside* and it is directed that he shall forfeit his chances for promotion to the officers' cadre only for a period of two years from the date of the order of reversion.[65] (Paras 11-14) (Italics supplied).

It is submitted that this case was rightly decided. An employee may opt for reversion to his original post, during the period of promotion to a higher grade post involving higher responsibilities, for a variety of reasons. It could be a case of self-assessment on his part whether he was having the necessary knowledge and skills to handle the higher grade position, before the management comes to such a conclusion, which is more detrimental to his career prospects. It could well be understood that the employee wants time to acquire the knowledge and skills so that he can stake his claim for promotion at a later date. The mere request to revert him to his original position, that too, during the period of probation in the promoted post, should not be used as a tool to condemn him for life. The reversion order issued by the management is archaic, primitive and tyrannical, apart from being in contravention of the terms of settlement reached under s 18(1). The said portion of the order was rightly struck down by the learned judge.

In *Air India Cabin Crew*, there was a long history of settlements commencing from 1977 covering, *inter alia*, the promotion policy of male Cabin Crew and female Air Hostesses with separate promotional avenues, as, for instance, male

Cabin Crew was only eligible to post of In-Flight Supervisor prior to 1997. While this was so, a settlement was arrived at between the Association and the Management in 1997 which provided for a new promotion policy by which the post of Inflight Supervisor was thrown open to both male cabin crew (*i.e*., Inflight Purser) and female Air Hotesses, thereby bringing parity between the two genders. The settlement further provided that all the earlier settlements, awards, past practices, record notes and understandings arrived at between the erstwhile Corporation (*i.e*., Indian Airlines Corporation) and the Association, would continue. Immediately after the signing of the said Memorandum of Settlement, on the very same day, Air India Limited issued a promotion policy for all the Cabin Crew members, but treated the pre-1997 and post-1997 crew separately. By a specific clause, the said promotion policy amended the existing promotional avenues for the male Cabin Crew to that of In-Flight Supervisors and female Cabin Crew to the post of Senior Check Air Hostesses recruited prior to the settlement. The said promotion policy kept the promotional avenues in the two streams of male Cabin Crew and female Cabin Crew, recruited prior to 1997, separate. The common issue raised before the Supreme Court was whether the promotional avenues and other terms of service of the pre-1997 cadre of Assistant Flight Pursers could be changed to their prejudice. Justice Altamas Kabir (for self and Cyriac Joseph J), while conceding the position of the appellant-union that that prior to 1997, there was a category of Cabin Crew referred to as In-Flight Supervisors, which was confined to In-Flight Pursers alone and did not concern the Air Hostesses, rejected the other plea for treating In-Flight Supervisor as a separate post, and held that the duties discharged by persons designated as 'In-Flight Supervisors' did not create any separate post and the post remained that of 'In-Flight Pursers'. On the question of the right of the management to change the promotion policy and the binding effect of the settlement reached in 1997, the learned judge, while dismissing the petitions filed by the Association, observed:

> In our view, the Management of Air India was always entitled to alter its policies with regard to their workmen, subject to the consensus arrived at between the parties in supersession of all previous agreements. We are also unable to accept the further submission made on behalf of the appellants that those workmen who had been promoted to the Executive category would continue to be governed by the Settlements arrived at when they were workmen and were represented by the Association. In our view, once an employee is placed in the Executive cadre, he ceases to be a workman and also ceases to be governed by Settlements arrived at between the Management and the workmen through the concerned Trade Union. It is not a question of an attempt made by such employees to wriggle out of the Settlements which had been arrived at prior to their elevation to the Executive cadre, which, by operation of law, cease to have any binding force on the employee so promoted by the Management.[66] ().

In *Needle Industries*, the issue was the binding effect of a settlement arrived at otherwise in the course of conciliation proceedings. A workman who was not a member of the union which signed the settlement and hence not a party thereto filed an application under s 33C(2) for computation and recovery of the benefits accruing therefrom, which was allowed by the labour court, but was rejected by a single judge of Madras High Court. Upholding the decision of single judge, Nagappan J (for self and Sundresh J) observed:

> The claimants were not parties to the Settlement under Section 18 (1) of the Act and in the absence of any existing right, claim under Section 33C(2) of the Act cannot be legally sustained and the Order granting relief to them suffers from lack of jurisdiction; error apparent on the face of the record and hence, liable to be set aside.[67]

The NCL-II took note of the practice of industry level negotiations on interest issues, which obtain in several industries and recommended that the practice should continue. The Commission is in favour of unit level negotiations and settlements in respect of wages, allowances, general conditions including total number of hours of work, leave, holidays, social security, safety and health, productivity, manpower adjustments, change in shifts *etc*, so as to maximize the efficient functioning of the individual establishments. The Commission recommended that a settlement entered into with a recognised negotiating agent must be binding on all workers. This is a recommendation of far reaching consequences in the face of the current law on the binding nature of settlements arrived at in the course of conciliation proceedings [s 18(3)] as against the ones arrived at otherwise than in the course of conciliation proceedings [s 18(1)]. In other words, the Commission favours that a settlement arrived at the bipartite level with the recognised negotiating agent should have the same effect as that of a settlement arrived at in the course of conciliation proceedings. The Commission further recommended that the recognition, once granted, should be valid for a period of four years to be co-terminus with the period of settlement; that no claim by anyother trade union/federation/centre for recognition should be entertained till at least 4 years have elapsed from the date of earlier recognition. The individual workers' authorisation for check-off should also be co-terminus with the tenure of recognition of the negotiating agent or college.[68]

SUB-SECTION (2): BINDING EFFECT OF THE AWARD OF AN ARBITRATOR

This sub-section was inserted by the Industrial Disputes (Amendment and Miscellaneous Provisions) Act 1956. It has been amended by the Industrial Disputes (Amendment) Act 1964. Before the amendment, an arbitration award was binding on

the parties who referred the dispute to arbitration, after such an award became enforceable. Now, the result of the amendment is that such an award would be binding subject to the provisions of sub-s (3). In other words, in a case where a notification has been issued under sub-s (3A) of s 10A, the award of the arbitrator would not only be binding on the parties to the agreement who referred the dispute to arbitration but shall also bind the parties mentioned in cl (d) of sub-s (3).

In *Nagdevi Kamgar Sabha*, the binding effect of an arbitration award came in for the consideration of Bombay High Court. The facts of the case were: an arbitration agreement was entered into in September 1992 between a union of workmen and four associations trading establishments. The government issued a notification under s 10A(3). Another union (petitioner, in the case) submitted a charter of demands to the Commissioner of Labour on 28 August 1992 and when the arbitration agreement was arrived at between the seventh respondent and respondent Nos. 3 to 6, the petitioner-union protested before the Commissioner of Labour in writing, and also filed a writ petition before the Bombay High Court challenging the notification issued under s 10A(3). The Commissioner of Labour declined to make a reference in respect of the charter of demands raised by the petitioner on the ground that arbitral proceedings were to take place in pursuance of the notification under Section 10-A and that the petitioner could raise a dispute before the arbitrator under Section 10-A(3) of the Act. The writ petition was disposed of by a learned single Judge recording the agreement between the parties that the petitioner would be entitled to represent its workers and would be entitled to be heard before the Board of Arbitrators. In another writ petition filed by the petitioner against the refusal by the labour commissioner to refer the dispute, the single judge directed the arbitrator to arbitrate upon the dispute raised by the petitioner union as well. Before the Board of Arbitrators, the petitioner was impleaded as a party. The Board of Arbitrators, however, declined to issue notices in respect of 700 workers who had been left out of the purview of the arbitration. The Board of Arbitrators made an award dated 29 October 1994. The petitioner thereupon filed another writ petition challenging the validity of the award. The employers' association, respondent Nos. 3 to 7 also challenged the award by filing writ petitions. One of the issues canvassed before the High Court was the extension of the award to all the workmen and the establishments set out in the petitioner's application before the Board of Arbitrators dated 20 March 1993. Rejecting the contention, Chandrachud J held that in view of the admitted fact that no notification was issued under s 10A(3A), the operation of the said award could not be extended to other establishments, which were not parties to the original arbitration agreement that was published by the Government under s 10A (3) in September 1992.[69]

SUB-SECTION (3)

(i) Settlements arrived at in the Course of Conciliation Proceedings and Awards

The original s 18 has been renumbered as the present s 18(3) by the Industrial Disputes (Amendment and Miscellaneous Provisions) Act 1956. This provision with respect to the binding effect, places the 'settlements arrived at in the course of conciliation proceedings' at par with the awards made by the adjudicatory authorities. The combined effect of cll (a) to (d) of this sub-section is that the 'settlements arrived at in the course of conciliation proceedings', or the award made by the adjudicatory authorities, *viz*, labour courts, tribunals or national tribunals or an arbitrator [where a notification under sub-s (3A) of s 10A has been issued] shall be binding on the following persons:

(i) all parties to the industrial dispute [section 18(3)(a)];

(ii) all other parties summoned to appear in the proceedings as parties to the dispute, unless the authority before whom the proceedings are going on, records its opinion that such parties were summoned without proper cause [section 18(3)(b)];

(iii) the heirs, successors or assigns of the employer in respect of the establishment to which the dispute relates [section 18(3)(c)]; and

(iv) all persons who were employed in the establishment or a part thereof on the date of the dispute, and all persons who become subsequently employed in the establishment or a part thereof [section 18(3)(d)].

Such settlements or awards bind not only the employer who is actually a party to the industrial dispute, but also his heirs, successors or assigns in respect of that particular establishment.[70] A settlement as a whole is binding on the parties, not parts thereof only. In other words, those who invoke s 18(3) are not entitled to seek the implementation of a settlement with the reservation treating parts of the terms as binding on them and parts of it not binding.[71]

Binding on All Parties to the Industrial Dispute:

This clause makes a settlement arrived at 'in the course of conciliation proceedings' and an award of a labour court, tribunal or national tribunal or of an arbitrator [in a case where a notification under sub-s (3A) of s 10A has been issued], binding on all parties to the dispute. Law gives greater sanctity to settlements than it gives to awards. Therefore, industrial law does not contemplate any interference with the finality of a settlement and compels a settlement to run on for the

period mentioned in the settlement itself and neither party is permitted to challenge that settlement during the period of its operation.[72] A settlement arrived at even by an unregistered union is binding on the parties to such a settlement.[73] The principle behind this is that a minority shall not be allowed to jeopardise the right of a majority,[74] and in the interest of uniformity and industrial peace such a settlement should bind all the parties.[75] The object of giving extended application to a settlement 'arrived at in the course of conciliation proceedings' is to uphold the sanctity of such settlement and to discourage an individual employee or a minority union from scuttling the settlement. In the language of Ahmadi J:

> There is an underlying assumption that a settlement reached with the help of a conciliation officer must be fair and reasonable and can, therefore, safely be made binding not only on the workmen belonging to the union signing the settlement but also on others.[76]

Such a settlement has been put at par with an award. In *ITC*, the Supreme Court reiterated that a settlement arrived at in the course of conciliation proceedings, being a product of collective bargaining, is entitled to due weight and consideration. It cannot be ignored unless it is demonstrably unjust, unfair or the result of mala fides. A settlement extending benefits of life pension only to employees retiring after a particular date and excluding those who retired before the said date could not be a ground to characterise the settlement as unjust or unfair. A settlement arrived at under s 12(3) carries a presumption that it is just and fair. It is binding on all the parties to the dispute as well as the other workmen in the establishment to which the dispute relates and all other persons who may be subsequently employed in the establishment. An individual employee cannot seek to wriggle out of the settlement merely because it does not suit him.[77] A minority union has no *locus standi* to challenge a settlement arrived at between the management and the majority union in the course of conciliation proceedings under s 12(3) r/w s 18(3) of the Act.[78]

Power to Summon Parties to Appear:

The original parties to an industrial dispute are those parties that are mentioned in the order of reference and none other.[79]There is no sanction in the Act which expressly empowers a tribunal to add parties to the proceedings. However, such power is necessarily to be implied from s 18. From the provisions of cl (b), it is to be implied that the tribunal has power to summon parties other than parties to a reference to appear in the proceedings before it as parties to the dispute. This has a reference to proper and necessary parties who need not necessarily belong to the category of employer and workmen.[80] A necessary or proper party to a dispute referred for adjudication can be summoned at the instance of one of the parties or *suo motu* by the tribunal and the award eventually passed will be binding on the party so summoned unless the tribunal records that the said party was summoned without proper cause.[81] In *Brahmaputra Tea*, the Supreme Court held that where a receiver was appointed with respect to a tea company and an official liquidator was appointed, the labour court should have issued notices to either or both of them as it was entitled to, and then should have proceeded to consider, as to whether any reliefs could be granted to the workmen in view of the provisions of s 18 which clearly visualise parties being summoned to appear before the labour court.[82] Though the power to implead a party to adjudication does not fall under any of the four heads enumerated in s 11(3), there is abundant authority that the provisions of s 18(3) of the Act vest an implied authority in the industrial tribunals to implead parties. This power of the tribunals is similar to that under O I, r 10 of the Code of Civil Procedure 1908 to add necessary and proper parties to a dispute[83] on whom an award shall be binding.[84]The power implied in this provision is to summon such a party. There is no form of summons prescribed so far. The tribunal, however, may issue summons in a form it deems fit and proper under s 11 (1) and follow such procedure with regard to it as it may think fit, until the rules are framed under the Act, which deal with the matter of summons, *etc*.[85]

Parties cannot be added to Enlarge the Scope of Reference:

The power to summon and add other parties to the dispute which is implied in s 18(3)(b), cannot, however, be exercised by the industrial tribunal so as to enlarge materially the scope of the reference itself, because basically the jurisdiction of the tribunal to deal with an 'industrial dispute' is derived solely from the order of reference passed by the appropriate government under s 10(1) of the Act. What the tribunal can consider in addition to the points of dispute specified in the order of reference, are only the matters incidental to the said dispute; and that naturally suggests certain obvious limitations on the implied power of the tribunal to add parties to the reference before it, purporting to exercise its implied powers under this clause. If it appears to the tribunal that a party to an 'industrial dispute' named in the order of reference does not completely or adequately represent the interest either on the side of the employer, or on the side of the employees, it may direct that other persons should be joined who would be necessary to represent such interest. If the employer named in a reference does not wholly represent the interest of the employer as such, other persons who are interested in the undertaking of the employer may be joined. Similarly, if unions specified in a reference do not represent all the employees of an undertaking, it may be open to the tribunal to add such other unions as it may deem necessary.[86]A receiver of a factory is not a party to the dispute even if he has terminated the services of a workman because the workman is the employee of the factory owner and not of the receiver. The receiver can act only on behalf of the suit-parties and not on his own behalf and he does not step into the shoes of the owner and unless specifically directed does not carry on the business

in the usual course.[87] The terms of reference in any particular case determine the amplitude of the jurisdiction as well as the scope of powers exercisable in such a case. The power of the tribunal to summon parties is narrow and limited and is confined to cases where the summoning of the parties is necessary to make the adjudication of the dispute, as referred, effective and enforceable. The Act does not vest any power in an industrial adjudicator to summon or implead the heirs or the legal representatives of a deceased workman and to entertain their claims on behalf of the estate of the deceased workman and to permit further prosecution of the proceedings. To concede such power will result in a wholesale substitution of an 'industrial dispute' as referred by another dispute between the heirs of the deceased workman and the employer which is not permissible and would be outside the purview of the Act.[88]

Principles governing the joinder of parties:

The test always must be: Is the addition of a party necessary to make adjudication itself effective and enforceable? Conversely, the test may well be, would non-joinder of a party make adjudication proceedings ineffective and unenforceable? It is in the light of this test that the implied power of the tribunal to add parties must be held to be limited. The implied power of the tribunal to summon additional parties is confined only to cases where such addition appears to be necessary for making a reference complete and an award effective and enforceable. Such a power would not be exercised to extend the scope of the reference and to bring in matters which are not the subject-matter thereof, and which cannot be incidental to the dispute which has been referred.[89] Before impleading a party in a dispute, the tribunal should record a finding that it is a necessary party to the dispute under O 1, r 10(2) of the Code of Civil Procedure 1908. For instance, where a party who has purchased property from the vendor, *ie*, owner of a closed industry who is a party to the dispute in regard to lockout declared by him, the tribunal must record a finding that the purchaser who is sought to be impleaded must be a person held to be successor-in-interest. Without such a finding, the tribunal cannot validly implead a person as a necessary party.[90] The parties whose presence is not necessary for the adjudication of a dispute which is pending before a tribunal, cannot be parties who can be summoned by the tribunal under the sub-section.[91] In a case where two unions raise industrial disputes and one of them settles the dispute raised by it while the other one let the matter be referred to adjudication on account of the dispute having been settled, a single judge of the Bombay High Court held that the former union is not a necessary party for adjudication.[92] But the correctness of this view is not free from doubt.

Section 18 of the Act empowers an adjudicator to summon the parties to the dispute and all other parties to appear in the adjudication proceedings as parties to the dispute before it. In *Bhagwan Dass Chopra*, the Supreme Court felt it necessary to evolve a reasonable procedure to deal with cases in which, a devolution of interest takes place during the pendency of a proceeding arising under the Act. The court considered it reasonable to hold that in every case of transfer, devolution, merger, takeover or a scheme of amalgamation under which the rights and liabilities of one company or corporation stand transferred to or devolve upon another company or corporation either under a private treaty, or a judicial order or under a law, the transferee company or corporation as a successor-in-interest becomes subject to all the liabilities of the transferor company or corporation and becomes entitled to all the rights of the transferor company or corporation subject to the terms and conditions of the contract of transfer or merger, the scheme of amalgamation and the legal provisions as the case may be under which such transfer, devolution, merger, takeover or amalgamation, as the case may be, may have taken place. Hence, the transferee company subject to such terms becomes liable to be impleaded or becomes entitled to be impleaded in place of or in addition to the transferor company or corporation in any action, suit or proceeding filed against the transferor company or corporation by a third party and that whatever steps have already taken place in those proceedings will continue to operate against and be binding on the transferee company or corporation in the same way in which they operate against a person on whom any interest has devolved in any of the ways mentioned in O XXII, r 20 of the Code of Civil Procedure, subject of course to any terms in the contract of transfer or merger, scheme of amalgamation or other relevant legal provisions governing the transaction under which the transferee company or corporation has become the successor-in-interest of the transferor company or corporation.[93] Where the validity of a settlement arrived at between the management and the union was referred for adjudication, the tribunal, while adjudicating the issue, did not bring on record the said union which was the party to settlement, Biswas J (for self and AK Mathur CJ) of the Calcutta High Court set aside the award of the tribunal on the ground that the award was vitiated by a jurisdictional error in so far as it did not bring on record the Mazdoor Union which was party to the settlement.[94]

Procedure to Summon Parties to Appear:

The law in respect of the power of the adjudicatory authorities, *viz*, labour courts, tribunals or national tribunals to summon a person other than the employer or workmen to appear as a party to the dispute, and the procedure to be followed for the exercise of such power has been summarised by the Calcutta High Court in *Anil Kumar*, as follows:

(1) An industrial dispute under the Act arises between an employer and his workmen, where the employer is concerned.

(2) Such a dispute can only be referred for adjudication by an order made by the appropriate government under the Act. There is no express provision in the Act or the rules framed thereunder, for adding any party to the adjudication proceedings other than parties to the reference, by the adjudicating court or tribunal.

(3) Such a power may be granted by prescribing rules and or making the relevant provision of the Code of Civil Procedure, but so far it has not been done.

(4) From the provisions of cl (b) of sub-s (3) of s 18 of the Act, it is to be implied that the tribunal has power to summon parties other than parties to the order of reference, to appear in the proceedings as parties to the dispute. This has a reference to proper and necessary parties, as such parties need not necessarily belong to the category of employer or workmen.

(5) The power to be implied from the provisions of cl (b) is to summon such a party. The form of summons has not yet been prescribed, but under sub-s (1) of s 11, the tribunal may issue summons in its own form, and follow such procedure with regard to it as it may think fit, until rules framed under the Act deal with such matter.

(6) Form D1 is not an appropriate form of summons for that purpose.

(7) Clause (b) of sub-s (3) of s 18 clearly contemplates that not only should there be such a summon but that the party summoned should have an opportunity to show that he has been summoned without proper cause. Such an opportunity be given when the party is added as a party without any notice to him, and he is compelled to join in the whole reference proceedings.

(8) It is not necessary to add such a party at all, but it is sufficient to summon such a party to appear in the proceedings as party to the dispute. However, after the summons has been served, or a show cause notice why such a summons should not be served and he has an opportunity of showing cause, it would not be illegal to put him formally on the records as a party if the tribunal thinks that it would be more convenient for the purposes of the adjudication proceedings.[95]

Illustrations

A company went into liquidation and its Managing Director, PG Brookes, was appointed as a receiver. The workmen's union applied to the tribunal to implead the receiver for the reason that he had taken possession of all the assets of the company and further that some financial commitments were involved in the issues; therefore it was necessary to implead the receiver. The industrial tribunal accordingly impleaded the receiver. It was held that s 18(3)(b) by necessary implication, gives power to the tribunal to add parties.[96] There was an industrial dispute between the workers of 65 textile mills and their managements regarding compensation for involuntary unemployment caused to the workers. One of the mills applied to the industrial tribunal to summon and implead the Government of Madras as a party to the proceedings before it. It was held that the tribunal had sufficient authority to summon and implead the government.[97] An industrial dispute between the Delhi Cloth Mills and a few other textile mills on one hand, and their workmen on the other represented by Kapra Ekta Union, was referred to the adjudication. A petition was made by the Textile Mazdoor Sangh to be added as a party to the industrial dispute. The tribunal allowed the petition and impleaded the Sangh as a party. The Punjab High Court held that the tribunal was vested with the power under s 18(3)(b) to implead such parties.[98] In an industrial dispute between Parry & Co, and their workmen, the workmen applied to the tribunal for impleading the contractors of the employers as a party to the dispute. The tribunal accordingly impleaded the said contractors and subsequently made an award granting certain reliefs against the said contractors. It was held that the tribunal had no jurisdiction to give an award against the said contractors. The Government had referred one dispute, while the tribunal decided another one. Nothing in s 18(3) can possibly be construed as authorising a tribunal to

enlarge the ambit or alter the character of a dispute referred for adjudication under section 10 of the Act.[1]

In *CRO Canteen*, an industrial dispute between workmen employed in a canteen and the canteen management was referred for adjudication. The workmen applied to the industrial tribunal to implead the factory management as a party to the industrial dispute, alleging that their real employer was the company, and not the canteen committee. The tribunal on evidence on record found that the real employer was not the company and hence dismissed the application. In writ proceeding it was held that in view of the findings arrived at by the industrial tribunal, its order rejecting the application to implead the company as a party to the industrial dispute could not be interfered with. However, liberty was given to the petitioner for making a second application for impleading the company as a respondent on any ground other than that the company is the real employer of the concerned workmen.[2] The demand for amendment of the Provident Fund Rules was referred for adjudication. The provident fund vested in the trustees under the Rules of the Provident Fund Scheme. Held, the trustees of Provident Fund in the circumstances could be summoned to appear as parties to such disputes.[3] An industrial dispute in regard to a claim for bonus between workmen and an employer 'X' was referred for adjudication.

Employer 'X' contended that 'B' is the real employer and that under the terms of the contract, the latter is liable to meet the claim of bonus by the concerned employees. Held, the employer 'B' in the circumstances could not be impleaded as a party to the pending dispute. Such questions are not incidental to the main dispute referred for adjudication.[4]

An industrial dispute in regard to various service conditions between the workmen and management of an electric supply undertaking was referred for adjudication. Pending such reference, the licence of the company to manufacture and supply energy was revoked by the State Government, and the properties and assets of the company were sold to the State Electricity Board, under an agreement, *inter alia*, providing for sale of a substantial portion of the machinery of the undertaking to the Board. The Board further had option to take such of the orders and contracts of the company as selected by it. But the Board was not liable to fulfil contracts or obligations of the company in respect of supply of energy. The assets of the undertaking were sold free from all incumbrances. Sale and purchase prices were determined in accordance with the provisions of the Indian Electricity Act 1910. The Board was not under any obligation to meet the claims of the employees of the company, or to take over or employ any employee of the company. On revocation of its licence, the company terminated the services of all the employees paying them retrenchment compensation under s 25 FF of the Industrial Disputes Act. It was held that in the circumstances, the Board could not be considered as a successor-in-interest of the company, even though there was continuity and identity of the company. The Board in the circumstances was not considered necessary or proper party, even though there were continuity and identity of the company. The order of the industrial tribunal impleading the Board as a party to the adjudication proceedings pending between the concerned employees and the company was quashed by a writ of certiorari.[5]

In *Udaipur Phosphates*, a few employees were retrenched by the transferor-employer. In the subsequent transfer of the undertaking, the transferee-employer signed a 'Memo of Understanding' agreeing to employ the existing employees of the transferor-employer. A single judge of the Gujarat High Court held that the tribunal would be justified in adding the transferee-employer as a party to the proceedings, only after it comes to the conclusion that the retrenchment effected by the transferor-employer prior to the transfer of undertaking was invalid.[6] Where, in a dispute between a contract worker and the contractor running a canteen in HMT factory, the Government impleaded the company as a party to the dispute, by a subsequent order and on the request made by the worker, it was held that the state government had no authority or power to implead another party on the request of one of the parties to the dispute, more so, in the face of a direction issued by the Division Bench to the tribunal to decide the dispute between the two parties according to the original order of reference.[7] If the labour court considers that the presence of a party is necessary for the effective adjudication and enforcement of the award, it has implied power to add or admit a party to the industrial dispute. Where the promotion of a few employees was challenged by certain others through a civil suit and, during its pendency, by raising simultaneously an industrial dispute, the application of the first category of employees (who were promoted) seeking to be impleaded as necessary parties cannot be refused by the labour court in the interests of effective adjudication of the dispute.[8] But such power cannot be exercised by the tribunal to enlarge the scope of reference.[9]

The management of the company is not a relevant or necessary party to the dispute relating to the termination of the service of a workman employed by the cooperative society running the industrial canteen, as the workman was neither appointed nor terminated by the management.[10] Where the labour court directed the Chairman-cum-Managing Director to be impleaded as a party in a dispute where the management contended that there was no employer-employee relationship between the company and the workman whose services were terminated and that he was in the personal employment of the Chairman-cum-Managing Director, the High Court quashed the direction of the labour court holding that the said direction virtually amounts to amending the terms of reference. The High Court further held that the onus of proving that the workman was not the employee of the company lies on the management.[11]In a case where the labour court passed an order under s 33C(2) against the Bay of Bengal Programme of United Nations, which enjoyed legal immunity under the United Nations (Privileges and Immunities) Act 1947, the High Court held that it is the Government which is answerable to such a claim against the organisation and accordingly ordered that the Central Government stood impleaded as the opposite party in the proceedings before labour court[12]

Extended Operation of Settlements:

The whole policy of s 18 appears to be to give an extended operation to settlements arrived at 'in the course of conciliation proceedings', and that is the object with which four categories of workmen on whom such settlements are binding are specified in s 18(3) of the Act.[13]It is manifest that cll (a) and (b) have been given extended meaning by the introduction of cll (c) and (d) to s 18(3) of the Act.[14]

Heirs, successors or assigns:

Sub-clause (c) makes a settlement arrived at in the course of conciliation proceedings, and the awards binding on the 'heirs, successors or assigns' of the employer in respect of the establishments to which the dispute relates, whether or not they were summoned to appear before the tribunal as parties to the dispute. But a settlement or an award will not bind the

heirs, successors or assigns of an employer if at the time of the settlement reference or the award, they were minors.[15] This provision has been enacted with a view to checkmate the devices to avoid the liability under settlements and awards by transfer of establishments. In *Anakapalle CAIS*, a company manufacturing sugar which was running at a loss was contemplating to shift its mills to another locality. The local cane-growers formed a co-operative society and purchased the machinery and the business of the company. The company agreed to pay statutory compensation to its employees. The society did not purchase the goodwill of the company nor its outstandings and liabilities. The dispute with respect to 49 permanent employees and 103 seasonal employees who were not absorbed into the service of the co-operative society, was referred to an industrial tribunal for adjudication. On a preliminary objection being raised, the tribunal held that the society was a 'successor-in-interest' of the company, and gave the relief of re-employment to the concerned employees. In appeal, the Supreme Court discussed various aspects of the question. Then after enumerating a number of factors to be taken into consideration for deciding the question whether one party is the successor-in-interest of another, the court observed that 'the decision of the question must ultimately depend upon the evaluation of all the relevant factors and it cannot be reached by treating anyone of them as of overriding or conclusive significance.[16] In *Brahmaputra Tea*, the official liquidator conveyed, by a registered sale deed, the equity of redemption in three tea gardens to a purchaser along with certain other items of machinery. The sale by the official liquidator, acting on behalf of the tea company, was specifically of the equity of redemption owned by the company and was subject to the mortgage decree and other liabilities payable up to the date of sale. In view of the facts and circumstances of the case and the recitals in the sale deed, following the tests laid down in *Anakapalle* case, the court held that the purchaser could not be said to be the successor-in-interest of the tea company because what was purchased by him was only the equity of redemption and part of the assets of the tea company in respect of which the official liquidator was still functioning.[17]

Factors to be considered for treating Transferee as Successor-in-interest:

This provision imposes liabilities of an award not only on an employer in the industrial dispute but also his heirs and successors or assignees. To enforce this liability against a transferee, he must be a successor-in-interest. A person can be called a successor-in-interest only if the prior business is taken over as a going concern with all its assets and liabilities. Therefore, before impleading a party, the tribunal should record a finding that the person proposed to be impleaded is successor-in-interest of the employer, and without such finding, the tribunal cannot implead a person as a necessary party to the dispute. A person can be called a successor-in-interest only if the prior business is taken over as a going concern with all its assets and liabilities. But where the entire business is not taken over, only land and buildings are purchased for starting altogether a new business and the plant and machinery is left to the vendor's disposal, the purchaser cannot be considered a successor or assignee of the old business.[18] In *Anakapalle CAIS* (supra), the Supreme Court has stated the following illustrative tests:

(i) Did the purchaser purchase the whole of the business?

(ii) Was the business purchased as a going concern at the time of the sale transaction?

(iii) Is the business purchased carried on at the same place as before?

(iv) Is the business carried on without a substantial break in time?

(v) Is the business carried on by the purchaser the same or similar to the business in the hands of the vendor?

(vi) If there has been a break in the continuity of the business, what is the nature of the break and what were the reasons responsible for it?

(vii) What is the length of the break?

(viii) Has goodwill been purchased?

(ix) Is the purchase only of some parts and the purchaser having purchased the said parts, purchased some other new parts and started a business of his own which is not the same as the old business but is similar to it?

But these tests are merely illustrative and by no means exhaustive or exclusive of one other. For applying these tests to a particular case, the following observations of the court provide the guidelines:

> These and all other relevant factors have to be borne in mind in deciding the question as to whether the purchaser can be said to be a successor-in-interest of the vendor for the purpose of industrial adjudication. It is hardly necessary to emphasise in this connection that though all the facts to which we have referred by way of illustration are relevant, it would be unreasonable to exaggerate the importance of anyone of these facts or to adopt the inflexible rule that the presence or absence of anyone of them is decisive of the matter one way or the other. If industrial adjudication were to insist that a purchaser must purchase the whole of the

property of the vendor concern before he can be regarded as a successor-in-interest, it is quite likely that just an insignificant portion of the property may not be the subject-matter of the conveyance and it may be urged that the exclusion of the said fraction precludes industrial adjudication from treating the purchaser as a successor-in-interest. Such a plea, however, cannot be entertained for the simple reason that in deciding this question, industrial adjudication will look at the substance of the matter and not be guided solely by the form of the transfer. What we have said about the entirety of the property belonging to the vendor concern, will apply also to the good-will which is an intangible asset of any industrial concern. If good-will along with the rest of the tangible property has been sold, that would strongly support the plea that the purchaser is a successor-in-interest, but it does not follow that if good-will has not been sold, that alone will necessarily show that the transferee is not a successor-in-interest. The decision of the question must ultimately depend upon the evaluation of all the relevant factors and it cannot be reached by treating anyone of them as of overriding or conclusive significance.[19]

Establishment to which the Dispute Relates:

The words 'establishment to which the dispute relates' have been significantly used in cll (c) and (d). This indicates that the settlements or awards mentioned in this sub-section would bind the employer under cl (c) only with respect to the establishment to which the industrial dispute under reference relates. An illustration of this is to be found in the decision of the Supreme Court in *Indian Oxygen.*[20] In AEI, the Calcutta High Court held that, from the use of the expression 'establishment' in s 18(3)(c), it is fairly clear that the establishment must exist in some definite or indefinite form. As a result of taking over of various establishments of insurance companies doing the life insurance business, the establishment run by the Life Insurance Corporation is a unified establishment, and the old establishments have not retained their identity. Consequent upon such merger of the various establishments, it is not possible to say that any old establishment as such has continued. In this view of the law, the awards and settlements which governed the employers and employees in relation to various insurance companies, before the establishments were taken over by the Life Insurance Corporation, were held to have ceased to bind the Life Insurance Corporation under s 18(3) of the Act.[21] In *Arunachalam*, a purchaser who purchased only four buses along with the route permits from a motor service company, was held not to be a successor-in-interest of the previous owner, because it did not purchase the entire business of the previous operator whose identity had been extinguished by selling his business to several purchasers.[22]

Practice and Procedure:

For the application of s 18(3)(c) of the Act, it is necessary that, if the award is sought to be enforced against a person who is not a party to the award, such person must be either an heir, successor or an assignee of the establishment to which the dispute relates. In the absence of evidence to show that the parties against whom certain sums are directed to be recovered under a certificate issued under s 33C(1) were heirs, successors or assignees of the employer, the certificate issued by such authority would be bad in law.[23]

Binding on Present and Future Workmen:

This clause appears to have been designed to meet some difficulties implicit in the collective bargaining with a floating army of workmen, a few of whom may not choose to be the members of any union and, one or more unions may, for reasons of their own, not like to reach a settlement. Legislature contemplates making such settlement binding, even on such indifferent or unwilling workmen, if the conciliation officer brings it about bona fide to ensure industrial peace.[24] From the language of this clause, it is clear that where a party referred to in cl (a) or cl (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates, on the date of the dispute, and all persons who subsequently become employed in that establishment or part thereof, would be bound by the settlement or the award. In order to bind the workmen, it is not necessary to show that the said workmen belong to the union which was a party to the dispute before the conciliator. The whole policy of s 18 appears to be to give an extended operation to an award and a 'settlement arrived at in the course of conciliation proceedings or adjudication proceedings', and that is the object with which the four categories of persons bound by such awards and settlements are specified.[25] The expression 'any party bound by the award' in s 19(6) refers to and includes all persons bound by any award under this section.[26] There is a significant difference between the provisions of cl (c) and cl (d). Clause (c) contemplates that a settlement or an award shall be binding not only upon the employer, but also upon his heirs, successors or assignees in respect of the establishment to which the dispute relates. But no reference to the heirs, successors or assigns of a workman is to be found in cl (d). Evidently, it was not the intention of the legislature to provide for adjudication of an industrial dispute at the instance of heirs or legal representatives of a deceased workman. No duty, therefore, is cast on the tribunal to bring on record, the heirs or legal representatives of a deceased workman.[27]

In *Anthony Gomes*, conciliation proceedings were initiated in connection with a dispute relating to the dismissal of the workman. But subsequently, a settlement was arrived at between the union and the management, relating to certain

disputes including the dispute relating to the dismissal of the workman despite the fact that he had ceased to be a member of the union at that time. In terms of the said settlement, the employment of the workman ceased with effect from a particular date and he was to be given ex gratia amount equivalent to 40 per cent of his basic wages and dearness allowance for the period of two months together with one month's wages inclusive of dearness allowance as an additional ex-gratia payment and the provident fund dues of the workman were to be paid in accordance with the company's rules. Accordingly, the company discharged the workman from service in terms of the settlement. A single judge of the High Court held that the discharge of the workman being by a settlement in the course of conciliation proceedings was binding on him.[28] This holding does not appear to be correct law. Since, the workman raised a dispute on his own under s 2A without involving the union, it was not open to the union to club the said dispute with other disputes which were admitted in conciliation and which nullified the conciliation proceedings initiated into the dispute raised by the workman under s 2A. In *Andhra Bank Offices Union*, the AP High Court held that, in order to be binding, a settlement should essentially be between the employer and the workmen. In other words, a settlement between the employer and non-workmen or a union not representing the workmen will not be binding on the parties.[29] In *Punjab National Bank*, the facts were: a reference was made by the Government in the following terms:

> Whether the demand of the Commission Agents or as the case may be Deposit Collectors employed in the banks listed in Annexure that they are entitled to the pay scale and other service conditions admissible to regular clerical employees of these banks is justified? If not to what relief the workers concerned entitled to and from which date?

Several banks including the Indian Banks Association (IBA) were impleaded in the said reference. The tribunal passed an award on 22 December 1988, in which it opined that the deposit collectors were 'workmen' and as such the reference was maintainable. The tribunal, in its award, directed absorption of eligible deposit collectors, who are less than 45 years of age as on 3 October 1980, if otherwise eligible, and, to others, extension of benefits as conferred by the Award, *i.e*., full back wage of Rs. 750/- linked to minimum deposit of Rs. 7500/ p.m., (ii) Incentive remuneration @ 2% for deposit collected above Rs. 7500/ p.m., (iii) Conveyance allowance of Rs. 50/ p.m. for deposit collected less than Rs. 10,000/ and Rs. 100/ p.m. for deposit collected over Rs. 10,000/ p.m., and (iv) Gratuity equal to 15 days commission for each year of service rendered. In the writ petition filed by the Banks against the award, the High Court had set aside that part of the award which directed absorption of the Deposit Collectors, while upholding the other part thereof. Appeals to Supreme Court soon followed both from the Banks and the workmen on different grounds including (i) non-maintainability of the award, (ii) not being given individual notice to the employees, and (iii) the binding nature of the award on the workmen who were not put on individual notice. Rejecting the contention of respondent-workman that he was not bound by the award, Sinha J (for self and Bhandari J) observed:

> From a perusal of clause (d) of sub section (3) of Section 18 of the Industrial Disputes Act, it is, thus, evident that all workmen who are employed in the establishment or who subsequently become employed in that establishment would also be bound by an award made by an industrial Tribunal. The management as also the workmen were parties to the said award. Hence, respondents cannot be heard to say that the award was not binding on them only because they were not parties.. .. In an industrial dispute referred to by the Central Government which has an all India implication, individual workman cannot be made parties to a reference. All of them are not expected to be heard. The Unions representing them were impleaded as parties. They were heard. Not only the said Unions were heard before the High Court, as noticed hereinbefore from a part of the judgment of the High Court, they had preferred appeals before this court. Their contentions had been noticed by this Court. As the award was made in presence of the Unions, in our opinion, the contention of respondents that the award was not binding on them cannot be accepted. The principles of natural justice were also not required to be complied with as the same would have been an empty formality. The Court will not insist on compliance of the principles of natural justice in view of the binding nature of the award. Its application would be limited to a situation where the factual position or legal implication arising thereunder is disputed and not where it is not in dispute or cannot be disputed. If only one conclusion is possible, a writ would not issue only because there was a violation of the principle of natural justice.[30]

Settlement which runs counter to the statutory provisions:

In *Oswal Agro*, the facts disclosed that, after filing an application for permission under s 25-O, the company entered into a settlement with the workmen, which was challenged by the workmen in the High Court successfully. Dismissing the appeal filed by the management, Sinha J (for self and Hegde J) observed:

> A settlement within the meaning of Section 2(p) read with sub- section (3) of Section 18 of the Act undoubtedly binds the workmen but the question which would arise is, would it mean that thereby the provisions contained in Sections 25-N and 25 -0 are not required to be complied with? The answer to the said question must be rendered in the negative. A settlement can be arrived at

between the employer and workmen in case of an industrial dispute. An industrial dispute may arise as regard the validity of a retrenchment or closure or otherwise. Such a settlement however, as regard retrenchment or closure can be arrived at provided such retrenchment or closure has been effected in accordance with law. Requirements of issuance of a notice in terms of Sections 25-N and 25 -0, as the case may, and/or a decision thereupon by the appropriate Government are clearly suggestive of the fact that thereby a publicpolicy has been laid down. The State Government before granting or refusing such permission is not only required to comply with the principles of natural justice by giving an opportunity of hearing both to the employer and the workmen but also is required to assign reasons in support thereof and is also required to pass an order having regard to the several factors laid down therein. One of the factors besides others which is required to be taken into consideration by the appropriate Government before grant or refusal of such permission is the interest of the workmen. The aforementioned provisions being imperative in character would prevail over the right of the parties to arrive at a settlement. Such a settlement must conform to the statutory conditions laying down a public policy. A contract which may otherwise be valid, however, must satisfy the tests of public policy not only in terms of the aforementioned provisions but also in terms of Section 23 of the Indian Contract Act.. .. Indisputably, in this case, the industrial undertaking belonging to the appellant herein attracts the provisions of Chapter V-B of the Act and consequently the provisions referred to in Section 2(s) including Section 25-J shall apply in relation thereto.[31] (Paras 15 & 19).

Different Unions concerned with Conciliation Proceedings:

Occasionally peculiar situations arise in the process of settlement of industrial disputes on account of trade union rivalries. The same establishment may have more than one union. Sometimes, each one of such unions may enter into negotiations with the employer with respect to certain or some demands of the workmen and likewise, each one of such unions may go before the conciliator for conciliation of the demands. It also happens that the negotiations with one of the unions in the course of conciliation proceedings may succeed and end in a settlement whereas there may be no settlement with the other unions. The question naturally will arise whether such a settlement will bind the other unions, and the workmen in general in terms of s 18(1)(d). In *Ramnagar Cane Sugar*, the Supreme Court held that such a settlement will bind the workmen of the other unions as well as all other workmen who are employed on the date of the dispute and who may be subsequently employed in the establishment.[32] In *Tiruchi-Srirangam*, a single judge of the Madras High Court took the view that where there are identical disputes raised by two sets of workmen or there are relative unions before the same conciliation officer, they should be regarded as one dispute any settlement in such a situation will have to be arrived at, not between the management and some of the workmen only, but between the management and the entirety of the workmen who are parties to the dispute either by themselves or through their unions before the same officer, so as to make the settlement come within the ambit of s 18(3) of the Act.[33] The attention of the High Court does not appear to have been drawn to the decision of the Supreme Court in *Ramanagar Cane Sugar*. The holding in *Tiruchi-Srirangam* is inconsistent with the holding of the Supreme Court in *Ramanagar Cane Sugar* and is wrong. If an industrial establishment has two unions, say '*A*' and '*B*', an agreement otherwise than in the course of conciliation proceeding between the management and the workers of union 'A' will be binding on the management and the workers of union '*A*' only. But a settlement 'arrived at in the course of conciliation proceedings' will be binding on all the members of the other unions who were not parties to the agreement as well as by virtue of s 18(3)(d) of the Act.[34] In *Pierce Leslie*, a conciliation settlement was arrived at with the participation of only one of the two unions operating in the establishment. Both the unions had raised a demand with the employer; but only one union was invited for conciliation talks. In these circumstances, the Kerala High Court observed that it may be difficult to say that the settlement is a settlement in the course of conciliation proceedings conducted in accordance with the provisions of the Act.[35] But in *Kerala Minerals*, a single judge of the same High Court held that a union which has not put forth any demand cannot be said to raise any industrial dispute under s 12 and was not, therefore, entitled to participate in the conciliation proceedings. The fact that such a union was not invited to participate in the conciliation proceedings will not in any way vitiate the settlement arrived at in the course of the conciliation proceedings and such a settlement would be binding on all workers including those who may not owe allegiance to the participating union.[36]

Illustrations

Where some workmen after considering an offer, by a statutory corporation offering certain changes in the service conditions of its employees with an option to the employees to opt for the existing service conditions accepted it, it was not later on open to them to challenge the settlement agreement on the ground that most of the workmen who agreed to the change were not aware of its implications.[37] There were two unions: union '*A*' and union '*B*' in an establishment. But there was only one conciliation proceeding pending before the conciliation officer. No objection was taken by the union '*A*' to the settlement that had been arrived at between union '*B*' and the management in the course of the conciliation proceeding, despite the notice by the conciliation officer to the effect that the conciliation proceedings, were being heard by him in the matter of the dispute. In these circumstances, it was held that the settlement would come under s 18(3) and would be binding upon all the workmen including those who owed their allegiance to union '*A*'.[38] A company had many branches in Kerala, Mysore and Madras states, including one in Cochin. A majority of the monthly paid employees were members of the Cochin Commercial Employees' Association. minority members of the Cochin office and a large number of employees

of the company in other branches, were members of the Mercantile Employees' Association. In the course of a conciliation proceeding, the management entered into a settlement with the Mercantile Employees' Association in respect of a demand in the Cochin office. It was held that the Cochin Commercial Employees' Association could not question the validity of the agreement.[39] In a concern three unions represented the workmen and each one of them presented a charter of demand to the management. One of the unions arrived at a settlement with the management without reference to the other two. But regarding the demands made by the other two unions, the conciliation officer served notices on them. It was held that the settlement between the first union and the management did not bind the workmen who were not its members and also did not affect the rights of the members of the other two unions to raise the industrial dispute.[40] Where the dispute regarding additional bonus was raised by one of the unions and the conciliation officer recorded the settlement after holding conciliation proceedings in relation thereto, and the management in the circumstances of the case could negotiate for settlement only with that union, it was held that the settlement was binding on all the workmen of the establishment under s 18(3)(d) of the Act.[41]

Where a settlement was arrived at between the transferor-bank and its union providing for compassionate appointments to the heirs of its deceased employees, it was held that on a subsequent amalgamation, the transferee bank which had emerged as a result of the amalgamation would be liable to meet the contractual obligations flowing from the settlement entered into by the transferor bank, regardless of the fact that the transferee bank was an outsider (stranger) to the settlement (contract) between the transferor bank and its employees.[42] A settlement arrived at under s 12(3) between the management and four out of the five unions limiting the payment of lay-off compensation to the forty-five days as provided in s 25C is binding on all the workmen including those belonging to the union which is not party to the settlement; the workmen of the said union cannot invoke s 33C for computation and recovery of compensation for the period beyond forty-five days on the ground that the said settlement was not binding on them or on the ground that the statutory right given under s 25C could not be whittled down by a settlement to which they were not parties.[43]A settlement arrived at in the course of conciliation proceedings and executed between parties has a statutory force and is binding upon an unregistered trade union and its members. A suit by the unregistered union alleging that the terms of settlement are not fairly implemented is barred. The proper remedy is to seek reference for industrial adjudication under the Act.[44] A tripartite settlement arrived at between the management and the recognised union cannot be challenged by a section of the employees.[45] A settlement of disputes between the parties themselves should be preferred, where it could be arrived at, to industrial adjudication, as the settlement is likely to lead to more lasting peace than an award. A settlement is arrived at by the free will of the parties and is a pointer to there being goodwill between them. When there is a dispute that the settlement is not bona fide in nature or that it has been arrived at on account of fraud, misrepresentation or concealment of facts or even corruption and other inducements, it could be the subject-matter of an industrial dispute which an appropriate Government may refer for adjudication after examining the allegations as there is an underlying assumption that the settlement reached with the help of the conciliation officer must be fair and reasonable.[46]

In *SC Adhikari*, the Bombay High Court held that a clause in a settlement arrived at in the course of a conciliation proceeding under s 18(3) cannot be challenged in a writ petition. The court, however, observed that the petitioners could seek their remedy under the provisions of the Industrial Disputes Act.[47]The latter part of this decision is clearly flawed. In the case of a settlement arrived at in the course of a conciliation proceeding, the presumption is in favour of its fairness for the reason that the terms are settled with the help and under the supervision of a competent authority. In the face of this legal position, it is difficult to comprehend what was the remedy under the so-called provisions of the Act, which the learned Chief Justice was referring to! It is equally doubtful whether a term of such a settlement could at all be challenged by raising an industrial dispute, if that is what the observation implies, so long as the settlement is in operation. In *Shyam Lal*, the Supreme Court held that where a settlement was arrived at under ss 12(3) and 18(3) of the Act between the University and its employees providing that the employee would be posted as a clerk, the University cannot wriggle out of its obligations under the settlement and refuse regularisation of the service of the clerk based on qualifications prescribed by the Vice-chancellor, prior to entering into the settlement.[48] A settlement arrived at under s 18(3) by the union, who enjoyed the majority support of the workmen employed in two units of the company located at Hubli and Harihar, has an extended application and is binding on all the workmen of the establishment in both the units. The petitioner-union, having acquiesced in the practice and agreement under which the two units were to be represented as a single unit for the purpose of collective bargaining, cannot go back on its own stand and plead that the two units should be treated separately.[49] Where subsequent to the raising of a dispute by a few workmen, the management drew up a scheme for payment of compensation to the workmen before closing down the unit and signed a settlement with the union, as a consequence of which the workmen received the payments and resigned from service, thereafter the workmen who left the service cannot raise a dispute claiming that the said settlement was achieved through misrepresentation and that it was an unfair labour practice. Once the workmen resigned and accepted the stipulated amounts under the settlement, neither the service nor the dispute could survive, and the Government would be justified in refusing to refer the dispute for adjudication.[50] In *Air India*, the facts were that the management entered into a settlement with the recognised union under ss 12(3) and 18(3), which provided for a deduction from the wages of employees towards death benefit scheme. While the agreement was subsisting, the management stopped the said deduction, admittedly at the instance of the labour commissioner, on the ground that the

individual workmen had not authorised the said deduction. The Bombay High Court held that when the recognised union negotiates with the employer, the workmen as individuals would not come into the picture and that the settlement was binding on all workmen and the employer was not justified in stopping the deductions unilaterally.[51]

Application of Awards:

There is nothing in s 18 to bar the adjudication of a dispute by the commissioner for workmen's compensation.[52] Further, this section will also not apply to a particular award, the decision of which is intended for a particular class of employees. Thus, if under an award a particular number of old workmen are to get a certain benefit, it does not *ipso facto* mean that all new entrants would be equally entitled to the benefit, when they have been by necessary implication, excluded from the operation of the award.[53]

'On the Date of the Dispute':

Section 18(3)(d) does not refer to the date of reference under s 10(1), but it refers to the date on which the industrial dispute arose. Thus, if a workman was in the employment of the company on the date on which the dispute arose, he becomes a party to the dispute, and being employed as such, the award is binding on him as well as his employer[54] The same principle applies to settlements.[55] Though an award is binding on every workman who was employed in the establishment on the date of the dispute, it cannot be assailed by an individual workman because at no stage, was he a party to the dispute in his individual capacity.[56] The industrial disputes except those falling under s 2A, postulate collective disputes. The awards, therefore, can only be assailed by the workmen in their collective character whether through a union or otherwise.

(ii) Settlements Arrived at in the Course of Conciliation Proceedings

The import and effect of the words 'in the course of conciliation proceedings', has been discussed under s 2(p). The mode and manner of arriving at 'settlements in the course of conciliation proceedings', has been discussed under s 12(3). Section 12 makes a distinction between a settlement 'arrived at in the course of conciliation proceedings' and a settlement 'arrived at otherwise than in the course of conciliation proceedings'. The legal effects of both kinds of settlements are not identical. Under s 18(3), a settlement 'arrived at in the course of conciliation proceedings' will be binding on all parties to the industrial dispute referred to in cll (a) to (d) of s 18(3) which in the case of the employer will include his heirs, successors or assignees in respect of the establishment to which the dispute relates and in the case of a workman will include all persons who are employed in the establishment or part of the establishment on the date of the dispute and all persons who subsequently become employed in the establishment or part thereof. But the settlement arrived at between the management and workmen otherwise than in the course of conciliation proceedings will bind only the actual parties to the agreement in accordance with s 18(1) of the Act.[57] Intervention of the conciliation officer and his belief in the settlement being fair and reasonable, appears to be the basis of this provision which presently takes into account the impossibility of satisfying every section. It is the intervention of the conciliation officer that makes the difference between the settlement that is reached in the course of conciliation proceedings and the one reached otherwise than in conciliation proceedings and makes the former binding on a larger cross-section of the workmen. 'Therefore, a settlement arrived at in the course of conciliation proceedings with a recognised majority union will be binding on all workmen of the establishment and even to those who belong to the minority union which had objected to the same. To that extent, it departs from the ordinary law of contract. The object obviously is to uphold the sanctity of settlement reached with the active assistance of the conciliation officer and to discourage an individual employee or a minority union from scuttling the settlement. There is an underlying assumption that a settlement reached at with the help of the conciliation officer must be fair and reasonable and can, therefore, safely be made binding not only on the workmen belonging to the union signing the settlement, but also on others'.[58]

That is why a settlement arrived at 'in the course of conciliation proceedings is to be put on par with an award made by an adjudicatory authority'. In other words, such a settlement is binding in the same manner as the award of an adjudicatory authority. It is, therefore, assumed that the conciliation officer will not persuade any union to settle unless he is satisfied that the settlement is fair and reasonable and it is in the larger interest of industrial peace and in the interest of the workmen as a whole. The legislature has given statutory effect to such a settlement by preventing agitation of the same dispute by other workmen for the statutory period even if they do not happen to be a party to it and are found to have not been agreeable to the terms indicated therein. The circumstance, that the signatory union happens to represent majority of the workmen in a concern, is not relevant as long as the settlement has been arrived at bona fide with the mediation of the conciliation officer and its terms appear to be on the whole, reasonable and fair.[59] The settlement arrived at during the course of conciliation proceedings, however, binds the parties under this section only to the extent of the matters covered by the settlement. It cannot prevent the workmen from raising any dispute in future which was neither visualised at the time of the settlement nor covered by the settlement. In other words, the sanctity of settlement is confined to the terms of settlement which has been signed and sealed between the parties. But the concept of sanctity of a settlement cannot be

extended to cover disputes or demands made on behalf of the workmen which are not specifically covered by such settlement. The general clauses in a settlement to the effect that no demands involving any monetary commitment will be entertained by the management and the settlement is deemed to be full and final settlement of all demands and the demands not referred to would be deemed to have been withdrawn would also not preclude the workmen from raising such other disputes as are not covered by the settlement. The words 'relating to monetary or financial commitment' cannot be stretched to an extent that the management is absolved forever of undertaking any financial obligation for the benefit of the workmen in view of the settlement arrived at. In such a situation, the question of monetary or financial commitment would be confined to the concept of the terms of settlement. But the management cannot render itself immune from assuming any financial obligation of any kind, as this cannot be borne out by interpretation of such clauses of a general nature. Similarly, the expression that the 'settlement is deemed to be full and final settlement of all demands made by the union and the demands which had not been made would be deemed to have been withdrawn also would have to be given a plausible interpretation—the settlement would be deemed to be full and final settlement in regard to all the demands which had been considered in the settlement'.[60]

For binding the parties, s 18 makes a distinction between a case of settlement without the aid of the recognized agency under the Act and the one arrived at with the help of it or which may be the result of the adjudication by a tribunal functioning under the Act.[61] The whole policy of s 18 appears to be to give an extended operation to the 'settlements' arrived at in the course of conciliation proceedings and that is the object, with which the four categories of persons bound by such settlement are specified in s 18(3) of the Act.[62] 'In extending the operation of such a settlement beyond the parties thereto, sub-s (3) departs from the ordinary law of contract and gives effect to the principle of collective bargaining'.[63] The legal effects of both the kinds of settlements are not identical in that whereas the former binds, under the clear provisions of s 18(1), only the actual parties to the agreement; the latter binds the others also as specified in s 18(3), even though such persons were not parties to the dispute and joined the establishment subsequent to the settlement.[64]Section 18(1) is merely intended to cure the defect in the law and to make an agreement possible with reference to an industrial dispute, binding on the parties thereto. It is intended to go no further.[65] There is nothing in the section to justify an extended meaning being given to it, contrary to the ordinary law that a contract will bind only those that are parties to it. In other words, such a settlement would bind only those workers who were represented by the union at the time when the settlement was arrived at and not the workers who had ceased to be members of the union at the time when the settlement was arrived at. If it were to be binding on others as well, there was really no need for any reference in sub-s (3) to the binding nature of a conciliation settlement.[66]Section 18(3) specifically provides that a 'settlement arrived at in the course of conciliation proceedings' which has become enforceable, shall be binding on all the parties specified in cll (a), (b), (c) and (d). Clause (c) binds the 'heirs, successors or assignees' whereas a party referred to in cl (a) or (b) is an employer and cl (d) makes it clear that where a party referred to in cl (a) or (b) is composed of workmen, all persons, who were employed in the establishment or the part of the establishment, as the case may be, to which the dispute relates, on the date of the dispute, and all persons, who become subsequently employed in that establishment or part of the establishment, shall be bound by the settlement.[67] It is only by virtue of this provision that the settlement specified in the section becomes binding on persons not actually parties thereto.

In *Barauni Refineries*, the facts disclosed that a settlement was arrived at between the management and union providing, *inter alia* to the effect that the unions shall not raise any demand 'having financial burden on the corporation' was arrived at between the management and the workmen in the course of conciliation proceedings. Subsequently, the workmen sought to have the clause relating to superannuation age modified by raising the retiral age from 58 to 60 years. The court held that during the operation of the settlement it was not open to the workmen to demand change in the relevant certified Standing Orders because any upward revision of the age of superannuation would come in conflict with the settlement as the upward revision of superannuation would throw additional financial burden on the management.[68] In *Motor Industries*, a settlement between the employer company and the union provided that the parties would not resort to direct action, such as strike, go-slow, lock-out, *etc* without giving four days' notice. The workmen went on a spontaneous strike without giving the required notice and without there being any call from the association. The workmen took the stand that the settlement was between the management and the association, which was a distinct legal entity and that the obligation to give the notice was only on the association and not on the workmen and as such the strike by the workmen could not be called a strike in breach of the relevant term of the settlement. The Supreme Court rejected the contention and held that a settlement arrived at between an employer and a union representing the employees during the conciliation proceedings is binding not only on such union but also on the workmen whom it represents.[69] Similarly, in *Ram Pukar Singh*, the settlement was arrived at between the management and the union of the workmen in the course of conciliation proceedings. Pursuant to this settlement, the appellant employees were upgraded. Subsequently, another settlement was entered into between the management and the union for revision of the pay scales and under that settlement, the appellants received higher salary from the revised pay scales. Even then, they raised another dispute in which they took the stand that the aforesaid settlements were not binding on them because they were in a 'supervisory' category and not 'workmen'. Hence, the union had no right to represent them. The Supreme Court discountenanced these contentions holding that under the settlements, the workmen had not only received the benefits of arrears of salary but also of revised pay scales since then.

They could not have had these benefits if they were not workmen and, therefore, had considered themselves as belonging to a non-supervisory category. Since there was only one union representing all workmen during the relevant period, the appellants were bound by the settlements, whether they were members of the union or not.[70]

Where a dispute relating to the termination of service of a workman has been referred to adjudication under s 2A, it cannot be the subject-matter of a settlement between the union and the management without the consent of the concerned workman.[71] A settlement, in either case, by virtue of s 19(2) shall be binding on the parties for such period as may be agreed upon by them and, if no such period is agreed upon, it shall be binding for a period of six months from the date on which the memorandum of settlement has been signed by the parties to the dispute and shall continue to be binding until the expiry of two months from the date on which a notice in writing intimating an intention to terminate the settlement is given by one of the parties to the other party or parties to the settlement.[72] In order to be binding under s 18(3), a settlement must be one which is 'arrived at in the course of conciliation proceedings'. A settlement arrived at between the management and the union representing the majority of the workmen will not cease to be a settlement in the course of conciliation proceedings merely because the minority union has not signed it.[73] But the sanctity of the settlement under s 18(3) cannot be extended to cover the demands or disputes raised on behalf of the workmen which were neither visualised nor covered by the terms of settlement. In other words, even the settlement arrived at in the course of the conciliation proceedings has to be confined to its specific terms.[74] A settlement arrived at otherwise than in the course of conciliation proceedings shall bind only the parties to such settlement under s 18(1) and not others. A settlement arrived at with respect to an industrial dispute after that dispute has been referred for adjudication under s 10(1), cannot be a 'settlement arrived at in the course of conciliation proceedings', even if such settlement has been arrived at with the mediation of a conciliation officer.[75]Likewise, where a settlement is arrived at before a conciliation officer, whose appointment has not been made by a notification in the Official Gazette of the 'appropriate government', will not be a 'settlement in the course of conciliation proceedings', as such an officer will not be a conciliation officer as appointed under s 4(1) of the Act.[76]

(iii) Binding Effect of Awards

The award of the adjudicatory authorities, *viz*, labour courts, tribunals and national tribunals and the arbitrators, under s 10A where a notification under sub-s (3A) of s 10A has been issued have been made binding of the parties mentioned in cll (a), (b), (c) and (d) of sub-s (3). Such awards will remain in operation as provided under s 19(3) after having become final under s 17(2). The effect of this is that as long as an award is not terminated after the period of its operation is over, it will remain binding on the parties. But there are two types of awards, *viz*,

(1) Where the subject-matter of the dispute is decided once for all; for instance, the question of legality of the action of discharge or dismissal of a workman. In such a case there is no question of the period of its operation or its being terminated by the parties. The award is binding once and for all.

(2) Where the subject-matter revives after the period of operation of the award is over, for instance, the question of fixation of wages or dearness allowance, in such cases after the period of operation of the award is over, a fresh dispute can be raised and referred under s 10.

It is clear that once an 'industrial dispute' is the subject-matter of adjudication, there can be no conciliation proceedings, before a conciliation officer or a board with respect to that dispute. Hence there can be no settlement arrived at 'in the course of conciliation proceedings' after an industrial dispute has been referred to an adjudicatory authority and is pending adjudication before it. However, there is nothing in the Act to prohibit a private settlement between the parties even during the course of the adjudicatory proceedings.[77] The parties, therefore, may arrive at a settlement between themselves and approach the adjudicator to make its award in terms of the settlement. It is now well settled that in such a case the tribunal will make an award in terms of the settlement.[78]Even though a dispute is referred to an adjudicator, he cannot refuse to accept the settlement made by the parties. There is no provision in the Act which gives power to the adjudicator to veto the settlement arrived at between the parties not even similar to one under O XXIII, r 3 of the Code of Civil Procedure 1908 in respect of compromises.[79] In *DN Ganguly*, the Supreme Court held that a reference once made to an adjudicator cannot be withdrawn or cancelled. It must, therefore, be adjudicated upon by the adjudicator. If the subject-matter of reference is settled between the parties, the settlement must come before the adjudicator finally disposes of the matter by making his award, even though the award may be in terms of the settlement. The Court observed:

> It would be very unreasonable to assume that the industrial tribunal would insist upon dealing with the dispute on the merits even after it is informed that the dispute has been amicably settled between the parties. There can be no doubt that if an industrial dispute before a tribunal is amicably settled, the tribunal would immediately agree to make an award in terms of the settlement between the parties.[80]

In *Amalgamated Coffee*, the Supreme Court held that a settlement arrived at between the parties during the pendency of the appeal before it, against the award of the industrial tribunal covering the same dispute was binding on the parties in preference to the award.[81] Even if there is a compromise between the parties which comes before the tribunal, the tribunal should bring its own judicial mind to bear upon such a compromise for determining whether it is fair, just and equitable between the parties as it is implicit in the word 'determination' that it should be judicial implying that the tribunal exercises its own judgment.[82] The principle that emerges is that a private settlement between the parties after having received the stamp of adjudication by the adjudicator loses the character of a 'settlement' as defined in s 2(p) and partakes the character of an award as defined in s 2(b) and becomes binding on the parties under s 18(3) instead of s 18(1). In this view of law, the observation of the Delhi High Court in *Hindustan Housing*, to the extent it suggests that it is not necessary for the industrial tribunal to bring his own judicial mind to bear upon the compromise to give it the character of 'determination' is not correct.[83]

SETTLEMENT - IF BARS REFERENCE OF INDUSTRIAL DISPUTE

A settlement as defined in s 2(p) will be binding upon the parties either under s 18(1) or 18(3), as the case may be, and it will remain in operation for the period as provided in s 19(2) of the Act. It will remain binding upon the parties as long as it is in operation. Since there is no specific provision in the Act prohibiting the raising of an 'industrial dispute' with regard to a matter which is the subject of a settlement arrived at under s 12 and is in operation in accordance with s 19(2) ; some conflict in judicial opinion has arisen on the question whether such a dispute can be referred for adjudication during the operation of the settlement. The Bombay High Court in *Poona Mazdoor Sabha*, held that despite the absence of any such specific provision, it is clear that neither an 'industrial dispute' can be raised with regard to the matters covered by the settlement nor can such matter be the subject-matter of a conciliation during the period of operation of the settlement.[84] A similar view has been taken by the Mysore High Court[85] and a single judge of the Calcutta High Court.[86] But the Orissa High Court in *State Transport Service*, on the other hand, has taken the view that since there is no specific provision prohibiting the raising of a fresh dispute with respect to the matter covered by an operating settlement, there can be no bar to raise such a dispute.[87]

The view of the Bombay, Mysore and Calcutta High Courts is correct and the view of the Orissa High Court is not correct. The Orissa High Court has contented itself by noticing the absence of any specific provision and gave no other reason for arriving at its conclusion and it completely lost sight of the scheme of the Act. The bar to the reference of a dispute covered by a settlement is the direct result of the legal position that when a dispute between the workers and the employer is concluded by a settlement which binds them, no industrial dispute relating to any item covered by the settlement can come into existence or can be apprehended, which can be referred by the Government under s 10 of the Act. It is only when a dispute exists or is apprehended that the question arises whether a reference should or should not be made. If during the period of operation of settlements, fresh disputes could be raised with respect to the subject-matter covered by such settlements, the purpose of the Act to achieve peaceful and harmonious industrial relations by settlements will be completely foiled. The object of ss 18 and 19 is to achieve industrial peace with regard to the subject-matter of the settlements for the duration of the settlement agreement. Obviously, therefore, if there is to be industrial peace for the period contemplated then the parties bound by a settlement cannot be allowed to raise an 'industrial dispute' with regard to the matters covered by that settlement. Section 18(3) places a 'settlement arrived at in the course of conciliation proceedings' at par with the awards of the adjudicatory authorities with respect to its binding effect. Since the Act does not contemplate any interference with the finality of an award, there can be no interference with the finality of a settlement as well during the period of its operation and it must run on for the period of its operation. Furthermore, if during the period of operation of a settlement, an industrial dispute relating to the subject-matter of the settlement is raised and referred to adjudication, there will be a conflict between the settlement which will be binding under s 18(1) or s 18(3) and the award which will be binding under s 18(3). Hence, the matters covered by a settlement cannot be made the subject-matter of conciliation proceedings under s 12 or the subject-matter of a reference under s 10(1) of the Act.[88]

The reference of a dispute under s 10 during the period of operation of the settlement will, therefore, be barred by such settlement.[89] However, in this connection, the distinction between the bar to refer the disputes covered by a 'settlement arrived at in the course of conciliation proceedings' and 'private settlements' has to be borne in mind. The former type of settlements will be a complete bar to the reference of the disputes relating to the subject-matter covered by them, but the latter type of settlements will not operate as a complete bar against making a reference of the subject-matter covered by them because in case of a private settlement, the existence of an 'industrial dispute', though in a mutilated form, is a statable possibility. A private settlement binds only those workmen who are parties to it. Hence, it is not binding on those who are not parties to it. Therefore, such a settlement will not bar a reference of the dispute relating to the matters covered by such a settlement between the employer and the workmen who are not parties to such a settlement. However, the question which in such a case will arise in connection with the making of a reference for adjudication will be a question of expediency.[90]

13 Sub-secs (1) and (2) ins by Act 36 of 1956, s 13 (wef 7-10-1956).

14 Subs by Act 36 of 1964, s 9, for "An arbitration award" (wef 19-12-1964).

15 s 18 re-numbered as sub-sec (3) of that section by Act 36 of 1956, s 13 (wef 7-10-1956).

16 Ins by Act 36 of 1964, s 9 (wef 19-12-1964).

17 The words "an award which has become enforceable" subs by Act 48 of 1950, s 34 ."

18 Ins by Act 36 of 1956, s 13 (wef 10-3-1957).

19 Ins by Act 36 of 1964, s 9 (wef 19-12-1964).

20 Subs by Act 36 of 1956, s 13, for "or Tribunal" (wef 10-3-1957).

21 *BK Jobanputra v BS Kalelkar* (1965) 1 LLJ 543, 547 (Bom) (DB), per Tambe J.

22 *Chairman, SBI v All Orissa SBI Officers Assn* (2003) 3 LLJ 751 [LNIND 2003 SC 605] : AIR 2003 SC 4201 [LNIND 2003 SC 605]: (2003) 11 SCC 607 [LNIND 2003 SC 605] (SC), per Srikrishna J.

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25 *Hindustan Housing Factory Ltd v HHFE Union* 1969 Lab IC 1450, 1457 (Del), per Tatachari J.

26 *Scindia Steam Navigation Co Ltd v SSE Union* 1983 Lab IC 759, 766 (Bom) (DB), per Chandurkar J.

27 *Herbertsons Ltd v Workmen of Herbertsons Ltd* 1977 Lab IC 162 [LNIND 1976 SC 415] (SC), per Goswarni J.

28 *Tata Chemicals Ltd v Workmen* 1978 Lab IC 637 [LNIND 1978 SC 113], 642 : AIR 1978 SC 828 [LNIND 1978 SC 113]: (1978) II LLJ 22(SC), per Jaswant Singh J.

29 *Workmen of DCM v Delhi Cloth & General Mills Ltd* (1972) 1 LLJ 99 (SC), per Dua J.

30 *Cooper Engineering Ltd v DM Aney* 1971 Lab IC 603, 609-10 (Bom) (DB), per KK Desai J.

31 *Hindustan Housing Factory Ltd v HHFE Union* 1969 Lab IC 1450, 1458 (Del), per Tatachari J.

32 *Quazi Almas Khan v 7th IT* 1974 Lab IC 368, 370-71 (Cal), per SC Ghose J.

33 *Allied Sales Corpn v Authority under APSEA* (1990) 2 LLJ 510 (AP) (DB).

34 *Andhra Pradesh PDE Assn v APSEB* (1988) 1 LLJ 534, 542 (AP), per Jeevan Reddy J.

35 *State of Bihar v DN Ganguly* (1958) 2 LLJ 634 [LNIND 1958 SC 92], 640 : AIR 1958 SC 1018 [LNIND 1958 SC 92] (SC), per Gajendragadkar J.

36 *Sirsilk Ltd v Government of Andhra Pradesh* (1963) 2 LLJ 647 [LNIND 1963 SC 70], 651-52 (SC), per Wanchoo J.

37 *Amalgamated Coffee Estates Ltd v Workmen* (1965) 2 LLJ 110 [LNIND 1965 SC 16] (SC), per Wanchoo J.

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39 *Rohtas Industries Ltd v PO, IT* 1977 Lab IC 147, 152 : 1977 (25) BLJR 85 (Pat) (DB), per SK Choudhuri J.

40 *Blue Star Ltd v KS Khurana* (1994) 2 LLJ 590 : 49 (1993) DLT 329 : 1993 (25) DRJ 162 [LNIND 1992 DEL 602] (Del), per JK Mehra J.

41 *Western India Match Co Ltd v Workmen* (1973) 2 LLJ 403 [LNIND 1973 SC 241] : AIR 1973 SC 2650 [LNIND 1973 SC 241]: (1974) 3 SCC 330 [LNIND 1973 SC 241] (SC), per Dwivedi J.

42 *Veeramani v PO & Anor* (1998) 1 LLJ 494, 496 (Kant), per Mohan Kumar J.

43 *Raghavendra Prasad Gautam v Union Bank of India* (1999) 1 LLN 452 (MP) (DB), per Misra J.

44 *KSRTCSW Federation v Karnataka SRTC* (2002) 4 LLN 291 (Kant), per Gururajan J.

45 *Hindustan Level Ltd v Employees Union* (1999) 1 LLN 930 (943) (Bom), per Savant J.

46 *Central Provinces Tpt Services Ltd v RG Patwardhan* (1957) 1 LLJ 27 [LNIND 1956 SC 91] (SC), per Venkatarama Ayyar J.

47 *Ram Prasad Vishwakarma v Chairman IT* AIR 1961 SC 857 [LNIND 1960 SC 333], per Das Gupta J.

48 *Brooke Bond India Ltd v Workmen* (1981) 2 LLN 286 (SC), per AC Gupa J.

49 *State of Bihar v DN Ganguly*, 1958 II LLJ 634(SC), per Gajendragadkar J.

50 *Mgmt of Karnataka SRTC v KSRTCSW Federation* (1999) 2 LLN 17 (SC), per Majmudar J.

51 *NJ Joseph v Bank of Baroda* (1999) 2 LLN 888 (Ker) (DB), per Lakshmanan J.

52 *Dena Bank v Kartik Das Bandopadhyay* (2002) 1 LLN 699 (SC).

53 *TCE & AS Association v Tata Som Ltd* (2002) 1 LLN 781 (Bom), per Kochar J.

54 *Tamil Nadu Magnesite Ltd v CGIT* (2001) 1 LLN 377 (Mad), *per* Venkatachalam J.

55 *Gent Secy, ICE Union v India Cements Ltd* (1999) 2 LLJ 1 [LNIND 1998 MAD 862] (4) (Mad) (DB), *per* Shivappa J.

56 *Abad Dairy v Manjibhai Dhanjibhai* (2001) 4 LLN 1192 (Guj) (DB), *per* Dharrnadhikari CJ.

57 *V Vaidyanathan v DCL* (2002) 3 LLN 539 (Mad), per Jayasimha Babu J.

58 *Smithkline Beecham CHC Ltd v SBCBL Operators* (2002) 3 LLN 802 (AP) (DB), per Nayak J.

59 *HP Sarkar v State of West Bengal* (2002) 4 LLN 137, 140-41 (Cal), per Seth J.

60 *Hill Son and Dinshaw Ltd v PG Pcdnekar* (2002) 4 LLN 260 (Bom) (DB), per Shah J.

61 *Sarva Shramik Sangh v VVF Ltd* (2002) 4 LLN 266 (Bom), per Khanwilkar J.

62 *Indian Drugs and Pharamaceuticals Ltd v. PO, LC* (2003) 1 LLJ 269 : 2003 (2) UC 1384 : 2003 (96) FLR 135 (UC), per PC Verma J.

63 *EID Parry (India) Ltd v MN Padmanabhan* (2008) 3 LLJ 687 [LNIND 2008 MAD 1768] : 2008 (118) FLR 818 (Mad), per Dhandapani J.

64 *HMT Ltd v P Subbarayudu*, AIR 2004 SC 3280 : (2003) III LLJ 850: (2003) 10 SCC 156 (SC), per Srikrishna J.

65 *CV Satheeshchandran v GM, UCO Bank*, AIR 2008 SC (supp) 1371, per Naolekar J.

66 *Air India Cabin Crew Assn v Union of India* AIR 2011 SC (supp) 717, per Altamas Kabir J.

67 *A Kari v Needle Industries Ltd.* (2011) 3 LLJ 423 : 2011 (1) CTC 811 [LNIND 2011 MAD 496] : 2011 (129) FLR 240 (Mad), per Nagappan J.

68 Govt of India (2002), *Report of NCL-II*, pp. 38-9, 42 & para 6.76

69 *Nagdevi Kamgar Sabha v KM Desai* (2005) 4 LLJ 222 (Bom), per Chandrachud J.

70 *BK Jobanputra v BS Kalelkar* (1965) 1 LLJ 543, 547 : AIR 1965 Bom 146 [LNIND 1964 BOM 36] (Bom), per Tambe J.

71 *MN Gopinathan v Kerala SEB* 1975 Lab IC 1727, 1731 (Ker), per Bhaskaran J.

72 *Poona Mazdoor Sabha v GK Dhutia* (1956) 2 LLJ 319 [LNIND 1956 BOM 105], 322 (Bom) (DB), per Chagla CJ.

73 *State of Bihar v Kripa Shankar Jaiswal* (1961) 1 LLJ 334 [LNIND 1960 SC 233] (SC), per Kapur J.

74 *Workmen of H&C Ltd v Harrisons and Crosfield Ltd* (1969) 1 LLJ 61, 65 (Ker), per Isaac J.

75 *Amalgamated Coffee Estates Ltd v Workmen* (1965) 2 LLJ 110 [LNIND 1965 SC 16] (SC), per Wanchoo J.

76 *Barauni Refineries PS Parishad v IOC Ltd* (1991) 1 LLJ 46 [LNIND 1990 SC 330], 51 (SC), per Ahmadi J.

77 *ITC Workers Welfare Assn v ITC Ltd* (2002) 1 LLN 1144, 1151-52 (SC), per Venkatarama Reddi J.

78 *All India PNB Workers Federation v Punjab National Bank* (2010) 3 LLJ 207 (Del).

79 *FACT Employees' Assn, Cochin v FACT Ltd* (1977) 1 LLJ 182 [LNIND 1996 MAD 736], 190-91 (Ker), per Thommen J.

80 *PG Brookes v IT* (1953) 2 LLJ 1 [LNIND 1952 ALL 105] (Mad) (DB).

81 *CI Abraham v IT* (1958) 2 LLJ 725 (Ker), per MS Menon J.

82 *Workmen of Brahmaputra Tea Estate v BTE* (1969) 2 LLJ 685 [LNIND 1967 SC 280], 692 : AIR 1968 SC 514 (SC), per Vaidialingam J.

83 *Delhi Cloth & General Mills Co Ltd v KME Union* (1962) 2 LLJ 277 [LNIND 1961 PNH 22] (Punj), per Shamsher Bahadur J.

84 *Shahjahanpur Electric Supply Co Ltd v Employees* (1952) 1 LLJ 631 (LAT).

85 *Anil Kumar Upadhaya v PK Sarkar* (1961) 2 LLJ 459 [LNIND 1960 CAL 128] (Cal), per DN Sinha J.

86 *Hochtief Gammon v IT* (1964) 2 LLJ 460 [LNIND 1964 SC 118] : AIR 1964 SC 1746 [LNIND 1964 SC 118] (SC), per Gajendragadkar CJI.

87 *Howrah Trading Co Pvt Ltd v Gopal Krishna Jalan* 1983 Lah IC (NOC) 4(Cal), per DK Sen J.

88 *F Veeramani v Mgmt of Madurai DCSMS Ltd* 1983 Lab IC 687, 691-95 (Mad) (DB), per Ratnam J.

89 *Hochtief Gammon v IT* (1964) 2 LLJ 460 [LNIND 1964 SC 118] : AIR 1964 SC 1746 [LNIND 1964 SC 118] (SC), per Gajendragadkar CJ.

90 *PSI Data Systems Ltd v PO* (1993) 1 LLJ 73, 75-76 (Kant), per Ramakrishna J.

91 *Maharashtra State Electricity Board v IT* (1965) 2 LLJ 458 (Bom) (DB), per Gokhale J.

92 *VVF Employees' Union v SM Limaye* (1990) 2 LLJ 484, 486 (Bom), per Jahagirdar J.

93 *Bhagwan Dass Chopra v United Bank of India* 1988 Lab IC 366 [LNIND 1987 SC 771] : AIR 1988 SC 215 [LNIND 1987 SC 771]: (1988) I LLJ 427(SC), per Venkataramiah J.

94 *Mayurakshi Cotton Mills (1990) Ltd & Anr v Ninth IT*, (2003) 2 LLJ 485 [LNIND 2002 CAL 370] : (2003) ILR 1 Cal 293 (Cal), per JK Biswas J.

95 *Anil Kumar Upadhaya v PK Sarkar* (1961) 2 LLJ 459 [LNIND 1960 CAL 128], 466 : AIR 1961 Cal 60 [LNIND 1960 CAL 128] (Cal), per DN Sinha J.

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97 *Radhakrishna Mills Ltd, Coimbatore v IT* (1954) 1 LLJ 295 [LNIND 1953 MAD 179] (Mad), per Govinda Menon J.

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1 *Abraham v IT* (1958) 2 LLJ 725 (Ker), per MS Menon J.

2 *Workmen of CRO Canteen v Fourth IT* (1964) 1 LLJ 134 (Cal), per BN Banerjee J.

3 *Anil Kumar Upadhaya v PK Sarkar* (1961) 2 LLJ 459 [LNIND 1960 CAL 128] (Cal), per DN Sinha J.

4 *Hochtief Gammon v IT* (1964) 2 LLJ 460 [LNIND 1964 SC 118] (SC), per Gajendragadkar CJ.

5 *Maharashtra State Electricity Board v IT* (1965) 2 LLJ 458 (Bom), per Gokhale J.

6 *Udaipur Phosphates and Fertilizers Ltd v GMK Union* (1998) 1 LLN 277 (Guj), per Balia J.

7 *Krishna Panicker v HMT Ltd* (1999) 4 LLN 1079 (Ker) (FB), per Venkatachala Moorthy J.

8 *R Palanisamy v PO, LC* (2001) 3 LLN 638 (Mad), per Raviraja Pandian J.

9 *President, CCIW Union v PO, LC* (2001) 3 LLN 1095 (Kant), per Rajaratnam J.

10 *Britannia Industries Ltd v PO, II Addl LC* (2001) 2 LLN 448 (Mad), per Dinakaran J.

11 *Alfo Laval (India) Ltd v KB Waghmare* (2002) 2 LLN 538 (Bom), per Rebello J.

12 *Bay of Bengal Programme v P Natarajan* (2002) 1 LLN 365 (Mad), per Sivasubramaniam J.

13 *Ramnagar Cane and Sugar Co Ltd v Jatin Chakravorty* (1961) 1 LLJ 244 [LNIND 1960 SC 157] (SC), per Gajendragadkar J.

14 *PM Deshpande v Ferro Alloys Corpn* (1964) 1 LLJ 613 [LNIND 1961 AP 91], 620 (AP), per Kumarayya J.

15 *PK Pathumma Beevi v Chief Secretary* (1968) 1 LLJ 400, 403 (Ker) (DB), per Krishnamoorthi Ayyar J.

16 *Anakapalle CAIS v Workmen* (1962) 2 LLJ 621 [LNIND 1962 SC 345] : AIR 1963 SC 1489 [LNIND 1962 SC 345] (SC), per Gajendragadkar J.

17 *Workmen of Brahmputra Tea Estate v Brahmaputra Tea Estate* (1969) 2 LLJ 685 [LNIND 1967 SC 280], 692 : AIR 1968 SC 514 (SC), per Vaidialingarn J.

18 *PSI Data Systems Ltd v PO* (1993) 1 LLJ 73, 75-76 : ILR 1992 KARNATAKA 2163 [LNIND 1991 KANT 495] : 1991 (3) Karlj 243 [LNIND 1991 KANT 495] (Kant), per Ramakrishna J.

19 *Anakapalle CAIS v Workmen* (1962) 2 LLJ 621 [LNIND 1962 SC 345] : AIR 1963 SC 1489 [LNIND 1962 SC 345] (SC), per Gajendragadkar J.

20 *Indian Oxygen Ltd v Workmen* (1969) 1 LLJ 235 [LNIND 1968 SC 193], 238 : AIR 1969 SC 306 [LNIND 1968 SC 193] (SC), per Shelat J.

21 *Associated EIM Co Pvt Ltd v Fifth IT* 1969 Lab IC 1341 [LNIND 1969 CAL 54] : AIR 1969 Cal 542 [LNIND 1969 CAL 54] (Cal), per Mukherjea J.

22 *Arunachalam Pillai v CGIT* (1957) 2 LLJ 682 (Mad), per Rajagopala Ayyangar J.

23 *M Velayudhan v State of Kerala* (1960) 1 LLJ 319 (Ker), per TK Joseph J.

24 *Assn of Chemical Workers v Wahid Ali* (1980) 1 LLJ 276, 279 (Born) (DB), per Deshpande J.

25 *Ramnagar Cane & Sugar Co Ltd v Jatin Chakravorty* (1961) 1 LLJ 244 [LNIND 1960 SC 157], 247-48 (SC), per Gajendragadkar J.

26 *Associated Cement Companies Ltd v Workmen* (1960) I LLJ 491(SC), per Gajendragadkar J.

27 *Bihar Working Journalists' Union v HK Chaudhuri* 1968 Lab IC 515, 517 : AIR 1968 Pat 135 (Pat) (DB), per Prasad J.

28 *Anthony Gomes v State of West Bengal* (1974) 2 LLJ 94 -95 : 79 CWN 301 (Cal), per Murari Mohan Dutt J.

29 *Andhra Bank Officers' Union v Union of India* 1991 Lab IC 588, 596 (AP), per MN Rao J.

30 *Punjab National Bank v Manjeet Singh*, AIR 2007 SC 262 [LNIND 2006 SC 800]: (2006) 8 SCC 647 [LNIND 2006 SC 800], per Sinha J.

31 *Oswal Agro Furane Ltd v OAF Workers Union*, (2005) 1 LLJ 1117 [LNIND 2005 SC 138] : AIR 2005 SC 1555 [LNIND 2005 SC 138]: (2005) 3 SCC 224 [LNIND 2005 SC 138] (SC), per Sinha J.

32 *Ramnagar Cane & Sugar Co Ltd v Jatin Chakravorty* (1961) 1 LLJ 244 [LNIND 1960 SC 157], 247 : AIR 1960 SC 1012 [LNIND 1960 SC 157] (SC), per Gajendragadkar J.

33 *Tiruchi-Srirangam Transport Co Pvt Ltd v IT* (1962) 1 LLJ 94 [LNIND 1961 MAD 171], 98 : AIR 1963 Mad 79 [LNIND 1961 MAD 171] (Mad), per Veerasami J.

34 *Britannia Biscuit CE Union v ACL* (1984) 1 LLJ 349 [LNIND 1983 MAD 488] (Mad) (DB), per Gokulakrishnan J.

35 *Monthly-rated Workmen of Pierce Leslie Co Ltd v LC* (1967) 1 LLJ 789 : 1967 KLJ 134 (Ker) (DB).

36 *Kerala Minerals Employees Congress v ACL* (1983) 1 LLJ 424 [LNIND 1982 KER 250] : ILR 1983 (1) Kerala 289 : 1983 KLJ 16 (Ker), per UL Bhat J.

37 *Tamilnadu EW Federation v Madras SEB* (1964) 2 LLJ 392 [LNIND 1963 MAD 296] (Mad) (DB), per Anantanarayanan J.

38 *General Engg Employees' Union v TR Bhagwath* (1966) 1 LLJ 568, 572-73 (Bom), per Tulzapurkar J.

39 *Monthly-rated Workmen of Pierce Leslie & Co v Labour Commr* (1966) 1 LLJ 503 (Ker), per KK Mathew J.

40 *TK Padmanabhan Menon v Indian Aluminium Co Ltd* (1968) 2 LLJ 225 (Ker), per Isaac J.

41 *Syndicate Bank Staff Assn v Regional Labour Commr* (1968) 2 LLJ 712 (AP), per Seshachelapati J.

42 *Indian Bank v Usha K & Anor* (1998) 1 LLJ 643 [LNIND 1998 SC 114] (SC), per Majmudar J.

43 *P Virudhachalam v Lotus Mills* (1998) 1 LLN 977 (SC), per Majmudar J.

44 *AP Paper Mills Ltd v First Addl District Munsif* (1998) 4 LLN 919 (AP), per Nayak J.

45 *Bidyadhar Mohapatra v DLO-cum-CO* (1999) I LLJ 138(Orissa) (DB), per Chatterji J.

46 *National Engineering Industries Ltd v State of Rajasthan* (1999) 4 LLN 1185 (SC).

47 *SC Adhikari v Air India* (2001) 1 LLN 1119 (Bom) (DB), per Singh CJ.

48 *Shyam Lal v Ch Charan Singh, Haryana Agri University* (2000) I LLJ 24(SC).

49 *Mysore KYM Sangh v Mysore Kirloskar Ltd* (2000) II LLJ 1050(Kant), per Rajaratnam J.

50 *Insafi Kamdar Mandal v ACL* (2002) 1 LLN 1081 (Guj), per Waghela J.

51 *Air India Employees' Union v Air India Ltd* (2002) 2 LLN 990 (Bom) (DB).

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54 *Volkart Bros v TV Chellappa* [1954-55] 7 FJR 513 (Bom), per Chagla CJ.

55 *Hamilton Jewellery Workers' Union v Hamilton & Co Ltd* [1956] LAC 462(LAT).

56 *Kanai Chandra Ganguli v Central Government IT* 1971 Lab IC 569, 570-71 (Pat) (DB).

57 *Britannia Biscuit Co Employees' Union v ACL* (1983) 1 LLJ 181, 189 (Mad), per Padmanabhan J.

58 *Barauni RPS Parishad v Indian Oil Corpn Ltd* (1991) 1 LLJ 46 [LNIND 1990 SC 330], 51 (SC), per Ahmadi J.

59 *Assn of Chemical Workers v Wahid Ali* (1980) 1 LLJ 276, 280 (Bom) (DB), per Deshpande J.

60 *Singareni Collieries Co Ltd v IT* 1988 Lab IC 1271, 1278 (AP), per Sardar Ali Khan J.

61 *Workmen of Asbestos Cement Ltd v Asbestos Cement Ltd* (1965) 2 LLJ 544 (Mad), per Ramakrishnan J.

62 *Ramnagar Cane & Sugar Co Ltd v Jatin Chakravorty* (1961) 1 LLJ 244 [LNIND 1960 SC 157], 247 (SC) per Gajendragadkar J.

63 *Jhagrakhan Collieries Pvt Ltd v Central Government IT* 1975 Lab IC 137 (SC), per Sarkaria J.

64 *S Joseph v Panyam Cements & Mineral Industries* (1967) 1 LLJ 10 [LNIND 1965 AP 91], 13 (AP) (DB), per Kumarayya J.

65 *Bata Shoe Co Pvt Ltd v DN Ganguly* (1961) 1 LLJ 303 [LNIND 1960 SC 345] (SC), per Wanchoo J.

66 *Workers of B & C Co v Commr of Labour* (1964) 1 LLJ 253 [LNIND 1963 MAD 174] (Mad) (DB), per Ramachandra Ayyar CJ.

67 *Ramnagar Cane & Sugar Co Ltd v Jatin Chakrttvorty* (1961) 1 LLJ 244 [LNIND 1960 SC 157] (SC), per Gajendragadkar J.

68 *Barauni RPS Parishad v Indian Oil Corpn Ltd* (1991) 1 LLJ 46 [LNIND 1990 SC 330], 52 : AIR 1990 SC 1801 [LNIND 1990 SC 330]: (1991) 1 SCC 4 [LNIND 1990 SC 330] (SC), per Ahmadi J.

69 *The Workmen of the Motor Industries Co Ltd v The Management of the Motor Industries Co Ltd* (1969) 2 LLJ 673 [LNIND 1969 SC 166] : AIR 1969 SC 1280 [LNIND 1969 SC 166]: (1969) 2 SCC 13 [LNIND 1969 SC 166] (SC), per Shelat J.

70 *Ram Pukar Singh v Heavy Engineering Corpn* (1995) 1 LLJ 214 : AIR 1995 SC 251 : (1994) 6 SCC 145 (SC).

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72 *SJoseph v Panyam Cements & Mineral Industries Ltd* (1967) 1 LLJ 10 [LNIND 1965 AP 91], 13 (AP) (DB), per Kumarayya J.

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74 *Indian Airlines v Airlines Cabin Crew Assn* 1992 Lab IC 1867, 1869 (Del), per SC Jain J.

75 *Vazir Sultan Tobacco Co Ltd v LC* 1974 Lab IC 817 -18 (AP), per Chinnappa Reddy J.

76 *Jhagrakhan Collieries Put Ltd v CGIT* 1975 Lab IC 137 (SC), per Sarkaria J.

77 *Sirsilk Ltd v Government of Andhra Pradesh* (1963) 2 LLJ 647 [LNIND 1963 SC 70], 651-52 (SC), per Wanchoo J.

78 *Eastern Manganese & Mineral Ltd v IT* (1968) 2 LLJ 817 (Pat) (DB), per BN Jha J.

79 *Garment Cleaning Works v DM Aney* (1970) 2 LLJ 195 [LNIND 1969 BOM 21] (Bom) (DB) per Patel J.

80 *State of Bihar v DN Ganguly* (1958) 2 LLJ 634 [LNIND 1958 SC 92], 640 : AIR 1958 SC 1018 [LNIND 1958 SC 92] (SC) per Gajendragadkar J.

81 *Amalgamated Coffee Estates Ltd v Workmen* (1965) 2 LLJ 110 [LNIND 1965 SC 16] (SC), per Wanchoo J.

82 *Workers Employed in 32 Textile Mills v Dhanalakshmi Mills Ltd* (1960) 2 LLJ 556 : AIR 1961 Mad 212 (Mad), per Ramachandra Ayyar J.

83 *Hindustan HFE Union v HH Factory Ltd* (1971) 2 LLJ 222, 231-33 (Del) (DB), per Hardayal Hardy J.

84 *Poona Mazdoor Sabha v GK Dhutia* (1956) 2 LLJ 319 [LNIND 1956 BOM 105], 322 (Bom), per Chagla CJ.

85 *Workers & Staff Assn of GSF v State of Mysore* 1971 Lab IC 79, 81 (Mys) (DB), per Narayana Pai J.

86 *Anglo India Jute Mills Co Ltd v Fifth IT* 1971 Lab IC 58 [LNIND 1970 CAL 73], 62 (Cal), per TK Basu J.

87 *Employees of State Transport Service v Govt of Orissa* (1971) 1 LLJ 60, 63 (Ori) (DB), per GK Misra CJ.

88 Cf *Poona Mazdoor Sabha v GK Dhutia* (1956) 2 LLJ 319 [LNIND 1956 BOM 105] (Bom) (DB), per Chagla CJ.

89 *Amin Chand Pyare Lal v Second Punjab IT* (1958) 1 LLJ 604 (Punj), per Bishen Narain J.

90 *Workers & Staff Assn of GSF v State of Mysore* 1971 Lab IC 79, 81 (Mys) (DB), per Narayana Pai J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

S. 19. Period of operation of settlements and awards.—

(1) A settlement [1][* * *] shall come into operation on such date as is agreed upon by the parties to the dispute, and if no date is agreed upon, on the date on which the memorandum of the settlement is signed by the parties to the dispute.

(2) Such settlement shall be binding for such period as is agreed upon by the parties, and if no such period is agreed upon, for a period of six months [2][from the date on which the memorandum of settlement is signed by the parties to the dispute], and shall continue to be binding on the parties after the expiry of the period aforesaid, until the expiry of two months from the date on which a notice in writing of an intention to terminate the settlement is given by one of the parties to the other party or parties to the settlement.

3[(3) An award shall, subject to the provisions of this section, remain in operation for a period of one year [4][from the date on which the award becomes enforceable under S. 17-A]:]

Provided that the appropriate Government may reduce the said period and fix such period as it thinks fit:

Provided further that the appropriate Government may, before the expiry of the said period, extend the period of operation by any period not exceeding one year at a time as it thinks fit so, however, that the total period of operation of any award does not exceed three years from the date on which it came into operation.

(4) Where the appropriate Government, whether of its own motion or on the application of any party bound by the award, considers that since the award was made, there has been a material change in the circumstances on which it was based, the appropriate Government may refer the award or a part of it [5][to a Labour Court, if the award was that of a Labour Court or to a Tribunal, if the award was that of a Tribunal or of a National Tribunal], for decision whether the period of operation should not, by reason of such change, be shortened and the decision of [6][Labour Court or the Tribunal, as the case may be] on such reference shall, [7][***] be final.

(5) Nothing contained in sub-section (3) shall apply to any award which by its nature, terms or other circumstances does not impose, after it has been given effect to, any continuing obligation on the parties bound by the award.

(6) Notwithstanding the expiry of the period of operation under sub-section (3), the award shall continue to be binding on the parties until a period of two months has elapsed from the date on which notice is given by any party bound by the award to the other party or parties intimating its intention to terminate the award.

8[(7) No notice given under sub-section (2) or sub-section (6) shall have effect, unless it is given by a party representing the majority of persons bound by the settlement or award, as the case may be].

SUB-SECTION (1): OPERATION OF SETTLEMENT

Under this sub-section, a settlement shall come into operation:

(i) on the date which has been agreed upon by the parties to the dispute; or

(ii) in case where no date has been agreed upon, on the date on which the memorandum of the settlement is signed by the parties to the dispute.

Signing the memorandum of settlement:

section 2(p) postulates two methods of arriving at a settlement, *viz* (i) a settlement in the course of conciliation proceedings, and (ii) a settlement otherwise than in the course of conciliation proceedings. From the definition of 'settlement', it is clear that as far as the settlement arrived at otherwise than in the course of conciliation proceedings is concerned, it must be signed, by the parties in the prescribed manner. But in reference to a 'settlement arrived at in the course of conciliation proceedings' the definition of, 'settlement' in s 2(p) and s 18, which makes a settlement binding, only requires that such a settlement should be 'arrived at'. However, s 12(3) requires the memorandum of a settlement to be signed by the parties to the dispute and to be sent by the conciliation officer along with his report to the appropriate Government. Rule 58 of the Industrial Disputes (Central) Rules 1957 prescribes the form and mode of signing both the types of settlements.

SUB-SECTION (2)

(i) Period of Operation of Settlements

The obvious intendment of sub-s (2) is that every settlement reached between the parties shall continue to be binding upon the parties, even after the expiry of the period of settlement, until one of the parties expresses its intention to terminate the settlement by a notice in writing to the other party.[9] The plain purpose of the legislature, was to provide for continuance of the settlement until its termination was manifested in the prescribed manner so that there is no disturbance of industrial peace until then.[10]The object of this provision is to ensure that once a settlement is arrived at, there prevails peace, accord and cordiality between the parties during the period agreed upon and if the settlement does not require to be altered for some reason or other, the same climate prevails by extension of the settlement by operation of law. There is an option given to either party to terminate the settlement by a written intimation. After the expiry of two months from the date of such notice, the settlement will stand terminated. This is in accordance with the policy of settlement of industrial disputes which is the principal object underlying the provisions of the Act. In a given case, it may be even advantageous to the parties, who do not want to continue the settlement, to strike a new bargain without loss of time so that unnecessary bickering and resultant industrial unrest do not take place.[11] In *Binny*, a single judge of the Karnataka High Court summed up the import of this sub-section thus:

(i) In the case of a settlement in which no period is mentioned, the settlement would be in force and binding on both the parties for a period of six months. During this period, a party to the settlement has no right to terminate the settlement. In other words, no notice of termination can be given by any of the parties terminating the settlement on any date earlier to six months. Even if it is given, it is invalid.

(ii) The position is the same in respect of a settlement in which a period of operation is mentioned. Until the expiry of that period, none of the parties to the agreement has any right to repudiate or terminate the agreement and even if it is done by a party to the settlement, the settlement does not come to an end before the expiry of the period agreed upon.

(iii) After the expiry of the period agreed upon in respect of an agreement or in the absence of such specification, in the agreement after the expiry of six months, any of the parties to the agreement can, by issue of two months' notice, terminate the agreement with effect from a date on or after the agreed or statutory period comes to an end and such a notice becomes effective after the expiry of two months from the date of service of notice. [12]

In *India Reconstruction*, the labour appellate tribunal took the view that the words 'after the expiry of the period aforesaid' qualify the second part, namely, the period of six months mentioned therein and not the first part which refers to the period 'agreed upon by the parties'.[13] But this view has been dissented from by the Calcutta High Court in *National Carbon*, observing that if the period is fixed either by contract or statute, then it amounts to the same thing, and there is no reason why the provision as to notice and extension of the period during which the settlement would subsist, should refer only to the one and not to the other.[14] The view of the Calcutta High Court represents the correct law. Therefore, a notice of intention to terminate the settlement in writing under s 19(2) would also be necessary to terminate a settlement which was agreed upon by the parties to remain in operation for a fixed period.[15] The settlement does not cease to be binding *ipso facto* on the expiry of the period aforesaid in (i) and (ii). It is not open to a party to terminate and unilaterally repudiate the settlement without complying with the requirements of sub-s (2) of s 19 of the Act.[16]

(ii) Notice to Terminate the Settlement

A party intending to terminate a settlement has to give a notice in writing to the other party or parties of its 'intention to terminate the settlement'. The settlement will be terminated after the expiry of two months from the date on which the notice is given by the intending party to the other party or parties. In other words, the settlement shall continue to be binding for a period of two months from the date on which the notice is given.[17] Therefore, the terms of a settlement continue to govern the relations between the parties after the notice of termination and till the expiry of a period of two months thereafter until the settlement is replaced by a valid contract or award between the parties.[18] If, therefore, a party intends to terminate the settlement on expiry of the period specified in this sub-section, it has to give notice of its intention to terminate the settlement two months prior to the expiry of such period. The notice terminating the settlement can, therefore, be given even before the actual expiry of the period of operation of the settlement as specified in it.[19] There is no legal bar to give advance intimation about the intention to terminate the settlement on the expiry of the agreed period and to start negotiations for a more favourable settlement immediately thereafter. The only condition that has to be fulfilled by such a notice is that the period of two months from the date of notice must end on the expiry of the settlement and not before it.[20] The termination of a settlement by a notice with effect from the date prior to the expiry of the period of operation prescribed in the settlement would be invalid.[21] The requirements of law will be satisfied if:

(i) a notice in writing is issued,

(ii) which conveys a clear intention to terminate the settlement,

(iii) on a date after the period of settlement agreed upon, and

(iv) a period of two months has elapsed between the date of issue of the notice and the termination of settlement.[22]

Otherwise, the settlement shall continue to be binding for a further period of two months from the date of notice. Failure to give notice goes to the root of the matter.[23] This section requires the notice merely to be 'in writing'. The Industrial Disputes (Central) Rules 1957 do not prescribe any form for giving such notice.[24] All that has to be done, therefore, is to see that the provisions of s 19(2) or s 19(6), as the case may be, are complied with, and in substance a notice is given by one party to the other party or parties, intimating its intention to terminate the settlement or award.[25] This provision contemplates not a tacit representation but an express representation physically in the form of writing, terminating an agreement.[26] However, the intimation of the intention to terminate the settlement or award, has to be fixed with reference to a particular date so as to enable a court to come to the conclusion that the party, giving that intimation, has expressed its intention to terminate the settlement. Such a certainty regarding the date, is absolutely essential, because the period of two months, after the expiry of which, the settlement will cease to be binding on the parties, will have to be reckoned from the date of such intimation.[27] In other words, the intimation to terminate a settlement, whether it is by a formal notice in writing or it is to be spelt out from the correspondence, must be certain as to the particular date on which such a termination is to take effect. This is vitally necessary, because the court has to fix the period of two months with reference to s 19(2) after which the settlement or award ceases to be binding on the parties.[28]

In *Cochin State Power*, the presentation of a charter of demands, referring to a resolution of the union to terminate the settlement was held to be sufficient notice.[29] Likewise, in *WIMCO*, the representation of the union in the charter of demands coupled with the relevant correspondence itself was considered to be notice within the meaning of s 19(3).[30] In *Bangalore WCS Mills*, the court rejected the contention that an inference of termination of the settlement could be gathered from the correspondence that passed between the management and the union, and observed that that decision 'does not lend any support to such a view'.[31] If the termination of the settlement has not been proved with certainty as regards date of such termination, a reference of the dispute covered by the settlement would be incompetent and the award passed in consequence thereof would be invalid.[32] In *Indian Link Chain*, a particular letter stating that it terminates the settlement was taken as the requisite notice. The court also viewed the matter from a different angle, *viz*, when both the parties to the dispute proceeded on the plea that there was no settlement binding on either of them, the Government was justified to refer the dispute for adjudication on the failure of conciliation proceedings. Hence, the management was estopped from taking the stand that the settlement was not put an end to, and that the reference was invalid. Jaganmohan Reddy J held:

> It is true that though a written notice can be spelled out from the correspondence, there must be a certainty regarding the date on which such a written notice can be construed to have been given because a settlement notwithstanding such notice continues to be in force for a period of two months from that date'.[33]

In *Karnani Properties*, it was held that a particular letter was a notice under s 19(2) as well as under s 19(6) of the Act. The letter of the union which was addressed to the labour commissioner was sent to the employer as well. In this letter there was a clear intimation of the intention of the employees to terminate the award and from the reply of the employer to this

letter, it was evident that it had become aware of the intention of the union to terminate the award. In the circumstances, the court held that the award had been validly terminated.[34] In *Thungabhadra Industries*, the workmen did not give any notice in terms of s 19(6) before they served a charter of demands on the management on all matters covered by the previous award. The court observed that the union must establish the point of time when the previous award had been terminated and pointed out that the fact, that the workmen went on a strike on the refusal of the employer to accede to their demands and the participation of the management in conciliation proceedings, did not indicate that the award had been terminated as required by s 19(6). The serving of charter of demands too was not held to be an indication of the termination of the previous award, because if the notice was served, the workmen would not have gone on an illegal strike before the expiry of two months from the date of the service of the charter of demands.[35] Where the agreement is not a 'settlement' as contemplated by its definition, for instance an agreement by acquiescence and without a memorandum being signed, it is not necessary to give a notice of the termination of such an agreement.[36]

This sub-section, however, requires only the expression of intention to terminate a subsisting settlement and nothing more. It does not provide that the workmen shall by their act terminate the subsisting settlement with effect from a particular date. The workmen are required only to express the intention which produces the statutory results of terminating the settlement. The mere fact that the workmen in their notice first referred to the charter of demands and then expressed their intention to terminate the existing settlement would not vitiate the notice on the ground that the charter of demands preceded the expression of intention to terminate the existing settlement because both were simultaneous.[37] In *Rajasthan Atomic Power*, the settlement provided that the motor vehicle drivers would be paid overtime allowance in accordance with the provisions of the Motor Transport Workers Act 1961. After the expiry of about one year, the management gave notice to the union under s 19(2) conveying their intention to terminate the settlement in so far as the staff car drivers were concerned and on the expiry of two months from the service of this notice, the management gave a further notice under s 9A of the Act proposing to effect a change in the conditions of service of the car drivers as indicated in the earlier notice. The dispute raised by the workmen was referred for adjudication. The tribunal, agreeing with the contention of the employer, took the view that since the car drivers were not motor transport workers within the meaning of s 2(h) of the Motor Transport Workers Act, they were wrongly included in the settlement and that the termination of the settlement in so far as it concerned the staff car drivers was, therefore, justified. Hence, the tribunal held that the car drivers were not entitled to any relief and made the award accordingly. In appeal the Supreme Court proceeded, on the basis that the right asserted by the staff car drivers arose out of the settlement which adopted the provisions of the Motor Transport Workers Act with respect to over-time allowance payable to motor vehicle drivers. Hence, the court took the view that there was no question of entering into a settlement on a mistaken belief.[38]

In *National Engg*, the Supreme Court held that a settlement arrived at under ss 12(3) and 18(3) of the Act between the management and the recognised union could not be terminated by a minority union by issuing a notice under s 19(2), and that such a notice of termination would be invalid as it did not represent the majority of the persons bound by the settlement nor the union could be said to be a representative union.[39] In *NTC*, the facts were: the employees of a corporation fell in three categories, with separate settlements for each category, but any change in the conditions of service of one category had its own impact on the status of the employees belonging to the other categories. The Supreme Court held that it was permissible to make a reference of the dispute raised by the affected category of employees, even during the subsistence of the settlement, because of the material change in the circumstances. For instance, due to a change brought about in respect of one category, the gardener was to get less emoluments by being treated under category II (ministerial staff) while his helper were to receive higher emoluments in view of the settlement entered into with category III (workmen) to which the helper belonged, the whole system smacked arbitrariness and unfair treatment of different categories of employees. In such an event, reference of the dispute raised by category II employees was admissible.[40]

(iii) Effect of Termination of Settlement on the Rights and Obligations of Parties

In *DJ Bahadur*, a majority of a three judge bench held that there is no difference between the effect of termination of a settlement under s 19(2) and termination of an award under s 19(6) on the rights and obligations of the parties. The topic has been discussed in detail under s 19(6).[41] In *Patiala CC Bank*, the settlement reached between the bank and the union under s 12(3) provided, *inter alia*, for dearness allowance. The settlement was due to expire on 31 March 1977, but continued in operation as no notice was given by either party of its intention to terminate the settlement. In the meantime, s. 84B was inserted in 1981 in the Punjab Co-operative Societies Act 1961, which provided that '*notwithstanding anything contained in this Act or any other law for the time being in force or any agreement, settlement or award no employee of a co-operative society shall be paid dearness allowance at a rate higher than that admissible to the employees of the government drawing pay at the same rate*'. The validity and applicability of this provision was challenged by the union in the High Court, which held that the said provision was not only *ultra vires* the state legislation, but also had no application to the settlement. Setting aside the decision of High Court, a three-judge Bench comprising Sen, Jeevan Reddy and Majumdar JJ, by a majority held that if, after the settlement was entered into, any law was passed and the settlement could not be enforced without violating that law, then the law would prevail over the terms of settlement in view of the non

obstante clause in s 84B.[42]

SUB-SECTION (3)

(i) Period of Operation of Awards

This sub-section prescribes the statutory period of operation of an award at one year from the date on which it becomes enforceable under s 17A. But this provision does not provide any period of limitation for enforcement of an award. It only lays down that subject to other provisions of this section, the duration for which the award shall remain in force or continue to be binding.[43] A claim to recover money due under an award not being in the nature of a continuing obligation on the parties to the award and the fact that claim awarded is in respect of an antecedent period would take it out of the operation of this provision.[44] The power to extend the award for a period not exceeding one year from the date of its becoming enforceable under s 17A which is given to the Government by the second proviso, is an independent power, and such extension does not in any way, affect the jurisdiction or power of the tribunal. The maximum period of one year mentioned in s 19(3) starts from the date on which the award becomes enforceable and does not cover the period antecedent to the award.[45] A Full Bench of the Andhra Pradesh High Court in *Ikram Ahmed*, had taken the view that the term 'award' used in this provision would include 'awards' made under other enactments as well.[46]But from a plain reading of sub-s (3), it would appear that it refers to such an award as would be 'enforceable under s 17A '. In other words, it is only an award as contemplated by s 2(b) of the Act that can be enforceable under s 17A. The awards under other enactments obviously would not be enforceable under s 17A of this Act. The section, therefore, concerns itself only with the awards as defined in this Act and not under other enactments. Though the full bench has entered into a long dissertation, it does not appear to have adverted to the plain language of the statute. The construction placed by the full bench is clearly incorrect.

(ii) 'Subject to the Provisions of this Section'

The words 'subject to the provisions of this section' used in this sub-section makes the period of operation of the award subject to the other provisions in s 19. A private settlement between the parties, after having received the stamp of adjudication by an adjudicator, arrived at during the course of adjudicatory proceedings loses the character of a 'settlement' as defined in s 2(p) and partakes the character of an 'award' as defined in s 2(b) of the Act. This rule, however gives rise to the query whether such an 'award-settlement' would be operative as a 'settlement' in accordance with the provisions of sub-s (2) or as an award according to the provisions of sub-s (3). The Bombay High Court, in *Ghatge Patil*, having regard to the language of this sub-section, took the view that the tribunal cannot direct that the award should remain in operation for a period longer than one year despite a longer period agreed upon in the settlement-award. In this case in a pending reference, the employer produced agreements signed by 104 out of 124 workmen and asked for an award in terms thereof. The union representing the workers objected to the award being made in terms of the agreement and contended that the agreements were contrary to the principles of collective bargaining and were brought about by fraud, misrepresentation and coercion. The tribunal went into each of the items of settlement between the parties and accepted the settlement as being fair and just except in regard to two matters, *viz*, privilege leave and bonus, consequently, it made its own award though substantially in consonance with the settlement filed by the employer. One of the terms of the settlement was that the award should be effective and operative for a period of three years. The High Court held that the tribunal had no jurisdiction to make the award for a period longer than one year in view of the language of s 19(3) and unless the Government had extended the period of operation of award in exercise of its power under the proviso to s 19(3), the award could only remain in force for a period of one year.[47] But subsequently another Division Bench of the same High Court in *Garment Cleaning*, took a different view on the construction of the words 'subject to the provisions of this section'. In this case the settlements arrived at between the parties were filed before the tribunal in the course of adjudication proceedings which contained a longer period for the operation of the 'settlement-award' than the statutory period of one year provided in sub-s (3). The court distinguished this case from *Ghatge & Patil* and held that the 'settlement award' shall be binding for the period agreed upon in the settlement rather than the statutory period of one year for an award as provided in sub-s (3).[48] This view does not appear to be correct. The court has lost sight of the principle that after the tribunal has adjudicated upon a settlement and made the settlement, its own award which became final under s 17A, no longer remained a settlement. To extend the statutory period of the operation of an award under sub-s (3), is beyond the jurisdiction of the tribunal. But the court has pressed into service the words 'subject to the provisions of this section' in observing that 19(3) is subject to sub-s (2) as much as to the second proviso thereto which gives power to the Government to extend the operation of an award. Sub-section (3) which refers to awards, cannot be subject to the provisions of sub-s (2) which refers to the period of operation of settlements. On true construction of sub-s (3), it would be obvious that it is subject to those provisions of s 19 which deal with the period of operation of 'awards'. Such provisions are the two provisos to sub-ss (3)-(6). The statutory period of operation of an award under sub-s (3) is only subject to these provisions and not sub-s (2).

(iii) First Proviso: Reduction of the Period of Operation

This proviso empowers the appropriate Government to reduce the period of an award from one year to such short period as it may think fit. Since the provisions of sub-s (3) are 'subject to the provisions of s 19, the period can be shortened only after complying with the requirements of sub-s (4). In other words, before the appropriate Government can fix a reduced period of operation of an award, it must comply with the requirements of sub-s (4).

(iv) Second Proviso: Extension of the Period of Operation

This proviso empowers the Government to extend the period of operation of an award. The requirements of this proviso are:

(a) the period must be extended before the period prescribed in sub-s (1) has expired;

(b) the period extended should not exceed one year at a time; and

(c) the total period of operation of any award should not exceed three years from the date on which the award came into operation.

The award will be in operation:

(1) For a period of one year from the date on which it becomes enforceable under s17A.

(2) For such shorter period to which the appropriate government in its discretion may reduce it.

(3) For such extended period to which the government in its discretion may extend the period of operation of the award. The period of extension is subject to the following qualifications:

  (a) the period of extension cannot be more than one year at a time;

  (b) the total period of extension of operation of the award should not exceed three years from the date on which it comes into operation, under s 17A (4).

(4) For such extended or reduced period as aforesaid, till the expiry of two months from the date of a notice as required by sub-s (6).

From the scheme of sub-s (3) along with the provisos, it appears that the period of operation of an award has been fixed by the statute at one year. The tribunal has not been given the discretion to increase or reduce this statutory period. The reduction and extension of the period of operation is the prerogative of the 'appropriate Government'. However, in case of reducing the period of operation from the statutory period of one year, the Government must comply with the requirements of sub-s (4).

SUB-SECTION (4)

(i) Reference of Award for Reducing the Period of its Operation

This sub-section empowers the 'appropriate Government', *suo motu* or on the application of any party bound by the award, to make a reference for a decision whether the period of operation thereof should not be shortened. But before making a reference under this sub-section, the 'appropriate Government' must consider whether since the award was made, there has been a material change in the circumstances on which the award was based. In other words, this is a precondition to such a reference. The award of a labour court can be referred to a labour court, whereas the award of an industrial tribunal or a national tribunal can be referred to an industrial tribunal. It is, therefore, for the labour court or the industrial tribunal to decide whether the period of operation should not by reason of such change be shortened. Such a reference under s 19(4) is different from the reference under s 10 or under s 36A. Under s 19(4), the tribunal has to decide only the limited question 'whether the period of operation of the award should not, by reason of a material change in the circumstances on which it is based, be shortened?'.[49] The decision of the labour court or the tribunal on such reference shall be final. In case the labour court or the tribunal decides that the period should be shortened, the 'appropriate Government' in exercise of the power under the first proviso to sub-s (3) will reduce the period of operation of the award. But if the labour court or the tribunal decides that there is no case for shortening the period, the decision being final, the 'appropriate Government' will have no power to reduce the period of operation as the power under the proviso in sub-s (3) is subject to other provisions of s 19. The words 'the decision of a labour court or tribunal as the case may be, on such reference shall be final' ousts the jurisdiction of the ordinary civil courts. But such decision being of a quasi-judicial nature, the labour court or the tribunal will decide the question after giving a hearing to the parties and complying with the rules of natural justice. The use of the

word 'decision' in s 19(4) indicates that the decision of the tribunal on a reference under this provision is not an award and does not require publication. The legislature has advisedly used the word 'decision' instead of the word 'award' which has been made final. Hence the decision of the labour court or the tribunal under s 19(4) does not require publication under s 17(1) which specifically speaks of an 'award'. Such decision will be reviewable by a writ court if vitiated by errors of law apparent on the face of the record or perversity, or if it is in violation of the rules of natural justice.

(ii) Constitutional Validity of Sub-section (4)

This provision does not empower the 'appropriate Government' to change the period of operation of an award, merely by its own volition and without having regard to the circumstances of a particular case. The discretion given thereunder shall not be exercised arbitrarily or capriciously. This provision, therefore, was held not to be unconstitutional or void as infringing the fundamental rights guaranteed under Art. 14 and 19(1)(f) and (g) of the Constitution.[50]

SUB-SECTION (5): CONTINUING OBLIGATION UNDER THE AWARD

There are two types of awards: (i) those which decide the questions once and for all without any continuing obligation; (ii) those with a continuing obligation for the parties. For instance, the awards involving personal rights, *eg*, upholding the discharge or dismissal of workmen or setting aside the discharge or dismissal and directing reinstatement of a discharged or a dismissed workman for victimisation or any other unfair labour practice; or the awards dealing with questions like transfer, legality or justifiability of lock-outs or strikes *etc*.[51]

SUB-SECTION (6)

(i) Extended Operation of the Award: Notice of Termination

This sub-section postulates that after the expiry of the period of operation of an award, be it for one year as specified in sub-s (3) or for a reduced or extended period as contemplated in the two provisos thereto, it does not automatically cease to be 'binding' on the parties. In other words, though the period of operation expires, the binding effect of the award would still survive. In order to terminate the award, the party intending to terminate it must give a notice of two months' duration under s 19(6) to the other party or parties. It is clear from the language of this provision that even after the notice, the award continues to be binding for a further period of two months from the date on which it is given. Section 19(3) talks of the period of operation of an award, while s 19(6) talks of the award continuing to be 'binding' notwithstanding the expiry of the period of operation. There is the difference between an award being in 'operation' and an award being 'binding on the parties'. After the period of operation of an award has expired, the award does not cease to be effective or binding but continues to be binding thereafter on the parties until the notice has been given by one of the parties of its intention to terminate it and for a further period of two months from the date of such notice.[52] 'In considering the intendment of sub-ss (3) and (6) of s 19, the distinction between the expressions 'in force' and 'in operation' has to be borne in mind. While sub-s (3) lays down that an award shall be in operation for the different periods mentioned therein whenever action has been taken by the Government after the expiry of the period of operation, the award does not automatically cease, but it continues to be in force and binds the parties until it is terminated by a notice and such termination takes effect two months after the notice. The words 'in operation' have reference to the period fixed by law or by the parties according to law while the words 'in force' have reference to the period (subsequent to the period of operation) during which it will statutorily be binding on the parties to the award or settlement'.[53] The legal position on reading of these two provisions, *viz*, sub-ss (3) and (6) seems to be that the operation of the award is for a period of one year from the date on which the award becomes enforceable under s 17A and this period may be extended from time to time up to a maximum period of three years under the second proviso to sub-s (3). A party to the award, therefore, cannot terminate it so long as it remained operative either during the period of one year or during the extended period under sub-s (3) of s 19. It does not cease to be binding on the parties merely by the lapse of the period of its operation.[54]

As long as the award continues to be binding any further reference for adjudication of the matters covered by the award would be barred. In order to terminate the binding effect of the award any party bound by it has to give a notice to the other party or parties intimating its intention to terminate the award. Hence any party bound by the award can get rid of the award by service of two months' notice under sub-s (6) on the other party or parties bound by it at any time from the date, two months before the expiry of the statutory period of the operation of such award under sub-s (1) or sub-s (3). From the date of such notice, for a further period of two months, the award shall continue to be binding on the parties. It is on the lapse of this period of two months, that the award ceases to be binding. If any of the parties wants to terminate the binding effect of the award with the expiry of the period of its operation, it has to give notice of its intention to terminate the award to the other party or parties, two months before the expiry of the period of operation prescribed under sub-s (3). Then the award will cease to be binding on the expiry of the period of its operation. The Delhi High Court has taken the view that the notice of termination contemplated by sub-s (6) can be given only after the expiry of the period of operation under sub-s (3) because 'reading sub-s (3) and sub-s (6) together it has to be held that no notice of termination can be given within the

period of operation of the award.[55] This view is not warranted by the language of the statute. On a plain reading of sub-s (6), it is clear that the termination of the binding effect of the award can be made co-terminus with the expiry of the period of its operation. But the award shall continue to be binding until a period of two months has elapsed from the date on which the notice is given.

Even where the award mentions the date till which it would be binding on the parties, notice under s 19(6) is necessary.[56] 'It cannot be over-emphasised that an intimation, claimed to have been given, regarding the termination of an award, be fixed with reference to a particular date, so as to enable a court to come to the conclusion that the party, giving that intimation, has expressed its intention to terminate the award. Such a certainty regarding the date is absolutely essential, because, the period of two months after the expiry of which, the award will cease to be binding on the parties, will have to be reckoned, from the date of such clear intimation'.[57]The provision in s 19(6) as regards the period for which the award shall continue to be binding on the parties is not in any way affected by s 4 of the Industrial Disputes (Banking Companies) Decision Act 1955.[58] In *Bank of India*, the Supreme Court held that under s 19(6), an award would continue to be binding on the parties even after the period stated in s 19(3) ; and that s 4 of the Industrial Disputes (Banking Companies) Decision Act 1955, would not affect the same. An award would not cease to be binding on the parties in view of s 19(6) until the parties intimate each other about their intention to do so.[59]

Notice in writing:

On the question whether the notice intending to terminate the award under s 19(6) should be in 'writing' or not, as unlike s 19(2) the words 'in writing' do not occur in s 19(6), there is a conflict of judicial opinion. The Rajasthan[60] and Delhi[61] High Courts have taken the view that it is absolutely necessary that the notice must be 'in writing' and a contrary opinion might land the parties in a further dispute on a question of fact, because under sub-s (6) limitation arises on the expiry of two months from the date of the notice. It may be communicated in any manner, provided the party for whom it is intended, has sufficient knowledge of the facts constituting it. In case the notice is not 'in writing', though it may be possible to presume that the party for whom the notice is intended had sufficient knowledge of the facts constituting the notice, it will be extremely difficult to determine as to on what date, for the first time, the party for whom the notice was intended, came to know, such facts. Such a construction, therefore, will lead to further disputes on questions of facts. On the other hand, the plain language of the statute does not contain the words 'in writing' in sub-s (6). If the legislature uses different words in the same enactment, and particularly in the same section, it must be deemed to have intended to give those words different meaning. Though it may lead to disputes on questions of facts as to the date on which the notice was served, if the notice is not 'in writing', such facts can be determined by the tribunal. This construction does not lead to any absurdity. Hence, it would not be permissible for the court to infer the omission of the words, 'in writing' and add the same to sub-s (6). The view of the labour appellate tribunal and the Calcutta and the Mysore High Courts appears to be correct. But, it is advisable that the legislature amends sub-s (6) by adding to it the words 'in writing' and obviate disputes on questions of facts as to the date on which the notice was given. If a notice terminating a settlement is to be in writing, there is no reason why a notice terminating an award should not be in writing.

(ii) Supersession and Waiver of Notice

A notice under s 19(2) or s 19(6) may be waived by the party for whom it is intended.[62] If after the notice under s 19(6), the Government extends the period of operation of an award by a further period, the notice will be superseded by the order of the Government. The party intending to terminate the award shall again have to give a fresh notice under s 19(6) of two months before the date from which it intends to terminate the award.

(iii) Effect of Termination of Award under Section 19(6) on Rights and Obligations of Parties

There are three stages or phases with different legal effects on the life of an award. There is a specific period contractually or statutorily fixed as the period of operation. After the expiry of this period, the award does not cease to be effective. But it continues to be binding on the parties until notice has been given by one of the parties of its intention to terminate it and two months have elapsed from the date of such notice. This is the second stage. The last stage is arrived at when the period of notice, under s 19(6), by either party, expires. After this, the award ceases to be binding under the Act. In other words, the effect of termination of the award is to prevent the enforcement of the obligations under it in the manner prescribed. After the termination of the award, it is open to the workmen to raise fresh industrial disputes relating to the subject-matter of the award. However, the termination of the award does not have the effect of extinguishing the rights flowing there from. The rights and obligations which flow from it are not wiped out. Evidently, by the termination of an award, the contract of employment is not terminated.[63] In *South Indian Bank*, the Supreme Court pointed out that even if an award has ceased to be in operation under s 19 or ceased to be binding under s 18 on the parties, it will continue to have its effect as a contract between the parties that has been made by industrial adjudication in place of the old contract. In other words, 'even though the period of the operation of the award and the period for which it remains binding on the parties may elapse, new contract would continue to govern the relations between the parties till it is replaced by another contract'.[64]

The obligations created by the award or contract can, however, be altered by a fresh adjudication or fresh contract created either by a fresh award or a fresh settlement. In other words, when a notice intimating termination of an award or a settlement is issued, the legal import is merely that the stage is set for fresh negotiations or industrial adjudication and until either effort ripens into a fresh set of conditions of service, the previous award or settlement does not cease to regulate the relations between the employer and the employees.[65]

(iv) Bar to Further Reference

Hence, when there is a subsisting settlement or award, binding on the parties, the tribunal will have no jurisdiction to consider the same point, in a subsequent reference. Since the points covered by a settlement or an award are binding on the employer and the workmen, they cannot raise any industrial dispute relating to those points. Hence, there can be no existing or apprehended industrial dispute relating to the points. In the absence of an existing or apprehended industrial dispute, a subsequent reference relating to such points will itself be invalid and illegal.[66] In other words, where an item of dispute covered by a settlement or award is substantially the same, as set out in a subsequent reference, a change of phraseology in the language of the subsequent reference would not create a new dispute.[67] When an inquiry is to be on the grounds mentioned in s 19(4), it must be confined to the question whether the period of operation should not, by reason of the alleged change, be shortened. But unless the period is so shortened and effect of the award is terminated or the matter is re-opened after termination of the award under s 19(6), the first award will not cease to be operative and its binding effect cannot be avoided. The matter covered by such an award, therefore, cannot be referred or adjudicated upon.[68]

Illustrations

While a 'consent award' providing that a supervisor would not be a workman was in force and the same had not been terminated as required under s 19(6), a fresh dispute on the same question was held to be barred.[69] Where the concerned workmen withdrew certain demands and that matter was incorporated in the award, they could not raise the same demand as long as the prior award was in force.[70] The bar of s 19(6) will, however, operate only where there is an adjudication by a tribunal on the merits of the dispute in an award. The settlement or award wherein certain items of dispute were not pressed and were withdrawn, would not operate as a bar to a subsequent reference in regard to such items, as in such a case there would be no adjudication on merits by the industrial tribunal in regard to items withdrawn and not pressed by the workmen. Similarly, in regard to such items of dispute, which were not pressed and were withdrawn, there could be no agreement or settlement between the parties.[71] The bar will not apply where there has been a settlement between the parties to have the dispute referred. In order that a particular award should operate as a bar to further adjudication, the matter should have been directly and substantially in issue in the former proceedings. For instance, where there was no inquiry whether certain persons were workmen, for the reason that no material was placed before the tribunal to adjudicate the question, the previous award would not bar subsequent adjudication of the question.[72] Likewise, where the 'grades and scales' of pay were covered by a previous award, a subsequent reference regarding 'dearness allowance' was not barred as the two disputes were not identical or substantially identical.[73] If the question in subsequent reference is not the same or substantially the same, the second reference will not be barred; for instance, a reference with reference to 'dearness allowance' would not be barred by a previous award regarding 'pay' of an employee.[74]

SUB-SECTION (7): WHO CAN GIVE EFFECTIVE NOTICE

This sub-section was inserted by the Industrial Disputes (Amendment) Act 1964. The effect of this provision is that a notice under sub-s (2) or sub-s (6) of s 19 to be effective, must be only by a party representing the majority of persons bound by the settlement or award, as the case may be. This sub-section annuls the effect of the Supreme Court decision in *ACC*, in which it was held that a trade union representing even a minority of the workmen in an establishment could terminate an award by giving notice under s 19(6) of the Act.[75]

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1 The words "arrived at. .. this Act" omitted by Act 36 of 1956, s 14 (wef 7-10-1956).

2 Ins by Act 36 of 1956, s. 14 (wef 7-10-1956).

3 Sub-secs (3) to (7) subs by Act 48 of 1950, s 34 and Sch.

4 Ins by Act 36 of 1956, s 14 (wef 17-9-1956).

5 Subs by Act 36 of 1956, s 14 for "to a Tribunal" (wef 10-3-1957).

6 Subs by Act 36 of 1956, s 14, for "the Tribunal" (wef 10-3-1957).

7 The words "subject to the provision for appeal" omitted by Act 36 of 1956, s 14 (wef 10-3-1957).

8 Ins by Act 36 of 1964, s 10 (wef 19-12-1964).

9 *Mysore Vegetable Oil Products Ltd v Workmen* (1965) 2 LLJ 8, 10 (Mys) (DB), per Somnath Ayyar J.

10 *State of Kerala v Antony D'Cruz* (1966) 1 LLJ 373, 375 (Ker), per Govinda Menon J.

11 *Shukla Manseta Industries Pvt Ltd v Workmen* (1977) 2 LLJ 339 [LNIND 1977 SC 242], 341 : AIR 1977 SC 2246 [LNIND 1977 SC 242]: (1977) 4 SCC 31 [LNIND 1977 SC 242] (SC), per Goswami J.

12 *Binny Ltd v PO* (1986) 1 LLJ 220, 223 : ILR 1985 KARNATAKA 59 [LNIND 1984 KANT 101] (Kant), per Rama Jois J.

13 *Employees of India Reconstruction Corpn v India Reconstruction Corpn* [1953] LAC 563(LAT).

14 *National Carbon Co (India) Ltd v LAT* (1958) 1 LLJ 472 [LNIND 1957 CAL 79] (Cal), per Sinha J.

15 *Mysore Vegetable Oil Products Ltd v Workmen* (1965) 2 LLJ 8 (Mys) (DB), per Somnath Ayyar J.

16 *State of Kerala v Antony D'Cruz* (1966) 1 LLJ 373, 375 (Ker), per Govinda Menon J.

17 *Jeypore Sugar Co Ltd v Employees* (1955) 2 LLJ 444 (LAT).

18 *Maruti Mahipati Mullick v Poison Ltd* 1970 Lab IC 308, 310 (Bom) (DB), per Tarkunde J.

19 *Glaxo Laboratories (India) Ltd v IT* 1975 Lab IC 1545, 1548 (Ker), per Bhaskaran J.

20 *Shukla Manseta Industries Pvt Ltd v Workmen* (1977) 2 LLJ 339 [LNIND 1977 SC 242] (SC), per Goswami J.

21 *British India Corpn Ltd v LC*, 1984 Lab IC (NOC) 43 (All), per Dhaon J.

22 *Glaxo Laboratories (India) Ltd v IT* 1975 Lab IC 1545, 1548 (Ker), per Bhaskaran J.

23 *Antiseptic Employees' Unit v State of Madras* 1970 Lab IC 396 [LNIND 1968 MAD 80], 398 (Mad), per Kailasam J.

24 *Workmen of Western India Match Co v Western India Match Co* (1962) 1 LLJ 661 [LNIND 1962 SC 161], 665 (SC), per Mudholkar J.

25 *Cochin State Power Light Corpn Ltd v Workmen* (1964) 2 LLJ 100 [LNIND 1963 SC 143] (SC), per Wanchoo J.

26 *Workmen of Continental Commercial Co Pvt Ltd v Govt of WB* (1962) 1 LLJ 85 (Cal), per BN Banerjee J.

27 *Bangalore WCS Mills Co Ltd v Workmen* (1968) 1 LLJ 555 [LNIND 1967 SC 274], 559 (SC), per Vaidialingam J.

28 *Anglo-Indian Jute Mills Co Ltd v Fifth IT* 1971 Lab IC 58 [LNIND 1970 CAL 73], 63 (Cal), per TK Basil J.

29 *Cochin State Power, Light Corpn v Workmen* (1964) 2 LLJ 100 [LNIND 1963 SC 143] (SC), per Wanchoo J.

30 *Workmen of WIMCO v WIMCO Ltd* (1962) 1 LLJ 661 [LNIND 1962 SC 161], 665 (SC), per Mudholkar J.

31 *Bangalore WCS Co Ltd v Workmen* (1968) 1 LLJ 555 [LNIND 1967 SC 274], 559 : AIR 1968 SC 585 [LNIND 1967 SC 273] (SC), per Vaidialingam J.

32 *Hindustan Paper Corpn v Government of India* 1985 Lab IC 95, 98 (Cal), per UC Banerjee J.

33 *Indian Link Chain Mfrs.Ltd v Workmen* (1971) 2 LLJ 581 [LNIND 1971 SC 479] : AIR 1972 SC 343 [LNIND 1971 SC 479]: (1971) 2 SCC 759 [LNIND 1971 SC 479] (SC), per Jaganmohan Reddy J.

34 *Karnani Properties Ltd v State of WB* 1990 Lab IC 1677 [LNIND 1990 SC 449], 1682 : AIR 1990 SC 2047 [LNIND 1990 SC 449]: (1990) 4 SCC 472 [LNIND 1990 SC 449] (SC), per SC Agrawal J.

35 *Employers of Thungabhadra Industries Ltd v Workmen* (1973) 2 LLJ 283 [LNIND 1973 SC 196] : AIR 1973 SC 2272 [LNIND 1973 SC 196]: (1974) 3 SCC 167 [LNIND 1973 SC 196] (SC), per Vaidialingarn J.

36 *Cooper Engineering Ltd v DM Aney* 1971 Lab IC 603, 610-11 (Bom) (DB), per KK Desai J.

37 *Glaxo Laboratories (India) Ltd v PO, LC* 1977 Lab IC 1523, 1526-29 (AP), per Sheth J.

38 *Workmen of Rajasthan Atomic Power Project v Mgmt* (1976) 1 LLJ 271 [LNIND 1975 SC 528] : AIR 1976 SC 441 [LNIND 1975 SC 528]: (1976) 3 SCC 80 [LNIND 1975 SC 528] (SC), per AC Gupta J.

39 *National Engg Industries Ltd v State of Rajasthan* (1999) 4 LLN 1185 (1201) (SC), per Wadhwa J.

40 *NTC (APKKM) Ltd v SYCWSMS Assn* (2001) 2 LLN 795 (SC), per Rajendra Babu J.

41 *Life Insurance Corpn of India v DJ Bahadur* 1980 Lab IC 1218 [LNIND 1980 SC 442], 1234 : AIR 1980 SC 2181 [LNIND 1980 SC 442]: (1981) 1 SCC 315 [LNIND 1980 SC 442] (SC), per Krishna Iyer J.

42 *Patiala Central Co-op Bank Ltd v Patiala CCBE Union* 1996 Lab IC 2728 (SC).

43 *S Kumaraswami v South Travancore EW Union* (1958) 2 LLJ 72 (Ker) (DB), per Koshi CJ.

44 *M Velayudhan v State of Kerala* (1960) 1 LLJ 319 (Ker), per TK Joseph J.

45 *Roberts Mclean & Co v AT Das Gupta* AIR 1949 FC 151, per Kania CJ.

46 *APSE Board, Hyderabad v Ikram Ahmed* 1979 Lab IC 915 (AP) (FB), per Madhava Reddy J.

47 *Ghatge & Patil Co Employees' Union v KR Powar* (1966) 1 LLJ 250 (Bom) (DB), per Chainani CJ.

48 *Garment Cleaning Works v DM Aney* (1970) 2 LLJ 195 [LNIND 1969 BOM 21], 199-200 : AIR 1970 Bom 209 [LNIND 1969 BOM 21] (Bom) (DB), per Patel J.

49 *Indian Industrial Works Ltd v Engineering Mazdoor Sabha* (1955) 2 LLJ 675 (LAT).

50 *Niemla Textile Finishing Mills Ltd v Second Punjab Tribunal* (1957) 1 LLJ 460 [LNIND 1957 SC 1] (SC), per Bhagwati J.

51 *Indian Aluminium Co Ltd v Workmen* (1958) 2 LLJ 403 (Ker) (DB), per MS Menon J.

52 *South India Bank v AR Chacko* (1964) 1 LLJ 19 [LNIND 1963 SC 277] (SC), per Das Gupta J.

53 *Krishnarajendra Mills Workers' Union v ACL* (1968) 1 LLJ 504, 510 (Mys) (DB), per Tukol J.

54 *Patna Municipal Corpn v Workmen* 1970 Lab IC 1236, 1238 (Pat) (DB), per Untwalia J.

55 *Hindustan Housing Factory Ltd v HHFE Union* (1971) 2 LLJ 222, 229 (Del) (DB), per Hardy J.

56 *South Indian Bank Ltd v AR Chacko* (1964) 1 LLJ 19 [LNIND 1963 SC 277] (SC), per Das Gupta J.

57 *Bangalore WCS Mills Co Ltd v Workmen* (1968) 1 LLJ 555 [LNIND 1967 SC 274], 559 (SC), per Vaidialingam J.

58 *South India Bank v AR Chacko* (1964) 1 LLJ 19 [LNIND 1963 SC 277] (SC), per Das Gupta J.

59 *Bank of India v PO* (2001) 4 LLN 41 (SC).

60 *Maharaja Shri Umaid Mills v Textile Labour Union* AIR 1958 Raj 34 [LNIND 1957 RAJ 62] (DB), per Dave J.

61 *Hindustan Housing Factory EU v HHF Ltd* (1971) 2 LLJ 222, 229-30 (Del) (DB), per Hardy J.

62 *Workmen of Continental Commercial Co Pvt Ltd v Govt of WB* (1962) 1 LLJ 85 (Cal), per BN Banerjee J.

63 *Mangaldas Narandas v PW Authority* (1957) 2 LLJ 256 [LNIND 1957 BOM 41], 259 (Bom) (DB), per Shah J.

64 *South Indian Bank Ltd v AR Chacko* (1964) 1 LLJ 19 [LNIND 1963 SC 277], 22 : AIR 1964 SC 1522 [LNIND 1963 SC 277] (SC), per Das Gupta J.

65 *Life Insurance Corpn of India v DJ Bahadur* 1980 Lab IC 1218 [LNIND 1980 SC 442], 1235 (SC), per Krishna Iyer J.

66 *Bangalore WCS Mills Co Ltd v Workmen* (1968) 1 LLJ 555 [LNIND 1967 SC 274], 559 (SC).

67 *British India Corpn v IT* (1959) 1 LLJ 68 (Punj), per GD Khosla J.

68 *Indian Industrial Works Ltd v Engineering Mazdoor Sabha* (1955) 2 LLJ 655 (LAT).

69 *Aluminium Factory Workers' Union v Indian Aluminium Co Ltd* (1962) 1 LLJ 210 [LNIND 1962 SC 26] (SC), per Sarkar J.

70 *Punjab Distilling Industries Ltd v IT*, (1958) 2 LLJ 109 (Punj), per Grover J.

71 *Technological Institute of Textiles v Workmen* (1965) 2 LLJ 149 [LNIND 1965 SC 85] (SC), per Ramaswami J.

72 *National Tobacco Co (India) Ltd v Miriyala Kalidas* (1962) 2 LLJ 207 : AIR 1962 AP 160 (AP), per Chandra Reddy CJ.

73 *BN Elias & Co Pvt Ltd v GP Mukherjee* 16 FJR 128 (Cal) (DB), per Bachawat J.

74 *Hotel Ambassador v Workmen* (1964) 1 LLJ 631 (Punj), per Grover J.

75 *Associated Cement Companies v Workmen* (1960) 1 LLJ 491 [LNIND 1960 SC 60] : AIR 1960 SC 777 [LNIND 1960 SC 60] (SC), per Gajendragadkar J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

S. 20. Commencement and conclusion of proceedings.—

(1) A conciliation proceeding shall be deemed to have commenced on the date on which a notice of strike or lock-out under Section 22 is received by the conciliation officer or on the date of the order referring the dispute to a Board, as the case may be.

(2) A conciliation proceeding shall be deemed to have concluded—

(a) where a settlement is arrived at, when a memorandum of the settlement is signed by the parties to the dispute;

(b) where no settlement is arrived at, when the report of the conciliation officer is received by the appropriate Government or when the report of the Board is published under Section 17, as the case may be; or

(c) when a reference is made to a Court, [76][Labour Court, Tribunal or National Tribunal] under Section 10 during the pendency of conciliation proceedings.

(3) Proceedings [77][before an arbitrator under Section 10-A or before a Labour Court, Tribunal or National Tribunal] shall be deemed to have commenced on the date of the [78][reference of the dispute for arbitration or adjudication, as the case may be,] and such proceedings shall be deemed to have concluded [79][on the date on which the award becomes enforceable under section 17-A].

SUB-SECTION (1): COMMENCEMENT OF CONCILIATION PROCEEDINGS

(i) In a Public Utility Service

The first part of this provision relates to the commencement of conciliation proceedings before a conciliation officer in a 'public utility service'. The date of commencement of conciliation proceedings is the date on which a notice of strike or lockout under s 22 is received by the conciliation officer. Section 22 prohibits strikes and lockouts in a 'public utility service' concern and has no reference to 'non-public utility service' concerns. Therefore, if the undertaking is not a 'public utility service' as defined in s 2(n) of the Act, provisions of s 22 will not be attracted. In other words, even if a notice of strike or lockout under s 22 is given by a party to the other, conciliation proceedings shall not be deemed to have commenced on the date of such notice.[80] The second part of the sub-section provides that the proceedings before a Board commence when a reference under s 10(1) is made to it by the 'appropriate Government', whether the dispute relates to a public utility or a non-public utility service. This sub-section, by a fiction, makes the date on which the notice of strike or lockout is received by the conciliation officer or the date on which the dispute has been referred to the Board, to be the date of commencement of conciliation proceedings. The word 'deemed' indicates that in a public utility concern even if the conciliation officer had been negotiating with the parties or had received a charter of demands from the workmen and the reply from the employer prior to the date of receipt of notice by him under s 22, it would not tantamount to conciliation proceedings as the conciliation proceedings in such a case can only commence from the date on which the notice of strike or lockout under s 22 is received.

(ii) In a Non-Public Utility Service

From the provisions of s 20(1), it is clear that upon a reference of dispute, being made to a Board under s 10(l)(a) for promoting a settlement, whether relating to a public utility service or a non-public utility service, proceedings before it shall be deemed to have commenced on the date when the order referring the dispute to it is made. However, there is no indication in sub-s (1) as to from what date the conciliation proceedings before a conciliation officer in a 'non-public utility service' shall be deemed to have commenced. However, for determining the pendency of conciliation proceedings before a conciliation officer, the determination of the date of commencement is essential. The date of commencement, therefore, has to be determined from the other provisions. Section 12(1) lays down that 'where an industrial dispute exists or is apprehended the conciliation officer may ... hold conciliation proceedings in the prescribed manner'. The manner of holding the conciliation proceedings has been prescribed in r 10 of the Industrial Disputes (Central) Rules 1957 which lays down that 'where the conciliation officer receives any information about an existing or apprehended industrial dispute which does not relate to a public utility service ... he shall give formal intimation in writing to the parties concerned declaring his intention to commence conciliation proceedings with effect from such date as may be specified therein'. From this rule, it appears that the date of commencement of conciliation proceedings before a conciliation officer will be the date specified by him in his communication sent to the parties in writing, intimating them of his intention to commence the proceedings. It is neither the date on which the conciliation officer receives the information nor the date on which he communicates his intention to the parties on which the conciliation proceedings commence. Even if on the date specified by the conciliation officer in his communication to the parties, any or all the parties do not appear before him, the conciliation proceedings before him shall still be deemed to have commenced on that date.

SUB-SECTION (2): CONCLUSION OF CONCILIATION PROCEEDINGS

This sub-section provides the following points of time on which the conciliation proceedings before a conciliation officer or a Board shall be deemed to have concluded in different situations:

(i) In case a settlement is arrived at, whether before a conciliation officer or the board, the date on which the memorandum of settlement is signed by the parties to the dispute. Though the report of the board regarding the settlement of the dispute is to be sent by it to the 'appropriate government' under s 13(2) and is to be published under s 17(1), the date of the conclusion of the proceedings before the board, like the conclusion of the proceedings before a conciliation officer, has been made the date of signing of the memorandum and not the date of the publication of the report.

(ii) In case no settlement is arrived at:

  (a) the date on which the report of the conciliation officer is received by the appropriate government; or

  (b) the date on which the report of the board is published under s 17.

(iii) In case, during the pendency of conciliation proceedings, the dispute is referred for adjudication, the date of reference is the date of conclusion of the conciliation proceedings.

The provisions of sub-s (2) apply to all conciliation proceedings, whether in regard to a public utility service or otherwise. A conciliation proceeding under this sub-section shall be deemed to have been concluded in the manner aforesaid. The conciliation proceedings, therefore, do not end when the report under s 12(6) is submitted by the conciliation officer, but it ends when that report is received by the appropriate Government. If a conciliation officer does not, for some reasons, submit his report within the period of 14 days prescribed by s 12(6), his action may be reprehensible, but that will not affect the interpretation of s 20(2)(b) that the conciliation proceedings only terminate as provided thereunder.[81] The word 'received' in s 20(2)(b) obviously implies actual receipt of the report by the Government where no settlement is arrived at. It cannot mean that when the report should have been received by the appropriate Government.[82] However, there may be cases where the report is not received by the Government at all. For instance, it might have been lost in transit or might not have been dispatched due to clerical inadvertence. In such cases, on the evidence that the conciliation officer has dispatched his report to the Government, it must be presumed, unless there is evidence to the contrary, that the report was received by the Government in the normal course.[83] Clause (c) of sub-s (2) provides that when, during the pendency of conciliation proceedings before the conciliation officer or the board of conciliation, a reference of the dispute is made to the court of inquiry, labour court, tribunal or national tribunal, the conciliation proceedings shall be deemed to have been concluded. In other words, the conciliation proceedings do not survive a reference under s 10(1). Hence, a conciliation officer cannot enter upon conciliation proceedings of an industrial dispute which has been referred under s 10(1) for investigation or adjudication.[84]

SUB-SECTION (3)

(i) Commencement and Conclusion of Arbitration or Adjudication

Under this sub-section, arbitration or adjudication proceedings before an arbitrator or a tribunal, *etc* shall be deemed to have:

(a) commenced on the date of reference of the dispute for arbitration or adjudication; and

(b) concluded on the date on which the award becomes enforceable under section 17A(1).[85]

(ii) Date of Reference

By legal fiction of s 20(3), the proceedings before an arbitrator or the tribunals *etc* shall be deemed to have commenced from the date when the order of reference is made. There is nothing in the Act to suggest that a reference is incomplete until it has reached the tribunal or the parties; nor is there any indication to suggest that a reference is not complete until the original order is signed and delivered to the tribunal. On plain construction of s 10 and s 20, as soon as a reference is made 'by order in writing', it becomes a complete reference. It is that date on which the proceedings before a tribunal, *etc*, shall be deemed to have commenced within the meaning of this sub-section. The date of the delivery to or receipt by the tribunal of the order of reference is not material.[86]

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76 Subs by Act 36 of 1956, s 15, for "or Tribunal" (wef 10-3-1957).

77 Subs by Act 36 of 1956, s 15, for "before a Tribunal" (wef 10-3-1957).

78 Subs by Act 36 of 1956, s 15, for "reference of dispute for adjudication" (wef 10-3-1957).

79 Subs by Act 18 of 1952, s 4, for "when the award. .. thereon is passed." (wef 4-3-1952).

80 *Municipal and Panchayat Employees' Union v State of Gujarat* (1988) 1 LLJ 307 (Guj), per Ahmadi J.

81 *Andheri-Marol-Kurla Bus Service v State of Bombay* (1959) 2 LLJ 236 [LNIND 1959 SC 60] (SC), per Kapur J.

82 *Workers of Industry Colliery v Industry Colliery* (1953) 1 LLJ 190 [LNIND 1952 SC 93] (SC), per Das J.

83 *KN Padamanabhan Ayyar v State of Madras* (1954) 1 LLJ 469 (Mad), per Govinda, Menon J.

84 *Rohtas Industries Ltd v PO, IT* 1977 Lab IC 147, 152 (Pat) (DB), per SK Choudhuri J.

85 *G Claridge & Co Ltd v IT* (1951) 2 LLJ 1 [LNIND 1951 BOM 9] (Bom), per Shah J.

86 *Associated Cement Companies Ltd v Workmen* (1953) 2 LLJ 369 (LAT).

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER IV Procedure, Powers and Duties of Authorities

S. 21. Certain matters to be kept confidential.—

There shall not be included in any report or award under this Act any information obtained by a conciliation officer, Board, Court, [87][Labour Court, Tribunal, National Tribunal or an arbitrator] in the course of any investigation or inquiry as to a trade union or as to any individual business (whether carried on by a person, firm or company) which is not available otherwise than through the evidence given before such officer, Board, Court, [88][Labour Court, Tribunal, National Tribunal or arbitrator], if the trade union, person, firm or company in question has made a request in writing to the conciliation officer, Board, Court, [89][Labour Court, Tribunal, National Tribunal or arbitrator], as the case may be, that such information shall be treated as confidential; nor shall such conciliation officer or any individual member of the Board, [90][or Court or the presiding officer of the Labour Court, Tribunal or National Tribunal or the arbitrator] or any person present at or concerned in the proceedings disclose any such information without the consent in writing of the secretary of the trade union or the person, firm or company in question, as the case may be:

Provided that nothing contained in this section shall apply to a disclosure of any such information for the purposes of a prosecution under Section 193 of the Indian Penal Code (45 of 1860).

LEGISLATION

This section was enacted in the original Industrial Disputes Act 1947, and corresponds to s 13 of the repealed Trade Disputes Act 1929. It has since undergone some minor amendments which have been footnoted in the text of the section.

SECRECY OF INFORMATION

This section makes provision for secrecy of the information obtained in the course of various proceedings before the authorities under the Act, which is not otherwise available than through the evidence given before such authorities. However, the party desiring such information to be kept confidential has to make a request in writing to the concerned authority that such information should be treated as confidential. On such request being made, it is incumbent on the authority concerned to treat the said information as confidential. The protection of this section is not available to a party against prosecution for perjury under s 193 of the Indian Penal Code. In *Garment Cleaning*, the tribunal had relied on certain information disclosed by the employer regarding his financial capacity at the trial. The employer had requested the tribunal to keep the information confidential under s 21 of the Act. After examining the balance-sheet and other information, the tribunal came to the conclusion that the employer had the financial capacity to bear the burden of provident fund, besides gratuity. However, in view of the provisions of s 21, neither the tribunal nor the labour appellate tribunal in appeal could refer to the figures in the award. In appeal, before the Supreme Court against the award, the employer took the plea that the tribunal had not considered the question of capacity to pay in its proper perspective and hence, the matter might be remanded to it. Rejecting the plea, Gajendragadkar J, held that if the employer wanted the tribunal to consider the figures and state its conclusion in the light of the said figures in its award, it need not have claimed

privilege under s 21 at the trial. At the stage of appeal before the Supreme Court, the privilege could not be waived for consideration of the matter afresh by the Supreme Court or the industrial tribunal on remand.[91]

Once a document has been secured as evidence, there is nothing in s 21 to justify refusal of inspection to the other party. The provision of s 21 only prevents the authority concerned from including in its award the contents of any documents claimed by a party to be confidential. However, it does not prevent a party from asking for inspection of any document produced in evidence by his adversary. It is a fundamental rule that a party must have inspection of any document which the other side wishes to use.[92] In this view of law, the labour appellate tribunal in *Kanpur Hosiery*, directed the representative of the employer company to give inspection of the balance-sheet to the representative of the union.[93]The provisions of s 21 of the Act afford ample protection against the disclosure of information which a party may wish to be treated as confidential. When workmen or their representatives ask for inspection of the account books or any other relevant confidential paper, it should ordinarily be possible for the employer to comply with the request, subject, however, to the protection of s 21. When a prayer is made to the tribunal by a party for inspection of the confidential papers of the opposite party, the tribunal has to use its judicial discretion in the matter and in the absence of any special circumstances would ordinarily be justified in asking the opposite party to give reasonable access to the account books or all relevant confidential papers to the party applying for inspection.[94]

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87 Subs by Act 36 of 1956, s 16, for "or Tribunal" (wef 10-3-1957).

88 Subs by Act 36 of 1956, s 16, for "or Tribunal" (wef 10-3-1957).

89 Subs by Act 36 of 1956, s 16, for "or Tribunal" (wef 10-3-1957).

90 Subs by Act 36 of 1956, s 16, for "Court or Tribunal" (wef 10-3-1957).

91 *Garment Cleaning Works v Workmen* (1961) 1 LLJ 513 [LNIND 1961 SC 147] : AIR 1962 SC 673 [LNIND 1961 SC 147] (SC), per Gajendragadkar J.

92 *Goodlass WEOME Union v Goodlass Wall Ltd* (1951) 1 LLJ 21 (LAT).

93 *Kanpur Hosiery Workers' Union v Pukka Hosiery Mills* [1952] LAC 18(LAT).

94 *Workmen of Joint Steamer Companies v Joint Steamer Cos.* (1963) 2 LLJ 349 [LNIND 1963 SC 135], 354 (SC), per Das Gupta J.

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CHAPTER V Strikes and Lockouts

S. 22. Prohibition of Strikes and Lockouts.—

(1) No person employed in a public utility service shall go on strike in breach of contract—

(a) without giving to the employer notice of strike, as hereinafter provided, within six weeks before striking; or

(b) within fourteen days of giving such notice; or

(c) before the expiry of the date of strike specified in any such notice as aforesaid; or

(d) during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.

(2) No employer carrying on any public utility service shall lock-out any of his workmen—

(a) without giving them notice of lock-out as hereinafter provided, within six weeks before locking-out; or

(b) within fourteen days of giving such notice; or

(c) before the expiry of the date of lock-out specified in any such notice as aforesaid; or

(d) during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.

(3) The notice of lock-out or strike under this section shall not be necessary where there is already in existence a strike or, as the case may be, lock-out in the public utility service, but the employer shall send intimation of such lock-out or strike on the day on which it is declared, to such authority as may be specified by the appropriate Government either generally or for a particular area or for a particular class of public utility services.

(4) The notice of strike referred to in sub-section (1) shall be given by such number of persons to such person or persons and in such manner as may be prescribed.

(5) The notice of lock-out referred to in sub-section (2) shall be given in such manner as may be prescribed.

(6) If on any day an employer receives from any person employed by him any such notices as are referred to in sub-section (1) or gives to any persons employed by him any such notices as are referred to in sub-section (2), he shall within five days thereof report to the appropriate Government or to such authority as that Government may prescribe, the number of such notices received or given on that day.

RIGHT TO STRIKE

The right to strike work is not one of the fundamental rights recognised by the Constitution and would not come within the ambit of Art 19(1)(c) of the Constitution. Therefore, in this country nobody including a workman has a fundamental right to strike. However, strikes and lockouts are weapons in the armoury of labour and the employer in the process of collective bargaining all over the world. The Act does not purport to take away the right to strike or lockout. As a matter of fact, these rights have been impliedly recognised by the Act. The right to strike or the right to declare lockout may be controlled or restricted by a proper industrial legislation and the validity of such legislation would have to be decided not with

reference to the criteria laid down in Art 19(4) of the Constitution but on totally different considerations.[1]Thus, the right of the workmen to strike and the right of the employer to lockout are regulated by the Act. With a view to achieve the purpose of the Act, *viz*, peaceful investigation and settlement of industrial disputes and for eliminating industrial strikes and lockouts, and achieving harmonious relations between the industrial employers and their workmen, the right of the workmen to strike and the right of the employer to lockout have been subjected to certain restrictions imposed by the Act. The Act has prohibited the resort to strikes and lockouts in certain circumstances. Sections 10(3) and 10 A(4A) prohibit the continuance of strikes and lockouts and ss 22 and 23 prohibit the commencement of strikes and lockouts in the circumstances stated therein.

Though the right to strike as a mode of redress of legitimate grievances of the workmen is recognised in industrial jurisprudence, this right is circumscribed by the statutory provision of this Act, and is to be exercised on compliance with the requirements of the provisions in ss 10(3), 10A(4A), 22 and 23 of the Act. A strike during the pendency of conciliation between the management and the workmen was held to be illegal. Furthermore, a strike by workmen for enforcement of a settlement between the management and workmen without complying with the requirements of r 58(4) of the Industrial Disputes (Central) Rules 1957 was held to be not permissible. The strikes and lockouts continued or commenced in contravention of these statutory provisions have been made illegal by s 24.[2] The Act, however, takes note only of the right of the workmen as defined in this Act to strike work. However, it does not recognise the right of non-workmen to strike. It is only the workmen who can raise an industrial dispute in connection with which they can strike. Since the right of raising an 'industrial dispute' is the right of the workmen, the right to go on strike, *a priori*, belongs to the workmen alone. Non-workmen do not, therefore, have the right to strike.[3]

SUB-SECTION (1)

(i) 'Public utility service'

This section is analogous to s 15 of the repealed Trade Disputes Act 1929. It was enacted in the original Industrial Disputes Act 1947 and has not been amended since.[4]It bans the commencement of strikes and lockouts in public utility services while s 23 bans strikes and lockouts generally in industrial establishments, in the circumstances enumerated therein. Every industrial establishment is not a public utility service though every public utility service, is an industrial establishment. Therefore, the provisions of ss 22 and 23 cumulatively will apply to prohibition of strikes and lockouts in 'public utility services', as defined in s 2(n) of the Act.[5] The effect of combined reading of ss 22 and 23 is that a strike will be illegal if:

1. it is in breach of contract of employment;
2. the concern is a public utility concern; and
3.
   (i) notice required by s 22(1) has not been given;
   (ii) it is commenced during the period of operation of a settlement or an award in respect of the matters covered by that settlement or award; or
   (iii) it is commenced;
      (a) during the pendency of conciliation proceedings, and
      (b) within seven days from the conclusion of such proceedings; or
   (iv) it is commenced during the pendency of:
      (a) adjudication proceedings before a labour court, tribunal or national tribunal, or
      (b) within two months after the conclusion of such proceedings; or
      (c) during the pendency of arbitration proceedings before an arbitrator; or
      (d) within two months after the conclusion of such proceedings where a notification under sub-s 3A of s 10A has been issued.

The object of the legislature in giving additional protection to public utility services was to provide safeguard to the running of public utility services and to obviate the possibilities of inconvenience to the general public and society.[6] The breach of s 22 or 23, makes the strikes illegal and entails the penalties under s 26. In *Swadeshi Industries*, the facts disclosed that the company was running three units, namely, cotton textile weaving, silk mill and an art silk products manufacturing unit. Cotton textiles industry was notified to be a public utility service. The concerned workmen, 230 in number, were employed at the time of their going on strike in the silk mill unit. No evidence was led by the company to

show that at or about the relevant time or prior to that the concerned workmen had ever worked in the cotton weaving mill. There was nothing to show that any work in the cotton textile section was ever assigned to any of the concerned workmen. On this evidence, it was held that the workmen concerned could not be considered to have been employed in a public utility service.[7]

(ii) Burden of Proof

Apart from the above requirements, making a strike illegal, two other important ingredients have to be proved, namely: (i) that the concern in which a strike took place is a 'public utility service' within the meaning of s 2(n) of the Act and (ii) that the strike is in 'breach of a contract of service' of the striking workmen. The burden to prove that the strike was resorted to in breach of the contract of employment and that the concern is a public utility concern is on the employer. There cannot, however, be any set formulae for proving breach of contract on the part of employers or employees. The proof will depend upon the facts and circumstances arising in a particular case. As the expression 'breach of contract' does not mean breach of a condition of service, it is not incumbent on the prosecution to produce and prove the standing rules in order to establish that the employees were guilty of breaking the contract.[8]

(iii) Prohibition of Strikes in a Public Utility Service

The Act, as regards strikes, makes a clear distinction between persons employed in a 'public utility service' and those employed in ordinary industrial occupations. The enactment of s 22, is for the purpose of preventing a handful of workmen employed in public utility services from holding the community at large to ransom by resorting to lightning strikes. Such workmen are not shorn of their right to go on strike, but a qualification is attached thereto requiring them to fulfil certain additional conditions as enumerated in the four clauses of s 22(1) of the Act. These conditions have been prescribed for avoiding inconvenience to the society and the general public. The relevant rule for notice is r 74 of the Industrial Disputes (Central) Rules 1957 which prescribes Form 'L' for giving notice, regarding precise specification of the date on which the strike is to commence. The obvious object is to enable the authorities to make alternative arrangements for running the public utility service vital to the day-to-day life of the community in the event of a strike. The provisions are mandatory and their violation would not only entail penal consequences under the Act, but will also expose the workmen to the disciplinary action against the misconduct of going on an illegal strike apart from disentitling them to wages for the period of the strike.[9] The NCL-II recommended that in the case of socially essential services like water supply, medical services, sanitation, electricity and transport, when there is a dispute between employers and employees in an enterprise, and when the dispute is not settled through mutual negotiations, there may be a strike ballot as in other enterprises, and if the strike ballot shows that 51% of workers are in favour of a strike, it should be taken that the strike has taken place, and the dispute must forthwith be referred to compulsory arbitration [by arbitrators from the panel of the Labour Relations Commission (LRC), or arbitrators agreed to by both sides].[10]

(iv) Notice

If the strike is to be resorted to in a public utility service, s 22 enjoins upon the persons proposing to go on strike to comply with the following requirements:

(a) The notice of the intention to go on strike should be in the prescribed manner as required by sub-s (4). Rule 71 of the Industrial Disputes (Central) Rules 1957 requires that the notice shall be in Form 'L'.

(b) Before the date of striking, the notice should have been given within six weeks. In other words, from the date of the notice to the date of strike a period of six weeks should not have elapsed. After the expiry of six weeks, a fresh notice with all its requirements will all over again become necessary [s 22(1)(a)].

(c) A period of 14 days must have elapsed from the date of notice to the date of the strike [s 22(1)(c)].

(d) The date specified in the notice must have expired on the day of strike [s 22(1)(d), r 71, Form 'L'].

Thus, if the workmen proposed to go on strike on 15 October 1998, the notice of strike should be given on any date not earlier than 1 September 1998 and not later than 1 October 1998 specifying therein that the strike will be resorted to on 14 October. In *Mineral Miners' Union*, the issue was about the interpretation of the phrase *within six weeks before striking work*, appearing in s 22(1)(a). The brief facts were: the union issued a notice of strike on 01 September 1984 intimating its intention to go on one day token strike on any day after 20 September 1984. Conciliation proceedings commenced thereon and took place in terms of s 20(1) of the ID Act on 19 September 1984. On 1 October 1984, the conciliation failed and report about the failure of conciliation was submitted to the State Government on 12 October 1984. But the parties were informed about the failure of conciliation on 09 November 1984. The members of the union went on strike on 10 December 1984. The management considered that the strike resorted to by the workmen without a fresh notice and without informing the date of strike was illegal, and in the circumstances, the workmen were not entitled to wages. Accordingly,

the management published a notice on 20 December 1984 stating that on the principle of 'no work, no pay', the workmen were not entitled to wages on 10 December 1984. The management also informed that they were deducting 8 days wages from the wages payable to the workmen, as permitted u/s 9(2) of the Payment of Wages Act 1936. The two points, namely, (i) what is meant by the expression "*within six weeks before striking*"; and (ii) "*whether a fresh notice of strike is required to be served in respect of the same demands, if six weeks stand expired from the date of first notice*", need some analysis. Rama Jois J held:

> On a harmonious construction of the relevant provisions of the Act it is clear that fresh notice of strike u/s. 22(1) is necessary if, in a given case, by the date on which the failure of conciliation is intimated, six weeks period from the date of notice of strike issued earlier u/s. 22(1) of the Act had expired. In respect of public utility services, workmen cannot go on strike abruptly which would result in irreparable loss and damage to the industry and State. Workmen could go on strike after the expiry of seven days after the date of conclusion of conciliation in failure. If by that time, six weeks had expired from the date of notice of strike issued u/s. 22(1), the issuance of a fresh notice u/s. 22(1) is obligatory on the part of the workmen. If such notice is issued, the provisions of Ss. 12(1) and 20(1) are not applicable though the demand in respect of which the fresh notice of strike is given is identical with the one, which was the subject matter of earlier notice of strike and conciliation proceedings which ended in failure. *Any other interpretation will lead to incongruous results for the result would be commencement of purposeless conciliation and a continued prohibition of strike and the same cycle continuing endlessly, resulting in total prohibition of strike though such result is unintended by S. 22 of the Act*. The only course open under the Act to prevent the strike in public utility service is to refer the demands for adjudication u/s. 10 of the Act.[11] (Paras 8 & 10) (Italics supplied).

The same question came up before the SC in *Essorpe Mills.*[12] Pasayat J (for self and Sathasivam J), gave a curious interpretation to the words "*within six weeks before striking*", appearing in s 22 (1) (a). The learned judge held that the said expression meant that, in a public utility service, no strike can be resorted *until the expiry of the six weeks*. The learned judge observed:

> Somewhat unacceptable plea has been taken by the respondents 2 to 23 that in terms of Section 22(1)(b) after 14 days of giving the notice, the workmen can go on strike. If this plea is accepted, six weeks' time stipulated in Section 22 (1)(a) becomes redundant. The expression "giving such notice" as appearing in Section 22(1)(b) refers to the notice u/ s. 22(1)(a). Obviously, therefore, the workmen cannot go on strike within six weeks notice in terms of Section 22(1)(a) and 14 days thereafter in terms of Section 22(1)(b). .. the expression "such notice" refers to 6 weeks advance notice. Earlier illegal strike is not remedied by a subsequent strike as provided in Section 22. If such stand is accepted it will go against the requirement of Section 22 which aims at stalling action for illegal strike. (Paras 19 & 20)

This is a wrong reading and a misconstruction of the said provision in its entirety. If the interpretation placed by the learned judge were to be accepted as correct, then what is the significance and import of cl(b), which prohibits strike '*within fourteen days of giving such notice*'? And what is the import of cl(c), which extends the said prohibition in terms: '*before the expiry of the date of strike specified in any such notice as aforesaid*'? The fallacy of above reasoning lies in the fact that the learned judge proceeded to *expound the said provision in the reverse direction*. Where, for instance, *a provision prescribes a longer period in order for some act or event to be legal and, in the same breath, also prescribes a shorter period for the same act or event to be legal, then which of the two periods get eclipsed and become redundant - the longer one or the shorter one?* The answer is too obvious. It is not the "*six weeks time*" [cl. (a)], which becomes redundant, as averred by the learned judge, but the "*expiry of fourteen days*" [cl (b)] and the "*expiry of the date, if any, prescribed in the notice*" [cl (c)], which become redundant. This is because of the fact that the period of six weeks stipulated in cl (a) is a longer period and takes into its fold the shorter periods stipulated in the next two clauses. In the face of this position, to hold that "*if this plea is accepted, six weeks' time stipulated in Section 22(1)(a) becomes redundant"* is a misreading of the provision in its comprehensive whole. Secondly, if the intention of the legislature were to prohibit a strike or lockout until after the expiry of six weeks from the date of notice, what was the need for incorporating clauses (b) & (c) in the section; and for what ostensible purpose? In view of the settled legal position that no court should presume that the legislature has used words either wastefully or without purpose, what would be the significance of clauses (b) & (c), which prescribe certain vital conditions in substantial terms? The correct legal position with regard to strikes in a *public utility service* u/s 22 can be stated thus:

(i) No strike (or lockout) can be resorted to without serving a notice of six weeks on the opposite party with a copy to the conciliation officer.

(ii) The notice so served shall remain in force for a period of six weeks (42 days).

(iii) In any case, the strike cannot be resorted to until the expiry of the first 14 days after the issue of the notice, as it is considered as the '*cooling off*' period.

(iv) In a situation, where the party mentions a specific date in the notice on or after which, it intends to strike work, it cannot resort to strike until the expiry of the said date, notwithstanding the fact that the first 14 days stood expired.

(v) Where the conciliation has failed and the failure report is received by the Government, the party cannot strike work within 7 days of the receipt of the failure report. (*This period is intended for giving time to the Government to take a decision and make a reference of the dispute for adjudication*).

(vi) If the Government makes a reference, no strike can be resorted to during the pendency of the adjudication proceedings and within two months after the conclusion thereof.

(vii) If, in the rare eventuality of the Government not referring the dispute within 7 days after the receipt of the failure report, the party is free to strike work (or declare a lockout) after the expiry of the 7th day.

What is crucial in this process is Point No. (vii) above, *i.e.*, the non-reference of the dispute by the Government for adjudication, which, of course, is an exception than a rule, in so far as a public utility service is concerned. On this aspect, Rama Jois J of the Karnataka HC *rightly reasoned and concluded that if the government has not referred the dispute for adjudication after the receipt of the failure report and, in the meantime, the outer limit of six weeks stood expired from the date of strike notice, then there is no need for the union to issue a fresh notice*, as it would result in the *commencement of purposeless conciliation and a continued prohibition of strike and the same cycle continuing endlessly, resulting in total prohibition of strike*. Justice Rama Jois, rightly observed that such an absurd legal position would not have been intended by s 22. It is submitted that the reasoning and conclusion reached by Rama Jois J are right, whereas the interpretation placed by Pasayat J is unsound for the reason that it renders the whole section a dead letter and *non est*. *This decision needs to be reviewed by a larger Bench and overruled.*[13]

In *Bharatiya ANSKCPG Hospital*, a single judge of the Bombay High Court held that if the employer bona fide believes and decides that the strike resorted by workmen is an illegal strike within the meaning of s 22, he need not go to a court of law to get it declared illegal before initiating disciplinary action or dismissing the workmen.[14] In *Bharat Petroleum*, the facts disclosed that the trade union conducted a gate meeting to take strike ballot with 92 percent of workers voting in favour of strike. The management immediately took steps to shut the operations of refinery one-by-one in view of the apprehension that any stoppage of work by a section of workmen in the refinery with highly interdependent operations might lead to an explosion endangering the safety and security not only of the plant and personnel, but also the lives of people living in the neighbourhood of the refinery. Kochar J of the Bombay High Court held that the workmen were not entitled to wages for the strike period. He observed that, given the extremely sensitive and hazardous nature of operations, such establishments as refineries should be treated as the 'intensive care units' of the nation, and further held that it is high time that all and every strike in public utility services should be banned by law.[15]

Where the employees of Food Corporation of India belonging to scheduled castes and scheduled tribes, in the course of protest against their transfer to Andhra region, indulged in acts of violence, threatening with inflammatory agitation not conducive to the reputation of the institution and interfering with the conduct of business, the application for grant of injunction restraining the employees from resorting to such forms of demonstration is maintainable. Employees do not have any right to indulge in such activities, which cannot be supported by law in the light of the fact that no notice of strike was given as required under s 22. Injunction was granted restraining the employees from holding demonstrations, shouting slogans, exhibiting banners, placards and posters within a distance of 100 meters from the office of the corporation.[16] Where the bank management deducted a full day's wages in respect of a strike resorted to by the employees lasting for one and a half hours and one hour on different dates, it was held that the action of the management deducting a full day's wages for stoppage of work on each occasion was justified.[17]

(v) Settlements and Awards

Section 18 makes settlements and awards binding on the parties and s 19 lays down the period of operation of the settlements and awards. During the period of operation of the settlements and awards, strike action is prohibited in respect of any of the matters covered by such settlement or awards [s 23(c)]. The words 'in respect of the matters covered by the settlement or award' have been deliberately inserted in cl (c) of s 23 to limit its operation. During the period in which a settlement or award is in operation, the workmen cannot strike and the employer cannot lockout in respect of any of the matters covered by the settlement or award. Strikes and lockouts in respect of other matters are not prohibited. A clear distinction between strikes and lockouts relating to matters in respect of which an award or settlement has been made and strikes or lockouts connected with matters not covered by such an award or settlement, has been made.[18] In *Ballarpur Collieries*, the Patna High Court held that the regional labour commissioner merely used his good offices in effecting some

sort of a settlement and did not act in terms of the statutory provisions of the Act. Since the conciliation proceedings and the matter in dispute at the time of the strike were not covered by the settlement of the regional labour commissioner, it was held that cl (c) of s 23 would have no application.[19] A settlement, which does not conform to the requirements of the expression as defined in s 2(p) as, for instance, it is a mere agreement or an acquiescence without being in writing and signed, will not be a settlement, the breach of which will attract the provision of s 23 (c).[20]

(vi) Conciliation Proceedings

In a public utility service, during the pendency of conciliation proceedings before a conciliation officer as well as the Board, and up to the expiry of seven days from the date of conclusion of such proceedings, resort to strike is prohibited [ss 22(1)(d) and 23(a)]. Sub-sections (1)(d) and (2)(d) lays down that no person employed in a public utility service shall go on strike in breach of contract and no employer carrying on public utility service shall declare a lockout during conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings. The effect of these provisions is clear. If a strike or lockout is declared in a public utility service during the pendency of conciliation proceedings or till the expiry of seven days after the conclusion of such proceedings, it would be illegal. The pendency of a conciliation proceeding on a dispute relating to all the employees will operate as a bar against all the employees going on strike. However, if the conciliation proceedings in question are confined to a specific demand limited to a specific class of employees, the other workmen who are not concerned with the said demand, may not be bound by the said proceedings.[21]

In *Industry Colliery*, the facts briefly were: The conciliation officer submitted his report on 20 October 1949, *i.e.*, well within 14 days from the commencement of the conciliation proceedings as required by s 12(4) of the Act. The report was sent through the 'routine official channel' and was received in the office of the chief labour commissioner at New Delhi on 25 October 1949. However, the report was not passed on to the Ministry of Labour which was also at New Delhi until about 17 November 1949. The employees had no means of knowing when the report was actually 'received' by the Central Government which was the 'appropriate Government' or when the period of seven days after such receipt expired. In these circumstances, the employees went on strike on 7 November 1949 in accordance with the date specified in their notice. However, in view of the fact that the chief labour commissioner was not the agent of the Central Government, the 'receipt' by him was not the receipt by the Central Government. Hence, on strict construction of the provisions of s 22(1), it was held by the Supreme Court that the strike was illegal and the employees must face and bear the consequences of an illegal strike. The reason is that if in respect of a public utility service, the workmen go on strike abruptly it is sure to result in great inconvenience to the public and might result in irreparable loss and damage to the industry and to the state. Thus, although factually the conciliation proceedings terminate when a settlement is arrived at or when it is found that no settlement can be arrived at, in the latter case, the Act by a legal fiction, prolongs the conclusion of the conciliation proceedings to the date of the actual receipt of the report by the appropriate Government and goes on further to provide that the appropriate Government must have seven days time to consider what further steps it would take under the Act.[22] Hence, up to the expiry of this period of seven days, from the day the Government received the conciliation officer's report, the Act prohibits any strike, but after that period is over, the employees are free to resort to strike.

(vii) Adjudication and Arbitration Proceedings

During the pendency of adjudication proceedings before a labour court, a tribunal or a national tribunal and till the expiry of two months after the conclusion of such proceedings, the commencement of strike in any industrial establishment, *a fortiori*, in a public utility service is prohibited [s 23(b)]. Section 20(3) deals with the commencement and conclusion of the proceedings before the labour court, tribunal, national tribunal or the arbitrator under s 10A. Likewise, during the pendency of arbitration proceedings before an arbitrator and till the expiry of two months after the conclusion of such proceedings, where a notification under s 10A(3A) has been issued, the commencement of strike is prohibited [s 23(bb)]. The object of ss 22 and 23 is to ensure an atmosphere of calm and peace during the period of conciliation proceedings before Boards, adjudication proceedings before labour courts, tribunals and national tribunals, and arbitration proceedings before an arbitrator under s 10A. Strikes and lockouts are forbidden not only during the pendency of proceedings before these authorities, but also till the expiry of seven days after the conclusion of the proceedings before the conciliatory authorities and till the expiry of two months after the conclusion of the proceedings before the adjudicatory authorities. The words in these clauses cover all strikes and lockouts irrespective of the subject-matter of the dispute pending before these authorities.[23] Thus, where the solutions regarding victimisation of workers and certain pending demands were not put for consideration before the tribunal, it was held that that would not make any difference in as much as the workers are not permitted in law to resort to a strike during the pendency of proceeding before the tribunal or a Board or an arbitrator under s 10A according to the conditions laid down both under s 22 and s 23 of the Act.[24] However, where in a pending reference, neither the employer nor the workmen were taking any part, it was held that cl (b) of s 23 would have no application to the strike declared during the pendency of such reference.[25]

(viii) 'In Breach of Contract'

The word 'contract' means contract of service. Such contract may be express or implied, and the expression 'breach of contract' in ss 22 & 23 of the Act means breach of contract of service or employment and not a special contract to not go on strike.[26] This is clear from the fact that while there must necessarily be a contract of service, express or implied, between a workman and his employer, a special contract not to go on strike does not constitute an essential part of the contract between a workman and his employer, so that a contract of service may exist without any special contract, in the contract of employment of every workman, there is an implied term that he will work according to the rules of the concern in which he is employed.[27] The expression 'breach of contract' does not mean breach of a condition of service. The provisions of ss 22 & 26 read together are of a penal nature and have to be construed strictly.[28] A mere breach of a Standing Order is not sufficient to make a strike illegal under ss 23 & 24 of the Act. It may be that the Standing Orders, after having been approved by the statutory authority, regulate the contractual relationship between the workmen and the employer, and any strike in contravention of the terms of the Standing Orders may be strike in breach of contract. However, s 23 does not say that a strike in 'breach of contract' is by itself sufficient to make the strike illegal. On the other hand, that section clearly states that, apart from the 'breach of contract', the strike or lockout must have been resorted to during the pendency of the proceedings in terms of cll (a), (b) & (bb), or during the period of operation of a settlement or award, in terms of cl (c) before it can be held to be illegal. In other words, it must have taken place during the pendency of conciliation proceedings or during pendency of the proceedings before an adjudicatory authority or during any period in which the settlement in respect of any of the matters covered by the settlement is in operation.[29] There cannot be any set formulae for proving breach of contract on the part of the employees. The proof will depend upon the facts and circumstances arising in a particular case.[30]

SUB-SECTION (2): PROHIBITION OF LOCKOUT IN A 'PUBLIC UTILITY SERVICE'

Sub-section (2) prohibits an employer from declaring lockout in a public utility service in contravention of the provisions thereof. Whatever has been stated in the preceding paragraphs in relation to strike applies in equal measure to a case of lockout in a public utility service.

SUB-SECTION (3): NO NOTICE IN CASE OF EXISTING STRIKE OR LOCKOUT

Sub-section (3) provides that: (1) if a strike is already in existence at the time of declaring a lockout, a notice of such lockout as required by sub-s (2) shall not be necessary. Similarly, if a lockout is already in existence at the time of declaring a strike, a notice of such strike as required by sub-s (1) shall also not be necessary. This sub-section is in the nature of an exception to cll (a), (b) and (c) of sub-ss (1) and (2), respectively. However, a duty is cast on the employer to send intimation of the lockout declared by him or of the strike declared by the workmen, which falls within the purview of sub-s (3). Such intimation in either case, is to be sent by the employer to the authority specified by the appropriate Government.

SUB-SECTIONS (4) AND (5): MANNER OF SERVING OF NOTICE

Sub-sections (4) and (5) lay down that the notice of strike or lockout as contemplated by sub-s (1) or (2), as the case may be, shall be given by such number of persons to such person or persons in the manner as may be prescribed. Rules 71 to 74 of the Industrial Disputes (Central) Rules 1957 lays down that the notice of strike to be given by workmen in a public utility service shall be in Form 'L'. Form 'L' requires that the notice shall be given by five elected representatives of workmen and shall specify the date on which they propose to call the strike and also to state the reasons for going on strike. This rule further requires the employer to intimate the conciliation officer having jurisdiction in the matter, of the fact of his having received the notice forthwith. Rule 72 prescribes that the notice of lockout shall be in Form 'M', and further requires the employer to display the notices conspicuously on the notice board at the main entrance of the establishment and in the manager's office and further to serve a copy of the notice on the secretary of the trade union where a registered trade union exists. Form 'M' requires the employer to state the reasons therein for declaring the lockout. Rule 73 prescribes Form 'N' for the notice of lockout or strike in a public utility service to be submitted by the employer.

SUB-SECTION (6)

Sub-section (6) further requires the employer to send a report to the appropriate Government or such authority as that Government may prescribe of the number of notices received by him under sub-s (1) from any person employed by him or the notice given to any persons employed by him under sub-s (2) within five days of the receipt of giving of such notices. Rule 74 prescribes that the report of the notice of strike or lockout to be submitted by the employer under sub-s (6) of s 22 shall be sent by registered post or given personally to the conciliation officer (central) appointed for the local area concerned, with a copy by registered post to the authorities enumerated therein.

1 *All India Bank Employees Assn v National IT* (1961) 2 LLJ 385 [LNIND 1961 SC 283], 398 : AIR 1962 SC 171 [LNIND 1961 SC 283] (SC), per Rajagopala Ayyangar J.

2 *State Bank's Staff Union v Bank of India, Bombay* 1991 Lab IC 2299, 2310 (Mad), per Ramalingam J.

3 *Kerala SEBW Federation v Kerala SEB* (1983) 2 LLJ 30, 36 (Ker), per Narendran J.

4 The Statement of Objects and Reasons, Gazette of India, 1946, Pt 5, 239.

5 *Mgmt of Katkona Colliery WCL v PO, CGIT* 1978 Lab IC 1531 (MP) (DB), per GP Singh J.

6 *State of Bihar v Deodar Jha* AIR 1958 Pat 51 (DB), per Banerji J.

7 *Swadeshi Industries Ltd v Workmen* (1960) 2 LLJ 78 [LNIND 1960 SC 7] : AIR 1960 SC 1258 [LNIND 1960 SC 7] (SC), per Das Gupta J.

8 *Swadeshi Industries Ltd v Workmen* (1960) 2 LLJ 78 [LNIND 1960 SC 7], per Das Gupta J.

9 *Municipal Committee, Pathankot v IT* (1971) 2 LLJ 52, 55 (P&H), per Sandhawalia J.

10 Government of India (2002), *Report of NCL-II*, p 40, para 6.48.

11. *Mineral Miner's Union v. Kudremukh IO Co. Ltd.*, (1986) I LLJ 204 : ILR 1985 KARNATAKA 2833 (Kant.), *per* Rama Jois J.

12 *Mgmt, Essorpe Mills Ltd., v P.O., L.C.*, AIR 2008 SC 2504 [LNIND 2008 SC 839], *per* Pasayat, J.

13 Rao, EM (2015), *Industrial Jurisprudence: A Critical Commentary*, 2nd ed., Lexisnexis, pp. 655-7.

14 *Bharatiya ANSKCPG Hospital v Bombay Labour Union* (2001) 2 LLN 266 (Bom), per Kochar J.

15 *Bharat Petroleum Corpn Ltd v Workmen* (2000) 4 LLN 776 (790, 93) (Bom), per Kochhar J.

16 *Food Corpn of India v Employees FCI* (2002) 1 LLN 341 (Mad), per Ramamurthi J.

17 *Manager, RBI v V Raveendran* (2001) 1 LLN 613 (Ker), per Hariharan Nair J.

18 *Provat Kumar Kar v William Trevelyan Curties Parkar* AIR 1950 Cal 116, 118, 119 (DB), per Harries CJ.

19 *Ballarpur Collieries Co Ltd v Salim M Merchant* (1967) 2 LLJ 201, 204 (Pat) (DB), per Narasimham CJ.

20 *Cooper Engineering Ltd v DM Aney* 1971 Lab IC 603, 614, 165 (Bom) (DB), per KK Desai J.

21 *Ramnagar Cane & Sugar Co v Fatin Chakravorty* (1961) 1 LLJ 244 [LNIND 1960 SC 157], 247 (SC), per Gajendragadkar J.

22 *Workers of Industry Colliery v Industry Colliery* (1953) 1 LLJ 190 [LNIND 1952 SC 93] (SC), per SR Das J.

23 *State of Bihar v Deodar Jha* AIR 1958 Pat 51, 57 (DB), per Banerji J.

24 *State of Bihar v Deodar Jha* AIR 1958 Pat 51, 57 (DB), per Banerji J.

25 *Ballarpur Collieries Co v Salim M Merchant* (1967) 2 LLJ 201, 205 (Pat) (DB), per Narasimham CJ.

26 *Punjab National Bank Ltd v Workmen* (1952) 2 LLJ 648 (LAT).

27 *Ram Naresh Kumar v State of West Bengal* (1958) 1 LLJ 567 [LNIND 1957 CAL 138] (Cal) (DB), per Guha Ray J.

28 *State of Bihar v Deodar Jha* AIR 1958 Pat 51, 57 (DB), per Banerji J.

29 *Ballarpur Collieries Co Ltd v Salim M Merchant* (1967) 2 LLJ 201, 205 (Pat) (DB), per Narasimham CJ.

30 *State of Bihar v Deodar Jha* AIR 1958 Pat 51 (DB), per Banerji J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER V Strikes and Lockouts

S. 23. General Prohibition of Strikes and Lock-outs.—

No workman who is employed in any industrial establishment shall go on strike in breach of contract and no employer of any such workman shall declare a lock-out—

(a) during the pendency of conciliation proceedings before a Board and seven days after the conclusion of such proceedings;

(b) during the pendency of proceedings before [31][a Labour Court, Tribunal or National Tribunal] and two months after the conclusion of such proceedings; [32][* * *]

33[(bb) during the pendency of arbitration proceedings before an arbitrator and two months after the conclusion of such proceedings, where a notification has been issued under sub-section (3-A) of Section 10-A ; or]

(c) during any period in which a settlement or award is in operation, in respect of any of the matters covered by toe settlement or award.

GENERAL RESTRICTION ON STRIKES AND LOCKOUTS

The provisions of ss 22 & 23 cumulatively apply to public utility services, while the provisions of s 23 apply to public and non-public utility services. Section 23 imposes a general restriction on declaring strikes and lockouts in breach of contract:

(i) during the pendency and till the expiry of seven days after the conclusion of conciliation proceedings before a Board;

(ii) during the pendency and two months after the conclusion of proceedings pending before a labour court, tribunal or national tribunal;

(iii) during the pendency and two months after the conclusion of arbitration proceedings before an arbitrator, where a notification has been issued under sub-s (3A) of s 10A ; and

(iv) during the period of operation of a settlement or award in respect of the matters covered by such settlement or award.

The pendency of proceedings contemplated by cll (a), (b) & (bb) refers to the parties to the proceedings either actually or constructively. Hence, the pendency of an industrial dispute under s 2A before a tribunal will not be a bar to the workmen going on strike in general room.[34] In *Gujarat Steel Tubes*, Krishna Iyer J pointed out that s 23(a) appears to convey the meaning that strike will be illegal when launched during the pendency of adjudication of another industrial dispute, although the ambit of cl (a) may have to be investigated fully in some appropriate case in the light of its scheme and rationale. The learned judge observed:

> It looks strange that the pendency of a reference on a tiny or obscure industrial dispute and they often tend too long-should block strikes on totally unconnected yet substantial and righteous demands. The constitutional implications and practical complications

of such a veto of a valuable right to strike often leads not to industrial peace but to seething unrest and lawless strikes. This will equally apply to cases of lockout as well.[35]

'EMPLOYED IN ANY INDUSTRIAL ESTABLISHMENT'

The words 'employed in any industrial establishment' must mean employed in some particular place, being the place used for manufacture or an activity amounting to 'industry' as that term is used in the Act. The words 'industrial establishment' means the place at which workmen are employed and the words as used in s 2(n)(ii) must have the same meaning as they are used in s 23 of the Act.[36] As such, s 23 cannot cover the case of workmen in Bombay striking against an employer with whom employees in Calcutta have a dispute.[37]

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31 Subs by Act 36 of 1956, s 17, for "a Tribunal" (wef 10-3-1957).

32 The word "or" omitted by Act 36 of 1964, s 11 (wef 19-12-1964).

33 Ins by Act 36 of 1964, s 11 (wef 19-12-1964).

34 *Chemicals & Fibres India Ltd v DB Bhoir* (1975) 2 LLJ 168 [LNIND 1975 SC 203], 174 (SC), per Alagiriswami J.

35 *Gujarat Steel Tubes Ltd v GST Mazdoor Sabha* (1980) 1 LLJ 137 [LNIND 1979 SC 464], 164 : AIR 1980 SC 1896 [LNIND 1979 SC 464]: (1980) 2 SCC 593 [LNIND 1979 SC 464] (SC), per Krishna Iyer J.

36 *Provat Kumar Kar v William Trevelyan Curties Parkar* AIR 1950 Cal 116, 118 (DB), per Harries CJ.

37 *Provat Kumar Kar v William Trevelyan Curties Parkar* AIR 1950 Cal 116, 118-19 (DB), per Harries CJ.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER V Strikes and Lockouts

S. 24. Illegal Strikes and Lockouts.—

(1) A strike or a lock-out shall be illegal if—

(i) it is commenced or declared in contravention of Section 22 or Section 23 ; or

(ii) it is continued in contravention of an order made under sub-section (3) of Section 10[38][or sub-section (4-A) of Section 10-A].

(2) Where a strike or lock-out in pursuance of an industrial dispute has already commenced and is in existence at the time of the reference of the dispute to a Board, [39][an arbitrator, a] [40][Labour Court, Tribunal or National Tribunal], the continuance of such strike or lock-out shall not be deemed to be illegal, provided that such strike or lock-out was not at its commencement in contravention of the provisions of this Act or the continuance thereof was not prohibited under sub-section (3) of Section 10[41][or sub-section (4-A) of Section 10-A]

(3) A lock-out declared in consequence of an illegal strike or a strike declared in consequence of an illegal lock-out shall not be deemed to be illegal.

LEGISLATION

This section is based on s 16 of the repealed Trade Disputes Act 1929. The section was enacted as part of the Industrial Disputes Act 1947. The amendments have been footnoted in the body of the section.

STRIKES AND LOCKOUTS, WHEN ILLEGAL AND WHEN NOT ILLEGAL

Section 24 lays down the circumstances under which strikes and lockouts shall be illegal and under which they shall not be deemed to be illegal.

(1) A strike or a lockout shall be illegal if it is:

(i) commenced or declared in contravention of s 22 in a public utility service;

(ii) commenced or declared in contravention of s 23 in any industrial establishment;

(iii) continued in contravention of an order made by the 'appropriate Government' under s 10(3) of the Act; or

(iv) continued in contravention of an order made by the 'appropriate Government' under sub-s (4A) of s 10A and a notification has been issued under sub-s (3A) of s 10A.

(2) A strike or a lockout shall not be deemed to be illegal if:

(i) it is at its commencement not in contravention of the provisions of this Act; or

(ii) its continuance has not been prohibited by the appropriate Government under s 10(3) or s 10A(4A) and notification as required by s 10A(3A) is not issued;

(iii) a lockout is declared in consequence of an illegal strike or a strike is declared in consequence of an illegal lockout.

It is not that every strike is illegal. In fact, workers have a right to go on strike whenever they like in order to demonstrate their grievances or to make certain demands in the process of collective bargaining. This right of the workmen cannot be impaired. Section 24 makes the strikes illegal only when they contravene the provisions of ss 10(3), 10A(4A), 22 and 23 of the Act.[42] In *Otis Elevator*, a single judge of the Bombay High Court held that a lockout declared in violation of s 24(2), though illegal at its commencement and until the expiry of 14 days from the date of such commencement, could still be a legal lockout subsequent to the expiry of the period of 14 days.[43] A lockout declared by the management from 24 December 1983 as a consequence of continuous 'go-slow' resorted to by the workmen, coupled with taking out processions, slogan-shouting, *etc*., and a total strike on 23 December 1983, and the continuance of it up till 8 February 1984 was legal and that the workmen were not entitled to wages for the whole period of lockout.[44] In *India Radiators*, the facts disclosed that the management declared a lockout from October 22 1986 till November 18 1986, as a consequence of 'go-slow' resorted to by the workmen and the consequent fall in the production. The management further maintained that the said go-slow was also in contravention of an incentive scheme which, *inter alia*, required that the workmen "*should not resort to any direct action like not working for incentive, before the failure of mutual discussion*". The facts further disclosed that mutual discussion was in progress at the time the workmen decided to reduce the level of production, and that, sometime after the lock-out was declared, the disputes which had led to the go-slow and the subsequent lock-out was in fact resolved amicably. While so amicably resolving the dispute which concerned bonus and also general demands it was agreed that the question of wages for the lock-out period would be referred for adjudication. The tribunal held that the lockout was unjustified. Setting aside the order of the tribunal, Jayasimha Babu J of the Madras High Court cited the observations of the court in an earlier decision involving the same parties as follows:

> 'Slowing down' implies the existence of a higher level before slowing down commenced, and falling to the lower level after the slowing down was practised. The lower level of production was in this case, only by reason of the deliberate action of the workmen in not exerting themselves to the level which they were capable and maintained consistently for a long period of time.[45]

The learned judge further observed:

> The object of the Industrial Disputes Act is to provide a machinery for the peaceful resolution of differences between the management and workmen so that even during the currency of the dispute, the work of the industry goes on unhampered and that the levels of production are not brought down by reason of the disputes for resolving which provision is made in the Act by way of settlement, by way of mutual negotiations, through conciliation, as also the resolution of disputes through the machinery of arbitration and ultimately by adjudication. The very object of establishing industry is to produce goods or services and the joint effort of management and labour in the organised industry is aimed at maintaining a level of production which at the best of times should be the optimal level having regard to the resources available and the conditions of the market in which such goods and services are bought or sold. Declining to maintain the higher level of production is, therefore, not a part of the role assigned either to the management, or workmen as a lever in bargaining with each other. The incentive scheme in this case did require the maintenance of a level of production which had taken note of what the workmen were capable of doing and which they admittedly were doing by ensuring the higher level of production which they were giving prior to their own decision voluntarily taken to slow down the production.. . The action of the workmen in deliberately slowing down the production contrary to the terms of the scheme which was binding on them, the scheme being part of the settlement which had been entered into bilaterally did amount to breach of the requirements of Section 23 of the Act, more particularly, sub-clause (c) which resulted in the management having the right to regard the lock-out declared by it as legal and justified by reason of the illegal strike resulting from the breach of the terms of the scheme on the part of the workmen.[46]

The above decision of Jayasimha Babu J when considered against the backdrop of the anarchic decisions handed down in *Gujarat Steel Tubes*,[47] and *Glaxo Laboratories*,[48]looks all the more handsome in so far as it gives an assurance to the industrial community as well as every civilised citizen of the country that sanity and good sense - which became so conspicuous by their absence for nearly two decades - have not totally disappeared from the precincts of higher courts. The learned judge deserves full compliments for expounding the law consistent with the spirit and scheme of the Act.

38 Ins by Act 36 of 1964, s 12 (wef 19-12-1964).

39 Ins by Act 36 of 1964, s 12 (wef 19-12-1964).

40 Subs by Act 36 of 1956, s 18, for "or Tribunal" (wef 10-3-1957).

41 Ins by Act 36 of 1964, s 12 (wef 19-12-1964).

42 *State of Bihar v Deodar Jha* AIR 1958 Pat 51 (DB), per Banerji J.

43 *Otis Elevator Co (I) Ltd v GS Baj* (2001) 2 LLJ 298 [LNIND 2000 BOM 707] (Bom), per Deshmukh J.

44 *Mysore WPAC Ltd v PO IT* (2001) 2 LLN 1019 (Kant), per Vallinayagam J.

45 *India Radiators Ltd v Second LC* 1998 (3) LLN 411 (Mad).

46 *Mgmt of India Radiators Ltd v PO*, (2003) 2 LLJ 615 : 2003 (97) FLR 647 (Mad), per Jayasimha Babu J.

47 *Gujarat Steel Tubes Ltd v GST Mazdoor Sabha* (1980) 1 LLJ 137 [LNIND 1979 SC 464] : AIR 1980 SC 1896 [LNIND 1979 SC 464]: (1980) 2 SCC 593 [LNIND 1979 SC 464] (SC), per Iyer J.

48 *Glaxo Laboratories (I) Ltd v PO, LC*, (1984) 1 LLJ 16 [LNIND 1983 SC 289] : AIR 1984 SC 505 [LNIND 1983 SC 289]: (1984) 1 SCC 1 (SC), per Desai J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER V Strikes and Lockouts

S. 25. Prohibition of financial aid to illegal Strikes and Lockouts.—

No person shall knowingly expend or apply any money in direct furtherance or support of any illegal strike or lockout.

ILLEGAL STRIKES AND LOCKOUTS

The word 'illegal' occurring before 'strike or lockouts' qualifies both the words, namely, 'strikes' as well as 'lockouts'. In other words, financial aid, both to illegal strikes as well as to illegal lockouts, is prohibited by s 25.

MENS REA

The section makes it clear, by the use of the word 'knowingly', that before a person can be said to have contravened the provisions of s 25, he must have knowledge that the strike or lockout in direct furtherance or support of which he has expended or applied any money, must be an illegal strike or lockout. If the strike or lockout is not illegal, the provisions of this section are not attracted.[49] This section should be read along with s 28 which prescribes penalty for giving financial aid to illegal strikes and lockouts. The cumulative effect of both these sections is that before a person can be convicted for its breach, the prosecution must prove that:

1. the strike or lockout in question was illegal; and
2. the accused had the knowledge:
   (i) that the strike or lockout is illegal; and
   (ii) that the money expended by him was in direct furtherance or support of the strike or lockout; and
   (iii) that the money was expended or applied by the accused.

The NCL-II made the following observations in respect of strikes:

> Strike could be called only by the recognised negotiating agent and that too only after it had conducted a strike ballot amongst all the workers, of whom at least 51 percent support the strike. Correspondingly, an employer will not be allowed to declare a lockout except with the approval at the highest level of management except in cases of actual or grave apprehension of physical threat to the management or to the establishment. The appropriate Government will have the authority to prohibit a strike or lockout by a general or special order and refer for adjudication the issue leading to the strike/lockout. The general provisions like giving of notice of not less than 14 days, not declaring a strike or lockout over a dispute which is in conciliation or adjudication and so on will be incorporated in the law. In this context we also recommend that an illegal strike or illegal lockout should attract similar penalties. A worker who goes on an illegal strike should lose three days wages for every day of illegal strike, and the management must pay the worker wages equivalent to three days wages per day of the duration of an illegal lockout. The union which leads an illegal strike must be de-recognised and debarred from applying for registration or recognition for a period of two or three years.[50]

49 *State of Bombay v Caul Field Holland* (1953) 1 LLJ 458 (Bom) (DB), per Gajendragadkar J.

50 Government of India (2002), *Report of NCL-II*, pp 46-47, para 6.101.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VA Lay-off and Retrenchment

S. 25A. Application of Sections 25C to 25E.—

(1) Sections 25-C to 25 -E inclusive [8][shall not apply to industrial establishments to which Chapter V-B applies, or—]

(a) to industrial establishments in which less than fifty workmen on an average per working day have been employed in the preceding calendar month; or

(b) to industrial establishments which are of a seasonal character or in which work is performed only intermittently.

(2) If a question arises whether an industrial establishment is of a seasonal character or whether work is performed therein only intermittently, the decision of the appropriate Government thereon shall be final.

[9][*Explanation*.—In this section and in Sections 25-C, 25-D and 25-E, "industrial establishment" means—

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

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

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

EXEMPTIONS TO CERTAIN INDUSTRIES FROM APPLICATION OF SECTIONS 25C TO 25E

Three types of 'industrial establishments' have been exempted from the provisions of ss 25C to 25E, namely:

(i) those to which ch VB applies;

(ii) those in which less than fifty workmen on an average per working day have been employed in the preceding calendar month; or

(iii) those which are of seasonal character or in which work is performed intermittently.

The result is that the last two types of industrial establishments are exempted from the payment of lay-off compensation as required under s 25C, maintaining the muster rolls of workmen as required by s 25D and compliance with the requirements of s 25E. However, to the establishments of the first type, the provisions of ss 25M and 25O will apply. In case an industrial establishment falls under one of the last two types, the industrial tribunals have no jurisdiction to award lay-off compensation to the workmen employed in such an industrial establishment. Again the tribunals cannot circumvent the statute by calling the compensation awarded by them as 'unemployment compensation' or by any other name. The matter is governed by the provisions of the statute rather than considerations of equity or social justice. The bar of s 25A is absolute.[10] However, in *Kundan Iron & Steel*, despite the finding that the provisions of s 25C were not applicable to the facts of the case, a single judge of the Punjab High Court held that the award granting compensation was justified because the lay-off virtually amounted to mala fide termination of the services of the workmen.[11] This decision does not lay down

the correct law.

SUB-SECTION (1): EXEMPTION FROM SECTIONS 25C TO 25E

(i) Clause (a)

(a) 'On an Average per Working Day'

The words 'on an average per working day' are significant. The provisions of s 25C are not applicable to industrial establishments in which less than 50 workmen on an average per working day have been employed in the preceding calendar month. Therefore, even when more than 50 workmen had been employed on certain days, if the average number of persons employed per working day during the preceding month was less than 50, the provisions regarding lay-off would not apply. No compensation can, therefore, be claimed for lay-off in concerns in which less than 50 workmen on an average per working day have been employed in the preceding calendar month.[12]

(b) 'Preceding Calendar Month'

In *Kohinoor Saw Mills*, it was held that the expression 'preceding calendar month' can have reference only to a claim, arising under s 25C, *i.e.*, a claim of a workman for compensation for having been laid-off by his employer. Thus, if that claim is satisfied by the employer, no further question could arise of the employer pleading that he is not liable to pay any compensation. If the claim of the workmen is resisted on the ground specified in s 25A(1)(a), that the industrial establishment is one in which less than 50 workmen were employed on an average per working day, the period with reference to which that test has to be applied is the calendar month that preceded that point of time, the point of time when the statutory right conferred by s 25C arose. The expression 'intermittent' is distinct from 'seasonal', implying seasonal or otherwise intermittent. 'Seasonal' would certainly appear to imply dependence on nature, over which obviously neither the employer nor the employee in a given industrial establishment has any control. The use of the words 'industrial establishment' limits the ambit of application of the provisions relating to 'lay-off' and 'retrenchment' to a particular factory or workshop.[13]

(ii) Clause (b): 'Seasonal Character'—'Intermittently'

Neither the expression 'seasonal' nor 'intermittent', as they occur in ss 25A(1)(b) and 25A(2), have been defined in the Act. However, in the context of s 25A(2), both the expressions are not synonymous. The exemption of this provision is available to only those establishments where the work is performed only intermittently. In *Fisheries Terminal Division*, the Supreme Court, while rejecting the contention that it was a seasonal establishment, observed that the claim was not substantiated by bringing relevant evidence on record. On this view of the matter, the court, while dismissing the appeal, held that the burden of proof that he was employed for 240 days was initially on the workman, but it shifts to the employer once the workman has discharged his burden once he has deposed from the witness box; and that as the employer had failed to produce complete records it could not sustain its stand, and further, on facts, procedure under Section 25-G was not followed.[14]

SUB-SECTION (2): DECISION OF THE GOVERNMENT

The expression 'question' in s 25A(2) implies a question at issue between two contending parties. Such a 'question' can arise only if there is a disputed claim to a right or a disputed liability. The Government can have jurisdiction to determine such a question only if it arises under s 25A(2), and its exercise thereof would be a quasi-judicial function, because a decision has to be given in a dispute between two contending parties. Such a decision could be given by the statutory authority normally only after giving an opportunity to both contending parties to make their representations.[15]

EXPLANATION: SCOPE OF AUTHORITY

The true scope and effect of the explanation is that it explains as to what categories of factories, mines or plantations, come within the meaning of the expression 'industrial establishment' for the purpose of ss 25A, 25C, 25P, 25E.[16] The definition of an industrial establishment in the explanation to s 25A(2) is limited in its scope and cannot apply to the interpretation of 'industrial establishment' as it has been used in s 25G. For the purposes of applying s 25G, the term 'industrial establishment' has not been defined in the Act.[17]

8 Subs by Act 32 of 1976, s 2, for "shall not apply—" (wef 5-3-1976).

9 Subs by Act 48 of 1954, s 2, for *Explanation* (wef 01 April 1954).

10 *South India Corpn v All Kerala Cashewnut FW Fedrn* (1960) 2 LLJ 103 (Ker), per TK Joseph J.

11 *Kundan Iron & Steel Industries v State of Punjab* (1961) 2 LLJ 599 (Punj), per Dua J.

12 *Tinkori Oil Mill Mazdoor Congress v Tinkori Sadhu Khan & Sons* 11 FJR 197 (LAT).

13 *Kohinoor Saw Mills Co v State of Madras* (1957) 2 LLJ 210 [LNIND 1956 MAD 116] (Mad) (DB), per Rajagopalan J.

14 *Director, Fisheries Terminal Divn v BM Chavda,* (2010) 1 LLJ 3 [LNIND 2009 SC 1967] : AIR 2010 SC 1236 [LNIND 2009 SC 1967]: (2009) 1 SCC 47 [LNIND 2009 SC 1967] (SC), per HL Dattu J.

15 *Kohinoor Saw Mills Co v State of Madras* (1957) 2 LLJ 210 [LNIND 1956 MAD 116] (Mad) (DB), per Rajagopalan J.

16 *Associated Cement Companies Ltd v Workmen* (1960) 1 LLJ 1 [LNIND 1959 SC 156] (SC), per SK Das J.

17 *India Tyre & Rubber Co (India) Pvt Ltd v Workmen* (1957) 2 LLJ 506 (Mad), per Rajagopalan J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VA Lay-off and Retrenchment

[18][S. 25B. Definition of Continuous Service.—

For the purposes of this Chapter.—

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer—

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

Explanation.—For the purposes of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which—

(c) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946) or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks].

CONTINUOUS SERVICE

This section has been substituted for the old s 25B and s 2(ee) by the Industrial Disputes (Amendment) Act 1964 (Act 36 of 1964). It consolidates the law in one place with minor additions and alterations. The definition of the expression ‘continuous service’ is prefaced with the words ‘for the purposes of this chapter’, which means that the effect of continuity

or interruption of service in terms of this definition is to be limited only for the purposes of this chapter, *viz*, for calculating, quantifying and payment of compensation under the provisions contained in this chapter. The words 'continuous service' occur in ss 25B, 25C, 25F, 25FF, 25FFF in ch VA, which gives certain rights and advantages to the workmen who have been in 'continuous service' for a specified period of time. The section further lays down that the service shall be deemed to be continuous in spite of its interruption on account of any of the reasons stated therein and should remain uninterrupted.[19] According to this definition, what is required is that the workman should have been in 'continuous service' under an employer. The employer must be one and the same. It is, however, not necessary that the workman should work in the same capacity during the required period in order to earn 'continuous service' as defined in this section. If a person is a workman as defined in the Act and the employer is the same, he earns 'continuous service' by working for 240 days within a period of 12 calendar months preceding the date of retrenchment.[20] Sub-section (1) defines 'continuous service' for 'a period' as uninterrupted service for that period, and by fiction includes also the service interrupted for the enumerated reasons. Sub-section (2) introduces further fiction in calculating the continuous service for 'one year' or 'six months'.

SUB-SECTION (1): 'CONTINUOUS SERVICE FOR A PERIOD'

Under sub-s (1), 'continuous service for a period' may comprise of two periods, *viz*:

(i) Uninterrupted Service

The use of the words 'shall be said to be in continuous service' makes this part of the definition exhaustive, *i.e.*, all uninterrupted service means 'continuous service', and

(ii) Interrupted

Service which is interrupted on account of any of the following reasons, namely:

(a) sickness,

(b) authorised leave,

(c) an accident,

(d) a strike which is not illegal,

(e) a lockout, or

(f) acessation of work that is not due to any fault on the part of the workman shall be included in the 'continuous service'.

The purport of this sub-section is that if a workman has been in 'uninterrupted service' of the establishment for a certain period, he shall be said to be in 'continuous service' for that period. For instance, if a person has been in uninterrupted service for a period of one year (12 months), he shall be said to be in continuous service for one year irrespective of the number of days he has actually worked. However, the workman must have been in service during the period, *i.e.*, not only on days when he actually worked, but also on days he could not work under the circumstances set out in sub-s (1). In other words, he should be in the employment of the employer concerned not only on the days he has worked, but also on the days on which he had not worked either on account of his inability or on account of his being prevented by the employer from working.[21] Furthermore, even if his service during such period is interrupted by any of the reasons set out in the second part of this section, he shall still be in 'continuous service' for that period. It is obvious that the definition of the expression 'continuous service' in this section is in two parts. The first part is the meaning of the expression 'continuous service' and the second part is an inclusive definition. In regard to the first part, to be 'continuous', the service must be uninterrupted. The second part takes within the scope of the term 'continuous service' even the period of service which has been interrupted for the reasons enumerated therein. However this does not mean that if the service is interrupted for any reasons other than the enumerated reasons, it will *ipso facto* disrupt the contract of service or sever the *vinculam juris* of the relationship of employment. In such cases, the continuity of the contract of service will subsist albeit the continuity of service for the purposes of this chapter, *viz*, calculating, quantifying and payment of compensation is interrupted. In other words, for other purposes the 'continuity of service' will not be interrupted even if the interruption is not due to sickness, accident, or lockout, or is without leave, or is on account of illegal strike, or is for any fault on the part of a workman. For other purposes than the purposes of this chapter, the continuity of service will be interrupted or disrupted only when the employee is retrenched, discharged, dismissed or his service is otherwise terminated either in accordance with contract of service or in accordance with the Standing Orders of the establishment. For instance, taking part in an illegal strike amounts to misconduct on the part of an employee, for which he invites an order of dismissal. If certain workmen go on an

illegal strike for a number of days, though the continuity of their service for the purposes of this chapter shall be *ipso facto* interrupted, their contract of service will not be disrupted causing the discontinuity of their service for other purposes.[22]

On the construction of the expression 'continuous service' as used in the provisions of a gratuity scheme under an award, in which it was not defined, the Supreme Court in *Jeewanlal*, observed that participation in an illegal strike may incur the punishment of dismissal, but mere participation in an illegal strike cannot be said to cause a breach in continuity of service for the purposes of gratuity.[23] However, on the construction of 'continuous service' in s 49B of the Factories Act 1948, in *Buckingham & Carnatic*, the court held that interruption by illegal strike by itself interrupted the continuity of service and there was no further necessity to terminate the service by way of dismissal for the misconduct of taking part in an illegal strike.[24] This view of the Supreme Court has been followed by the Madras High Court in construing the expression 'continuous service' occurring in the proviso to s 3 of the Tamil Nadu Industrial Establishments (National and Festival Holidays) Act, 1958 (prior to its amendment by the Madras Act (43 of 1961).[25]However, the meaning attributed to the words 'continuous service' in the context of the Factories Act or the National or Festival Holidays Act is not relevant for the construction of the expression as used in s 25B of the Industrial Disputes Act. The same words may mean one thing in one context and altogether another in a different context. The decision on the meanings of particular words or collocation of words in other statutes are scarcely of much value while construing specific statutes; they can be helpful, but cannot be taken as guides or precedent. The expression 'cessation of work' has to be interpreted *ejusdem generis*, *i.e.*, when a particular expression precedes a general expression, the latter should be interpreted in the light of the former.[26] On the construction of this expression in the light of this rule, this expression has to be interpreted in the light of illegal strike or lockout and matters of similar nature which are not difficult to be foreseen like power failure, imposition of curfew, acceleration of bandhs, breakdown of law and order and related matters, merely because a casual worker was willing to work, there is no obligation on the part of the employer to provide him with work even if there is no work.[27]

SUB-SECTION (2): CONTINUOUS SERVICE FOR ONE YEAR OR SIX MONTHS

This sub-section introduces a fiction to the effect that even if a workman is not in 'continuous service' within the meaning of cl (i) for a period of one year or six months, he shall be deemed to be in continuous service for that period under an employer if he has 'actually worked' for the days specified in cll (a) and (b) thereof.

(i) Clause (a): Continuous service for a period of one year

By fiction of this clause even if a person has not been in 'continuous service' within the meaning of sub-cl (i) for a period of one year, he shall be deemed to be in 'continuous service' under an employer for that period if he has 'actually worked' under that employer for 190 days in case he is employed underground in a mine or 240 days in any other case. On the construction of the old provisions in *Sur Enamel*, the Supreme Court had held that before a workman can be considered to have completed 'one year of continuous service' in an industry, it must be shown first that he was employed for a period of not less than 12 calendar months and next that during those 12 calendar months he had worked for not less than 240 days. Both these conditions had to be cumulatively satisfied.[28] In *Digwadih Colliery*, the court observed that the amendment only consolidates the provisions of ss 25B and 2(eee) in one place, and the purport of the new provision is not different. The amendment only removes the vagueness.[29] After the amendment of the section, in *Ramakrishna Ramnath*, the Supreme Court observed:

> Under s 25B a workman who during the period of 12 calendar months has actually worked in an industry for not less than 240 days, is deemed to have completed one year's service in the industry. Consequently, an inquiry has to be made to find out whether the workman had actually worked for not less than 240 days during a period of 12 calendar months immediately preceding the retrenchment. These provisions of law do not show that a workman after satisfying the test under s 25B has further to show that he has worked during all the period he has been in the service of the employer for 240 days in the year.[30]

However, these observations did not elaborate the law because the point does not appear to have been argued in detail. In this case, the court did not refer to its earlier decisions in *Sur Enamel* and *Digwadih Colliery*. Here the workman had worked for eight years in the service of the employer. The contention of the employer was that a workman has to establish that he had worked for 240 days in all the years for each year the compensation was claimed. The court rejected the contention with the observation that before claiming compensation, the workman has only to establish that he has been in continuous service for not less than one year in the undertaking immediately before he was retrenched or deemed to have been retrenched from service. In *Surendra Kumar Verma*, the court observed:

> These changes brought about by Act 36 of 1964 appear to be clearly designed to provide that a workman who has actually worked under the employer for not less than 240 days during a period of twelve months shall be deemed to have been in 'continuous service' for a period of one year whether or not he has in fact been in such continuous service for a period of one year. It is enough

> that he has worked for 240 days in a period of 12 months; it is not necessary that he should have been in the service of the employer for one whole year.. .. Even if a workman has not been in 'continuous service' under an employer for a period of one year, he shall be deemed to have been in such 'continuous service' for a period of one year if he has actually worked under the employer for 240 days in the preceding period of twelve months. There is no stipulation that he should have been in employment or service under the employer for a whole period of twelve months. In fact, the thrust of the provision is that he need not be. That appears to be the plain meaning without gloss from any source.[31]

The law was elaborated in *Mohan Lal*, in the following words:

> Sub-section (2) provides for a fiction to treat a workman in continuous service for a period of one year despite the fact that he has not rendered uninterrupted service for a period of one year but he has rendered service for a period of 240 days during the period of 12 calendar months counting backwards and just preceding the relevant date being the date of retrenchment. In other words, in order to invoke the fiction enacted in sub-s (2)(a), it is necessary to determine first the relevant date, *i.e.*, the date of termination of service which is complained of as 'retrenchment'. After that date is ascertained, move backward to a period of 12 months just preceding the date of retrenchment and then ascertain whether within the period of 12 months, the workman has rendered service for a period of 240 days. If these three facts are affirmatively answered in favour of the workman, pursuant to the deeming fiction enacted in sub-s 2(a), it will have to be assumed that the workman is in continuous service for a period of one year, and he will satisfy the eligibility qualification enacted in s 25F.[32]

In *Ramasamuz*, the workman was in employment of the company between January 1945 and April 1975. His claim for retrenchment was resisted by the employer on the ground that he had not worked for a period of 240 days every year and, therefore, he could not be deemed to be in 'continuous service' as contemplated by s 25B. A single judge of the Bombay High Court held that the mere fact that during some years in a long period of service, the workman had not worked for 240 days, is not sufficient to deprive him of the retrenchment-compensation by ignoring the entire period.[33] A single judge of the Punjab and Haryana High Court in *MR Khosla*, held that a workman in service on daily wages for nearly six years except for a break of one day in the middle of service was in 'continuous service' for the entire period despite the break as he had served for 240 days in each year of service in the relevant 12 months' period.[34] In *Kailash Paswan*, the Patna High Court held that the section only postulates rendering of work for 240 days in the preceding period of 12 months. It cannot be said that for 'continuous service' for a period of one year, the workman must do and continues to do the same work for which he was engaged or the other work at the same time for a period of 240 days in the preceding 12 months.[35] If a workman is engaged initially for a particular period and that period is extended from time to time, such employment has to be treated as continuous service, if he has continued in service uninterruptedly for a period of 240 days in the calendar year preceding the date of termination.[36] The condition precedent for invoking s 25F is that the workman ought to have been employed continuously for 240 days under the same employer. It is not necessary that the employment during the requisite period should be of the same character. The period of past service put in before appointment on probation should be included and not ignored.[37] In the absence of proof that the concerned workmen/daily wagers worked for at least 240 days in the year, they cannot claim protection against termination of their service nor seek regularisation of their service on monthly salary with benefits like pension, gratuity, *etc*.[38] Interruption of service because of accident occurring during the course of job has to be included in uninterrupted service.[39] Sundays and holidays should be included in computing the continuous service under s 25B.[40]

(a) 'Actually worked'

The fiction of this sub-section will operate only if the workman has actually worked under the employer for the number of days specified therein. The explanation specifically includes the days on which the workman has been laid-off under an agreement, or he has been on leave with full wages or he has been absent due to temporary disablement caused by an accident arising out of and in the course of his employment and in the case of a female workman the maternity leave, in the expression 'actually worked'. The explanation obviously is inclusive and not exhaustive. However, the Madras High Court, held that the words 'actually worked' would not include holidays much less Saturdays and Sundays for which full wages are paid. The words 'days worked' itself would normally mean days actually worked. The legislature, as if, to give emphasis, has also added the word 'actually'. There could, therefore, be no scope for argument that paid holidays are to be included in 'actually worked'. The explanation to s 25B has included in the expression 'the actually worked', certain deemed actual working days. Only those days which are provided in the explanation could be included in calculating 240 days in addition to the actual working days. The meaning of the words 'actually worked' cannot be enlarged beyond what is contained in the explanation.[41]

In *American Express*, the Supreme Court held that the expression 'actually worked under the employer' cannot mean only those days when the workman works with hammer and sickle or pen, but must necessarily comprehend all those days

during which he was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statute, Standing Orders, *etc*. Accordingly, the court held that Sundays and other holidays would be comprehended in the words 'actually worked' and it discountenanced the contention of the employer that only days which are mentioned in the explanation should be taken into account for the purpose of calculating the number of days on which the workman had 'actually worked' though he had not so worked and no other days. The court observed that the explanation is only clarificatory, as all explanations are, and cannot be used to limit the expanse of the main provision.[42] Where the labour Court upheld the termination of service of a daily rated worker, engaged by the irrigation department, after the completion of the project, the Bombay High Court dismissed his writ petition and upheld the award of the labour court rejecting his claim on the ground that he did not put in 240 days continuous service and that no relief could be granted to him under the Act.[43] Rejecting the contention of workmen engaged on a specific project undertaken by the Indore Development Authority, Sinha J (for self and Hegde J) observed:

> This case involves 31 employees. A distinction is sought to be made by Dr. Dhawan that out of them 27 had been appointed to a project and not in a project. The distinction although appears to be attractive at the first blush but does not stand a moment's scrutiny. As noticed hereinbefore, the High Court's observation remained unchallenged, that the project was to be financed by ODA. The project was indisputably to be executed by the Indore Development Authority; and for the implementation thereof, the appointments had to be made by it. If the Appellants were appointed for the purpose of the project, they would be deemed to have been appointed therefor and only because such appointments had been made by the Respondent would by itself does not entitle them to claim permanency. The life of the project came to an end on 30-6-1997. The maintenance job upon completion thereof had been taken over by the Indore Municipal Corporation. The Appellants were aware of the said fact and, thus, raised an alternative plea in their statements of claims. The Labour Court could not have granted any relief to them as prayed for, as Indore Municipal Corporation is a separate juristic person having been created under a statute. Such a relief would have been beyond the scope and purport of the reference made to the Labour Court by the State Government. Furthermore, the Indore Municipal Corporation was not a party and, thus, no employee could be thrust upon it without its consent.[44] (para 37)

In *Executive Engineer, ZPD*, the facts were: A few workers were engaged as daily wagers in relation to a scheme known as *Kriya Scheme* aimed at providing drinking water and construction of roads for the benefit of the rural poor in the District of 'Gulbarga' in the State of Karnataka. The employment commenced in the year 1993. The services of the said workers were terminated in 1996. They filed writ petitions before the Karnataka High Court contending *inter alia* that, having worked for a number of years, they became entitled for regularization. It was furthermore contended that they were still continuing in service. The writ petition and the writ appeal were dismissed by the single judge and Division Bench respectively of the High Court. Thereafter they raised an industrial dispute before the labour court without however disclosing the dismissal of their writ petition and writ appeal. The labour court directed reinstatement of the said workers with 50% back wages. Two writ petitions were filed on behalf of the Executive Engineer in the High Court which were dismissed by the High Court. Setting aside the award of the labour court as well as the orders of the High Court and holding that the orders of the courts below were barred by the operation of *res judicata*, Sinha J (for self and Hegde J), cited the following observation of the Supreme Court in *P Kulothangan*, in which it was observed:

> The principle of res judicata operates on the Court. It is the Courts which are prohibited from trying the issue which was directly and substantially in issue in the earlier proceedings between the same parties, provided the Court trying the subsequent proceeding is satisfied that the earlier Court was competent to dispose of the earlier proceedings and that the matter had been heard and finally decided by such Court. Here the parties to the writ petition filed by the respondent in the Madras High Court and the industrial dispute were the same. The cause of action in both was the refusal of the appellant to allow the respondent to rejoin service. The Madras High Court was competent to decide the issue which it did with a reasoned order on merits and after a contested hearing. The Madras High Court was competent to decide the issue which it did with a reasoned order on merits and after a contested hearing. This was not a case where the earlier proceedings had been disposed of on any technical ground as was the case in. .. *Cochin Port Trust*,[45] and *Pujari Bai*.[46] The 'lesser relief' of reinstatement which was the subject-matter of the industrial dispute had already been claimed by the respondent in the writ petition. This was refused by the High Court. The correctness of the decision in the writ proceedings has not been challenged by the respondent. The decision was, therefore, final. Having got an adverse order in the writ petition, it was not open to the respondent to re-agitate the issue before the Labour Court and the Labour Court was incompetent to entertain the dispute raised by the respondent and re-decide the matter in the face of the earlier decision of the High Court in the writ proceedings.[47]

Applying the said principle to the facts of the present case, Sinha J held:

> For the foregoing reasons, we are of the opinion that the Labour Court and the High Court committed a manifest error in passing

the impugned judgments and awards and as such they are liable to be set aside.[48]

In *UP Brassware*, Sinha J (for self and Balasubramanian J) held that Section 25B(2)(a) raises a legal fiction that if a workman has actually worked under the employer continuously for a period of more than 240 days during a period of twelve calendar months preceding the date with reference to which calculation is to be made, although he is not in continuous service, he shall be deemed to be in continuous service under an employer for a period of one year.[49] Where the tribunal took into account the unpaid sundays and holidays into account while arriving at 240 days, a single judge of the Calcutta High Court quashed the award directing reinstatement on the ground that the tribunal committed an error of law, and remitted the matter to the tribunal for fresh decision.[50] In *Haryana SCS Marketing Federation*, the facts were: the employee was engaged as a Chowkidar on casual basis by the District Manager, HAFED, Jind in August, 1998 for 29 days. On expiry of the said contract, fresh contracts were executed from time to time and he rendered service there until 31 December 1998. He was engaged afresh by the District Manager, HAFED, Hissar on 15 January 1999 where he worked upto 31 May 1999. As the service of the respondent was not renewed after 31 May 31 1999, he issued demand notice under Section 2-A of the Industrial Disputes Act 1947 (for short 'ID Act'). The industrial tribunal-cum-labour court held that there was contravention of s 25F in view of the fact that the workman had put in 240 days service in all, and directed reinstatement with 50% back wages, which order was confirmed by the High Court. Quashing the orders of the courts below, Lodha J cited the following passage from *Haryana Urban Development Authority*:

> The Industrial Tribunal-cum-Labour Court unfortunately did not go into the said question at all. If both the establishments are treated to be one establishment for the purpose of reckoning continuity of service within the meaning of Section 25-B of the Act, as was held by the Tribunal, a person working at different points of time in different establishments of the statutory authority, would be entitled to claim reinstatement on the basis thereof. However, in that event, one establishment even may not know that the workman had worked in another establishment. In absence of such a knowledge, the authority retrenching the workman concerned would not be able to comply with the statutory provisions contained in Section 25-F of the Act. Thus, once two establishments are held to be separate and distinct having different cadre strength of the workmen, if any, we are of the opinion that the period during which the workman was working in one establishment would not ensue to his benefit when he was recruited separately in another establishment, particularly when he was not transferred from one sub-division to the other. In this case he was appointed merely on daily wages.[51] ().

Having referred to the above decision, the learned judge finally held:

> In what we have discussed above, the conclusion would appear to us to be inescapable that the office of the District Manager, Jind and the office of the District Manager, Hissar are separate and distinct and the services rendered by the workman at these two establishments cannot be clubbed for the purpose of reckoning continuity of servicewithin the meaning of Section 25-F read with Section 25-B of the I.D. Act. The workman having not completed 240 days of continuous service under the employer in the year preceding his termination, Section 25-F is not at all attracted. In the circumstances, the impugned judgment cannot be sustained and has to be set aside.[52] ()

In *UP Drugs and Pharmaceuticals*, the termination of a few casual workers was referred for adjudication under s 4(k) of UP Industrial Disputes Act. The facts disclosed that none of the workers had put in 240 days service in the year immediately preceding the date of termination. However, some 29 of them had worked 240 days per year in the previous years. The labour court directed reinstatement of the said 29 workmen of which some 18 workmen challenged the award. Setting aside the award, the High Court held that under s 6-N read with s 2(g) of the UP Act, it was not necessary for the workmen to complete 240 days in the preceding year and since workmen had completed 240 days in earlier calendar years preceding the 12 months on the date of retrenchment, they were deemed to be in a continuous service and hence their termination in violation of Section 6-N of the UP Act was illegal. The respondents have been held to be in continuous service. The High Court directed that they shall be given consequential service benefits including reinstatement except the back wages. The company was directed to pay the wages of the respondents from the date of reinstatement. Dismissing the appeal filed by the company, Sabharwal J (for self and BN Agarwal J) observed:

> .. . the word 'preceding' has been used in Section 25-B of the ID Act as incorporated in the year 1964. Section 2(g) does not use the word 'preceding'. The concept of 'proceeding' was introduced in the ID Act so as to give complete and meaningful benefit of welfare legislation to the working class.. .. The High Court has rightly concluded that the termination of the respondents was in violation of Section 6-N read with Section 2(g) of the U.P. Act. Regarding denial of back wages to the respondents, in our view, no interference is called for having regard to the facts and circumstances of the case including the circumstance of the financial

position of the appellant and the proceedings before the Board for Industrial and Financial Reconstruction.[53] (Paras 10 & 12).

In a similar set of facts and circumstances in *Sriram Industrial Enterprises*, *i.e.*, where the workmen had not put in 240 days service in the preceding twelve calendar months, though they had worked for 240 days or more in the preceding years, the tribunal accepted the plea of the management and upheld the termination of workmen, which order was set aside by the High Court. In appeal by the company, Altamas Kabir J (for Self and Lakshmanan J) followed the above decision of the Supreme Court in *UP Drugs and Pharmaceuticals*, and affirmed the view of the High Court to the effect that the termination was illegal.[54] In *Chairman, ONGC*, the Supreme Court held that the onus of proving that he has worked for 240 days is on the workman. The onus shifts to the employer only after evidence is led. The court further held that whether a person has worked for more than 240 days or not is a disputed question of fact which should not be examined by the High Court, and the proper remedy for a person making such a claim is to raise an industrial dispute.[55] A direction for regularisation of daily wagers who worked for six years, without considering the availability of sanctioned posts is not sustainable.[56] In *Indian Railway Construction*, the Supreme Court held that persons engaged for project work in a Public Sector Undertaking, on an *ad hoc* basis and *de hors* the rules governing such appointments, do not get automatically converted into regular employees of the company, regardless of the fact that the company extended group insurance and regular pay scales to them. On completion of the project work, they cannot claim regularization in the company's services. Further, the opportunity given to the employees to appear for regular selection in the company was not availed of by them. In these circumstances, termination of their services cannot be said to offend Art 16 (Equality in Public Employment) and Art 21 (Right to Life) of the Constitution.[57] In *Hindustan Aeronautics*, the Supreme Court held that the fact of completing 240 days by a workman only imposes certain obligations on the employer at the time of termination of service, but it does not confer any right to regularization; and the direction given by the High Court for creating a post and for payment of regular salary to the workman could not be sustained.[58]

In *Santuram Yadav*, the facts disclosed that the termination of the services of a few workmen, who were daily wagers was upheld by the labour court on the ground that they had not worked for 240 days. The workers did not, through ignorance, produce the voluminous material, in their possession to prove that they had worked for 240 days, before the labour court. In view of the peculiar facts of the case and also in the light of the stand taken by the Management in the form of compromise agreeing to reinstate and provide seniority from the date of their first appointment *i.e.* 05 August 1989, as evidenced in the 'compromise deed', the Supreme Court remanded the matter to the labour court with permission to both the management and workmen to place all the relevant evidence in their possession before the labour court in support of their defence.[59] In *Sunita Gupta*, the facts were: the female employee was not continued after working as a daily wager for a period of 18 months. The labour court found that she had worked for more than 240 days, and directed reinstatement on the ground that her service was terminated without complying with the provisions of s 25F. Dismissing the writ petition filed by the employer, the MP High Court held that it was clearly established that she had worked for more than 240 days and hence she was entitled to reinstatement. The court, however, held that in the circumstances grant of back wages was not proper.[60] Where the tribunal, having recorded a finding that the termination of a casual worker engaged by Telephone Department on daily wages was illegal, did not grant either reinstatement or backwages, except a compensation of Rs. 35000/-. Quashing the order of the tribunal, a single judge of the Calcutta High Court held that there was no justification for denying reinstatement.[61]

In *Director of Transport*, the facts briefly were: the respondent-workman was engaged for a fixed tenure as a data entry operator on an *ad hoc* basis in a leave vacancy with a clear stipulation that the appointment would come to an end on the expiry of the period. When the situation arose for making regular appointment for the post of data entry operator, the respondent did not apply against the advertisement issued by the employer. When the respondent applied for the post, the selection process was already completed. The respondent raised a dispute. The tribunal directed reinstatement. Quashing the order of the tribunal, a single judge of the Calcutta High Court held that the provisions of s 25B are not applicable to the case, and that the termination was on the expiry of the period stipulated in the contract. The learned judge further held that the tribunal misdirected itself in ordering reinstatement.[62] In *Ranbir Singh*, the facts were: the services of a workman, who was engaged on daily wages for some seven years were terminated on the ground that he had been involved in a criminal case. The criminal case ended in his acquittal. The workman raised an industrial dispute alleging violation of Section 25F. The labour court directed his reinstatement with 50% back wages. The State of Haryana challenged the said order in so far as back wages were concerned. A single judge set aside the award in toto and instead awarded a compensation of Rs. 60,000/- to the appellant. The Division Bench, though noticed that the order of the single judge was beyond the prayer of the Government, nevertheless held that, in view of the fact the workman was a daily wager, the technicality touching upon the prayer in the writ petition would not stand in the way of quashing the award of the labour court, and accordingly affirmed the order of the single judge. Allowing the appeal of the workman, a Bench of the Supreme Court comprising HS Bedi and CK Prasad JJ held:

.. . the learned counsel for the appellant has argued that in the writ petition filed by the respondent-State challenging the Award of

> the Labour Court, the only plea was against the grant of back wages and nothing more. In support of this submission, the learned counsel has drawn our attention to the writ petition which has been appended with the paper book. We find that the assertion of the learned counsel is correct. We are, therefore, of the opinion that the order of the single Judge as well as of the Division Bench was well beyond the scope of the prayers in the writ petition. *If the State felt aggrieved by the Award of the Labour Court in toto there was no impediment in its way to challenge it in its entirety. We feel that a party must be held to be bound by its pleadings; a prayer clause cannot be construed or dubbed as a technicality*. We are, therefore, of the opinion that the appeal deserves to succeed. We, accordingly, allow the appeal and set aside the orders of the single Judge as well as the Division Bench and restore the order of the Labour Court to the extent of reinstatement.[63] ().

(b) Burden of Proof

It is for the workman to show by adducing relevant evidence that he has been in continuous service for not less than one year under the employer who had retrenched him from service and during the period of twelve months, he had served for not less than 240 days, for maintaining his complaint that the provisions of s 25F were not complied with.[64] Where the union espoused the cause of workmen whose services were terminated alleging contravention of the provisions of s 25F, a single judge of the Bombay High Court, while dismissing their writ petition, held that the burden of proving that they had worked for 240 days was on the workmen, which they could not discharge.[65] In *Hadimani*, the Supreme Court held that the burden of proving that he has worked for 240 days is on the workman.[66] In *Essen Deinki*, the facts were: the workman joined the services of the company as a helper on 1 July 1990 and continued till 26 February 1991. His service was terminated however, on the ground that his work was not found to be of desired standard. The company did not comply with s 25-F due to the fact that the workman had not completed 240 days in the preceding 12 calendar months. At all stages, the company contended that the workman had worked for a total period of 219 days in the preceding 12 months. The labour court passed an award holding that the termination was valid and the compliance with s 25F was not required in view of the shortfall in the number of days worked. The said award was set aside by the High Court with a direction to reinstate the workman. Quashing the order of the High Court and restoring the award of the labour court, Banerjee J (for self and Sabharwal J) relied on the decision rendered in *ST Hadimani* (supra) and held:

> Having regard to the opinion of this Court in the last noted decision [*ST Hadimani*], question of affirmance of the impugned judgment cannot and does not arise more so by reason of the fact that even this Court searched in vain in regard to the availability of such an evidence. The High Court, in our view, has thus committed a manifest error in reversing the order of the Labour Court.[67]

In *Hariram* the Supreme Court, while quashing the order passed by the labour court and the High Court, observed:

> The above burden having not been discharged and the Labour Court having held so, in our opinion, the Industrial Court and the High Court erred in basing an order of reinstatement solely on an adverse inference drawn erroneously.[68] ().

In *Lakshmoji Rao*, the facts were: In response to the advertisements made by APSRTC, the respondent-workmen were selected as conductors and appointed on daily-wages initially for a certain period of time and thereafter their services were extended on the same terms and ultimately regularized after a year or two. They were placed on time scale of pay and their seniority was counted from the date of such regularization. Long afterwards, the respondents filed writ petitions contending that their services ought to have been regularized from an anterior date *i.e.*, from the date of their initial appointment on daily-wage basis and the service benefits should be granted accordingly. This prayer was practically granted by the High Court with a rider that they should have completed one year of continuous service as defined in s 25B. In his opening remarks, Venkatarami Reddy J (for self and Rajendra Babu J) chastising the defective approach and deplorable style of handling the case by the AP High Court and held thus:

> These cases involving the issue as to the effective date of regular appointment and seniority unfold certain disturbing features - non-application of mind by the High Court to the crucial aspects of the case, vagueness of the directions issued, the deficiency of pleadings and material placed on record by the contending parties and above all *the default of the appellant-Corporation in allowing other similar orders becoming final while contesting certain others including the present matters*. ().. . *There was practically no discussion on the merits in any of these cases either in the judgments under appeal or the earlier judgments which were followed in the instant cases*. All the writ appeals were disposed of at the admission stage itself. One more fact to be noticed is that no averment has been made nor any material placed before us to establish that the judgments which were followed in these cases or similar judgments in certain other cases have been contested by APSRTC by filing LPAS or SLPS. (). .. A learned single Judge disposed of the writ petition on 20-6-1988 with a direction to the respondents to "declare the petitioners to be in service on regular basis from the dates of their joining duty and give consequential benefits". The only reason given by the learned Judge is

> contained in the following paragraph which we quote: 'The petitioners were selected by a Committee on the basis of their eligibility and they have been appointed on June 10, 1983. Therefore, though there appears the term 'on temporary basis on daily wages', the fact remains that they have been discharging the duties on regular basis.'. .. The *short order passed by the Division Bench on 24-7-1995 reads* as follows:
> Heard learned counsel for the appellant and learned counsel for the respondent. We do not think there is any mistake in the direction issued by the learned single Judge except that a clarification is required to reckon the date of continuous appointment and thus regularization in the post held by the petitioners respondents from the date of continuous appointment for the purpose of both of emoluments as well as seniority. *We accordingly clarify that the date of initial appointment as indicated in the order of the learned single Judge will be read as the date of continuous appointment as defined under Section 25B of the Industrial Disputes Act*. Such continuous service of the petitioner/respondents shall be counted for all benefits in the service in accordance with law. With the clarification as above, the appeal is dismissed.
> This order was followed in most of the writ petitions and writ appeals including the orders under appeal. (). .. It is difficult to comprehend the ratio of the above decision. While purporting to clarify the order passed in the writ petition by the learned single Judge, the Division Bench imported a totally alien concept of continuous service within the meaning of Section 25B of the ID Act which was for the special purpose of applying the provisions as to lay off and retrenchment contained in Chapter V-A of the Act. Moreover, the order in the writ appeal is as vague as it could be. The expression 'date of continuous appointment' makes no sense. Even if it is taken that the said wording has been inaccurately used for the words 'continuous service', still, the direction is unintelligible. Continuous service within the meaning of Section 25B- for how long? Nothing has been specified. ().

That was the level of intellectual acumen and the legal sense displayed so pathetically by the Division Bench. It is disconcerting to come across such mediocre observations purported to have been made at the level of a High Court! The above analysis of Reddi J, and the specific passages cited by him in the above paragraphs, betray the serious misconceptions of fatal dimensions entertained by the single judge as well as the Division Bench of the AP High Court, which is an unflattering reflection on the standard and quality of judges being appointed to higher level judicial positions. This aspect has been discussed at some length elsewhere in the book, hence not being repeated here. Adverting to the issues raised before the Supreme Court, Reddi J discussed the facts in detail and, after highlighting the absolute mess created by the AP High Court, finally held:

> In view of this peculiar situation and in order to avoid the anomalies that might otherwise ensue, while we hold that the respondent-employees have failed to establish their legal right to get the status of regular employees right from the date of their initial appointment on daily wage basis and the respective dates of regularization assigned to the respondents cannot be legally faulted, we are inclined to mould the relief in modification of the directions given in the judgments under appeal and direct as follows :
> If any of the Conductors, junior to the respondents in the relevant seniority list of the concerned Division/Region, have got the benefit of seniority and regularization OR are entitled to get the same by virtue of the judgments that have become final, then the respondents who are seniors to them, shall be given the same benefit on the same principle.[69] ()

In *Municipal Corporation Faridabad*, the court observed:

> A court of law even in a case where provisions of the Indian Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against his contentions. The matter, however, would be different where despite direction by a court the evidence is withheld. Presumption as to adverse inference for non-production of evidence is always optional and one of the factors which is required to be taken into consideration is the background of facts involved in the lis. The presumption, thus, is not obligatory because notwithstanding the intentional non-production, other circumstances may exist upon which such intentional non-production may be found to be justifiable on some reasonable grounds. In the instant case, the Industrial Tribunal did not draw any adverse inference against the appellant. It was within its jurisdiction to do so particularly having regard to the nature of the evidence adduced by the respondent.[70] (at p 5187).

Following the above decisions, another Bench of the Supreme Court, in *Rajasthan State Ganganagar Mills*, held:

> It was the case of the workman that he had worked for more than 240 days in the year concerned. This claim was denied by the appellant. It was for the claimant to lead evidence to show that he had in fact worked up to 240 days in the year preceding his termination. He has filed an affidavit. It is only his own statement which is in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that in fact the claimant had worked for 240 days in a year. These aspects were highlighted in *Range Forest Officer v. S.T. Hadimani* . .. No proof of receipt of salary or wages for 240 days or order

or record in that regard was produced. Mere non-production of the muster roll for a particular period was not sufficient for the Labour Court to hold that the workman had worked for 240 days as claimed.[71] ().

In *Sports Authority of India*, a single judge of the Delhi High Court, while dismissing the petition filed by the employer, held that once the workman discharged the burden by establishing that he had worked for 240 days including sundays and holidays, the burden shifts to the management, and the failure of the management to produce the attendance register and other records led the court to draw an adverse inference against the management, and the award of the labour court directing reinstatement needs no interference.[72] In *Reserve Bank of India*, the facts were: the respondents were employed intermittently as *Ticca Mazdoors* in RBI. They were not engaged every day or continuously and were never regarded as regular mazdoors. When they were interviewed for appointment as regular mazdoors, they produced certain certificates, which were later found to be fake and forged certificates. An FIR was lodged with the police and in the course of the criminal trial, they were acquitted, whereupon they submitted fresh school certificates and requested for appointment as regular mazdoors, which was rejected by the Bank. In the course of adjudicating the resultant dispute, the tribunal held that they had completed 240 days service and hence their termination without complying with s 25F was illegal. On this view of the matter, the tribunal directed their reinstatement with full back wages. A single judge dismissed the writ petition filed by the Bank, while the Division Bench observed that the non-employment of the workman was due to their submitting false certificates and that it had cast a stigma on them, and gave liberty to the Bank to hold a domestic enquiry into the alleged misconduct. Allowing the appeal filed by the Bank, Sinha J (for self, Hegde and Singh JJ), made a few observations of profound significance and import, which are reproduced below:

(i) It is trite that a judgment of acquittal passed in favour of the employees by giving benefit of doubt *per se* would not be binding upon the employer. The employer had no occasion to initiate departmental proceeding' against the respondents. They were not regularly employed. They, according to the appellant, filed forged and fabricated documents and as such were not found fit to be absorbed in regular service. ()

(ii) The concerned workmen in their evidence did not specifically state that they had worked for 240 days. They merely contended in their affidavit that they are reiterating their stand in the claim petition. Pleadings are no substitute for proof. No workman thus, took an oath to state that they had worked for 240 days. No document in support of the said plea was produced. It is, therefore not correct to contend that the plea raised by the respondents herein that they have worked continuously for 240 days was deemed to have been admitted by applying the doctrine of non-traverse. In any event the contention of the respondents having been denied and disputed, it was obligatory on the part of the respondents to add new evidence. (Paras 18 & 19)

(iii) An adverse inference, therefore, was drawn for non-production of the attendance register alone, and not for non-production of the wage-slips. Reference to 'other relevant documents' must be held to be vague as the appellant herein had not been called upon to produce any other document for the said purpose. It appears that the learned Tribunal considered the matter solely from the angle that the appellant has failed to prove its plea of abandonment of service by the respondents. (Paras 22 & 23)

(iv) The initial burden of proof was on the workmen to show that they had completed 240' days of service. The Tribunal did not consider the question from that angle. It held that the burden of proof was upon the appellant on the premise that they have failed to prove their plea of abandonment of service. ()

(v) The findings of the learned Tribunal, as noticed hereinbefore are wholly perverse. He apparently posed unto itself wrong questions. He placed onus of proof wrongly upon the appellant. His decision is based upon irrelevant factors not germane for the purpose of arriving at a correct finding of fact. It has also failed to take into consideration the relevant factors. A case for judicial review, thus, was made out. ()

(vi) Absorption of the Ticca Mazdoors in the services of the appellant was not automatic. The concerned workmen were required to fulfil the conditions laid down therefor. In law, 240 days of continuous service by itself does not give rise to claim of permanence. Section 25-F provides for grant of compensation if a workman is sought to be retrenched in violation of the conditions referred to therein (Paras 44 &46)

(vii) Furthermore, a direction for reinstatement for non-compliance of the provisions of Section 25-F of the Industrial Disputes Act would restore to the workmen the same status which he held when terminated. The respondents would, thus, continue to be Ticca Mazdoors, meaning thereby their names would continue in the second list. They had worked only from April, 1980 to December, 1982. They did not have any right to get work.[73] ()

It is submitted that the above case was rightly decided. The decision of the industrial tribunal was at a tangent and is wholly perverse. The learned single judge and the Division Bench of the Bombay High Court were no worse in so far as

they made highly perplexing observations while deciding the case against the Bank, which were deftly handled by Sinha J. In *Bank of Baroda*, the facts disclosed that a driver engaged by the bank had worked for more than 240 days before being terminated from service. The tribunal directed reinstatement of the driver, which was affirmed by a single judge and the Division Bench of the Gujarat High Court. Dismissing the appeal filed by the bank, Hegde J (for self, Singh and Sinha JJ) observed:

> While there is no doubt in law that the burden of proof that a claimant was in the employment of a Management, primarily lies on the workman who claims to be a workman. The degree of such proof so required, would vary from case to case. In the instant case, the workman has established the fact which, of course, has not been denied by the bank, that he did work as a driver of the car belonging to the bank during the relevant period which comes to more than 240 days of work. He has produced 3 vouchers which showed that he had been paid certain sums of money towards his wages and the said amount has been debited to the account of the bank. As against this, as found by the fora below, no evidence whatsoever has been adduced by the bank to rebut even this piece of evidence produced by the workman. It remained contended by filing a written statement wherein it denied the claim of the workman and took up a plea that the employment of such drivers was under a scheme by which they are, in reality, the employee of the Executive concerned and not that of the bank; none was examined to prove the scheme. No evidence was led to establish that the vouchers produced by the workman were either not genuine or did not pertain to the wages paid to the workman. No explanation by way of evidence was produced to show for what purpose the workman's signatures were taken in the Register maintained by the bank. In this factual background, the question of workman further proving his case does not arise because there was no challenge at all to his evidence by way of rebuttal by the bank. (). .. As held by the High Court and referred to hereinabove, neither the judgment of this Court in the case of *Punjab National Bank* (supra),[74] nor in *Range Forest Officer* (supra),[75] would assist the appellant in this case because of the proved facts of this case. Even the case of *M.P. Electricity Board* (supra),[76] relied upon by the learned counsel for the appellant, does not help the appellant. Said judgment only lays down that the initial burden of establishing the factum of the workman having continuously worked 240 days in the year, rests with the workman.[77] (para 9)

In *Batala Sugar Mills*, the workman claimed that he had worked for 240 days and that his termination without paying retrenchment compensation was illegal, which claim was resisted by the management. The tribunal directed reinstament of the workman on the ground that the burden of proving that the workman had not worked for 240 days was on the management. Setting aside the order of tribunal, Pasayat J (for self and Lakshmanan J) held:

> .. . the tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was so denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside. However, Mr. Hegde, appearing for the Department states that the State is really interested in getting the law settled and the respondent will be given an employment on compassionate grounds on the same terms as he was allegedly engaged prior to his termination, within two months from today.[78] ()

In a somewhat similar set of facts in *Surendernagar District Panchayat*, the workman claimed that he had worked for 10 years and that his service was terminated without complying with s 25F. The tribunal passed an award in favour of the workman. While quashing the orders of the courts below, Naolekar J (for self and Variava J) observed:

> .. . it was necessary for the workman to produce the relevant material to prove that he has actually worked with the employer for not less than 240 days during the period twelve calendar months preceding the date of termination. *What we find is that apart from the oral evidence the workman has not produced any evidence to prove the fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced; no co-worker was examined; muster roll produced by the employer has not been contradicted.It is improbable that workman who claimed to have worked with the appellant for such a long period would not possess any documentary evidence to prove nature of his engagement and the period of work he had undertaken with his employer*. Therefore, we are of the opinion that the workman has failed to discharge his burden that he was in employment for 240 days during the preceding 12 months of the date of termination of his service. The Courts below have wrongly drawn an adverse inference for non production of the record of the workman for ten years. *The scope of enquiry before the Labour Court was confined to only 12 months preceding the date of termination to decide the question of continuation of service for the purpose of Section 25F of the Industrial Disputes Act. The workman has never contended that he was regularly employed in the Panchayat for one year to claim the uninterrupted period of service as required under Section 25B(1) of the Act*.. .. In the absence

> of regular employment of the workman, the appellant was not expected to maintain seniority list of the employees engaged on daily wages and in the absence of any proof by the respondent regarding existence of the seniority list and his so called seniority no relief could be given to him for non-compliance of provisions of the Act. The Courts could have drawn adverse inference against the appellant only when seniority list was proved to be in existence and then not produced before the Court. In order to entitle the Court to draw inference unfavourable to the party, the Court must be satisfied that evidence is in existence and could have been proved.[79] ().

In *RM Yellatty*, the issue of burden of proof had once again come up for the decision of the Supreme Court. Speaking for a full bench, Kapadia J (for self, Variava and Lakshmanan JJ) observed:

> .. . it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under section 10 of the Industrial Disputes Act. However, applying general principles and on reading the afore-stated judgments, we find that this court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily waged earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register *etc*. Drawing of adverse inference ultimately would depend thereafter on facts of each case. The above decisions however make it clear that mere affidavits or self-serving statements made by the claimant/workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non-production of muster rolls *per se* without any plea of suppression by the claimant workman will not be the ground for the tribunal to draw an adverse inference against the management.. . .[80]

In *ONGC*, Pasayat J referring to the earlier decisions on the question and, more specifically, to *RM Yellatty* (supra) observed:

> .. . The respective stand was to be examined in the light of law laid down by this Court in the decisions referred to above. *The question of shifting of onus assumes relevance only when evidence is led. Almost all the decisions referred to above related to matters which came to the High Court after evidence was led before the Tribunal by the contesting parties. High Courts should not entertain writ petitions directly when claim of service of more than 240 days in a year is raised. Whether a person has worked for more than 240 days or not is a disputed question of fact which is not to be examined by the High Court. Proper remedy for the person making such a claim is to raise an industrial dispute under the Act so that the evidence can be analysed and conclusion can be arrived at.* As in the instant case the legal position has not been analysed in the proper perspective, it would be appropriate if the matter is decided by the forum provided under the Act.[81] (Italics supplied).

Where the workmen furnished some documentary evidence to show that they were working for two years, and the employer withheld the information, the Supreme Court upheld the award of the labour court directing reinstatement with 25% backwages, but modified the award by ordering payment of Rupees one lakhs to each of the workmen in lieu of reinstatement.[82] Where the workman had not discharged the burden of proving that he had worked for 240 days, and the labour court also did not record a finding that he had worked for 240 days, the order directing reinstatement passed is not maintainable.[83] In a case involving termination of service of daily wagers without complying with the provisions of s 25F, the labour court directed reinstatement with continuity of service and 50% back wages. The High Court, interfering with the award, ordered payment of Rs. 50,000/- as compensation in lieu of the 50% of back wages. Quashing the order of the High Court and restoring the award of the labour court, the Supreme Court observed that, in the face of the fact that the management did not take the plea that the post in question was not sanctioned nor that the appointment was not as per the rules nor did it establish that there was no vacancy, the interference with the award was improper.[84] In*Bhavanagar Municipal Corporation*, the facts disclosed that a conductor, whose services were terminated raised an industrial dispute which was referred for adjudication. The workman contended that he worked for 240 days, whereas the management contended that he worked only for 58 days. The tribunal directed reinstatement on the basis of a xerox copy of a certificate purported to have been issued by the Corporation to the effect that he was in the employment of the corporation as a conductor, and directed reinstatement, which was confirmed by the High Court. Thakur J (for self and Ms Banumati J) relied upon several landmark cases decided during the first decade of the present century (quite a few of which were cited in the preceding paragraphs) and held:

> It is fairly well-settled that for an order of termination of the services of a workman to be held illegal on account of non-payment of

retrenchment compensation, it is essential for the workman to establish that he was in continuous service of the employer within the meaning of Section 25B of the Industrial Disputes Act 1947. For the respondent to succeed in that attempt he was required to show that he was in service for 240 days in terms of Section 25B(2)(a)(ii). The burden to prove that he was in actual and continuous service of the employer for the said period lay squarely on the workman. The decisions of this Court. .. unequivocally recognise the principle that the burden to prove that the workman had worked for 240 days is entirely upon him. So also the question whether an adverse inference could be drawn against the employer in case he did not produce the best evidence available with it, has been the subject-matter of pronouncements of this Court. .. This Court has held that only because some documents have not been produced by the management, an adverse inference cannot be drawn against it.. .. The Labour Court has, in the case at hand, placed reliance upon a Xerox copy of a certificate allegedly issued by an officer of the appellant-Corporation stating that the respondent was in the employment of the appellant-Corporation as a Conductor between 3rd October, 1987 and 31st March, 1989.. .. That being so the admission of the Xerox copy of the certificate, without any objection from the appellant-Corporation, cannot be faulted at this belated stage. When seen in the light of the assertion of the respondent, the certificate in question clearly supported the respondent's case that he was in the employment of the appellant-Corporation for the period mentioned above and had completed 240 days of continuous service. That being so, non-payment of retrenchment compensation was sufficient to render the termination illegal. Inasmuch as the Labour Court declared that to be so it committed no mistake nor was there any room for the High Court to interfere with the said finding especially when the findings could not be described as perverse or without any evidence. The High Court was also justified in directing deletion of the back wages from the award made by the Labour Court against which deletion, the respondent did not agitate either before the Division Bench by filing an appeal or before us.. .. The case at hand, in our opinion, is one such case where reinstatement must give way to award of compensation. We say so because looking to the totality of the circumstances, the reinstatement of the respondent in service does not appear to be an acceptable option. Monetary compensation, keeping in view the length of service rendered by the respondent, the wages that he was receiving during that period which according to the evidence was around Rs.24.75 per day should sufficiently meet the ends of justice. Keeping in view all the facts and circumstances, we are of the view that award of a sum of Rs.2,50,000/- (Rupees Two Lacs Fifty Thousand only) should meet the ends of justice.[85] (Paras 8, 9 & 16).

(ii) Clause (b): Continuous service for a period of six months

The old s 25B defined only 'continuous service' for one year, and there was no reference to 'continuous service' for a period of six months in that section. Now, cl (b) to sub-s (2) of s 25B has defined 'continuous service for a period of six months'. The conditions to be fulfilled under this provision are similar to those in sub-s (2)(a).

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18 Subs by Act 36 of 1964, s 13, for s 25B (wef 19-12-1964).

19 *Jairam Sonu Shogale v New India Rayon Mills Co Ltd* (1958) 1 LLJ 28, 30-31 (Bom) (DB), per Dixit J.

20 *Prabhu Dayal Jat v Alwar Sahakar Bhumi Vikas Bank Ltd* (1991) 2 LLJ 130, 132 (Raj) (DB), per Mehta J.

21 *Honnayya v Karnataka State Road Transport Corpn* (1985) 2 LLJ 487 (Kant), per Rama Jois J.

22 *Jairam Sonu Shogale v New India Rayon Mills Co Ltd* (1958) 1 LLJ 28, 31 (Bom) (DB), per Dixit J.

23 *Jeewanlal* (1929) *Ltd v Workmen* (1961) 1 LLJ 517 [LNIND 1961 SC 85] : AIR 1961 SC 1567 [LNIND 1961 SC 85] (SC), per Gajendragadkar J.

24 *Buckingham & Carnatic Co Ltd v Workers* (1953) 1 LLJ 181 [LNIND 1952 SC 77] : AIR 1953 SC 47 [LNIND 1952 SC 77] (SC), per Mahajan J.

25 *Tiruchengode Mill Workers' Union v IT* (1964) 2 LLJ 404 (Mad), per Srinivasan J.

26 *Budge Budge Municipality v PR Mukherjee* (1953) 1 LLJ 193, 198 (SC), per Chandrasekhara Ayyar J.

27 *GYadi Reddy v Mgmt of Brooke Bond India Ltd* 1994 Lab IC 186, 188 (AP) (DB), per MN Rao J.

28 *Sur Enamel & Stamping Works Ltd v Workmen* (1963) 2 LLJ 367 [LNIND 1963 SC 146], 370 : AIR 1963 SC 1914 [LNIND 1963 SC 146] (SC), per Das Gupta J.

29 *Digwadih Colliery v Workmen* (1965) 2 LLJ 118 [LNIND 1965 SC 93], 120-21, per Hidayatullah J.

30 *Ramakrishna Ramnath v LC* (1970) 2 LLJ 306 [LNIND 1970 SC 86], 314 : (1970) 3 SCC 67 [LNIND 1970 SC 86] : 1973 Labic 87(SC), per Miner J.

31 *Surendra Kumar Verma v CGIT-cum LC* (1981) 1 LLJ 386 [LNIND 1980 SC 403], 390-91 : AIR 1981 SC 422 [LNIND 1980 SC 403]: (1980) 4 SCC 443 [LNIND 1980 SC 403] (SC), per a Chinnappa Reddy J.

32 *Mohan Lal v Mgmtof Bharat Electronics Ltd* 1981 Lab IC 806 [LNIND 1981 SC 244], 814 (SC), per Desai J.

33 *Ramasamuz Narsing Upadhya v Vinubhai M Mitra* (1982) 2 LLJ 186, 189 : 1982 (44) FLR 406 (Bom), per Pendse J.

34 *MR Khosla v CEO, Punjab State FCCWS Ltd* 1983 Lab IC (NOC) 134 (P&H), per Sodhi J.

35 *Kailash Paswan v Union of India* 1985 Lab IC 433, 437 (Pat) (DB), per SB Sanyal J.

36 *Tata Consulting Engineers v Vatsala K Nair* (1998) 1 LLN 525, 528 (Bom), per Lodha J.

37 *Mohd Yusuf v LC* (2001) 1 LLN 424 (Raj), per Balia J.

38 *Shankerje Cheljaji Thakur* (2000) 2 LLJ 239 (Guj) (DB).

39 *Durga Parsad v PO, IT-cum-LC* (2001) 3 LLN 1137 (P&H) (DB), per Sudhalkar J.

40 *Prathma Bank v PO, CGIT* (2002) 3 LLN 108 (All), per Anjani Kumar J.

41 *A Parthasarthi v Mgmt of Standard Motors Products of India Ltd* 1979 Lab IC (NOC) 136 (Mad) (DB).

42 *Workmen of American Express IBC v Mgmt* (1985) 2 LLJ 539 [LNIND 1985 SC 267], 542 : AIR 1986 SC 458 [LNIND 1985 SC 267]: (1985) 4 SCC 71 [LNIND 1985 SC 267] (SC), per Chinnappa Reddy J.

43 *Shaskant G Malgaonkar v State of Maharashtra* (2003) 4 LLJ 160 [LNIND 2003 BOM 26] (Bom), per Bhosale J.

44 *Mahendra L Jain v Indore Development Authority*, AIR 2005 SC 1252 [LNIND 2004 SC 1167]: (2005) 1 SCC 639 [LNIND 2004 SC 1167] : (2005) I LLJ 578(SC), per Sinha J.

45 *Workmen v Board of Trustees of the Cochin Port Trust* (1978) 3 SCC 119 [LNIND 1978 SC 158] : AIR 1978 SC 1283 [LNIND 1978 SC 158]: (1978) II LLJ 161(SC).

46 *Pujari Bai v Madan Gopal* (1989) 3 SCC 433 [LNIND 1989 SC 336] : AIR 1989 SC 1764 [LNIND 1989 SC 336].

47 *Pondicherry KVIB v P Kulothangan* AIR 2003 SC 4701 [LNIND 2003 SC 933]: (2004) 1 SCC 68 : (2003) III LLJ 1153(SC).

48 *Exec Engr, ZP Engg Division v Digambara Rao* AIR 2004 SC 4839 [LNIND 2004 SC 994]: (2004) 8 SCC 262 [LNIND 2004 SC 994] : (2005) I LLJ 1(SC), per Sinha J

49 *UP Brassware Corporation Ltd., v. Uday Narayan Pandey*, AIR 2006 SC 586 [LNIND 2005 SC 954]: (2006) 1 SCC 479 [LNIND 2005 SC 954] : (2006) I LLJ 496(SC), per Sinha J.

50 *Balmer Lawrie & Co Ltd v First IT* (2007) 2 LLJ 81 [LNIND 2006 CAL 581] : [2007 (112) FLR 787 : 2006 (4) CHN 860 [LNIND 2006 CAL 581] (Cal).

51 *Haryana Urban Development Authority v Om Pal* (2007) 2 LLJ 1030 [LNIND 2007 SC 450] : AIR 2008 SC 475 [LNIND 2007 SC 450]: (2007) 5 SCC 742 [LNIND 2007 SC 450] (SC), per Sinha J.

52 *Haryana State CSM Federation Ltd v Sanjay* (2009) 4 LLJ 53 [LNIND 2009 SC 1502] : AIR 2009 SC 3155 [LNIND 2009 SC 1502]: (2009) 14 SCC 43 [LNIND 2009 SC 1502] (SC), per Lodha J.

53 *UP Drugs and Pharmaceuticals Ltd v Ramanuj Yadav* (2003) 3 LLJ 1064 [LNIND 2003 SC 825] : AIR 2003 SC 3337 [LNIND 2003 SC 825]: (2003) 8 SCC 334 [LNIND 2003 SC 825] (SC), per Sabharwal J.

54 *Sriram Industrial Enterprises Ltd v. Mahak Singh*, AIR 2007 SC 1370 [LNIND 2007 SC 300]: (2007) 4 SCC 94 [LNIND 2007 SC 300] : (2007) 2 LLJ 393 [LNIND 2007 SC 300] (SC), per Kabir J.

55 *Chairman, ONGC Ltd v SC Bhowmik*, AIR 2006 SC 392 [LNIND 2005 SC 924]: (2006) 1 SCC 337 [LNIND 2005 SC 924] : (2006) I LLJ 419(SC), per Pasayat J.

56 *State of Uttaranchal v PSABYS Mahaparishad*, AIR 2007 SC (supp) 629 : (2007) 12 SCC 483 [LNIND 2007 SC 1210] : (2008) I LLJ 295(SC), per Pasayat J.

57 *Lal Mohammad v. Indian Railway Constn Co Ltd.*, AIR 2007 SC 2230 [LNIND 2007 SC 36]: (2007) 2 SCC 513 [LNIND 2007 SC 36] : [2007] 1 SCR 784 [LNIND 2007 SC 36] (SC), per Mathur J.

58 *Hindustan Aeronautics Ltd v Dan Bahadur Singh*, AIR 2007 SC 2733 : (2007) 6 SCC 207 : (2007) III LLJ 234(SC), per Mathur J.

59 *Santuram Yadav v Krishi Upaj MS*, AIR 2010 SC 1615 [LNIND 2010 SC 176]: (2010) 3 SCC 189 [LNIND 2010 SC 176] : (2010) II LLJ 139(SC), per Sathasivam J.

60 *Sunita Gupta v Nagar Palika Parishad, Sabalgarha* (2011) 2 LLJ 798 : ILR [2010] MP 1600 [LNIND 2010 MP 246] : 2010 (2) MPLJ 644 (MP) (DB).

61 *Debnath Chakraborty v Union of India* (2012) 3 LLJ 231 : 2012 LLR 425 [LNIND 2012 CAL 1864] : 2012 (133) FLR 187 (Cal), per Ms. Indira Banerjee J.

62 *Director of Transport v Yesurathinam* (2014) 3 LLJ 378 : 2014 Labic 2393(Cal), per Prasenjit Mandal J.

63 *Ranbir Singh v Executive Engineer* AIR 2012 SC (supp) 440 : (2011) 15 SCC 453 [LNINDORD 2011 SC 318] : (2011) II LLJ 313(SC).

64 *Mohan Lal v Mgmt of Bharat Electronics Ltd* 1981 Lab IC 806 [LNIND 1981 SC 244], 813 (SC), per Desai J.

65 *Bharatiya DTM Manch v GM, Kalyan Telecom District* (2003) 4 LLJ 779 : 2003 (4) Bomcr 189 [LNIND 2003 BOM 53] (Bom), per Bhosale J.

66 *Range Forest Officer v ST Hadimani*, 2002 AIR SCW 909.

67 *Essen Deinki v Rajiv Kumar*, AIR 2003 SC 38 [LNIND 2002 SC 668]: (2002) 8 SCC 400 [LNIND 2002 SC 668] : (2002) III LLJ 1111(SC), per Banerjee J.

68 *MP Electricity Board v Hariram*, 2004 AIR SCW 5476, per Hegde J.

69 *Divisional Manager, APSRTC v P Lashmoji Rao*, AIR 2004 SC 1503 [LNIND 2004 SC 93]: (2004) 2 SCC 433 [LNIND 2004 SC 93] : (2004) I LLJ 1045(SC), per Venkararama Reddi J.

70 *Municipal Corporation, Faridabad v Siri Niwas*, 2004 AIR SCW 5184 : (2004) 8 SCC 195 [LNIND 2004 SC 899] : (2004) III LLJ 760(SC).

71 *Rajasthan State GS Mills Ltd v State of Rajasthan* 2005 AIR SCW 3160 : AIR 2005 SC 4065 [LNIND 2004 SC 922]: (2004) 8 SCC 161 [LNIND 2004 SC 922] : (2004) III LLJ 832(SC).

72 *Sports Authority of India v SAI Kamgar Union* (2005) 4 LLJ 618 (Del), per Swatanter Kumar J.

73 *Manager, Reserve Bank of India v S Mani*, (2005) 2 LLJ 258 [LNIND 2005 SC 266] : AIR 2005 SC 2179 [LNIND 2005 SC 266]: (2005) 5 SCC 100 [LNIND 2005 SC 266] (SC), per Sinha J.

74 *Punjab National Bank v. Ghulam Dastagir*, AIR 1978 SC 481 [LNIND 1978 SC 3]: (1978) 2 SCC 358 [LNIND 1978 SC 3] : (1978) I LLJ 312(SC).

75 *Range Forest Officer, v. S. T. Hadimani*, AIR 2002 SC 1147 [LNIND 2002 SC 124]: (2002) 3 SCC 25 [LNIND 2002 SC 124] : 2002 Labic 987: (2002) I LLJ 1053(SC).

76 *MP Electricity Board v. Hariram*, AIR 2004 SC 4791 [LNIND 2004 SC 1003].

77 *Bank of Baroda v. Ghemarbhai Harjibhai Rabari*, AIR 2005 SC 2799 [LNIND 2005 SC 289]: (2005) 10 SCC 792 [LNIND 2005 SC 289] : (2005) II LLJ 475(SC), per Hegde J.

78 *Batala Coop. Sugar Mills Ltd. v. Sowaran Singh*, 2005 AIR SCW 5514 : AIR 2006 SC 56 [LNIND 2005 SC 814]: 2005 (107) FLR 815, per Pasayat J.

79 *Surendranagar District Panchayat v. Dahyabhai Amarsinh*, AIR 2006 SC 110 [LNIND 2005 SC 844]: (2005) 8 SCC 750 [LNIND 2005 SC 844] : (2006) I LLJ 424(SC), per Naolekar J.

80 *RM Yellatty v. Assistant Executive Engineer*, AIR 2006 SC 355 : (2006) 1 SCC 106 : (2006) I LLJ 442(SC), per Kapadia J.

81 *Chairman, ONGC Ltd. v. SC Bhowmick*, AIR 2006 SC 392 [LNIND 2005 SC 924]: (2006) 1 SCC 337 [LNIND 2005 SC 924] : (2006) I LLJ 419(SC), per Pasayat J.

82 *Sita Ram v Motilal Nehru Farmers Training Institute* (2008) 2 LLJ 688 [LNIND 2008 SC 592] (SC), per Sinha J.

83 *Ranip Nagar Palika v BG Thakore*, AIR 2008 SC 1240, per Pasayat J.

84 *Krishan Singh v Exec. Engineer, Haryana SAM Board* AIR 2010 SC (supp) 787, per AK Patnaik J.

85 *Bhavanagar Municipal Corporation v Jadeja, GC* (2015) 1 LLJ 1 : AIR 2015 SC 609 [LNIND 2014 SC 985]: (SC), per Thakur J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VA Lay-off and Retrenchment

[86][S. 25C. Right of workmen laid-off for compensation.—

Whenever a workman (other than a *badli* workman or a casual workman) whose name is borne on the muster rolls of an industrial establishment and who has completed not less than one year of continuous service under an employer is laid off, whether continuously or intermittently, he shall be paid by the employer for all days during which he is so laid off, except for such weekly holidays as may intervene, compensation which shall be equal to fifty per cent. of the total of the basic wages and dearness allowance that would have been payable to him had he not been so laid off:

Provided that if during any period of twelve months, a workman is so laid-off for more than forty-five days, no such compensation shall be payable in respect of any period of the lay-off after the expiry of the first forty-five days, if there is an agreement to that effect between the workman and the employer:

Provided further that it shall be lawful for the employer in any case falling within the foregoing proviso to retrench the workman in accordance with the provisions contained in section 25F at any time after the expiry of the first forty-five days of the lay-off and when he does so, any compensation paid to the workman for having been laid-off during the preceding twelve months may be set off against the compensation payable for retrenchment.

Explanation.—"*Badli* workman" means a workman who is employed in an industrial establishment in the place of another workman whose name is borne on the muster rolls of the establishment, but shall cease to be regarded as such for the purposes of this section, if he has completed one year of continuous service in the establishment].

INTRODUCTORY

The originals 25C was enacted along with ch VA in 1953 by the Industrial Disputes (Amendment) Act 1953 (Act 43 of 1953) with a view to give the right of compensation to a laid-off workman. The section was amended by the Industrial Disputes (Amendment) Act 1956 (Act 41 of 1956). The section so amended provided that a workman (who had completed not less than one year of continuous service) on being laid-off, was entitled to receive compensation up to a maximum period of 45 days during the course of any 12 months. Where, however, the period of lay-off after the expiry of the first 45 days comprised of a continuous period of one week or more, the workman was to be paid compensation for all the days comprised in every such subsequent period of lay-off, unless there was an agreement to the contrary between the workman and the employer. This provision was open to abuse inasmuch as workmen could be denied lay-off compensation by being made to work for some days in each week after the first forty-five days of lay-off. With a view to prevent such abuse, it was considered necessary to make provision that lay-off compensation would become payable for all the days of lay-off beyond the first 45 days, whether the period was continuous for a week or not. With this end in view, the new s 25C was substituted for the old section by the Amending Act of 1965. By the Amending Act 32 of 1976, the provisions of this section have been made inapplicable to those industrial establishment to which ch VB applies. Such establishment will be governed by the provisions of s 25N in that chapter.

CHANGES IN LAW

The whole section has again been recast. Previously there were two sub-sections and each sub-section had a proviso. At the end of the section there was an explanation. The new s 25C has no sub-sections. The main section itself has two provisos and then there is the explanation. The new s 25C corresponds to the old s 25C (1). However, in the new section it has been clarified that whether lay-off is continuous or intermittent, workmen will be entitled to compensation. The first proviso to s 25C replaces the provisos to the old sub-s (1). The effect is that now lay-off compensation would become payable to laid-off workman for all the days of lay-off beyond the first 45 days, whether such days constitute a continuous week or not. The present second proviso corresponds to the proviso to old sub-s (2) and has the same effect. The provisions of the section will not apply to industrial establishments to which ch VB applies.

COMPENSATION FOR LAY-OFF

Laying off a workman is an action of the employer. It results in depriving the laid-off workman of the opportunity to work and earn wages. The employer is, therefore, required to pay compensation to the workman who is laid-off, if the workman's case falls within the provisions of s 25C of the Act, which entitles a workman to lay-off compensation equivalent to 50 percent of the total of the basic wages and dearness allowance for the period of his lay-off, except for the intervening weekly holidays.[87] However, in order to be entitled to lay-off compensation under this sub-section, a workman should satisfy the following conditions:

1. his name should be borne on the muster rolls of the industrial establishment and he should not have been retrenched;
2. he should not be a *'badli'* workman or a casual workman;
3. he should have completed not less than one year of continuous service under the employer; and
4. he should not be employed in an industrial establishment to which ch VB applies.

The expression 'he shall be paid by the employer for all days during which he is so laid-off', necessarily indicates that the lay-off could be for less than a day or even half a day, otherwise the expression should have been 'he shall be paid by the employer for all the day of lay-off' and not 'all days during which he is so laid-off'. If the intention of the legislature was to limit the lay-off to a period of full day or half day, there was nothing to prevent it from saying so.[88] A *badli* workman or a casual workman has been specifically excluded in the opening part of s 25. However, a *badli* workman who has completed 'one year of continuous service' in the establishment, will cease to be a *badli* workman and will be treated as permanent workman. Thus, a *badli* workman is treated on a better footing than a casual workman as a *badli* workman has been given the right to claim lay-off compensation after he has completed 'one year of continuous service.' Such a right has not been given to a casual workman.[89] The industrial employer has no right to lay-off his workmen if such right is not provided by any statutory provision or Standing Orders or the contract of service between the employer and an employee, that is, the right to lay-off has to be specifically provided for, so that the employer and the employee know that the employer has the right to lay-off. The right to lay-off cannot be claimed as an inherent right of an employer if he cannot provide work for his workmen for a particular day or days during the continuance of his employment. This right has to be specifically provided for either by a statute or by the contract of service.[90]

ADJUDICATION

In dealing with a lay-off compensation case, it is not open to the tribunal to inquire whether the employer could have avoided the lay-off, if he had been more diligent, more careful or more foresighted. That is a matter relating to the management of an undertaking, and unless mala fides are alleged and proved, it would be difficult to assume that the tribunal has jurisdiction to sit in judgment over the managerial acts of the employer and investigate whether a more prudent management could have avoided the situation which led to the lay-off. Such transgression of jurisdiction is amenable to a writ of *certiorari*. However, the question whether the employer has brought about a lay-off mala fide in the sense that he has deliberately and maliciously brought about a situation where lay-off became necessary, or whether a lay-off has been declared in order to victimise the workman for some other ulterior purpose, are questions of fact to be determined by the tribunal. Such findings of fact are not amenable to judicial review. If lay-off is justified and the requirements in the definition of lay-off along with the requirements of s 25C are satisfied, the only relief to which the concerned workmen are entitled is the statutory relief prescribed by s 25C of the Act. If, however, lay-off is mala fide in the sense that the employer has deliberately and maliciously brought about a situation where lay-off became necessary, then it would not be a lay-off in the eyes of law. Also the relief provided to laid-off workmen under s 25C would not be the only relief to which they would be entitled. Mala fides of the employer in declaring a lay-off really means that no lay-off, as contemplated by the definition, has taken place. In other words, a finding of mala fides of the employer in declaring a lay-off, takes the lay-off out of the definition of s 2(kkk), and as such s 25C cannot be held to be applicable to it so as to

confine the workman's right to the compensation prescribed therein.[91]Besides, the lay-off referred to in s 25C, is lay-off as defined in s 2(kkk), and so the workmen who can claim the benefit of s 25C must be those workmen who are laid-off for reasons contemplated in s 2(kkk) of the Act.[92] For instance, a 'lay-off' declared in order to victimise the workman or for some other ulterior purpose, would not be a 'lay-off'. Likewise, where an employer has no power to lay-off any workman, it is open to the tribunal to award just and proper compensation which might not be equal to full amount of basic wages and dearness allowance.[93]

PAYMENT OF COMPENSATION NOT A CONDITION PRECEDENT TO LAY-OFF

The Act does not make the payment of compensation a condition precedent to the 'lay-off' of a workman. Hence, a workman who has been laid-off will be entitled to recover lay-off compensation in accordance with the provisions of the Act. No doubt, the Standing Orders of an establishment have to be read along with the provisions of ch VA but it does not follow that in case of a lay-off, compensation must be actually paid before a workman is laid-off. The Standing Orders read with ch VA, though create a right in favour of the workman, who has been laid-off, to claim compensation, they do not create a right of being paid compensation before he is laid-off. He can work out his right independently and so also the employer can exercise his right of laying-off independently of the payment of compensation under s 25C of the Act.[1] Compensation for lay-off cannot, therefore, be awarded in advance of actual lay-off and on grounds of social justice.[2]

LAY-OFF COMPENSATION IS WAGES

In *Suraj Mal Mehta,* the Supreme Court held that the payment of compensation under ss 25F, 25FF and 25FFF is wages within the meaning of s 2(vi)(d) of the Payment of Wages Act 1936. The same principles will apply to lay-off compensation under s 25C.[3] In this view of law laid down earlier in *Anasuyabai*,[4] and other cases are no longer good law.

FIRST PROVISO: COMPENSATION NOT TO BE CONFINED TO FIRST FORTY FIVE DAYS

The object of this proviso is to make provision that lay-off compensation should become payable for all the days of lay-off beyond the first 45 days, whether the period is continuous for a week or not, unless there is an agreement to the contrary. There was a lacuna in the previous provisos, the effect of which was that if lay-off was for an unbroken period of a whole year, the concerned employees were entitled to compensation for 45 days only, but if it was for broken periods, they might receive more compensation.[5] In *Modi Food Products*, where Venkatarama Ayyar J observed:

If, as observed in the above decision, this conclusion leads to an anomalous position it is for the Legislature, if it thinks fit, to amend the section and not for the tribunal to construe it otherwise than what it plainly means'.[6]

This judicial suggestion was given effect to by engrafting the present first proviso for the previous two provisos by the Amending Act of 1965.

SECOND PROVISO: EMPLOYER'S RIGHT TO RETRENCH A WORKMAN AFTER FORTY FIVE DAYS OF LAY-OFF

This proviso provides an alternative choice to the employer. Where during any twelve calendar months, a period of 45 days of lay-off of a workman either continuously or intermittently has expired and the periods of lay-off after the expiry of the said 45 days comprises of one week or more at a time, in the absence of an agreement to the contrary, the employer can do one of the two things; namely (i) to go on paying lay-off compensation for such subsequent periods under s 25C, or (ii) to retrench the workman under the second proviso. In case the employer exercises his right to retrench a workman laid-off under this proviso, he is bound to comply with the provisions of s 25F, *i.e.* 'conditions precedent to retrenchment of workman'. In case of such retrenchment, the employer has been enabled to set-off the lay-off compensation paid by him to the workmen so retrenched during the last 12 months against the compensation payable to him under the second proviso.[7]However, the right to such set-off is available to the employer only in cases of retrenchment as contemplated by s 2(oo) effected upon complying with the requirements of s 25F of the Act. This right is not available on the termination of the services of a workman or workmen by any other mode. For instance, where the services of laid-off workmen are automatically terminated upon closure of the undertaking, this proviso is not attracted, because the legal fiction in s 25FFF to treat the compensation, payable to the workmen on closure, as retrenchment compensation is limited to only two points *i.e.* the point of notice and the amount of compensation. It does not extend further and does not make the automatic termination of service upon closure as 'retrenchment' effected in accordance with s 25F. In other words, the termination of the service of workmen upon closure is not at all 'retrenchment' effected in accordance with the provisions of s 25F of the Act.[8]

EXPLANATION: *BADLI WORKMAN*

A *badli* workman means a workman who is employed in an industrial establishment in the place of another workman whose name is borne on the muster rolls of the establishment, but shall cease to be regarded as such for the purposes of this section, if he has completed one year of continuous service in the establishment. According to the explanation, the name of a *badli* workman should not be found in the muster-rolls of an establishment, but he should act for some other workman whose name is found in the muster rolls. Therefore, a workman cannot be said to be a *badli* workman simply because the management has chosen to describe him as a '*badli* workman' in the muster rolls. The phrase 'is employed' leaves no doubt that the explanation seeks to cover a *badli* worker in whose case actual substitution has taken place, *i.e.*, some workman on the muster rolls has been absent and in his place the *badli* worker is actually employed on the day in question. The explanation, therefore, would not apply to a case where there is no question of any vacancy being filled in by employing a *badli* worker in place of some other workman on the muster rolls. The effect of the explanation is that when a *badli* workman is available, the employer must provide him with work if he has completed one year's continuous service. If the employer fails to do so, the *badli* workman would be entitled to get lay-off compensation, if he has completed one year continuous service. However, where the worker, whose name is found in the muster rolls of the establishment, even though he is described in the muster rolls as a *badli* worker, he would be deemed to be a workman entitled to lay-off compensation. The explanation indicates that a worker in order to come within the purview of the term *badli* workman should not be one whose name is found in the muster rolls. What, therefore, decides the right to lay-off compensation to a *badli* workman is the effect of his name being found in the muster roll and not how he is described therein.[9] A *badli* is a workman appointed against a post, permanent or temporary, when the incumbent in that post is temporarily absent. Unless he has completed one year of continuous service in the establishment, a *badli* cannot claim the status of a permanent workman even though the management has failed to satisfactorily prove that the permanent incumbent was there in the respective place or was temporarily absent.[10]

The explanation was enacted for the reason that when a workman had been continuously working for a year within the course of which he had been working for 240 days, it was reasonable to presume that in the ordinary circumstances he would be provided with employment and therefore when the whole industrial unit is working he would also have got employment.[11] The presumption would apply when the whole of the industrial unit had ceased working and all its workmen were laid off. In such circumstances, the *badli* workman who fell within the explanation to s 25C would be entitled to lay-off compensation.[12] The Gujarat High Court in *Girdharlal Laljibhai*, took the view that a *badli* workman was but a substitute and casual workman. Therefore, when no employment was given to him, no question of lay-off compensation would be involved.[13] This view was followed in two decisions,[14] by two different single judges of the Madras High Court. However, a Division Bench of that High Court in *Gopal Textile Mills*, dissented from this view and held that the definition of 'workman' does not exclude even a casual employee or a substitute like a *badli*, and there is nothing in s 2(kkk) which would allow by-passing of the definition and it cannot be implied into this provision that only a man who has got a right would come in the purview of s 2(kkk). The question is not one of right to get employment but one of the *badli* having completed 240 days of continuous service and having qualified himself as a workman under s 2(kkk) and s 25C for compensation.[15] This decision lays down the correct law.

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86 Subs by Act 35 of 1965, s 5, for s 25C (wef 1-12-1965).

87 *Zandu Pharmaceutical Ltd v RN Kulkarni & Co* (1966) 1 LLJ 560, 562 (Bom), per Mody J.

88 *RS Rekchand Mohota, Spg and Weaving Mills Pvt Ltd v LC* 1968 Lab IC 480 [LNIND 1967 BOM 38], 482 (Bom), per Paranjpe J.

89 *English Electric Co of India Ltd v IT* (1987) 1 LLJ 141, 153 (Mad) (DB), per Chandurkar CJ.

90 *Steel & General Mills Co Ltd v Addl District Judge* 1971 Lab IC 1356, 1359 (P&H), per Bal Raj Tuli J.

91 *Tatanagar Foundry Co v Workmen* (1962) 1 LLJ 382 [LNIND 1962 SC 110] (SC), per Gajendragadkar J.

92 *Workers of Dewan Tea Estate v Mgmt* (1964) 1 LLJ 358 [LNIND 1963 SC 264], 363 : AIR 1964 SC 1458 [LNIND 1963 SC 264]: [1964] 5 SCR 548 [LNIND 1963 SC 264] (SC), per Gajendragadkar J.

93 *Mgmt of Gauhati Press Pvt Ltd v LC, Gauhati* 1983 Lab IC 824 (Gau), per Saikia J.

1 *Central India Spg, Wvg & Mfg Co Ltd v Industrial Court* (1959) 1 LLJ 468 [LNIND 1958 BOM 96] (Bom) (DB), per Mudholkar J.

2 *KT Rolling Mills v MR Meher* (1962) 2 LLJ 667 (Bom) (FB), per Shah J.

3 *Payment of Wages Inspector v Suraj Mal Mehta* (1969) 1 LLJ 762 [LNIND 1968 SC 372] : AIR 1969 SC 590 [LNIND 1968 SC 372]: [1969] 2 SCR 1051 [LNIND 1968 SC 372] (SC), per Shelat J.

4 *Anusuyabai Vithal v JH Mehta* (1959) 2 LLJ 742 (Bom) (DB), per Chainani CJ.

5 *Automobile Products of India v Workmen* (1955) 1 LLJ 67, 68 (LAT).

6 *Modi Food Products Co Ltd v Faqir Chand Sharma* (1956) 1 LLJ 749 [LNIND 1956 SC 4], 752 : AIR 1956 SC 628 [LNIND 1956 SC 4]: [1956] 1 SCR 560 [LNIND 1956 SC 4] (SC), per Venkatarama Ayyar J.

7 *Ravikrishna Wvg Mills Pvt Ltd v State of Kerala* (1959) 2 LLJ 760 (Ker), per CA Vaidialingam J.

8 *Mgmt of Junkundar Colliery v Sahdeo Thakur* 1974 Lab IC 417 [LNIND 1984 CAL 157], 419 (Pat) (DB), per Untwalia CJ.

9 *Vijayakumar Mills Ltd v LC* (1960) 2 LLJ 567 (Mad), per Ramachandra Ayyar J.

10 *Mgmt of Mahadev Textile Mills v Addl IT* 1976 Lab IC 1284, 1287 (Kant), per Shetty J.

11 *Mgmt of Sree Meenakshi Mills Ltd v LC* 1970 Lab IC 836 (Mad), per Alagiriswami J.

12 *Lakshmi Mills Co Ltd v LC* (1965) 1 LLJ 92 (Mad), per Ramakrishnan J.

13 *Girdharlal Laljibhai v MN Nagrashna* (1964) 2 LLJ 235 [LNIND 1964 GUJ 63] (Guj) (DB), per Mehta J.

14 *Sri Meenakshi Mills Ltd v LC* (1971) 2 LLJ 215, 221-22 (Mad), per Kailasam J.

15 *P Joseph v Mgmt of Gopal Textile Mills* (1975) 1 LLJ 136 [LNIND 1974 MAD 54]-38 (Mad) (DB), per Veeraswami CJ.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VA Lay-off and Retrenchment

S. 25D. Duty of an employer to maintain muster-rolls of workmen.—

Notwithstanding that workmen in any industrial establishment have been laid off, it shall be the duty of every employer to maintain for the purposes of this Chapter a muster roll, and to provide for the making of entries therein by workmen who may present themselves for work at the establishment at the appointed time during normal working hours.

In order to be entitled to lay-off compensation, the laid-off workman must at least once a day present himself for work at the establishment, at the appointed time on each working day, during normal working hours. The fact that a workman has so presented himself should be evidenced by his making entries in the muster roll maintained by the employer for this purpose. Section 25D casts a two-fold duty on the employer, *viz*, (i) to maintain a muster roll for the purposes of this chapter, and (ii) to provide facilities to the workmen who may present themselves for work at the establishment, at the appointed time, during normal working hours, to make entries about their so presenting themselves. This requirement of law is mandatory. The breach of the provisions of this section entails a penalty under s 31(2). But non-compliance with the provisions of this section is not a pre-condition to 'lay-off' though such non-compliance will debar the employer from taking advantage of the provisions of s 25E(ii).

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VA Lay-off and Retrenchment

S. 25E. Workmen not entitled to compensation in certain cases.—

No compensation shall be paid to a workman who has been laid off—

(i) if he refuses to accept any alternative employment in the same establishment from which he has been laid off, or in any other establishment belonging to the same employer situate in the same town or village or situate within a radius of five miles from the establishment to which he belongs, if, in the opinion of the employer, such alternative employment does not call for any special skill or previous experience and can be done by the workman, provided that the wages which would normally have been paid to the workman are offered for the alternative employment also;

(ii) if he does not present himself for work at the establishment at the appointed time during normal working hours at least once a day;

(iii) if such laying off is due to a strike or slowing-down of production on the part of workmen in another part of the establishment.

CIRCUMSTANCES DISENTITLING A WORKMAN TO LAY-OFF COMPENSATION

The main provision for payment of lay-off compensation is contained in s 25C. The provisions of s 25E carve out an exception to the general provision for payment of lay-off compensation.[16]Though lay-off is the result of an action on the part of the employer, he is absolved from the obligation to pay compensation in cases where the provisions of anyone of the three clauses of s 25E are attracted. In other words, s 25C creates the right to lay-off compensation in favour of a laid-off workman, whereas s 25E enumerates the circumstances which will disentitle him to lay-off compensation. Hence before a workman can claim lay-off compensation, he has to show that he was 'laid-off' within the meaning of s 2(kkk). Nonetheless it is open to the employer to repudiate the claim by showing that the workman was disentitled to claim compensation because his case falls within any of the three clauses of s 25E of the Act.[17]

CLAUSE (I): REFUSAL TO ACCEPT ALTERNATIVE EMPLOYMENT

Refusal of the workman to accept an alternative employment offered to him by the employer will disentitle him to claim lay-off compensation if such alternative employment is:

(i) in the same establishment from which he has been laid-off;

(ii) in any other establishment belonging to the same employer situate in the same town or village or situate within a radius of five miles from the establishment to which he belongs; or

(iii) in the opinion of the employer the alternative employment does not call for any special skill or previous experience and can be done by the laid-off workman; and

(iv) it carries the same wages which would normally have been paid to the workman in his original employment.

CLAUSE (II): ABSENCE FROM THE ESTABLISHMENT AT THE APPOINTED TIME

This clause casts a duty on a laid-off workman to present himself for work at the establishment from which he has been laid-off at the appointed time during normal working hours at least once a day during the period of lay-off, before he can be entitled to lay-off compensation. It absolves the employer from his liability to pay lay-off compensation in case the laid-off workman commits default in so presenting himself.[18]

The requirement of this clause is correlated to the question of compensation only for the lay-off period. Non-compliance with the condition that a laid-off workman should present himself for work, as required under this clause, does not militate against his right to be reinstated when lay-off is no longer necessary. In *Nutan Mills*, Chagla CJ observed:

> During the period of the lay-off, the employee would be entitled to go and serve another master. The only result of his doing so would be that he would be disentitled to receive compensation. But it is entirely a matter of his option whether he should present himself at the office of his employer and thus claim compensation or earn wages under a different employer and even though he may serve a different employer he would still have the right to be reinstated when the proper occasion arises.[19]

In other words, during lay-off, the relationship of master and servant is temporarily suspended and it would be revived as soon as the lay-off is over.

CLAUSE (III) :

(i) Lay-off Occasioned by a Strike or Go-slow

The intention of the legislature appears to be to absolve the employer from the obligation to pay compensation where the lay-off is occasioned by a strike or slowing down of production in another part of that establishment. The word 'part' used in this clause must be interpreted as meaning workers other than those who were on strike or have slowed down production, even if both the categories of the workmen be doing the same type of work or even in the same part of the factory premises. The phrase 'on the part of the workmen in another part of establishment' qualifies both the words 'slowing down of production' and 'a strike'. On proper construction of these expressions, if that phrase is read as qualifying the words 'slowing down of production', the rest of the clause which relates to a strike would read 'if such laying-off is due to a strike'. Strike can be of all workmen of an establishment or only of some. There is no provision in the Act for laying-off workmen who are themselves on strike or for payment of lay-off compensation to such striking workers. In the absence of such latter provision, no exception can be made in this clause absolving the employer from his obligation to pay compensation to workmen who are themselves on strike. Where all workmen are on strike, there would be no question of laying-off any workman or paying any lay-off compensation. This clause, therefore, will apply only when some workmen are on strike. No lay-off compensation need be paid when some workmen are laid-off due to a strike of workmen other than those who are laid-off. It is naturally inherent in this provision that there must be a strike in one part of the establishment, *i.e.*, of one section of the workmen and due to that reason there is a lay-off of workmen in another part of the establishment, *i.e.*, of workmen other than those on strike. It is this very provision, which is inherent in the situation, which is contained in the said qualifying words. The words, therefore, are applicable to the words, 'a strike' as well. Hence, the workmen laid-off as a consequence of strike by some other workmen in the same establishment will not be entitled to any lay-off compensation.[20]

Slowing down of production by workmen deliberately with a view to coerce the management to concede to their demands disentitles those laid-off, as a consequence of such slowing down, from claiming lay-off compensation.[21] A strike on the part of the workmen in another part of the establishment is thus made a justifiable reason for exonerating the employer from the liability to pay lay-off compensation.[22] If, therefore, on account of strike by some workmen in one part of the establishment, the management refuses to give work to the workmen in another part of the establishment, it will be quite justified in doing so.[23] However, in *Churakulam*, the Supreme Court in the peculiar circumstances of the case affirmed the award of the tribunal directing full wages for the period of lay-off.[24] In *India Radiators*, the Madras High Court held that when there was slowing down of production by workmen deliberately to pressurize the management to concede to their demands, they would not be entitled to layoff compensation, as provided for in s 25E.[25] In *KDCS Mill*, the facts were: The management had to stop operations one-by-one and lay-off the workmen because of refusal to work by the workmen of one section of the mills. The tribunal ordered payment of wages to the workmen on the ground that the lay-off, though bonafide, was illegal for failure to obtain permission under s 25M. When the matter was taken to the High Court in a writ petition, Misra J of the Madras High Court held that there was factual justification for laying off workmen and that they were not entitled to entire wages, but curiously enough, he modified the award by directing the management to pay 75 per cent of wages during the lay-off period, instead of full wages awarded by the tribunal.[26]

To say the least, both the decisions of the tribunal and the High Court run afoul of the plain language of the Act and are patently misconceived. What sense does it make to expect the employer to make an application for lay-off, going through all the cumbersome procedure, and wait for 60 days before a result could come, when the workers of a section resorted to a lightning strike with impunity thereby holding the entire factory, its employees and the processes to ransom? *Secondly*, it was not a case of mala fides or victimisation on the part of the employer. It is an admitted fact that the employer was left with no option than to shut down operation-by-operation as there was no work for them due to the stoppage of work in a critical section. That being the position, why should the employer pay full wages (75 per cent as modified by the single judge) to the whole body of workmen for no work and no output, which situation was brought about by the workmen themselves? Does the mere fact that the unit was covered by ch VB transforms an illegal stoppage of work or go-slow in one part of the establishment [s 25E(iii)] into a perfect legal action so as to render other workmen eligible for lay-off compensation, not to speak of full wages or 75 per cent of wages? And, lastly, where did the learned single judge get the figure of 75 per cent of wages as compensation - was it from any provision of the law or from his own wild imagination? Verily it is this kind of private notions of justice and misplaced benevolence on the part of judges that has largely been responsible for the gross indiscipline of workers as well as for industrial sickness. This decision undoubtedly sets an unwholesome precedent in the realm of industrial relations by sending wrong signals to workers that a small group of workmen could strike work with absolutely no concern for law and the employer would be called upon to pay full wages to the whole body of workmen. This is an obnoxious decision which requires to be reviewed and reversed.

(ii) Another Part of the Establishment

The expression 'workmen in another part of the establishment' should be interpreted to mean workmen other than those who were on strike or those who slowed down production though both these categories of workmen be doing the same kind of work, and even in the same part of the factory premises.[27] In such a case, an industrial tribunal cannot direct the management to pay unemployment compensation to the laid-off workman on the ground that the inability to give work, amounts to lockout, as such direction would be beyond the jurisdiction of the tribunal.[28] For general purposes of ch VA, the term 'industrial establishment' has not been defined in the Act.[29]

(iii) Tests to Determine whether One Establishment is Part of Another

In *Associated Cement Companies*, the Supreme Court had to decide the question, whether a lime-stone quarry run by a company owning a cement factory situated at a distance of a mile and a half was 'another part of establishment', *viz*, the cement factory. The relevant facts were that the accounts of the factory and the quarry were common. A manager was the common authority in respect of the quarry as well as the other departments of the factory. The manager used to transfer the staff from the quarry to the factory and vice versa, according to the exigencies of the business. There was also unity of purpose and functional integrality between the quarry and the factory. The company laid off a number of workmen in the factory on account of strike in the quarry. As the Act does not prescribe any tests for determining what is 'one establishment', the court noticed the difficulty in determining the question where an industrial establishment consists of parts, units, departments, branches, *etc.* especially where the undertaking has such parts, units, branches and departments, situated in different locations, near or distant and the further question as to what tests should be applied for determining what constitutes 'one establishment'. Adverting to several tests adumbrated before it in the course of the arguments such as: (i) geographical proximity; (ii) unity of ownership; (iii) management and control; (iv) unity of employment and conditions of service; (v) functional integrality, *ie*, functional inter-dependence of the nature that one unit cannot exist conveniently and reasonably without the other; and (vi) general unity of purpose, SK Das J observed:

> It is perhaps, impossible to lay down anyone test as an absolute and invariable test for all cases. The real purpose of these tests is to find out the true relation between the parts, branches, units, etc. if in their true relation they constitute one integrated whole, we say that the establishment is one; if on the contrary, they do not constitute one integrated whole, each unit is then a separate unit. How the relation between the units will be judged must depend on the facts proved, having regard to the scheme and object of the statute which gives the right of unemployment compensation and also prescribes a disqualification therefor. Thus, in one case the unity of ownership, management and control may be the important test; in another case functional integrality or general unity may be the important test; and in still another case, the important test may be the unity of employment. Indeed, in a large number of cases several tests may fall for consideration at the same time. The difficulty of applying these tests arises because of the complexities of modern industrial organisation: many enterprises may have functional integrality between factories which are separately owned; some may be integrated in part with units or factories having the same ownership and in part with factories or plants which are independently owned. In the midst of all complexities, it may be difficult to discover the real thread of unity.. . We must have regard to the provisions of the statute under which the question falls to be considered; if the statute itself says what is one establishment, then there is no difficulty. If the statute does not, however, say what constitutes one establishment, then the usual tests have to be applied to determine the true relation between the parts, branches, etc., namely whether they constitute one

> integrated whole or not. No particular test can be adopted as an absolute test in all cases of this type and the word 'establishment' is not to be given the sweeping definition of the organisation of which it is capable, but rather is to be construed in the ordinary business or commercial sense.[30]

There cannot be a strait-jacket formula. Though the question about the unity of two industrial establishments has to be considered in the light of relevant tests laid down by the courts from time to time, it would be unreasonable to treat anyone of the tests as decisive.[31] These tests and principles cannot be applied mechanically and by way of syllogism. It is enough to mention that among the many tests that have been evolved, functional integrality, inter-dependence or community of financial control and management, community of manpower and of its control, recruitment and discipline, the manner in which the employer has orgainsed the different activities, whether he has treated them as independent of one another or as inter-connected and inter-dependent, enjoy place of pride, but this list is by no means exhaustive.[32] In order to find whether there is sufficient functional integrality between the concerns, which may be separate entities, it is necessary to take an overall picture of their activities and the interest, if any, which they have in common.[33]

Judicial Review:

The inference, on application of these tests to the facts of a particular case, cannot be said to be a pure question of fact.[34] In other words, the question whether a branch or a department is in itself an industrial establishment is a mixed question of fact and law, and the correct inference to be drawn from the facts established, is one of law open to consideration in judicial review. Apart from lay-off, for determining the question whether a particular unit is a part of a larger establishment have been considered by the industrial adjudication in several other contexts as well, *e.g.*, applying the principle of 'last come first go' under s 25G,[35] profit bonus,[36] incentive bonus,[37] wage-structure and dearness allowance,[38]*etc*. It is also important to bear in mind that the significance or importance of these tests or factors would not be the same in each case. The question whether the two units constitute one establishment or really two separate and independent units, must be decided on the facts of each case.[39] There is bound to be a shift of emphasis in application of these tests from one case to another.[40] How the emphasis on one test or the other or a collocation of tests has varied according to facts and circumstances of each case may be illustrated by discussing some decided cases. In *Pratap Press*, the Supreme Court was dealing with the question of payment of bonus. The facts were that the Pratap Press belonged to an employer and he subsequently started the publication of 'Vir Arjun'. He was one of the partners of the firm which owned another paper-'the Daily Pratap'. The question for consideration was: whether the three activities, *viz*, the *Pratap Press*, the *Vir Arjun* paper and the *Daily Pratap* paper, were one establishment or separate and distinct units. The tribunal found that the ownership of the 'Daily Pratap' was different from the ownership of the 'Pratap Press' and the 'Vir Arjun'. It also found that the 'Vir Arjun' was a distinct and separate entity from the 'Pratap Press'. Hence the results of the 'Vir Arjun' and the 'Daily Pratap' could not be taken into consideration in deciding the question of bonus in the 'Pratap Press'. The parties were on issue on this point because, if the working results of the 'Vir Arjun' were taken into account, the position would be that the profits made by the 'Pratap Press' in the relevant year would have been wiped out by the losses incurred by the 'Vir Arjun' and no surplus profit would remain for distribution as bonus. In the first instance the Supreme Court enunciated the following principle:

> The question whether the two activities in which the single owner is engaged are one industrial unit or two distinct industrial units is not always easy of solution. No hard-and-fast rule can be laid down for the decision of the question and each case has to be decided on its own peculiar facts. In some cases, the two activities each of which by itself comes within the definition of 'industry' are so closely linked together that no reasonable man would consider them as independent industries. There may be other cases where the connection between the two activities is not by itself sufficient to justify an answer one way or the other, but the employer's own conduct in mixing up or not mixing up the capital, staff and management may often provide a certain answer.

The court observed that 'of all these tests the most important appears...to be that of 'functional integrality' and the question of unity of finance and employment and of labour'. Regarding the unity of ownership, the court held:

> Where two units belong to a proprietor, there is almost always likelihood also of unity of management. In all such cases, therefore, the court has to consider with care how far there is 'functional integrality' meaning thereby such functional inter-dependence that one unit cannot exist conveniently and reasonably without the other and on the further question whether in matters of finance and employment the employer has actually kept the two units distinct or integrated.[41]

Applying this test of 'functional integrality' to the facts of the case, the court held that there was no such functional inter-dependence between the 'Pratap Press' and the 'Vir Arjun' and the two could conveniently and reasonably exist without

one another, and the two were not parts of one industrial unit. Furthermore, this conclusion was accentuated by the conduct of the employer, in treating the finances and employment in the two units distinct and separate. In these circumstances, the conclusion of the tribunal holding the press and the paper to be two distinct separate industrial units was affirmed. In *Pakshiraja Studios*, the question again related to the payment of bonus. In this case, the management of a cinema studio also carried on the business of producing films and taking distribution rights of pictures. The question for consideration in this case again was whether for determining the 'available surplus,' all these activities constituted one establishment or were separate and distinct units. The tribunal treated all these activities as one establishment. In appeal, in the circumstances of the case, the Supreme Court relied more on the 'unity of ownership' than 'functional integrality', and observed that if the employer mingles several sides of his business activities they become one unit. Since there was one capital fund for the two lines of business, one cash book was maintained and separate staff was not maintained, there was one accountant for both the production and the studio side, the administrative side was also the same, the whole business was held to be one establishment. The fact that the account of the studio was prepared separately or that the separate balance-sheets were prepared for the two lines of business, was held to be of no consequence in the circumstances of the case.[42]

South India Mill Owners, again related to the question of bonus. A limited company had two textile mills in two different towns in the State of Madras situated at a distance of 150 to 200 miles. The labour force for the two mills was different and the workmen were not transferable from one unit to the other. Separate accounts were maintained for the two mills though ultimately were merged in the profit and loss account and the balance sheet of the company as a whole. The two units had two separate trade-marks. On these facts, the tribunal for the purposes of payment of bonus held that the two units should be treated as part of the same establishment. In appeal the Supreme Court observed that the question, as to whether the two units run by the same employer constitute one establishment or are separate and distinct units, is not easy of decision and restated the law in the following words:

> In dealing with the problem, several factors are relevant and it must be remembered that the significance of the several relevant factors would not be the same in each case, for their importance. Unity of ownership and management and control would be relevant factors. So would the general unity of the two concerns; the unity of finance may not be irrelevant and geographical location may also be of some relevance; functional integrality can also be a relevant and important factor in some cases. It is also possible that in some cases, the test would be whether one concern forms an integral part of another so that the two together constitute one concern, and in dealing with this question the nexus of integration in the form of some essential dependence of the one on the other may assume relevance. Unity of purpose or design, or even parallel of coordinate activity intended to achieve a common object for the 'purpose of carrying out the business of the one or the other can also assume relevance and importance.. .. In the complex and complicated forms which modern industrial enterprise assumes, it would be unreasonable to suggest that anyone of the relevant tests is decisive; the importance and significance of the tests would vary according to the facts in each case and so, the question must always be determined bearing in mind all the relevant tests and co-relating them to the nature of the enterprise with which the court is concerned. It would be seen that the test of functional integrality would be relevant and very significant when the court is dealing with different kinds of businesses run by the same industrial establishment of employer. Where an employer runs two different kinds of business which are allied to each other, it is pertinent to inquire whether the two lines of business are functionally integrated or are mutually inter-dependent. If they are, that would, no doubt, be a very important factor in favour of the plea that the two lines of business constitute one unit. But the test of functional integrality would not be as important when we are dealing with the case of an employer who runs the same business in two different places. The fact that the test of functional integrality is not and generally cannot be satisfied by two such concerns run by the same employer in the same line, will not necessarily, mean that the two concerns do not constitute one unit. Therefore, in our opinion, Sri Sastri is not justified in elevating the test of functional integrality to the position of a decisive test in every case. If the said test is treated as decisive, an industrial establishment which runs different factories in the same line and in the same place may be able to claim that the different factories are different units for the purpose of bonus. Besides, the context in which the plea of the unity of two establishments is raised cannot be ignored. If the context is one of the claim for bonus, then it may be relevant to remember that generally a claim for bonus is allowed to be made by all employees together when they happened to be the employees employed by the same employer.[43]

In this view of law and on the facts of the case, the court had set aside the finding of the tribunal, that the two mills run by the same employer at different places constituted one unit. In *Fine Knitting*, a limited company was carrying on the business of manufacturing of hosiery goods. Later on, with a view to assure supply of yarn for its hosiery manufacture, the company installed a spinning machinery unit. In the course of time, spinning of yarn became the principal activity of the company and bulk of the yarn manufactured in the spinning section was not suitable for consumption in the hosiery section and was sold in the open market. Only twenty per cent of the yarn manufactured in the spinning section was consumed in the hosiery manufacture and the rest was sold in the market. The company treated the employees working in the two units on separate basis in regard to wages, dearness allowance and payment of bonus. It also supplied the prescribed quantity of

yarn manufactured by it to the Government in accordance with a notification under the Cotton Textile (Control) Order 1948. The Registrar recognised the spinning and hosiery sections of the company under s 11 of the Bombay Industrial Relations Act 1946 as two distinct and separate undertakings and enterprises. In these circumstances, the Supreme Court held that the test of functional integrality or unity of employment or unity of purpose and design could not be considered to have been satisfied. Speaking for the court, Gajendragadkar J held that though the question about the unity of two industrial establishments has to be considered in the light of the relevant tests, such as functional inter-dependence, unity of ownership, management, labour, finance and habitation and treatment by the employer concerned, it would be unreasonable to treat anyone of the said tests as decisive. In dealing with such problems, several factors are relevant, but it must be remembered that the significance of several factors would not be the same in each case nor their importance.[44]

In *DCM Chemicals*, a limited company was engaged in the business of manufacturing various products such as textiles, chemicals and sugar *etc*. The units engaged in the manufacture of textiles and chemicals were situated in Delhi at two different places. The bulk of the chemicals manufactured by the chemical unit was sold in the open market and a small percentage of the chemicals was supplied to the textile unit for its use at the market price. The two units were treated as separate and distinct for the purposes of recruitment of labour, sale and conditions of service for the workmen employed therein. However, all the units had a common balance sheet for the whole company and there was no separate capital or reserve fund for the different units and dividends to the shareholders were declared on the basis of total profit of the company as a whole. It was held that the Chemical Works unit was an independent unit and therefore in fixing the wage structure *etc.*, it had to look to-the position of the Chemical Works units only and could not integrate it with other units and consider its wage-structure *etc.* on the basis of such integration. The fact, that the company was a legal entity in which all the profits and loss accounts of all the units merged, could not lead to the conclusion that the various undertakings carried on by the company must be regarded as one integral whole for the purpose of determining the wage structure *etc*., of the workmen of the chemical unit. The conduct of the employer company in dealing with the different units in the past also was taken into account in holding them as independent units.[45]

In *Wenger & Co*, the court was concerned with fixation of wages and dearness allowance etc. for certain restaurants and hotels. The question that arose was whether the wine shop owned by a restaurant was a separate and distinct unit from the restaurant or was a part of the same establishment for the purpose of fixing wages and dearness allowance. The evidence on record showed that there was unity of ownership, unity of finance, unity of management and unity of labour in regard to the restaurant and the wine shop attached to the restaurant in question. Furthermore, the wine shop and restaurant had not been registered as separate establishments under the provisions of Delhi Shops and Establishments Act 1954. On these facts, it was held that the wine shop and restaurant to which the wine shop was attached formed part of the same establishment for the purposes of fixation of wages, dearness allowance and other service conditions.[46] In *WIMCO*, the company was engaged in the manufacture of matches having one of its factories at Bareilly and had also a separate sales office at the same place to look after the sales of the goods manufactured at the factory. The staff employed by the company at the sales office consisted mainly of the salesmen and inspectors. The workmen employed in the factory and the staff working at the factory office of the company were having the benefit of production bonus scheme while the workmen employed at the sales office of the company were not given the benefit of that scheme. In these circumstances, the court held that functional integrality was writ large on the activities of the factory and the sales office in as much as the sales office could not exist without the factory. The test of 'functional integrality' was emphasised as the most relevant and the fact that the recruitment and control and discipline of manpower and muster rolls of the factory and sales office were different were not held to be relevant. Das Gupta J observed:

> It is enough to mention that among the many tests that have been evolved, functional integrality, inter-dependence, or community of financial control and management, community of man-power and of its control, recruitment and discipline, the manner in which the employer has organised the different activities, whether he has treated them as independent of one another or as inter-connected and inter-dependent, enjoy pride of place. But this list is by no means exhaustive. Nor can the tests and the principles that have been laid down be applied mechanically or by way of syllogism. That is why in applying the well-settled test and principles on these problems we have to bear in mind that while all tests that are possible of Application should be applied, the value and importance to be attached to an individual test will very according to the nature of the industrial activities and according to the nature of disputes in which the problem has arisen, viz, whether it is in respect of lay-off, retrenchment, production bonus, profit bonus or something else.[47]

In *Indian Cable Co*, the court was concerned with the application of the rule, 'last come first go' to an industrial establishment under s 25G of the Industrial Disputes Act. In this case, the company was carrying on business at various places in India. It decided to close one of its branches and consequently all the workmen employed and working at that branch were retrenched. An industrial dispute was raised on behalf of some of these workmen that their retrenchment was not valid as the provisions of s 25G of the Act were not applied by taking all the branches of the company as one unit. The

tribunal accepted this plea of workmen and directed the company to reinstate the workmen with backwages. In appeal, the Supreme Court held that the test of the location of the establishment and of financial integrity were held to be decisive.[48]

In *Straw Board*, the court was dealing with a case of closure of one of the units of the company. The company owned two units known as Straw Board Mill and Regmal Mill. The former manufactured straw board while the latter manufactured abrasive paper and cloth described as *regmal*. These two units were situated close to each other with only a railway line intervening. Each unit was a factory registered separately under the Factories Act. However, one balance sheet and one profit and loss account was prepared for the company as a whole consolidating the accounts of both the mills. The Straw Board Mill had more than 200 workmen whereas the Regmal Mill had only 50 workmen. The company closed the Straw Board Mill on the ground of non-availability of bagasse which was the raw material for the manufacture of straw board and terminated the services of the workmen of this mill by stages spread over a period of nearly two months. One of the questions for considerations was whether the Staw Board Mill and the Regmal Mill formed part of the same establishment. In this connection, the court observed that the principles laid down in the earlier dicta were not 'too rigid' and the question had to be decided on the basis of 'functional integrality' of the two units ascertainable from the facts on record. The common features between the two units were: unity of ownership; ultimate control and supervision: unity of finance; similarity of certain conditions in general; similarity of general wage structure; proximity of the units; some work for the Regmal Mills being performed in the Straw Board Mills; common boiler supplying steam to Regmal Mills; location of the processing furnace of the Regmal Mills in the Straw Board Mills, identical bonus scheme for both the units except for one year; inter-transferability of employees from one unit to the other; identical working conditions; maintenance of one balance sheet and profit and loss account and one consolidated account for the company including both the units depreciation fund, the same occupier, and, above all, treatment by the company of both the units as one in certain matters as above. The court said that the most important aspect in this particular case relating to closure was whether one unit has such complemental relation that closing of one must lead to the closing of the other or one cannot reasonably exist without the other. *Functional integrality would assume an added significance in a case of closure of a branch or unit; and that the Regmal Mills was capable of functioning in isolation was of material import*. The court, while holding that the two units were separate and independent of one another and that it was a clear case of closing an independent unit and not a part of the establishment, stated the principle thus:

> There is bound to be a shift of emphasis in application of various tests from one case to another. In other words, whether independent functioning of the R. Mill can at all be said to be effected by the closing of the S Mill. . .[49]

Likewise, in *Isha Steel*, the court held that the fact that (i) the two factories belonging to the same wonder had common PF and ESI number and (ii) there was a settlement containing similar terms between the management and the workmen of the two units; was not sufficient to hold that the two units were one and the same. There was no provision for inter-transferability of the workmen. The tribunal held that the two units were independent of each other and, therefore, s 25G was not attracted. The said award was set aside by the High Court. In appeal, the Supreme Court set aside the judgment of the High Court and restored the award of the tribunal, and observed that the findings of fact recorded by the tribunal were not amenable to interference by the High Court under Art 226 of the Constitution, and that the very fact that the second party continued to function notwithstanding the closure of the first one, evidenced the fact that there was no functional integrality between the two factories.[50] In *SG Chemicals*, the pharmaceutical division was at Worli, the laboratory and dyes division were at Trombay and the marketing and sales division was at Churchgate. It was held that the two units were considered to be integral part of the manufacturing activities of the factory at Trombay because the factory could never have functioned independently without the Churchgate division being there.[51] In *Andhra Cement*, the Andhra Cement Co. Ltd established the Andhra Cement Factory at Vijaywada in 1938, and in 1978 it established another factory at Visakhapatnam styled as 'Visakha Cement Works'. This was registered as a separate factory and had a separate management. Besides, a separate licence also was granted in its favour. The state Government allowed interest free sales tax loan and a rebate of 25 per cent in power tariff to this factory. However, the managing director and the general manager were the same persons in both the units; there was a management service pool consisting of managers, officers, supervisors and other service personnel working in all the units and officers had been transferred from one unit to the other. The annual report referred to the Vijayawada unit as the mother clinkering plant and the company itself referred to Visakha Cement works as a unit. On the basis of these facts, a single judge of the High Court held that Visakha Cement Works was a branch of the Vijayawada factory.[52] Where a company having several manufacturing units, such as an aerated water factory, electrical department, drugs factory, soda factory, air conditioning departments, pharmaceuticals, consumer stores, *etc.*, had closeddown one of the units, namely, the 'House Furnishing Unit' in which a total of 89 workers were employed, it was held that all the units should be taken together to arrive at the total number of employees which would work out to be more than 100 under the provisions of the Industrial Disputes Act, and that the said unit which was closed could not be said to be a 'separate establishment' for the purpose of s 25E. On this view of the matter, the High Court held that the workmen retrenched as a consequence of the said closure should be reinstated with full backwages.[53]

(iv) On the Part of Workmen

The phrase 'on the part of workmen in another part of the establishment' qualifies both the expressions, *i.e.*, 'slowing down of production' as well as 'strike'. Therefore, the workmen who are laid-off due to strike on the part of the workmen in another part of the establishment would not be entitled to lay-off compensation.[54]

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16 *Zandu Pharmaceutical Works Ltd v RN Kulkarni & Co* (1966) 1 LLJ 560, 562 (Bom), per Mody J.

17 *RS Rekchand Mohota Spg and Wvg Mills Pvt Ltd v LC* 1968 Lab IC 480 [LNIND 1967 BOM 38], 484 (DB), per Paranjpe J.

18 *Zandu Pharmaceutical Works Ltd v RN Kulkarni & Co* (1966) 1 LLJ 560, 563 (Bom), per Mody J.

19 *Nutan Mills Ltd v ESIC* (1956) 1 LLJ 215 [LNIND 1955 BOM 239], 219 : AIR 1956 Bom 336 [LNIND 1955 BOM 239] (Bom) (DB), per Chagla CJ.

20 *Zandu Pharmaceutical Works Ltd v RN Kulkarni & Co* (1966) 1 LLJ 560, 562-63 (Bom), per Mody J.

21 *India Radiators Ltd v Second LC* (1998) 3 LLN 411 (Mad), per Jayasimha Babu J.

22 *Lonetree Estate v IT* (1962) 2 LLJ 319 (Ker), per Velupillai J.

23 *Kairbetta Estate v Rajamanickam* (1960) 2 LLJ 275 [LNIND 1960 SC 92] (SC), per Gajendragadkar J.

24 *Churakulam Tea Estate Pvt Ltd v Workmen* (1969) 2 LLJ 407 [LNIND 1968 SC 256], 415 : AIR 1969 SC 998 [LNIND 1968 SC 256]: (SC), per Vaidialingam J.

25 *Mgmt of India Radiators Ltd v PO, Second LC* (1998) 3 LLN 411 (Mad).

26 *Mgmt of KDCS Mills Ltd v PO, IT* (2002) 3 LLN 329 (Mad), per Misra J.

27 *Zandu Pharmaceutical Works Ltd v RN Kulkarni & Co* 1 LLJ 560, 563 (Bom), per Mody J.

28 *Lonetree Estate v IT* (1962) 2 LLJ 319 (Ker), per Velupillai J.

29 *India Tyres & Rubber Co (India) Pvt Ltd v Workmen* (1957) 2 LLJ 506 (Mad), per Rajagopalan J.

30 *Associated Cement Companies v Workmen* (1960) 1 LLJ 1 [LNIND 1959 SC 156], 8-10 : AIR 1960 SC 56 [LNIND 1959 SC 156] (SC), per SK Das J.

31 *South India Millowners' Assn Ltd v Coimbatore DTW Union* (1962) 1 LLJ 223 [LNIND 1962 SC 43] (SC), per Gajendragadkar J.

32 *Western India Match Co Ltd v Workmen* (1963) 2 LLJ 459 [LNIND 1963 SC 142], 463 : AIR 1964 SC 472 [LNIND 1963 SC 142] (SC), per Das Gupta J.

33 *National Iron & Steel Co Ltd v* State of *West Bengal* (1967) 2 LLJ 23 [LNIND 1967 SC 10], 27 (SC), per Mitter J.

34 *Associated Cement Companies Ltd v Workmen* (1960) 1 LLJ 1 [LNIND 1959 SC 156], 8-9 (SC), per SK Das J.

35 *Indian Cable Co Ltd v Workmen* (1962) 1 LLJ 409 [LNIND 1962 SC 100], 417 : 1962 (4) FLR 444 : [1962] Supp 3 SCR 589 (SC), per Venkatarama Ayyar J.

36 *Pratap Press v Workmen* (1960) 1 LLJ 497 [LNIND 1960 SC 53] (SC), per KC Das Gupta J.

37 *Western India Match Co Ltd v Workmen* (1963) 2 LLJ 459 [LNIND 1963 SC 142], 463 (SC), per KC Das Gupta J.

38 *DCM Chemicals Works v Workmen* (1962) 1 LLJ 388 [LNIND 1962 SC 97] (SC), per Wanchoo J.

39 *Wenger & Co v Workmen* (1963) 2 LLJ 403 [LNIND 1962 SC 420], 408 (SC), per Gajendragadkar J.

40 *Workmen of Straw Board Mfg Co Ltd v Mgmt* (1974) 1 LLJ 499 [LNIND 1974 SC 114] (SC), per Goswami J.

41 *Pratap Press v Workmen* (1960) 1 LLJ 497 [LNIND 1960 SC 53]-498 : AIR 1960 SC 1213 (SC), per Das Gupta J.

42 *Pakshiraja Studios v Workmen* (1961) 2 LLJ 380 [LNIND 1961 SC 286] : AIR 1966 SC 1410 [LNIND 1961 SC 286] (SC), per Das Gupta J.

43 *South India Mill Owners Assn v Coimbatore DTW Union* (1962) 1 LLJ 223 [LNIND 1962 SC 43], 230 : AIR 1962 SC 1221 [LNIND 1962 SC 471] (SC), per Gajendragadkar J.

44 *Fine Knitting Co Ltd v Industrial Court* (1962) 1 LLJ 275 [LNIND 1962 SC 71] : [1962] Supp 3 SCR 196 (SC), per Gajendragadkar J.

45 *DCM Chemicals Works v Workmen* (1962) 1 LLJ 388 [LNIND 1962 SC 97] : [1962] Supp 3 SCR 516 : 1962 (4) FLR 409 (SC), per Wanchoo J.

46 *Wenger & Co v Workmen* (1963) 2 LLJ 403 [LNIND 1962 SC 420] : AIR 1964 SC 864 (SC), per Gajendragadkar J.

47 *Western India Match Co Ltd v Workmen* (1963) 2 LLJ 459 [LNIND 1963 SC 142], 46-64 : AIR 1964 SC 472 [LNIND 1963 SC 142]: [1964] 3 SCR 560 [LNIND 1963 SC 142] (SC), per KC Das Gupta J.

48 *Indian Cable Co Ltd v Workmen* (1962) 1 LLJ 409 [LNIND 1962 SC 100], 416-419 : [1962] Supp 3 SCR 589 (SC), per Venkatarama Ayyar J.

49 *Workmen of Straw Board Mfg Co Ltd v Mgmt.*, (1974) 1 LLJ 499 [LNIND 1974 SC 114] : AIR 1974 SC 1132 [LNIND 1974 SC 114]: (1974) 4 SCC 681 [LNIND 1974 SC 114] : 1974 Labic 730(SC), per Goswami J.

50 *Isha Steel Treatment v Assn of Engineering Workers* (1987) 1 LLJ 427 [LNIND 1987 SC 246], 430-32 : AIR 1987 SC 1478 [LNIND 1987 SC 246]: (1987) 2 SCC 203 [LNIND 1987 SC 246] (SC), per Venkataramiah J.

51 *SG Chemical & Dyes TE Union v SGCD Trading Ltd* 1986 Lab IC 863, 873-76 : (1986) 2 SCC 624 [LNIND 1986 SC 102] : (1986) I LLJ 490(SC), per Madon J.

52 *Andhra Cement Co Ltd v RPFC* (1988) 2 LLJ 453, 462 (AP), per Seetharam Reddy J.

53 *Spencer & Co Ltd v PO, Addl LC* (2000) 2 LLJ 1005 [LNIND 1999 MAD 796] (Mad), per Kanagaraj J.

54 *Zandu Pharmaceutical Works Ltd v RN Kulkarani & Co* (1966) 1 LLJ 560, 563 (Bom), per Mody J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VA Lay-off and Retrenchment

S. 25F. Conditions precedent to retrenchment of workmen.—

No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until—

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

[55][* * * * *]

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay [56][for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government [57][or such authority as may be specified by the appropriate Government by notification in the Official Gazette].

LEGISLATION

This section was inserted as a part of ch VA by s 3 of the Industrial Disputes (Amendment) Act 1953. Some amendments were introduced by the Industrial Disputes (Amendment) Act 1964, which have been shown in the footnotes to the text of the section.

OBJECT OF THE SECTION

Realising the position that an employer could not be expected to carry the economic dead weight of surplussage of labour, the legislature provided for the compensation under this section to soften the rigour of hardship resulting from an employee being thrown out of employment though for no fault of his.[58] In enacting s 25F, the legislature has also standardised the payment of compensation to workmen, 'retrenched in normal or ordinary sense in an existing or continuous industry'.[59] Before the enactment of this provision, tribunals had to deal with a perplexing variety of factors for determining appropriate relief and, by and large, adopted a simple yardstick of length of service of the retrenched workmen.[60] The right created by s 25F is based on grounds of humane public policy and on the consideration that involuntary unemployment causes dislocation of trade and industry and may result in general economic insecurity.[61] Station masters and traffic inspectors employed by the State Road Transport Corpn., being outside the scope of the definition of 'workman' within the meaning of s 2(s), the question of non-compliance of s 25-N does not arise.[62]

'NO WORKMAN EMPLOYED...SHALL BE RETRENCHED BY THAT EMPLOYER UNTIL'

This section is captioned 'conditions precedent to retrenchment of workmen' and the conditions laid down in it have been preambled with the words, 'no workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by the employer until'.[63] The postulates of this provision are that the

person claiming its protection must be (i) having the relation of employee with the employer, (ii) he must be a workman within the meaning of s 2(s) of the Act, (iii) the establishment in which he is employed must be an industry within the meaning of s 2(j) and (iv) he must have put in not less than one year of continuous service as defined by s 25B under the employer. These conditions are cumulative. If anyone of these conditions is lacking, the provisions of this section will not be attracted. In *Oasis School*, the AP High Court held that if the law prescribes certain requirements for valid termination of employment, retrenchment without complying with such requirements will not be void *ab initio*, as the provisions of this section will not be attracted.[64] For instance, in *Eranalloor Co-op Bank*, the appointment made without obtaining the prior approval of the Registrar of Co-operative Societies and without complying with the requirements of the relevant rule was held to be made without the authority of law and hence, void *ab initio*. The Kerala High Court observed that the person who claims the benefit of s 25F, must be one validly appointed in the service of the employer. In other words, he shall establish that he is in the service of the employer having been validly appointed. It is the contract of service that is terminated and service cannot be terminated unless it is capable of being continued. The workman should, therefore, establish that he has the right to continue in service and that the said service has been terminated without complying with the provisions of s 25F.[65]

Likewise, where the establishment in which the employee is employed is not an industry, the provisions of s 25F will not be attracted.[66] Even in a case where the workman was employed within a period of about 13 months on different occasions and each engagement was separate and distinct from every other engagement and there was no nexus between the one engagement and another engagement and his services for such engagements were utilised intermittently to do certain work which arose only on certain occasions and he was employed only to do work of a casual nature and not the work connected with the work of the bank, the workman could not be said to have been in continuous service for 240 days.[67] Furthermore, the continuous service of 240 days must be under the same employer. The period of employment under two different employers cannot be clubbed for the purposes of this section.[68] Likewise, earlier part-time employment can also not be taken into account for computing the period of 240 days.[69] It is for the workman to show that he has been in continuous service for not less than one year under the employer who retrenched him from service and during that period of twelve months he had served for not less than 240 days.[70] In *Hutchiah*, the Karnataka High Court held that where a workman has not worked for a period of 240 days immediately prior to the date of discharge, or during any other year, it is a matter relevant for consideration for computation of the amount payable under s 25F(b). He might not be entitled to 15 days salary for such year. However, that does not mean that if for some reason or other, a workman has not worked for 240 days in the year preceding the date of termination, his past service by the force of which he would be entitled to the notice and payment prescribed in s 25F would be wiped out.[71] Even a *badli* workman,[72] and a probationer,[73] is entitled to the protection of the provisions of this section. Likewise, even a daily worker who has put in more than 240 days in a year has to be regarded as a workman for the purposes of the protection of this section.[74] Merely because an employee has worked for 240 days or even for two years or three years on daily wage basis he cannot claim regularisation of service as a matter of right. For regularisation, there must be both posts and funds and the need for retention of the employee according to the requirement of work. Besides, he must be qualified and the work and conduct of such employee must also be satisfactory. It is also to be considered whether appointments on ad hoc/daily wage basis have been made against the leave or casual vacancies. In cases of appointment on such vacancies there would hardly be any scope for regularisation. These and various other factors have to be taken into consideration before deciding the question as to whether service of employee appointed on ad hoc or daily wage basis should be regularised. Regularisation cannot be made as a rule of thumb on the basis of completion of certain years of service of such an employee. It all depends on various facts and it is for the employer to decide as to whether in the facts and circumstances of the case, the services of those employees who were appointed on ad hoc or daily wages basis should be regularised.[75]

The negative form adopted by this section coupled with the use of the word ‘until’ which introduces the three conditions, indicates that the conditions must be first satisfied before retrenchment can be validly affected.[76] It is, implicit in the opening part of the section that a person claiming the protection and benefit of the section must show that he is a ‘workman’ because the protection and the benefit under this section is available only to an employee who is a workman as defined in s 2(s) and not any other employee.[77]Hence, for the purposes of this Act, a *badli* workman is a workman.[78] Clause (a) requires the employer either to give the workman one month’s notice or to pay him wages in lieu thereof before he is retrenched, while cl (b) provides that the workman is to be paid at the time of the retrenchment compensation which shall be equivalent to 15 days’ average pay for every completed year of service or any part thereof in excess of six months. The payment has to be made at the time of retrenchment. These requirements provide a safeguard in the interests of the workmen. Clause (c) require the employer to give notice of retrenchment to the ‘appropriate Government’ in the prescribed manner. The requirements of cll (a) and (b) are mandatory conditions precedent to valid retrenchment but the requirement of cl (c) cannot be said to constitute a condition precedent which has to be fulfilled before retrenchment can be validly effected. In *Hospital Mazdoor Sabha*, the court held that non-compliance of the mandatory conditions of s 25F would render the impugned retrenchment invalid and inoperative.[79] A similar view was taken in *National Iron and Steel*.[80] Where the retrenchment is invalid, it does not bring the employment relationship to an end, and the workman will be entitled to reinstatement with continuity of service and backwages.[81] Therefore, when the retrenchment is found to be illegal and

invalid for non-compliance with s 25F, it is imperative for the tribunal to award the relief of reinstatement with full backwages and it has no discretion to award any other relief.[82] Desai J observed:

> If the termination of service is *ab initio* void and inoperative, there is no question of granting reinstatement because there is no cessation of service and a mere declaration follows that he continues to be in service with all consequential benefits. In certain exceptional circumstances, the courts have not insisted on strict adherence to this rule. For instance, where it is established to the satisfaction of the tribunal that there, in fact, was need and necessity for retrenchment in the industry and the management for valid and legal reasons decided to retrench the workman, the tribunal will have to consider whether it would be just and reasonable to order reinstatement after holding that the mandatory requirements of s 25F had not been complied with. In other words, in cases of bona fide retrenchment without complying with the mandatory pre-conditions, the tribunal will have discretion to award compensation in lieu of reinstatement, depending on the facts and circumstances of the case.[83]

In *Surendra Kumar Verma*, the Supreme Court said that invalid retrenchment 'must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to backwages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and workmen to direct reinstatement will full backwages'. Then the court pointed out the instances where the adjudicator may have discretion to mould the relief and make appropriate consequential orders instead of reinstatement or backwages. For instance, where the industry is closed or is in severe financial doldrums or the workman might have secured better or other employment elsewhere, the relief of reinstatement might be denied. Likewise, the relief of full backwages also might be denied where it would place an impossible burden on the employer.[84] In *Bharat Heavy Electricals*, in the facts and circumstances of the case, the Gujarat High Court upheld the direction of the tribunal awarding reinstatement with backwages from a date subsequent to the date of termination of service till reinstatement and also granting only 25 per cent of backwages.[85] However the fact that retrenchment is justified would not bring the jurisdiction of the tribunal to an end; it would still have to see whether before ordering reinstatement, the statutory conditions have been complied with. Further, the rule of estoppel or waiver cannot be applied against retrenched workmen who have no freedom to refuse payment in view of their slender financial position caused by retrenchment.[86] Even if workmen have received sums paid to them 'in full and final settlement' of their accounts, they would still be entitled to challenge the order of retrenchment for non-compliance of the statutory requirements, if compensation as required by the section, has not been paid. There cannot be estoppel against the statute; particularly when non-compliance with the statute goes to the root of the thing. The management on the other hand, is on a higher platform. Therefore, acceptance of a lower post cannot be treated as acquiescence, and it would not amount to condonation of the illegality committed by the employer nor would such acceptance extinguish his rights under the law to have a declaration that the retrenchment was illegal particularly so when the workman is without employment and in need of making a living.[87] In *Straw Board*, Goswami J held that extreme technical considerations usually invoked in civil proceedings may not be allowed to out-weigh substantial justice to the parties in an industrial adjudication.[88] Nor is the benefit of retrenchment compensation subject to any contract between the parties, as the terms of contract cannot over-ride the statutory provision.[89]

For attracting the provisions of this section, the termination of service of the employee must be by a voluntary act of the employer. If there is no termination of service by the employer out of his own volition and discharge of the employee is brought about on account of a supervening act or even over which the employee has no control, then it cannot by any stretch of language be said that there is termination of the service of the employee by the employer. The essence of the idea of 'retrenchment' is that the termination of the workman's service is by a voluntary act on the part of the employer.[90]The benefit of this provision can only be claimed by an employee who falls within the definition of 'workman' in s 2(s) of the Act. For this purpose, even a temporary workman would also be entitled to claim the benefits under this section.[91] The Act makes no distinction between the casual workmen and other workmen. Benefit of this section, therefore, is available to casual workers as well. What is relevant is the relationship of employer and the employee for requisite length of time and the nature of employment is irrelevant provided that the conditions of s 2(s) are satisfied.[1] However, a person, who is not a 'workman' at all, cannot claim these benefits even though he may be an employee of the employer. However, the pre-conditions for effecting valid retrenchment provided in this section are required to be satisfied only in the case of a workman who was in continuous service for not less than one year at the time of the retrenchment and not in respect of others.[2] Where a question as to whether retrenchment was justified, is referred for adjudication, it would include whether it was legally and factually justified.[3] A lawful retrenchment cannot be struck down merely because it did not accord with executive instructions of a Government department because such instructions do not *per se* confer any legal right on an employee.[4]

REQUIREMENTS OF VALID RETRENCHMENT

This section postulates three conditions to be fulfilled by an employer for effecting a valid retrenchment, namely:

(i) one month's notice in writing indicating the reasons for retrenchment or wages in lieu of such notice;

(ii) payment of compensation equivalent to fifteen days, average pay for every completed year of continuous service or any part thereof in excess of six months; and

(iii) notice to the appropriate Government in the prescribed manner.[5]

It is now well-settled that considering the negative language used in s 25F, the section imposes a mandatory duty on the employer which is a condition precedent to retrenchment of a workman. Therefore, the contravention of the mandatory requirements of the section would invalidate the retrenchment and render it void *ab initio*.[6] The Mysore High Court took the view that these three things should be done simultaneously. In other words, the employer's conduct should show that the three things are parts of the same transaction.[7] The Supreme Court, on the construction of the section, held that requirement of notice to the Government postulated by cl (c) is not a condition precedent.[8] Hence, it need not be complied alongwith the conditions postulated by cll (a) and (b) which must be simultaneously complied with. Thus, any retrenchment effected without giving notice or paying wages in lieu of such notice as required by cl (a) and without paying the definite amount of compensation as required by cl (b) will be invalid.[9] However, it does not mean that the provision requires split-second action. The essence of the matter is that compliance with these requirements should appear to be parts of a single transaction. For instance, where the retrenchment notice stated that one month's wages in lieu of the notice as well as retrenchment compensation will be paid on the same day at the managing director's office, which was about a mile away from the factory, it could not be said the retrenchment and payment of wages and compensation did not form part of a single transaction.[10] In *Parsuram Mishra.* the retrenchment of the workman affected after complying with the requirement of s 25F was upheld by the industrial tribunal. The High Court directed that the workman should be retained in service pending the decision of the writ petition. After the writ petition was dismissed by the High Court, the employer struck the name of the workman off the rolls. This action of the employer was again challenged by a writ petition on the ground that striking the name of the workman off the rolls was retrenchment and that since the requirements of s 25F were not complied with, the retrenchment was invalid. This contention was negatived by the High Court holding that there was no question of a second retrenchment when the writ petition was finally disposed of. From the mere fact that the name of the workman was struck off the rolls subsequently, it could not be held that he was retrenched for the second time. Striking off the name of the workman was merely a clerical act and the retrenchment had taken effect when, it was effected by complying with the procedure under s 25F.[11]

In *Ramesh*, Kochar J of the Bombay High Court held that the fact that the retrenchment compensation was not paid along with notices and the further fact that vide a separate letter, the employees were asked to collect their retrenchment compensation from their concerned divisions, did not amount to any violation of s 25F, considering the fact that the large number of employees were employed in various divisions spread over miles of distance, it would be totally impracticable and impossible for the cashiers to carry the cash on to the sites and to offer or pay them the same along with retrenchment notices. In the circumstances, it could not be said that there was breach of s 25F if the employer had requested the workmen to come to the accounts department or the office and collect the amount of retrenchment of compensation as required under s 25F.[12] This ruling is inconsistent not only with the provisions of s 25F, but also with the numerous decisions of the apex court on the subject. The fact of practical difficulties involved in a project work of this nature with different divisions employing a large number of employees spread over several miles is no valid ground to violate s 25F, which prescribes, in unmistakable terms, the payment of notice wages and retrenchment compensation as 'conditions precedent to retrenchment'. Going by the maxim, *conditio praecedens adimpleri debet prius quam sequatur effectus*, which means, 'a condition precedent must be fulfilled before the effect can follow', a notice of retrenchment, which is couched in terms, *'you are advised to collect your dues/retrenchment compensation from the accounts department:* runs counter to the spirit of s 25F and renders the retrenchment invalid. Directing the retrenched workers to collect their dues from the account office is not the same thing as paying the compensation before effecting retrenchment as a condition precedent. This decision is wrong. In *Parrys*, a single judge of Calcutta High Court held that payment of retrenchment compensation through account payee cheque by registered post acknowledgment due on the date of retrenchment is sufficient compliance of s 25F.[13]

In *Pramod Jha*, speaking for the Supreme Court, Lahoti J (for self and Brajesh Kumar J) held that, where the facts disclosed that (i) the employer served one month notice under s 25F, (ii) tendered the compensation in the form of Banker's cheques, and (iii) also gave opportunity to the workmen to be heard on the said notices, even though he was not required under the law, the retrenchment could not be found fault with on any of the grounds under clauses (a) and (b) of s 25F.[14] In *Jagir Singh*, Sinha J (for Self and Hegde J) held that the question of compliance with s 25F arises when the service of the workman is terminated on a ground other than dismissal. Hence, the question of paying retrenchment compensation or serving the statutory notice would not arise in the case of dismissal for an act of misconduct.[15] The requirement to comply with the provision of Section 25-F(b) is mandatory before retrenchment of a workman is given effect to. In the event of any contravention of the said mandatory requirement, the retrenchment would be rendered void *ab initio*. Insufficient compensation paid to the workman, than what is prescribed in s 25F, renders the retrenchment invalid.[16]

In *ONGC*, it was held that the number of days worked in broken spells in different departments, which are independent departments of the corporation, cannot be taken as continuous service for the purpose of s 25F.[17] In *Abaskar Constructions*, the labour court recorded a finding to the effect that the retrenchment ordered by the management was in order in every respect as, for instance, the notice, the payment of compensation as a condition precedent to retrenchment, and the adherence to the principle of 'last come, first go'. Having held so, the labour court directed reinstatement of the workmen on the ground that the Joint Managing Director was not competent to sign and issue retrenchment letters. Quashing the order of the labour court, a single judge of the Delhi High Court dealt with the relevant provisions of the Articles of Associations and the provisions of the Companies Act and held that a Joint Managing Director was as much the Managing Director and performs all the functions assigned to the Managing Director.[18]

In *Mackinon Mackenzie*, the facts were: The company was having some 150 employees. In 1992, the company served a notice of retrenchment on 98 workmen together with the statement of reasons, which stated that the company was accumulating losses and the proprietors had taken a decision *inter alia* to rationalise its activities. Since there was a deviation from the seniority list of some workers in the clearing and forwarding departments and some of the remaining workers from the alleged closed departments of the company were to be transferred to the aforesaid retained departments, a seniority list of all the workmen was put up on the notice board. The union filed a complaint before the Industrial Court alleging the unfair labour practices on the part of the employer under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 (MRTU&PULP Act 1971). The industrial court directed, *inter alia*, to pay all the arrears of wages to retrenched workmen from the date of alleged retrenchment till the date of the award. Both the tiers of the High Court upheld the award. Dismissing the appeal, Gopala Gowda J (for self and Nagappan J) observed:

> .. . the cumulative effect of the pleadings, Statement of Reasons appended to the retrenchment notice, it is made very clear that the retrenchment notice served upon the concerned workmen was an action of closure. .. no cogent evidence has been brought before us by the appellant-Company to prove that the above referred one month's salary of the concerned workmen in lieu of the retrenchment notice has been actually paid to them. Further, the concerned workmen were given notice of retrenchment with Statement of Reasons appended therewith by the appellant-Company only on 27.07.1992 which was effective from 4.08.1992. Therefore, one month notice was not given to the concerned workmen before their retrenchment came into effect nor one month's salary in lieu of the retrenchment notice was paid to the concerned workmen. Therefore, the said action by the appellant-Company is a clear cut breach of the above said provision of condition precedent for retrenchment of the workmen as provided under Section 25F clause (a) of the I.D. Act. The Industrial Court after examining the facts and evidence on record has rightly answered the question of breach of Section 25F clause (b) in the negative since no evidence has been produced by the respondent-Union to prove the same and further no calculation is brought to our notice as to the amount received by way of retrenchment compensation and also the actual amount sought to have been paid to the retrenched workmen. Further, with regard to the provision of Section 25F clause (c), the appellant-Company has not been able to produce cogent evidence that notice in the prescribed manner has been served by it to the State Government prior to the retrenchment of the concerned workmen. Therefore, we have to hold that the appellant-Company has not complied with the conditions precedent to retrenchment as per Section 25F clauses (a) and (c) of the I.D. Act which are mandatory in law.[19]

In *Durgapur Casual Workers Union*, the facts were: the Food Corporation of India had long back setup a rice mill in the name and style of Modern Rice Mill at Durgapur and it had been handed to successive contractors for running the same. The concerned workmen, forty nine in numbers, had been working as contract labours under the contractors in the rice mill. The last contractor was Civicon. The contract system was terminated and the rice mill was closed in the year 1990-1991. Thereafter, the concerned workmen were directly employed by the Corporation in June, 1991 as casual employees on daily wage basis in the Food Storage Depot at Durgapur for performing the jobs of sweeping go down and wagon floors, putting covers on infested stocks for fumigation purpose, cutting grass, collections and bagging of spillage from god owns/wagons *etc.* A dispute raised by the workers for regularization was referred for adjudication in July 1996. The tribunal directed the corporation to regularize the services of the said workmen in view of their long service and held their continued casualisation amounted to unfair labour practice as stipulated in Part I (10) of Schedule-V to the ID Act. A single judge of the Calcutta High Court dismissed the writ petition filed by the management, which was reversed by a division bench, which apparently relied on the apex court decision in *Uma Devi*,[20] and held that no regularization of casual workers would be permissible unless the contingencies of law was satisfied. Aggrieved, the union approached the apex court. Allowing the appeal, Mukhopadhyaya J (for self and PC Pant J) held:

> In the present case, it is admitted that the workmen had been working as contract labours under the contractor in the rice mill of the Corporation. The contract system was terminated and the rice mill was closed in the year 1990-1991. *The effect was termination of services of the workmen. In that view of the matter, they were entitled for re-employment when the employer proposed to take into his employment any person, in view of Section 25H. .. . Under Section 25H the retrenched workman who offer themselves for employment shall have preference over other persons. It was for the said reason the workmen were employed by the Corporation*

> *in June, 1991*.. .. Having accepted that there was unfair trade practice, it was not open to the Division Bench of the High Court to interfere with the impugned award.[21] (paras 20 & 23) (Italics supplied).

With great respect, the reasoning and conclusion of Mukhopadhyaya J are not free from serious fallacies of fact and law, and deserve to be assailed on more grounds than one. *In the first place*, is it possible to hold that the closure of the rice mill in 1991 and the termination of contract between the Corporation and the contractor, resulting in the unemployment of the contract workers, amounted to retrenchment; if so, under what provision of the ID Act? *Secondly*, both sections 25FF & 25FFF stipulate notice and compensation on the lines of s 25F, as can be seen from the phrase '*as if the workman had been retrenched'*. It is well settled by a Constitution Bench decision that the said phrase was inserted as a *legal fiction* to the effect that, even though such termination occasioned by the transfer or closure of undertaking is not retrenchment *stricto sensu*, yet for the limited purpose of notice and compensation, it should be treated as retrenchment.[22] The said decision holds the field unscathed for over fifty years now. *Thirdly*, even *from a common sense point of view*, neither s 25G ("last come, first go") nor s 25H ("re-employment of retrenched workmen") could apply to a case of transfer or closure of undertaking for the reason that the undertaking was either sold or completely closed, and there is nothing left for the employer to 're-employ' the workmen, because, in the first case the undertaking was transferred, *i.e.*, sold to, or acquired by, another, and, in the second, it was completely closed. By the same token, the principle of '*last come, first go*' also doesn't apply, as the services of the whole body of workmen stand terminated in both the cases of transfer and closure. *Fourthly*, in the given set of facts, the corporation had, after the closure of the rice mill and the termination of the contract, appointed them on its rolls on a casual basis, though no obligation was cast on the corporation, given the fact that they were the employees of the contractor as on the date of closure of the mill in 1991. *Fifthly*, even assuming that s 25H was applicable to the case, *without conceding in the least*, does it impose a duty on the employer to compulsorily employ the workmen who were retrenched earlier? The said section, which was reproduced by the learned judge, is appended below for ready reference:

> Section 25H. *Re-employment of retrenched workmen*.- Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, *give an opportunity to the retrenched workmen who are citizens of India to offer themselves for reemployment and such retrenched workman who offer themselves for re-employment shall have preference over other persons*.

The said section merely casts an obligation of *giving opportunity* to the retrenched workmen in the event of future re-employment and *preferential treatment* over other persons, and nothing more. *There is no warrant for any judge at any level to read more* into the said provision. As is well understood, preferential treatment simply means that "*other things remaining equal, the ascertained person should be given preference*", with the further implication that "*if the merits are not equal, the word 'preference' loses its sanctity and becomes irrelevant*". *Sixthly*, that being the legal position, does the section confer a statutory right on retrenched workmen to be re-employed or, when so employed, to be given the same job and terms and conditions that were applicable to them at the time of retrenchment? *Seventhly*, is there is anything in the said section to show that a duty was imposed on the employer to necessarily employ the retrenched workmen, who offer themselves for re-employment? The answers to these two questions are a firm "No'. *Eighthly*, the learned judge averred (in para 20): "*Under Section 25H, the retrenched workmen who offer themselves for employment shall have preference over other persons. It was for the said reason the workmen were employed by the Corporation in June, 1991*". What is the truth value of this averment? *Was it because of s 25H or was it on compassionate grounds and voluntarily* that the corporation gave employment to the workers? The answer again is too obvious, for the reason that the said workmen were the employees of the contractor before closure, and were never on the rolls of the corporation. *Ninthly*, could it by any stretch of imagination be canvassed that '*contract workers*' have a statutory right to offer themselves for re-employment under the '*principal employer'*, and the latter has a corresponding duty to employ them; if so, under what provision of law? *Tenthly*, should the generosity shown by the corporation - by giving direct employment to contract workers, despite closure of the rice mill and termination of the contract itself - *be branded as 'Unfair Labour Practice'?* And, *lastly*, what is the judicial propriety in *accepting the outrageous conclusion of the tribunal that it was a case of 'unfair labour practice'*, at its face value, without investigating into the factual position? As a matter of fact, the issues raised in this case are squarely covered by the *ratio* of *Uma Devi*. It is disquieting to see the learned judge advancing untenable arguments and mediocre reasoning to reach an insipid conclusion. *The order passed by the tribunal was arbitrary, irresponsible, callous and illegal and, shockingly, the decision of Mukhopadhyaya J, was no different!* The learned judge failed to get a hang of the basic distinction between s 25F, on the one hand, and ss 25FF & FFF, on the other. Similarly, his analysis betrays his inability to grasp the *non-severable link between s 25F and ss 25G & H*, which either apply or do not apply *uno flatu* to a given case. The learned judge failed to come to grips with the legal position that ss 25G & H could have no application, whatsoever, to a case falling within the pale of s 25FF & s 25FFF. *Without a sound knowledge of the inter-relationship among these five provisions, what is it that a judge could decide in a matter falling within their range, and what quality of judgment does he*

propose to deliver? With great respect, the *Division Bench of the High Court was clear in the analysis of facts and candid in its reasoning and the application of law, and is right, whereas the decision of Supreme Court reflects nothing judicious, except an abuse of judicial power, apart from perversions of grave magnitude, and is manifestly wrong*. This decision calls for review by a larger bench and has to be overruled sooner than later, as it is capable of producing great public mischief, if allowed to stand in the form in which it was pronounced.

CLAUSE (A): NOTICE OR WAGES IN LIEU OF NOTICE

This clause requires that the workman proposed to be retrenched should be given one month's notice in writing indicating the reasons for retrenchment, and the period of notice should expire before retrenchment. Alternatively, it provides that the workman may be paid in lieu of such notice wages for the period of notice, *i.e*., one month. In other words, it is open to an employer not to give a notice but in that event it will be incumbent on him to pay at the time of retrenchment one month's wages in lieu of the notice, that is, for the period of the notice.[23] This clause, therefore, affords a safeguard to a retrenched employee. It requires the employer either to give him one month's notice or to pay him wages in lieu thereof before he is retrenched. The notice or payment in lieu of notice has to precede the retrenchment and not to follow it. Having regard, to the object which is intended to be achieved by this clause, it is clear that the requirement of serving a notice or pay wages in lieu thereof is mandatory.[24] Retrenchment effected without complying with the requirements of this clause would therefore be illegal and ineffective.[25] The first part of this clause prescribes the requirement of one month's 'notice in writing indicating the reasons for retrenchment'. For instance, in *Rabindra Kumar,* the termination order was given to the workmen on 7 July 1983 terminating their services wef 31 July 1983 afternoon. Since there was no notice for a complete month, the Orissa High Court held that the requirement of law to give one month's notice had not been complied with and, therefore, the retrenchment was illegal.[26]

A notice pasted on the board of the company without serving on the workmen for affecting retrenchment is not sufficient compliance of this provision.[27] This clause further requires that the reasons for retrenchment are to be indicated in the notice. The second part dispenses with the requirement of the notice in a case where the workman has been paid in lieu of such notice, wages for the period of notice. The language of this clause is plain and suggests that the two parts are completely independent. In other words, the employer has to 'either give one month's notice in writing indicating the reasons for the retrenchment, or to make payment of wages in lieu of such notice. The expression 'in lieu of such notice' is significant. The words 'such notice' means the notice referred to in the first part of the clause which prescribes that it should be in writing indicating the reasons for retrenchment. Failure to give one month's notice, or to state reasons for the retrenchment in the notice will vitiate the retrenchment.[28] Where one month's wages 'in lieu of the notice' have been paid, the requirement of indicating reasons does not survive.[29] However, where the winding-up order was passed on 5 December 1960, and the workers were discharged only more than a month thereafter on different dates, the claim of the workers to notice-pay of one month under s 25F(a) was disallowed, as they worked for more than the notice period and drew salary for such period and it was further held that the winding-up work of the liquidator was not the continuing of the business of the company.[30] An employer cannot take advantage of the Standing Orders providing for 48 hours' notice for termination of service of the workman in the face of the statutory provisions of s 25F of the Act which provides for one month's notice for retrenchment of a workman.[31]

CLAUSE (B): RETRENCHMENT COMPENSATION

(i) Quantum

It is implicit in the provision in s 25F that it confers a right on the workman to receive retrenchment compensation.[32] Clause (b) lays down that as a pre-condition to retrenchment, a workman should be paid compensation at the time of retrenchment at the rate of 15 days' average pay for every completed year of continuous service or any part thereof in excess of six months.[33] Thus, in order to be entitled to compensation under this clause, a workman should have worked during the period of twelve calendar months preceding the date of retrenchment, *i.e*., (i) for 190 days in case he is employed to work in a mine below ground; or (ii) 240 days in any other case. A plain reading of this clause along with the head-note and the opening words of the section, makes it clear that the requirement of paying compensation is a mandatory pre-condition for valid retrenchment of a workman, the non-compliance of which will make the retrenchment invalid and inoperative.[34] In *National Project Construction*, the Patna High Court held that the *question of retrenchment compensation was relevant only when the employment was regular. There could be no compensation in case of employment of temporary character*.[35] This decision is wholly misconceived. There is nothing in s 25F, which distinguishes 'regular' or 'permanent' tenure from 'temporary' for the purpose of entitlement to retrenchment compensation. All that it stipulates is 'one year continuous service' as the minimum qualifying requirement for being eligible to notice and retrenchment compensation. As a matter of fact, the tenure of service is not a relevant factor. The invidious distinction sought to be drawn by the Division Bench is clearly unwarranted and repugnant to the plain language of s 25F. Regardless of the fact whether a workman is 'permanent' or 'temporary' or 'casual', the employer is mandated to comply with the requirement of

notice/notice wages and retrenchment compensation, if the workman has put in one year continuous service under s 25F r/w s 25B. On the other hand, the LAT held that the plea that *the retrenched workman was a 'temporary' workman, and was therefore not entitled to it will not hold good, if 'continuous service' for the time required under s 25F has been put in*.[36] The decision rendered by LAT in *KNPR Weaving Factory* is right, whereas that of the Patna High Court in *National Project Construction* is patently wrong and deserves to be rejected on the threshold. The second proviso to s 25C gives a right to the employer to set-off any compensation paid to a workman for having laid-off during the preceding twelve months as against the compensation payable for retrenchment.[37] In awarding retrenchment compensation, the concepts of social justice cannot be taken into consideration.[38] The Calcutta High Court held that it would be sufficient compliance with the requirements of cll (a) and (b) of s 25F, if at the time of retrenchment, one month's pay in lieu of notice and the retrenchment compensation is paid to the concerned workman and it is not necessary to pay the arrears of wages, if any, due to the workman, at that time.[39] In a reference for determining the adequacy of compensation, the question that the retrenchment was unfair, cannot be raised and adjudication on such a point would be beyond the jurisdiction of the tribunal.[40] In *Purna Theatre*, the retrenchment of the workman was held to be void *ab initio* because the amount offered towards retrenchment compensation fell short of the amount required to be paid under this clause and such a mistake in payment could not be rectified after retrenchment was effected.[41]

(ii) Compensation - When Payable

The object the legislature had in mind in making this condition obligatory and in making it as a condition precedent was to partially redress the hardship caused by retrenchment.[42] In *Rajasthan SRTC*, the corporation retrenched the concerned workmen on 1 June 1982 with immediate effect. At the time of retrenchment, the corporation did not pay or tender the compensation to the workmen. On the same day at about 6 pm the corporation started the process of remitting dues to the workmen by mailing demand drafts for the requisite amount. However, on the reckoning of the court, the amount could not have been received by the workmen before the 3 June 1982. In the circumstances, the court held that it was impossible to say that the employer corporation had complied with the condition precedent of payment of compensation.[43] This appears to be too hyper-techincal view. In *Bombay Union of Journalists*, Gajendragadkar J held that the compensation for retrenchment must be paid at the time of retrenchment. It is implicit in the requirement to pay compensation at the time of retrenchment that the law recognises and declares the right of the workman to compensation at the time of retrenchment.[44] When the provision imposes a liability upon the employer to pay compensation at the time of retrenchment, it necessarily means that a corresponding right has been created in favour of the workmen.[45] This condition is a condition precedent to a valid order of retrenchment. If, therefore, no retrenchment compensation is paid to the workmen before they are asked to go, the retrenchment order is had and invalid, and is inoperative in law.[46] If the retrenchment order is invalid in law *ab initio*, subsequent payment of compensation cannot validate it.[47] Even if the workmen received compensation subsequent to the order of retrenchment, they will not be estopped from challenging the legality and validity of the order of retrenchment for there can be no estoppel against the statute.[48] The Madras High Court, on the construction of the word 'paid', held that the payment by cheque at the time of retrenchment will constitute valid payment for the purpose of this provision.[49]

On the issue of the time of payment of retrenchment compensation - before or after retrenchment - there was wide divergence of opinion among different High Courts, which is not being discussed here in view of the conclusive decisions rendered by the Supreme Court in several cases commencing from *Hospital Mazdoor Sabha*.[50] The purported retrenchment will be void *ab initio* and, therefore invalid and inoperative in law and cannot be said to have terminated the relation of employment. In such a case, the termination of the service cannot be treated as a 'sort of retrenchment'.[51] It will not be a case of retrenchment at all. In *Mohanlal*, Desai J held that, if the termination of service is void and inoperative *ab initio*, there is no question of granting reinstatement because there is no cessation of service and mere declaration follows that the workman continues in service with all consequential benefits.[52] In such a situation the provisions of s 11A will not be attracted.[53] However, since such termination is not retrenchment in the eyes of law, the workman will not be entitled to claim compensation under s 25F(b). Likewise, s 25F will have no direct application where services of all workmen have been terminated by the employer on real and bona fide closure, and in such a case, s 25FFF will come into play. [54] In case there is no retrenchment within the meaning of s 2(oo), the provisions of s 25F are not attracted. For effecting a valid retrenchment, the conditions of s 25F have to be satisfied. Good faith on the part of the employer or his efforts to get a job for the retrenched workman would not divest a workman of his right to that compensation before being retrenched.[55]

(iii) Unconditional Tender of Compensation Equivalent to Payment

The requirement of this clause, *inter alia*, is that no workman shall be retrenched by the employer until he 'has been paid' the prescribed compensation at the time of retrenchment. In *Delhi Transport*, the court observed that the law does not mean that the wages for one month should have been actually paid because in many cases the employer could only tender the amount before the dismissal but could not force the employee to receive the payment before the dismissal becomes effective. In this case, the workman was intimated that he was to be paid one month's wages and that he should report

immediately to the accounts officer at the head office to receive the payment. However, the workman did not go to receive the payment. In these circumstances, the court held that the tender was made before the dismissal came into force and the wages would have been paid to him if he had cared to receive them.[56] It is now well settled that giving notice or tendering payment is enough and refusal to receive the notice of payment by the workman does not invalidate the notice or tender of payment.[57] Merely because the workman declines to receive the notice or the payment tendered to him, it cannot be said that he has not been given notice or paid wages.[58] In *National Iron & Steel,* the Supreme Court held that the fact that the employer had asked the workman concerned to collect his dues from the cash office during the working hours was not sufficient compliance of the requirement offender or offer to pay compensation as it was incumbent upon the employer to pay to the workman such compensation and it was observed that if the workman was asked 'to go forthwith, he had to be paid at the time when he was asked to go and could not be asked to collect his dues afterwards.[59] In *Chandra Kumar,* one month's wages in lieu of notice together with the retrenchment compensation was sent to the workman concerned by postal money order, but the workman did not choose to accept the money order. In these circumstances, the offer was treated to be sufficient compliance with the requirement of s 25F(b).[60]

All that need be ensured in this connection, is a bona fide offer to the workman as a part of the same transaction of retrenchment. If actual payment in cash at the very spot of retrenchment is insisted on, it may lead to obvious difficulties. Care has to be taken that the management does not put off paying the workers. It has to make its best endeavour to pay.[61] In *Indian Compressors,* the workman refused to receive the notice of retrenchment and the offer of compensation. The employer sent the notice by registered post and the amount by money order the same day. A single judge of Delhi High Court held that the offer of payment and on its being refused, the sending of the amount by money order is a sufficient compliance with the requirement. The court also discountenanced the argument that the money order should have reached the workman before retrenchment took effect as misconceived since it overlooked the fact that the offer of payment had in fact, been made but it was declined by the workman and the money order was sent on the same day.[62] The Madras High Court held that a cheque is a valid tender. The mere fact that cheque cannot be encashed on that very day when the termination is effected, will not mean that the amount is not paid simultaneously.[63] In *Gurmail Singh,* the Supreme Court held that the amount of compensation due to various workmen awarded through individual bank drafts by the divisional/sub-divisional offices of the employer were sufficiently in time and therefore, there was sufficient compliance of the provisions of the section.[64] But a sham of tender, where receiving the payment before or at the time of retrenchment is impracticable or impossible, will be no tender in the eye of law.[65] Where the retrenchment infringed s 25F, but was otherwise bona fide, and the awarding of reinstatement is likely to be destructive to the employer, and the award of suitable compensation along with backwages was the rightful exercise of discretion by the labour court.[66]The relief of reinstatement can be denied even in a case of termination in violation of s 25F, if it is found that the employee gained backdoor entry by joining as a temporary employee first and getting extension of his service beyond 240 days, contrary to the provisions of s 4 of the Employment Exchanges (Compulsory Notification of Vacancies) Act 1959, which in turn goes against the principles governing public employment, thus violating Arts 14 and 16 of the Constitution.[67] In *Tannery and Footwear,* the Supreme Court repelled the contention of management that the workman had not discharged the burden of proving that he had worked for 240 days and, therefore, the order of reinstatement passed by the labour court was without jurisdiction, and held that in the absence of any evidence to the contrary the view taken by the labour court that the workman had worked for 240 days, based on the appointment letter, was justified.[68]

Where the services of a workman, who worked for more than 240 days were terminated without complying with s 25F, the labour court was right in directing reinstatement and there was nothing to show that the said appointment was temporary.[69] In *Western India SM Mills,* the Standing Orders of the company stipulated 60 years as the age of superannuation with an enabling provision that the management may retain an operative in service up to the age of 63 years if found efficient. Another provision of the same Standing Orders stipulated that, when retrenchment becomes necessary, a person who has completed the age of 60 years may be retired in preference to younger men. A single judge of Bombay High Court held that the management was entitled to retire the workmen who attained the age of 60 years, and that there was no need to comply with the provisions of s 25F.[70]Where the employer, after reinstating a workman pursuant to the orders passed by the High Court that the said termination was illegal for non-compliance with the provisions of s 25F, passed another order on the same day of reinstatement terminating his service duly complying with s 25F, the High Court held that the disputed questions of fact raised by the workman cannot be agitated again by way of a writ petition, and that he should pursue the remedy provided under the Industrial Disputes Act.[71] Termination of workmen without complying with s 25F, though void and the workmen were entitled to reinstatement with backwages, in view of the fact that 12 years had elapsed since termination, lump sum compensation be paid in lieu of reinstatement with backwages.[72] Termination of a casual worker who worked for more than 240 days without complying with s 25F is invalid and without jurisdiction; he is entitled to reinstatement.[73] Termination of the services of a workman, for not reporting for duty at the new place of work, without complying with s 25F is illega1.[74] Where the workman was given one month's notice, salary and retrenchment compensation in terms of s 25F, termination of his service cannot be held to be in violation of s 25F.[75] In *SM Nilajkar,* while dismissing the appeal filed by the workman, Lahoti J (for self and Brajesh Kumar J) made the following

observations, which disclose not only the facts of the case, but also the legal principle governing 'retrenchment' as well as the time when the compensation has to be paid:

> In the case before us the workmen have been given one month's notice in writing. The reasons for retrenchment have been indicated. An opportunity of hearing against the proposed termination was also afforded though not required by section 25F. Retrenchment was to take effect on expiry of one month from the date of the notice. Compensation as required by section 25F was available in the form of banker's cheques for payment to the workers simultaneously with the time of retrenchment and they were given an intimation in advance in that regard. The workers had already approached the High Court and secured an interim order protecting their employment and *status quo* being maintained. They were obviously not interested in receiving the retrenchment compensation which if done may have had the effect of frustrating the interim order. In these facts and circumstances, the retrenchment of any of the appellants cannot be found fault with on any of the grounds raised by the appellants by reference to Clauses (a) and (b) of section 25F. .. Faced with this situation, a last effort was made by the learned senior counsel for the appellants urging for relief being allowed on the ground of non-compliance with the provisions of section 25N of the Act. Section 25N is placed in Chapter V-B of the Act which according to section 25K has an application only to industrial establishment in which not less than 100 workmen were employed on an average working day for the preceding 12 months. The plea was not raised before the High Court. It is not even taken in the special leave petitions. It was sought to be taken only at the time of hearing. The plea need not detain us any longer. The infirmity in retrenchment by reference to section 25N cannot be ventured to be found out without laying factual foundation attracting applicability of the provision. It is basically a question of fact. In the absence of requisite pleadings having been raised and documents having been brought on record, we are not persuaded to entertain the plea.. .. For all the foregoing reasons we find the appeals devoid of any merit and liable to be dismissed. They are dismissed accordingly. The workers are free to collect the amount of retrenchment compensation as was offered to them.[76]

In *MP State Textile Corporation*, the issue was whether the holding company, which transferred its employees to different units for work can claim that those of them, who were deputed to work in one of the units which was closed, were not his. In the said case it was held as follows:

> The respondent-workmen were appointed by the appellant-Corporation and their appointment letters are on record.. .. . A reading of the said letter of appointment along with the evidence led by the parties before the Labour Court clearly shows that the respondent-workmen applied for employment in the appellant-Corporation. .. Under the said appointment letter, the appellant had retained its right to transfer the workmen to any unit managed by the appellant, directly or indirectly. From this material on record, it is clear that the workmen were appointed by Corporation as its employees and were transferred or deputed to various Textile Mills under it. . ., in the instant case, to Indore Textile, Ujjain, therefore, if Indore Textile, Ujjain, suffered a closure, the services of the respondent-workmen could not have been terminated by the management of Indore Textile, Ujjain, because the respondent-workmen were not its employees. Therefore, the Labour Court as well as the High Court were justified in coming to the conclusion that the respondent-workmen were the employees of the appellant-Corporation and their retrenchment by Indore Textile, Ujjain is without authority of law since they were not the employees or workmen of Indore Textile, Ujjain.. . .[77]

The number of days of work put in by the employee in broken periods cannot be taken as continuous service for the purpose of s 25F ; the termination of the service of the workman is valid.[78] In *Haryana Roadways*, Mathur J (for self, Lahoti CJI and Balasubramanian J), held:

> One of the important factors, which has to be taken into consideration, is the length of service ...where the total length of service rendered by a workman is very small, the award of back wages for the complete period...would be wholly inappropriate. Another important factor, which requires to be taken into consideration, is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year.[79]

In *Allahabad Jal Sansthan*, SB Sinha J held:

> …with the passage of time, it has come to be realized that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period that was spent unproductively, while the workman is being compelled to go back to a situation which prevailed many years ago when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may be arrived at.[80]

A *badli* workman, has no statutory status or right. The termination of his service for unsatisfactory performance, after giving opportunities for improvement, is neither illegal nor violative of the provisions of s 25F.[81] In *Darbara Singh*, the respondent-workman was appointed as a peon on daily wage basis in January 1988 daily wage on the condition that if his performance was not satisfactory or if a regular employee joins, his services would be deemed to be terminated without any notice. It was also indicated therein that the daily wager was appointed against vacant post which was temporary in character. His service was extended from time to time same terms, and finally on the appointment of a regular employee, his service was terminated. The labour court directed reinstatement and the writ petition was dismissed by the workmen. Quashing the orders of the courts below, Pasayat J (for self and Raveendran J) held that the materials on record clearly establish that the engagement of the workman was for a specific period and conditional. It was clearly indicated that on the appointment of a regular employee, his engagement would come to an end.[82] In *Sukhwinder Kaur*, the Sinha J (for self and Bhandari J) discussed the facts and the law relating to contractual appointment with special reference to the applicability of s 25F and observed:

> The respondent, within a span of about 18 months, was appointed thrice and disengaged thrice. As noticed hereinbefore, she was appointed on a contractual basis. The appointments were temporary ones. She was aware that her services could be terminated without notice. She accepted the terms and conditions of the said offers of appointments without any demur.. . However, it appears, before the High Court in the review application, the appellant itself had made a proposal to give lump sum compensation in lieu of her reinstatement. In view of that the appellant itself was before the High Court, we are of the opinion that interest of justice shall be met if a sum of Rs 30,000/- is directed to be paid to the respondent.. .[83]

In *Des Bandhu*, the facts disclosed that the services of the workman were terminated after more than one year of working, *i.e.*, from February 1988 to March 1989, where after he was not allowed to attend his duties. He filed a civil suit in 1990 seeking declaration that he continued in service. The civil court dismissed the suit and the appeal filed before the appellate court was also dismissed in 1997. Thereafter, he raised an industrial dispute. The labour court directed reinstatement with continuity of service and full back wages. Before the High Court, the employer contended that the workman was employed on a purely temporary basis and that he had worked for only 89 days and not 240 days as alleged. The High Court however affirmed the order of the labour court. In appeal, the Supreme Court took note of the fact that the delay of 8 years was due to the workman pursuing remedy in a civil court and, in the particular facts of the case, ordered compensation of Rs 60,000/- to be paid in full and final settlement of all claims and in lieu of reinstatement.[84] In *Mahesh Chand*, the facts briefly were: the workman was not engaged consistently but on part-time work intermittently on some days, that too, for 2 to 3 hours a day. No sanctioned post of *safaiwala* ever created in BSNL. There was no offer of appointment. The work that was being done by the workman was also being done sometimes by his wife and mother. Despite this position, the tribunal directed reinstatement of the workman, which was affirmed by both the tiers of High Court. In view of the above factual position, the Supreme Court set aside the award of the tribunal as well as the orders of the High Court.[85] In *Ghazibad Development Authority*, the Supreme Court took a similar view in a case falling within the ambit of s 6N of the UP Industrial Disputes Act, in which the Court directed that compensation be paid in lieu of reinstatement.[86] On the question of granting the relief of reinstatement with full back wages, DK Jain J (for self and Thakker J), in *Rajasthan Lalit Kala Academy*, observed:

> Once the termination of service of an employee is held to be illegal, the relief of reinstatement is ordinarily available to the employee. But the relief of reinstatement with full back-wages need not be granted automatically in every case where the Labour Court/Industrial Tribunal records the finding that the termination of services of a workman was in violation of the provisions of the Act. For this purpose, several factors, like the manner and method of selection; nature of appointment - ad hoc, daily-wage, temporary or permanent etc., period for which the workman had worked and the delay in raising industrial dispute, are required to be taken into consideration.[87]

Relief of reinstatement or of compensation in respect of daily wagers is not automatic and, having regard to distinction between daily wagers and permanent employees and the length of their service, compensation in lieu of reinstatement would meet ends of justice.[88] Part-time workers do answer to the definition of 'workman' within the meaning of s 2(s) and they are entitled to the benefit of continuous service under s 25B and the protection of s 25F.[89] In *Ramesh Kumar*, the Supreme Court held that the finding of fact recorded by the labour court, that the workman had put in 240 days service and hence his termination without complying with the provisions of s 25F was illegal, cannot be interfered with by the High Court while exercising its writ jurisdiction, and further held that termination of his service without notice or compensation was illegal.[90] In *Kuldeep Singh*, Where the retrenchment of workman was found to be in contravention of provisions of S. 25F and all throughout the workman was making representations against his termination to concerned authorities, the denial of relief to him on ground that reference was made by the Government belatedly, was improper. On this view of the matter, the Supreme Court directed that the workman be reinstated with consequential service benefits but without back

wages. The Court supportively cited the decisions rendered in *Nedungadi Bank*,[91] *Sapan Kumar Pandit*,[92] *SM Nilajkar* (supra) on the question of condoning the delay.[93]

Where the retrenchment of the workman was found to be in contravention of s 25 and the labour court directed reinstatement, the Supreme Court held that the order of the High Court setting aside the said award, on the ground that the workman was engaged only on contract basis repeatedly, and that his initial engagement was contrary to law and that it would not be in public interest to approve award of reinstatement after long lapse of time, could not be sustained. The court further observed that the worker could not be blamed for any delay in the disposal of the case by the labour court or of the writ petition by the High Court.[94] In a case where the labour court ordered reinstatement of a daily wager with 30% back wages on the ground that the employer did not comply with s 25F, Sandhawalia J of Punjab and Haryana High Court held that, even where the provisions of s 25F are not complied with while terminating the services of a 'daily wager', who had worked for 240 days or more, reinstatement would not be automatic and compensation, in lieu of reinstatement, would meet the ends of justice. On this view of the matter, the learned judge enhanced the compensation to Rs. 75000/-.[95] In *Vipin Kumar*, the facts disclosed that an employee who was working as a 'teacher' had, consequent upon the termination of his service, raised and industrial dispute claiming that he was employed as a 'working journalist' and that the employer had terminated his services in contravention of s 25F. The labour court declined the reference on the ground that he was working as a 'teacher' in a Model School and that the provisions of the ID Act were not applicable to his case. The employee challenged the order of the labour court. The Punjab & Haryana High Court upheld the order of the labour court and observed that the principal avocation of the petitioner was 'teacher' and not a 'working journalist' and that he was only collecting news to the Tribune Trust, and that the order of the labour court could not be found fault with.[96]

(iv) Succession to the Right of Compensation

If the workman dies during the period of unemployment subsequent to the termination of his service, the amount of his wages from the date of the termination of his service to the date of his death becomes a vested right of the workman and it will devolve on his heirs-at-law though the right to reinstatement would not survive. However, this would not be a case of retrenchment compensation. In *Shambu Nath Mukherjee*, the workman died during the pendency of the litigation before the Supreme Court. Therefore, without going into the technicalities of the legal maze, the Supreme Court itself ordered that since the workman could not be reinstated, the compensation in lieu of reinstatement should be paid to his widow.[97]

(v) Retrenchment Compensation under Section 25F and Gratuity

In *Indian Hume Pipe*, the Supreme Court pointed out that gratuity is to help workmen after their retirement, whatever cause the retirement may be due to, while retrenchment compensation is intended to give relief for sudden and unexpected termination of employment by giving partial protection to the retrenched workman and his family to enable them to tide over hard period of unemployment. There is nothing in law to prevent a workman from getting the double benefit, one under a gratuity scheme and the other as compensation for retrenchment. But now payment of gratuity has become a statutory liability of the employers under the Payment of Gratuity Act 1972.[1] In *Parrys*(supra), a single Judge of Calcutta High Court held that for calculating the retrenchment compensation at the rate of 15 days' wages, it is not necessary to divide monthly wages by 26, and the amendment to s 4(2) of the Payment of Gratuity Act 1972 has no application to the Industrial Disputes Act. This decision is right. In *Guru Jhambheswar University*, the Supreme Court took note of amendment to s 4(2) of the Payment of Gratuity of Act 1972 vis-à-vis s 2(aaa) of ID Act, which remained constant throughout. The Court, while reversing the decision of Punjab and Haryana High Court, observed:

> The language used in Section 2(aaa) is absolutely plain and clear and there is not the slightest ambiguity in the same. It is well settled principle that the words of a Statute are first understood in their natural, ordinary or popular sense and phrases and sentences are construed according to their grammatical meaning, unless that leads to some absurdity or there is something in the context or in the object of the statute to suggest to the contrary. The true way is to take the words as the legislature have given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered. As is often said the golden rule is that the words of a statute must prima facie be given their ordinary meaning and natural and ordinary meaning of the words should not be departed from unless it can be shown that the legal context in which the words are used requires a different meaning.. .. There is another important feature which deserves notice. Subsequent to the decision of this Court in *Jeevanlal* (supra),[2] an explanation has been added after second proviso to Section 4(2) of the Payment of Gratuity Act, by Act No. 22 of 1987, which reads as under:-
> "*Explanation:*—In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen."
> By adding the explanation, the legislature has brought the statute in line with the principle laid down in the case of *Jeevanlal*(supra) and has given statutory recognition to the principle evolved, viz. that in case of monthly rated employee the fifteen days' wages shall be calculated by dividing the monthly rate of wages by twenty six and multiplying the quotient by fifteen.

But, no such amendment has been made in the Industrial Disputes Act.*If the legislature wanted that for the purposes of Section 25F(b) also the average pay had to be determined by dividing the monthly wages by twenty-six, a similar amendment could have been made. But the legislature has chosen not to do so. This is an additional reason for holding that the principle of "twenty-six working days" is not to be applied for determining the retrenchment compensation under Section 25F(b) of the Act.. .. We are, therefore, of the opinion that the view taken by the Labour Court is clearly erroneous in law and has to be set aside.* The High Court did not go into the question at all and summarily dismissed the writ petition by a one line order observing that the compensation offered to the workman was short of the amount actually due.[3] (Paras 9, 14 & 15) (Italics supplied).

(vi) Authorities under State Acts cannot Award Compensation under s 25F

In a case governed by the provisions of Central Provinces and Berar Industrial Disputes Settlement Act 1947, the services of some workmen were terminated for which no compensation had been paid in accordance with the provisions of s 25F of the Industrial Disputes Act. On an application being made to the state industrial court under s 41 of that Act, the industrial court awarded compensation under s 25F. Quashing the award of the industrial court, the Bombay High Court held that the state industrial court could not grant any relief whatsoever under the Central Act, since its jurisdiction was invoked under s 41 of State Act and the powers of the industrial court were continued to doing such things as were permitted by the provisions of that Act and awarding retrenchment compensation under s 25F of the Industrial Disputes Act was not one of such things.[4]

(vii) Clause (c): Notice to the Appropriate Government

(a) Notice not a Pre-condition

In *Hospital Mazdoor Sabha* (supra), the Supreme Court made an obiter observation that cll (a) and (c) of s 25F prescribed similar condition, *i.e.*, all are mandatory preconditions. In a later case, *i.e.*, *Tea Districts Labour Assn*, the point was not argued as it was conceded that the requirement as to notice prescribed by s 25F(c) was mandatory and was a condition precedent to the action of retrenchment.[5] In *Subong Tea Estate*, again the Supreme Court in an obiter said that the three conditions prescribed by cll (a), (b) and (c) of s 25F appeared *prima facie* to constitute conditions precedent, before an industrial workman could be validly retrenched.[6] In *Bombay Union of Journalists*, the court observed, that 'cl (c) cannot be held to be a condition precedent even though it has been included under s 25F along with cll (a) and (b) which prescribe conditions precedent'. It was further pointed out that unlike cll (a) and (b), 'cl (c) is not intended to protect the interests of workmen as such and it is only intended to give intimation to the appropriate Government about the retrenchment, and that only helps the Government to keep itself informed about the conditions of employment in different industries within its region'. It was, therefore, held that cl (c) did not constitute a condition precedent, which had to be fulfilled before retrenchment can be validly effected. Non-compliance with the condition laid down in cl (c), *i.e.* serving a notice on the appropriate Government, before the retrenchment, would not, therefore, invalidate the retrenchment.[7]

(viii) Section 25F does not Confer Right of Retrenchment on the Employer

The language of s 25F is couched in negative form, *i.e.*, no workman, as indicated in the opening part of the section, shall be retrenched by his employer until the conditions enumerated therein are complied with. It is clear that the section does not give any positive or unregulated right of retrenchment to the employer. There is express provision in the section that on compliance with the three conditions referred to in the section, the employer shall have an unrestricted right to retrenchment of the workman.[8]In other words, the right of the employer to retrench the economic dead weight of surplus age of labour is inherent in his right to manage his business subject of course to the conditions prescribed by ss 25F and 25N. However, in the absence of any special conditions of service, the rights of the workman are to be governed by the provisions of the Act under which the only right of the employer to terminate the services of the workmen is by retrenchment after complying with the requirements of ss 25F and 25N of the Act.[9]

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55 Proviso omitted by Act 49 of 1984, s 3 (wef 18-8-1984).

56 Subs by Act 36 of 1964, s 14, for "for every completed year of service" (wef 19-12-1964).

57 Ins by Act 36 of 1964, s 14 (wef 19-12-1964).

58 *Parry & Co Ltd v PC Pal* (1970) 2 LLJ 429 [LNIND 1968 SC 358], 438 (SC), per Shelat J.

59 *Managment of Hindustan Steel Ltd v Workmen* 1973 Lab IC 461 [LNIND 1973 SC 12] (SC), per Dua J.

60 *Hariprasad Shivshankar Shukla v AD Divikar* AIR 1957 SC 121 [LNIND 1956 SC 104], per SK Das J.

61 *Associated Cement Companies v Workmen* (1960) 1 LLJ 1 [LNIND 1959 SC 156] (SC), per SK Das J.

62 *Orissa SRTCEAU v Orissa SRTC* (2001) 2 LLN 520 (Ori), per Mohapatra J.

63 *John Fernandez v Executive Engineer* 1979 Lab IC 255 -57, per Khalid J.

64 *Mgmt of Oasis School Hyderabad v LC* 1991 Lab IC 428 (AP), per Sivaraman Nair J.

65 *Eranalloor Service Co-op Bank Ltd v LC* (1986) 2 LLJ 492 : 1986 KLJ 589 (Ker), per Radhakrishna Menon J.

66 *Govindbhai Kanabhai Maru v NK Desai* 1988 Lab IC 505 [LNIND 1987 GUJ 8], 508 (Guj), per Qureshi J.

67 *Karur Vysya Bank Employees Union v PO, CGIT-cum-LC* 1988 Lab IC 1746 (Kant).

68 *Vijai Singh v State of Rajasthan* 1988 Lab IC 1125 -26 (Raj), per Lodha J.

69 *Ram Lakhan Singh v PO, LC* 1988 Lab IC 867, 869 (P&H), per JV Gupta J.

70 *Mohan Lal v Mgmt of Bharat Electronics Ltd* 1981 Lab IC 806 [LNIND 1981 SC 244], 813 (SC), per Desai J.

71 *Hutchiah v Karnataka State RTC* (1983) 1 LLJ 30, 43 (Kant) (DB), per Rama Jois J.

72 *Sarabhai Chemicals v Subhas N Pandya* (1984) 2 LLJ 75 (77) (Guj) (DB), per Poti CJ.

73 *Marmeswar Day v PO, LC* 1984 Lab IC 837 (Gau) (DB), per Hansaria J.

74 *Mgmt of Handicraft HECI Ltd v DD Gupta* 1987 Lab IC 1268, 1270 (Del), per Kirpal J.

75 *Zakir Hussain v Engr-in-Chief, Irrigation Dept* 1993 Lab IC 836, 840 (All) (DB), per RA Sharma J.

76 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 356 (SC), per Gajendragadkar J.

77 *Sunil Kumar SP Sinha v Indian Oil Corpn Ltd* 1983 Lab IC 1139 [LNIND 1982 GUJ 114], 1147 (Guj), per Nanavati J.

78 *Raymond Woollen Mills Ltd v CS Sonawane* 1993 Lab IC 1494 (Bom), per Kantharia J.

79 *State of Bombay v Hospital Mazdoor Sabha* (1960) 1 LLJ 251 [LNIND 1960 SC 19] : AIR 1960 SC 610 [LNIND 1960 SC 19]: [1960] 2 SCR 866 [LNIND 1960 SC 19] (SC), per Gajendragadkar J..

80 *National Iron and Steel Co Ltd v State of West Bengal* (1967) 2 LLJ 23 [LNIND 1967 SC 10] : [1967] 2 SCR 391 [LNIND 1967 SC 10] : 1967 (14) FLR 356 (SC), per Mitter J.

81 *Udaipur Mineral Development Syndicate Pvt Ltd v MP Dave* (1975) 2 LLJ 499 (Raj) (DB), per Singhal CJ.

82 *Swadesamitran Ltd v Workmen* (1960) 1 LLJ 504 [LNIND 1960 SC 102] (SC), per Gajendragadkar J.

83 *Mohanlal v Mgmt of Bharat Electronics Ltd* 1981 Lab IC 806 [LNIND 1981 SC 244], 815 : AIR 1981 SC 1253 [LNIND 1981 SC 244]: (1981) 3 SCC 225 [LNIND 1981 SC 244] : (1981) II LLJ 70(SC), per Desai J. .

84 *Surendra Kumar Verma v CGIT-cum-LC* (1981) 1 LLJ 386 [LNIND 1980 SC 403], 389 : AIR 1981 SC 422 [LNIND 1980 SC 403]: (1980) 4 SCC 443 [LNIND 1980 SC 403] : 1980 Labic 1292(SC), per Chinnappa Reddy J.

85 *Bharat Heavy Electricals Ltd v RN Krishnarao* 1989 Lab IC 1914, 1921 (Guj) (DB), per Majumdar J.

86 *BN Elias & Co Pvt Ltd v Fifth IT* (1965) 2 LLJ 324 [LNIND 1964 CAL 170] : AIR 1965 Cal 166 [LNIND 1964 CAL 170] (Cal), per Basu J.

87 Cf *Workmen of Subong Tea Estate v STE* (1964) 1 LLJ 333 [LNIND 1963 SC 278]-34 : AIR 1967 SC 420 [LNIND 1963 SC 278]: [1964] 5 SCR 602 [LNIND 1963 SC 278] (SC), per Gajendragadkar J.

88 *Workmen of Straw Board Mfg Co Ltd v Mgmt* (1974) 1 LLJ 499 [LNIND 1974 SC 114] : AIR 1974 SC 1132 [LNIND 1974 SC 114]: (1974) 4 SCC 681 [LNIND 1974 SC 114] : 1974 Labic 730(SC), per Goswami J.

89 *Uttar Pradesh Electric Supply Co Ltd v HV Bowm* 1968 Lab IC 326 (All), per Satish Chandra J.

90 *CVA Hydross & Son v Joseph Sanjon* (1967) 1 LLJ 509 (Ker), per Mathew J.

91 *Chief Engineer (Irrigation) v N Natesan* (1973) 2 LLJ 446 [LNIND 1973 MAD 232]-47 (Mad) (DB), per Veeraswami CJ.

1 *Dinesh Sharma v State of Bihar* 1982 Lab IC (NOC) 125 (Pat) (DB).

2 *Mgmt of Mahadev Textile Mills v Additional IT* 1976 Lab IC 1284 -85 (Kant), per Shetty J.

3 *Mgmt of Penguine Textile Ltd v LC* 1975 Lab IC 526 (AP), per Chinnappa Reddy J.

4 *Tejbhan Singh v State of Rajashtan* 1982 Lab IC (NOC) 12 (Raj), per Sidhu J.

5 Rule of 76 and Form F of the Industrial Disputes (Central) Rules 1957.

6 *Auro Engineering Pvt Ltd Nasik v RV Gadeka* 1992 Lab IC 1364 -65 (Bom), per Srikrishna J.

7 *Workmen of Davangere Cotton Mills Ltd v IT* (1973) 1 LLJ 306 (Mys), (DB), per Narayana Pai CJ.

8 Refer to Notes and comments under cl (c)—Notice to the 'Appropriate Government'.

9 *Mgmt of Penguine Textile Ltd v LC* 1975 Lab IC 526 (AP), per Chinnappa Reddy J.

10 *Workmen of Davangere Cotton Mills Ltd v IT* (1973) 1 LLJ 306 (Mys) (DB), per Narayana Pai J.

11 *Parsuram Mishra v Union of India* 1979 Lab IC 776 (Pat) (DB), per Uday Sinha J.

12 *Ramesh v EE, Jayakwadi Project* (2000) 4 LLN 986, 991 (Bom), per Kochhar J.

13 *Parry's (Cal) Employees Union v Third IT* (2001) 2 LLN 743 (Cal), per Bhattacharya J.

14 *Pramod Jha v State of Bihar,* AIR 2003 SC 1872, per Lahoti J.

15 *State of Punjab v Jagir Singh,* AIR 2004 SC 4757 [LNIND 2004 SC 995], per Sinha J.

16 *Krishna Bahadur v Purna Theatre,* AIR 2004 SC 4282 [LNIND 2004 SC 849], per Sinha J.

17 *DGM, ONGC Ltd v Ilias Abdulrehman,* AIR 2005 SC 669, per Hegde J.

18 *Abaskar Constructions (P) Ltd v Devi Dutt,* (2015) 1 LLJ 57 : 216 (2015) DLT 486 : 2015 (145) FLR 122 (Del), per Vibhu Bakhru J.

19 *Mackinon Mackenzie and Co Ltd v ME Union* (2015) 2 LLJ 151 : AIR 2015 SC 1373 [LNIND 2015 SC 120]: (2015) 4 SCC 544 [LNIND 2015 SC 120] : 2015 Labic 1645(SC), per Gopala Gowda J.

20 *State of Karnataka v Uma Devi,* AIR 2006 SC 1806 : (2006) 4 SCC 1 : (2006) II LLJ 722(SC), per Balasubramanian J.

21 *Durgapur Casual Workers Union v Food Corporation of India,* [2015] 1 LLJ 160 : (2015) 5 SCC 786 [LNIND 2014 SC 1005] : 2015 Labic 771(SC).

22 *Anakapalle CAIS Ltd v Workmen,* AIR 1963 SC 1489 [LNIND 1962 SC 345]: (1962) II LLJ 621(SC), per Gajendragadkar J.

23 *Viney Kumar Majoo v State of Rajasthan* (1968) 2 LLJ 398, 405-06 (Raj), per Kan Singh J.

24 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 357 (SC), per Gajendragakar J.

25 *National Iron & Steel Co v State of West Bengal* (1961) 2 LLJ 23 (SC), [1967] 2 SCR 391 [LNIND 1967 SC 10], per Mitter J.

26 *Rabindra Kumar Prusty v Government of Orissa* 1985 Lab IC 1770, 1775 (Ori) (DB), per Mohapatra J.

27 *Superintending Engineer, UPP v Yavatmal Zilla Raste* (1993) 1 LLJ 789 [LNIND 1992 BOM 410] (Bom), per HD Patel J.

28 *Malkhan Singh v Union of India* (1981) 2 LLJ 174 [LNIND 1981 DEL 56], 181 (Del) (DB), per TPS Chawla J.

29 *Babaiji Charan Swain v Union of India* (1973) 2 LLJ 589 -90 (Ori) (DB), per GK Misra CJ.

30 *Palai CBE Union v Palai Central Bank Ltd* (1966) 1 LLJ 533 (Ker), (DB), per Raghavan J.

31 *KP Dass & Co Ltd v Howrah Zillah Loha Karkhana Mazdoor Congress* (1956) 1 LLJ 679 (LAT).

32 *Adaiswar Lal v LC* 1970 Lab IC 936, 940 (Del), Per Tatachari J.

33 Refer to notes under s 2(aaa).

34 *Ramakrishan Ram Nath v PO, LC* (1970) 2 LLJ 306 [LNIND 1970 SC 86], 314 (SC), per Mitter J.

35 *National Projects Construction Corpn Ltd v Workmen* 1970 Lab IC 907, 912 (Pat) (DB), per Misra J.

36 *Workers of KNSPR Weaving Factory v Factory* 10 FJR 442 (LAT).

37 *Ravikrishna Weaving Mills Pvt Ltd v State of Kerala* (1959) 2 LLJ 760 (Ker), per Vaidialingam J.

38 *Bhartiya Machine Tools Co Ltd v GS, Bharitya Mill Sramik Congress* [1956] LAC 409(LAT).

39 *Chandra Kumar Dutta v Frank Ross & Co Ltd* 1971 Lab IC 790 (Cal) (DB).

40 *Harendra Nath Bose v Second IT* (1958) 2 LLJ 198 [LNIND 1957 CAL 193] (Cal), per Sinha J.

41 *Purna Theatre v State of West Bengal,* 1997 Lab IC 997, 1004-05 (1998) 1 Cal LT 135(Cal), per Dutta J.

42 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 357 (SC), per Gajendragadkar J.

43 *Rajasthan State Road Transport Corpn v IT* 1985 Lab IC 480, 488 (Raj), per Siddhu J.

44 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 357 (SC), per Gajendragadkar J.

45 *Adaishwar Laal v LC* 1970 Lab IC 936, 941 (Del), per Tatachari J.

46 *Somu Kumar Chatterjee v District Signal TC Engineer* (1970) 2 LLJ 179 (Pat) (DB), per Jha J.

47 Ibid; *National Iron & Steel Co Ltd v State of West Bengal* (1967) 2 LLJ 23 [LNIND 1967 SC 10] (SC), per Mitter J.

48 *Workmen of Subong Tea Estate v STE* (1964) 1 LLJ 333 [LNIND 1963 SC 278], 341 (SC), per Gajendragadkar J.

49 *Industrial Chemical Ltd v LC* (1977) 2 LLJ 137 [LNIND 1976 MAD 318] (Mad) (DB), per Balasubramanyan J.

50 *State of Bombay v Hospital Mazdoor Sabha* (1960) 1 LLJ 251 [LNIND 1960 SC 19], 255 (SC), per Gajendragadkar J.

51 *Shanmugham v LC* (1963) 1 LLJ 798 (Mad), per Veeraswami J.

52 *Mohanlal v Mgmt of Bharat Electronics Ltd* 1981 Lab IC 806 [LNIND 1981 SC 244] : AIR 1981 SC 1253 [LNIND 1981 SC 244]: (1981) 3 SCC 225 [LNIND 1981 SC 244] : (1981) II LLJ 70(SC), per Desai J.

53 *Bharat Heavy Electricals Ltd v RV Krishnarao* 1989 Lab IC 1914, 1919 (Guj) (DB), per Majmudar J.

54 *Mckenzie Ltd, Madras v LC* (1960) 1 LLJ 334 [LNIND 1959 MAD 203] (Mad), per Rajagopala Ayyangar J.

55 *Meenambigai Motor Service v State of Madras* AIR 1957 Mad 298 [LNIND 1956 MAD 161], per Rajgopalan J.

56 *Delhi Transport Undertaking v IT* (1965) 1 LLJ 458 [LNIND 1964 SC 292] : AIR 1965 SC 1503 [LNIND 1964 SC 292]: [1965] 1 SCR 998 [LNIND 1964 SC 292] (SC), per Hidayatullah J.

57 *Indian Oxygen Ltd v Nararayan* [1968] 17 FLR 214 (Cal).

58 *EID Parry (I) Ltd v LC, Guntur* 1992 Lab IC 278, 282 (AP), per Quadri J.

59 *National Iron & Steel Co Ltd v State of West Bengal* (1967) 2 LLJ 23 [LNIND 1967 SC 10], 30 (SC), per Mitter J.

60 *Chandra Kumar Dutta v Frank Ross* 1971 Lab IC 790 (Cal) (DB), per BC Mitra J.

61 *State Bank of India v N Sundaramony* (1976) 1 LLJ 478 [LNIND 1976 SC 13] (SC), per Krishna Iyer J.

62 *Mgmtof Indian Compressors Makers Corpn v DD Gupta* 1977 Lab IC 694 (Del), per Rangarajan J.

63 *Mgmt of Industrial Chemicals Ltd, Madras v PO, LC* 1977 FLR 403 (Mad) (DB).

64 *Gurmail Singh v State of Punjab* (1991) 2 LLJ 76 [LNIND 1990 SC 618], 83 : AIR 1993 SC 1388 [LNIND 1990 SC 618]: (1991) 1 SCC 189 [LNIND 1990 SC 618] : 1993 Labic 428(SC), per S Ranganathan J.

65 *National Iron & Steel Co Ltd v Third IT* (1964) 1 LLJ 525 [LNIND 1963 CAL 116], 527 (Cal), per Banerjee J.

66 *Sushil Kumar Mathur v State of Rajasthan* (2001) 1 LLN 429 (Raj), per Sethna J.

67 *Brij Bhushan v IT-cum-LC* (1998) 4 LLN 470, 473-4 (P&H) (DB), per Singhvi J.

68 *Tannery and Footwear Corpn of India v Raj Kumar* (2001) 3 LLN 827 (SC).

69 *President. Zilla Parishad v PO, IT* (2002) 1 LLN 420 (P&H) (DB), per Sudhalkar J.

70 *Western India SM Mills v TN Mantri* (2001) 2 LLN 937 (Bom), per Kochar J.

71 *Khadim Ali v State of Rajasthan* (2001) 3 LLN 786 (Raj) (DB), per Madan J.

72 *Karnataka Electricity Board v Pyare Jan* (1999) 1 LLJ 715 (Kant), per Basavana Goud J.

73 *Calcutta Telephones v Rintu Bagchi* (2001) 3 LLN 1006 (Cal) (DB).

74 *Amalgamated Machines Corpn v PO, IT*, (2001) 3 LLN 1036 (Del), per Mudgal J.

75 *MECON (India) Ltd v State of Bihar* (2001) 3 LLN 1067 (Ohar), per Mukhopadhyaya J.

76 *SM Nilajkar v. Telecom District Manager* (2003) 2 LLJ 359 : AIR 2003 SC 3553 : (2003) 4 SCC 27 (SC), per RC Lahoti J.

77 *MP State Textile Corporation Lrd v Mahendra* AIR 2005 SC 2242 [LNIND 2005 SC 357]: (2005) 10 SCC 675 [LNIND 2005 SC 357] : (2005) II LLJ 560(SC), per Hegde J.

78 *DGM, ONGC Ltd v. Ilias Abdul Rehman* AIR 2005 SC 660 [LNIND 2004 SC 1263]: (2005) 2 SCC 183 [LNIND 2004 SC 1263] : (2005) I LLJ 554(SC), per Hegde J.

79 *General Manager, Haryana Roadways v Rudhan Singh* AIR 2005 SC 3966 [LNIND 2005 SC 528]: (2005) 5 SCC 591 [LNIND 2005 SC 528] : (2005) III LLJ 4(SC), *per* Mathur J.

80 *Allahabad Jal Sansthan v Daya Shankar Rai* AIR 2005 SC 2371 [LNIND 2005 SC 452], 2372 : (2005) 5 SCC 124 [LNIND 2005 SC 452] : (2005) II LLJ 847(SC), *per* Sinha J.

81 *Karnataka SRTC v SG Kotturappa* AIR 2005 SC 1933 [LNIND 2005 SC 221]: (2005) 3 SCC 409 [LNIND 2005 SC 221] : (2005) II LLJ 161(SC), per Sinha J.

82 *Punjab State Electricity Board v Darbara Singh* AIR 2006 SC 387 [LNIND 2005 SC 908]: (2006) 1 SCC 121 [LNIND 2005 SC 908] : (2006) I LLJ 289(SC), per Pasayat J.

83 *Municipal Council, Samrala v Sukhwinder Kaur* AIR 2006 SC 2905 [LNIND 2006 SC 594]: (2006) 6 SCC 516 [LNIND 2006 SC 594] : (2006) III LLJ 502(SC), per Sinha J.

84 *State of Punjab v Des Bandhu* AIR 2007 SC (supp) 17 : (2007) 9 SCC 39 : (2007) 2 LLJ 529 (SC), per Pasayat J.

85 *GM, BSNL v Mahesh Chand* AIR 2008 SC (supp) 1328, per Pasayat J.

86 *Ghaziabad Development Authority v Ashok Kumar* AIR 2008 SC (supp) 1384, per Sinha J.

87 *Rajasthan Lalit Kala Academy v Radhe Shyam* AIR 2009 SC (Supp) 919, per Jain J.

88 *Jagbir Singh v Haryana SAM Board* AIR 2009 SC 3004 [LNIND 2009 SC 1449]: (2009) 15 SCC 327 [LNIND 2009 SC 1449] : (2009) 15 SCC 327 [LNIND 2009 SC 1449], per Lodha J.

89 *Divl Mgr, New India Assurance Co Ltd v A Sankaralingam* AIR 2009 SC 309 [LNIND 2008 SC 1975]: (2008) 10 SCC 698 [LNIND 2008 SC 1975] : (2009) I LLJ 602(SC), per HS Bedi J.

90 *Ramesh Kumar v State of Haryana* AIR 2010 SC 683 [LNIND 2010 SC 60]: (2010) 2 SCC 543 [LNIND 2010 SC 60] : (2010) I LLJ 841(SC), per Sathasivam J.

91 *Nedungadi Bank Ltd v KP Madhavan Kutty* AIR 2000 SC 839 [LNIND 2000 SC 184]: (2000) 2 SCC 455 [LNIND 2000 SC 184] : (2000) I LLJ 561(SC).

92 *Sapan Kumar Pandit v UPSEB* AIR 2001 SC 2562 [LNIND 2001 SC 1433]: (2001) 6 SCC 222 [LNIND 2001 SC 1433] : 2001 Labic 2814: (2001) II LLJ 788(SC), per Thomas J.A.

93 *Kuldeep Singh v GM, Instrument Design DFC* AIR 2011 SC 455 [LNIND 2010 SC 1180]: (2010) 14 SCC 176 [LNIND 2010 SC 1180] : (2011) I LLJ 615(SC), per Sathasivam J.

94 *Devinder Singh v Municipal Council, Sanaur*, AIR 2011 SC 2532 [LNIND 2011 SC 406]: (2011) 6 SCC 584 [LNIND 2011 SC 406] : (2011) III LLJ 1(SC), per Singhvi J.

95 *State of Punjab v PO, IT*, (2015) 1 LLJ 64 : 2015 (1) SCT 773 (P&H), per Sandhawalia J.

96 *Vipin Kumar v. PO IT-cum-LC*, (2015) 1 LLJ 219 : 2014 LLR 1175 (P&H), per Sandhawalia J.

97 *Delhi Cloth & General Mills Ltd v Shambu Nath Mukherjee* CMP No 6170 of 1980 (SC), per Desai J.

1 *Indian Hume Pipe Co Ltd v Workmen* (1959) 2 LLJ 830 [LNIND 1959 SC 185] : AIR 1960 SC 251 [LNIND 1959 SC 185] (SC), per Gajendragadkar J.

2 *Jeevanlal (1929) Ltd. v. Appellate Authority under PGA & Ors.*, (1984) Lab IC 1458 : AIR 1984 SC 1842 [LNIND 1984 SC 238]: (1984) 4 SCC 356 [LNIND 1984 SC 238] : (1984) II LLJ 464(SC).

3 *Guru Jhmbheswar University v Dharam Pal*, AIR 2007 SC 1040 [LNIND 2007 SC 65]: (2007) 2 SCC 265 [LNIND 2007 SC 65] : (2007) I LLJ 1006(SC), per Mathur J.

4 *Annasaheb R Bhosle v Syndicate of NM Union* (1959) 1 LLJ 114 (Bom) (DB), per Mudholkar J.

5 *Tea Districts Labour Assn v Ex-Employees of Tea Districts' Labour Assn* (1960) 1 LLJ 802 [LNIND 1960 SC 68] : AIR 1960 SC 815 [LNIND 1960 SC 68]: [1960] 3 SCR 207 [LNIND 1960 SC 68] (SC), per Gajendragadkar J.

6 *Workmen of Subong Tea Estate v STE* (1964) 1 LLJ 333 [LNIND 1963 SC 278] : AIR 1967 SC 420 [LNIND 1963 SC 278]: [1964] 5 SCR 602 [LNIND 1963 SC 278] (SC), per Gajendragadkar J.

7 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 357 : AIR 1964 SC 1617 [LNIND 1963 SC 305]: [1964] 6 SCR 22 [LNIND 1963 SC 305] (SC), per Gajendragadkar J.

8 *Chopra Motors v Workmen* (1957) 2 LLJ 162 (LAT).

9 *South Arcot EDC Ltd v NK Mohammed Khan* (1970) 2 LLJ 44 [LNIND 1968 SC 445], 48 (SC), per Bhargava J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VA Lay-off and Retrenchment

[10][S. 25FF. Compensation to workmen in case of transfer of undertakings.—

Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Section 25-F, as if the workman had been retrenched:

Provided that nothing in this section shall apply to a workman in any case where there has been a change of employers by reason of the transfer, if—

(a) the service of the workman has not been interrupted by such transfer;

(b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and

(c) the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has been interrupted by the transfer].

LEGISLATION

The original ch VA as inserted by the Industrial Disputes (Amendment) Act 1953, did not contain s 25FF. The Industrial Disputes (Amendment) Act 1957 inserted s 25FF. This section was enacted as it was not clear from s 25F whether the transfer, reconstitution and amalgamation of companies would be a ground for a claim for retrenchment compensation even if the service of the workman is continued without interruption and the terms and conditions of his service remain unaltered. This section, therefore, was substituted by present s 25FF along with s 25FFF by the Industrial Disputes (Amendment) Act 1957. This amendment was necessitated by the Supreme Court's decision in the case of *Hariprasad.*[11] In *Barsi Light Rly*, it was held that no retrenchment compensation under s 25F was payable, on the construction of the term 'retrenchment' in s 2(oo) to 'workmen whose services were terminated by an employer on a real and bona fide closure of business or when the termination of service occurred as a result of transfer of ownership...would be payable to workmen whose services are terminated on account of transfer or closure of an undertaking'. However, in the case of transfer of an undertaking, if the workman is re-employed on terms and conditions which are not less favourable to him, he will not be entitled to compensation. Though, the amendment brings about a radical change in law in respect of closure of a business, with respect to transfer of ownership, at the best the law as it existed prior to the amendment has been classified and there is no radical change in this respect.[12] By virtue of s 25F, this section has been expressly made applicable to all undertakings whether they fell within ch VA or ch VB. This is the only section which deals with compensation to all workmen in case of transfer of undertakings in the entire Act. The legislature, therefore, has taken care to make this section applicable to the undertakings governed by ch VB as well. This section contains a fiction for a limited purpose and it refers to s 25F of the Act expressly. In *Hariprasad*, the court maintained a distinction between the termination of employment arising on transfer of undertaking and closure of undertaking. By enacting ch VB, the legislature has not wiped out that distinction. The fact that two different sections are kept in the statute book simultaneously, one dealing with transfer and

the other with closure, goes to show that transfer and closure are not one and the same.[13]

PRE-CONDITIONS FOR ENTITLEMENT OF COMPENSATION ON TRANSFER OF UNDERTAKING

This section entitles a workman to notice or wages in lieu of notice and compensation in case of transfer of the ownership or management of an undertaking from one employer to another.[14] The compensation payable under this provision is determinable in accordance with the provisions of s 25F, 'as if the workmen had been retrenched'. However, before a workman is entitled to compensation under this section, the following conditions must be cumulatively satisfied:

(i) There should be a transfer of ownership of management of the undertaking from one employer to another by agreement, or operation of law;

(ii) the undertaking should be an industry within the meaning of s 2(j) ;

(iii) the workman claiming compensation should be a workman within the meaning of s 2(s) ; and

(iv) the workman should have put in minimum one year of continuous service within the meaning of s 25B immediately before the transfer of the ownership or management of the undertaking.

PROVISO: AVOIDANCE OF NOTICE AND COMPENSATION

The scheme of the proviso emphasizes the policy that if the three conditions specified in it are satisfied, there is no termination of service either in fact or in law, and so, there is no scope for payment of any compensation.[15] In other words, unless the transfer falls under the proviso, the employees of the transferred concern are entitled to claim compensation against the transferor and they cannot make any claim for re-employment against the transferee of the undertaking. The effect of s 25FF, as it at present stands, is that if an industrial undertaking is transferred, the employees of such transferred undertaking should be entitled to compensation; unless, of course, the continuity of their service or employment is not disturbed and that can happen if the transfer satisfies the three conditions of the proviso. The three conditions laid down in the proviso must cumulatively exist in which case the provisions of s 25FF will not apply, *i.e.*, the employer will not be liable to give notice and compensation on transfer of the ownership or management of the undertaking. Thus, each one of the conditions laid down in the proviso is to be satisfied before it can be held that the right conferred by the principal clause does not accrue to the workman.[16] These conditions are:

(i) the service of the workman has not been interrupted by such transfer;

(ii) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to him than those applicable to him immediately before the transfer;[17] and

(iii) the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer.[18]

The application of the requirements of the proviso is illustrated in the decision of the Supreme Court in *RC Sharma*, where it was held that on transfer of an undertaking from one employer to another, the workmen will be entitled only to such benefits to which they were entitled at the time of the transfer of the undertaking and not to the benefits to which the other employees of the previous employer become entitled in the subsequent years.[19] A claim under cl (b) of the proviso can arise only if terms or conditions of employment are varied to the prejudice of the workman on his re-employment by the transferee undertaking.[20] The Kerala High Court in *Thomas Paul*, held that if the termination of the services of a workman on the eve of transfer by the transferor, is mala fide or an act of victimisation, the termination will be illegal and inoperative. The workman will be deemed to have continued in service and will be entitled to claim continuity of service with the transferor employer and shall be entitled to claim all the rights and benefits of employment in his service after the transfer.[21]

TRANSFER OF OWNERSHIP OF MANAGEMENT

The first and foremost condition, for the application of s 25FF, is that the ownership or management of the undertaking is transferred from the employer in relation to that undertaking to a new employer.[22] The transfer may be effected by agreement or by operation of law. The section provides that in all cases which do not fall under the proviso to the section, on a transfer of ownership or management of an industrial undertaking, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer, shall be entitled to notice and compensation in accordance with the provisions of s 25F, as if the workman had been retrenched. In other words, cases of transfer not covered by the proviso to the section attract the provisions of s 25F and that proceeds on the basis that the

transfer in question brings about retrenchment of the employees to which the section applies. It is on the basis of this fiction that the employees of a transferred undertaking become entitled to compensation and notice.[23] The reference to s 25F in s 25FF is, however, only for the limited purpose of calculating the compensation payable to workmen under this section. The only claim that the workmen of a transferred establishment can legitimately make is a claim for compensation against their employers. No claim can be made against the transferee of the undertaking when the workmen have received retrenchment compensation from their *quondum* employer, they cannot claim re-employment from the transferee.[24] Some aspects of the practical application of the provisions of this section have been illustrated in the undernoted cases.[25]

Before s 25FF comes into operation, the ownership or management of an undertaking should have been transferred. The provisions of this section will, however, apply only to a case of bona fide and genuine transfer. They will not at all be attracted to a fictitious or benami transfer.[26] Normally this would mean that the ownership or management of the entire undertaking should be transferred. If an undertaking conducts one business, it would normally be difficult to imagine that its ownership or management can be partially transferred to invoke application of s 25FF. A business conducted by an industrial undertaking would ordinarily be an integrated business and though it may consist of different branches or departments, they would generally be inter-related to each other so as to constitute one whole business. In such a case, s 25FF would not apply if a transfer is made in regard to a department or a branch of the business run by the undertaking and the workmen would be entitled to contend that such a partial transfer is outside the scope of s 25FF. However, the fact that one undertaking runs several industries or businesses which are distinct and separate, would not necessarily exclude the application of s 25FF solely on the ground that all the businesses or industries which are run by the said undertaking have not been transferred. The distinct and separate businesses would normally be run on the basis that they are distinct and separate; employees would be separately employed in respect of all the said businesses and their terms and conditions of service may vary according to the character of the business in question. The organisation of the business will indicate clearly the distinctive and separate character of different businesses. In such a case, the transfer by the undertaking of one of its businesses may attract the application of s 25 FF.[27]

In *Mettur Beardsell*, a company entered into partnership with two of its own divisions and the employees working in such divisions. Later on, the company retired from partnership. Even after retirement of the company from partnership, it paid salaries to the employees on account and in the acquittance slip of the company. A single judge of the Madras High Court held that the consent of the employees for transfer was not necessary for entering into partnership because in law there would be no transfer of the workers to the transferee concerned and the relationship of master and servant between the company and the workmen did not cease and there was no severance of the said relationship. But when the company withdrew from the firm, the consent of the employees was essential as transfer of the workmen from one company to the firm could not have been effected except with the consent of the workers, express or implied. The fact that even subsequent to the withdrawal of the company from the firm, the workers were paid for some time by the company would show that the so called transfer was only a myth and not a fact and reality.[28]The change of constitution of a partnership firm or its dissolution to convert it into a sole proprietorship would not attract the provisions of s 25FF of the Act.[29] In transfer of an undertaking, there should be the identity of business, *i.e.* the same business which was carried on by the transferor must be carried on by the transferee.[30] On the implications of s 25FF for the transferor and the transferee as well as the workmen, in *Mettur Beardsell*, Pasayat J (for self and Chatterjee J) rightly observed:

> .. . the first and foremost condition for the application of Section 25-FF is that the ownership or management of an undertaking is transferred from the employer in relation to that undertaking to a new employer. What the section contemplates is that either the ownership or the management of an undertaking should be transferred; normally this would mean that the ownership or the management of the entire undertaking should be transferred before Section 25FF comes into operation. If an undertaking conducts one business, it would normally be difficult to imagine that its ownership or management can be partially transferred to invoke the application of Section 25-FF. A business conducted by an industries undertaking would ordinarily be an integrated business and though it may consist of different branches or departments they would generally be interrelated with each other so as to constitute one whole business. *In such a case, Section 25-FF would not apply if a transfer is made in regard to a department or branch of the business run by the undertaking and the workmen would be entitled to contend that such a partial transfer is outside the scope of Section 25-FF of the Act*.. .. It may be that *one undertaking may run several industries or businesses which are distinct and separate. In such a case, the transfer of one distinct and separate business may involve the application of Section 25-FF*. The fact that one undertaking runs these businesses could not necessarily exclude the application of Section 25-FF solely on the ground that all the businesses or industries run by the said undertaking have not been transferred. It would be clear that in all cases of this character the distinct and separate businesses would normally be run on the basis that they are distinct and separate, employees would be separately employed in respect of all the said businesses and their terms and conditions of service may vary according to the character of the business in question. In such a case it would not be usual to have one muster-roll for all the employees and the organization of employment would indicate clearly the distinctive and separate character of the different businesses. If that be so, then the transfer by the undertaking of one of its businesses may attract the application of Section 25-FF of the Act.[31] (Paras 17 &

18) (Italics supplied).

PAYMENT OF COMPENSATION

This section has been enacted to safeguard the rights of workmen who would not be employed by the new concern, and would be regarded as retrenched workers and will be entitled to compensation in the manner provided for, and it is immaterial whether the compensation is to be paid by the transferor or transferee.[32] This section declares the rights of the workmen of an undertaking which is transferred. The right is to receive compensation, as if the workmen are retrenched under s 25F and is available only against the owners of the undertaking, that is to say, the transferor of the undertaking. The liability of the transferor to pay compensation does not arise only when (i) there has been a change of employers by reason of the transfer and (ii) the three sub cll (a), (b) and (c) of the proviso of that section come into play. Each one of the three conditions in cll (a), (b) and (c) is to be satisfied before it can be held that the right conferred by the principal clause does not accrue to the workmen.[33] The language of the principal clause makes it clear that if the right of retrenchment compensation accrues to the workmen under it, it must be a right to receive that compensation from the previous employer who was the owner on the date of the transfer. This clause lays down that every workman mentioned therein shall be entitled to notice and compensation in accordance with the provisions of s 25F, as if the workman had been retrenched. It is the previous employer who is liable to give the notice in accordance with the provisions of s 25F of the Act and the claim for compensation under s 25FF too accrues to the workmen against the previous employer under whom they were employed until the date of transfer.[34]

The first part of the section postulates that on transfer of the ownership or management of an undertaking, the employment of workmen engaged by that undertaking comes to an end, and it provides for the payment of compensation to the said workmen because of the termination of their services, provided, of course, they satisfy the test of the length of the service prescribed by the section. This part further provides the manner in which and the extent to which the compensation has to be paid. Workmen, therefore, shall be entitled to notice and compensation in accordance with the provisions of s 25F, 'as if they had been retrenched'. The last clause clearly brings out the position that the termination of the services of the employees does not in law amount to retrenchment. The words 'as if he had been retrenched mark out the legal distinction between retrenchment defined in s 2(oo) and termination of service consequent upon transfer with which it deals. In other words, the section provides that though termination of service on transfer may not be retrenchment, by fiction of law, the workmen concerned are entitled to compensation as if the said termination was retrenchment.[35] A claim to compensation under this section arises on transfer of the undertaking. Every workman, who has been in the previous employer's service for not less than one year immediately before the transfer, is entitled to notice and compensation in accordance with the provisions of s 25F, 'as if he had been retrenched'. This provision of law presumes that on transfer, retrenchment takes place, unless the conditions mentioned in the proviso are satisfied. For this reason, s 25FF, uses the phrase as if the workman had been retrenched'. In order to entertain a claim for compensation under s 25FF, it is not necessary that the employer must terminate the services of the workmen.[36] It is enough that the transfer has taken place. Unlike s 25F, s 25FF does not contain any conditions precedent and transfer can validly take place without notice or payment of a month's wages in lieu thereof or payment of compensation. The words 'in accordance with the provisions of s 25F ' in s 25FF are used only for quantifying the compensation in case of transfer of an undertaking and are not used for laying down any time within which the employer must pay the compensation.[37]

In *Akhil Bharatiya Koyla Kamgar Union*, the Supreme Court held that the obligation of employer as contemplated under s 25H is not affected by s 9 of the Coal Mines (Nationalisation) Act 1973; that the employees were not a liability as yet in our country so as to fall within the ambit of s 9 ; and that, upon the transfer of business, the rights and obligations of old management continue vis-à-vis the new management.[38]Section 25FF merely safeguards the interest of workmen in the event of a transfer of the undertaking in which they were employed. The only grievance of the petitioner was that the Section did not require the consent of the workmen for the transfer. The petitioners' prayer to declare the s 25FF as unconstitutional for a non-existent clause therein is meaningless. The consequential relief could not, therefore, be granted.[39] In *New Horizon*, the facts were: the assets of New Horizon Sugar Mills were seized and sold by auction under the provisions of the Securitisation of Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (SARFA ESI Act 2002) by Indian Bank, a secured creditor. EID Parry was the auction purchaser of the assets. A single judge of Madras High Court held that the workmen of the New Horizon will be entitled to the benefits under s 25FF as against the employer - New Horizon and EID Parry. In appeal, the Supreme Court following the ratio of *Anakapalle CAIS* (supra) held that the liability to pay the sums due to the employees rests with Indian Bank and the New Horizon Sugar Mills, and not with EID Parry.[40]

In *Texmaco*, the dispute fell within the twilight zone of ID Act and Payment of Gratuity Act. The facts of the case were: the respondent workman was working in Oriental Machinery and Civil Construction Ltd. (for short OMCC), which declared a lockout due to certain labour unrest and was thereafter closed in January 1979. Admittedly, no compensation

was paid to the workmen by the OMCC at the time of closure in terms of s 25FFF. Subsequently, at the instance of the Government of West Bengal, negotiations took place and Texmaco took over OMCC. A tripartite agreement was executed by and between Texmaco, OMCC and the workmen of OMCC represented by Oriental Electric & Engineering Company Workers Union before the conciliation officer. The agreement provided for fresh employment of the permanent employees of OMCC, who were on its rolls as on the date of closure, in the services of Texmaco. As regard the liability of payment of gratuity to the concerned workmen it was agreed that such liability till the date of closure notice would be taken over by the Texmaco, the amount in relation whereto, however, would be payable to the concerned workmen as and when they reach the age of superannuation together with the amount of gratuity which would become due and payable by it for their fresh employment. A deed of transfer of the said undertaking was executed by the parties on 01 September 1983 although the possession thereof, as indicated hereinbefore, had been handed over in March, 1983. The respondent-employee retired on 03 January 1989. The company paid his gratuity dues for his services with the OMCC from February 11, up to the date of closure as also for the period of his service with the petitioner from 03 January 1989. The respondent No. 3 being not satisfied, filed an application before the Controlling Authority in terms of the provision of the said Act praying therein that he may be held to be in continuous service and, thus, is entitled to the gratuity for the entire period of his service. The said application was allowed by the Controlling Authority. Quashing the orders of Appellate and Controlling Authorities, Sinha J (for self and PK Ray J) of the Calcutta High Court observed:

> It may be true that no amount of compensation had been paid to the concerned workman by the erstwhile employer before declaring closure of its unit as is required under the proviso appended to section 25-FFF. Such non-compliance of the provision of the Act would make the erstwhile employer liable and not the petitioner. For the purpose of interpretation of the provision of the said Act all the provisions thereof must be read in their entirety.. .. By reason of the aforementioned settlement the third respondent agreed to become re-employed. Such re-employment was also not automatic. The very fact that the third respondent had to be re-employed upon fulfilling the criteria as contained in the settlement, the relationship of employer and employee between him and his erstwhile employer ceased to have any effect. The terms and conditions of his employment under the petitioner thus continued afresh.. . For the purpose of this case, we would assume that the closure of the Industrial Undertaking was illegal. However, as noticed hereinbefore, even if an Industrial Dispute was raised the same could have been resolved by reason of a settlement. Such settlement having been arrived at and the same being binding on all the workmen, the question of the matter being. reopened and the instance of the controlling authority does not arise.. .. Even in a case of this nature the controlling authority would have no jurisdiction to arrive at a conclusion that the settlement is illegal. The findings of the authority under the said Act have a wide repercussions. It may be true that the said Act contains a *non-obstante* clause but so does Industrial Disputes Act.[41] (Paras 20, 26, 28 & 29)

In *Karnataka State CM Federation*, the facts disclosed that Federation closed one of its ginning units employing less than 100 workmen and paid compensation as required under s 25FFA read with s 25FFF of the Act. The workmen filed a petition under s 33C(2) claiming certain sums, which were allowed by the labour court, which amounts were sought to be recovered as arrears of land revenue. Quashing the orders of the labour court, a single judge of Karnataka High Court held that (i) s 33C would be applicable if only there is a breach of the provisions of ch VA or VB, and (ii) the right claimed by a workman is a pre-existing right, and not one whose very existence is in dispute; and that, in view of the fact that neither of the two circumstances exist in this case, the labour court under s 33C was not competent to entertain the application. The court further observed that the dispute raised in the case could only be resolved before the Registrar of Cooperative Societies, who was the competent authority.[42]

SECTION 25FF DOES NOT VIOLATE ART 14 OF THE CONSTITUTION

A single judge of the Punjab and Haryana High Court, dealing with the question whether s 25FF violates Art 14 of the Constitution on the ground that in case of voluntary transfer of ownership or management of an undertaking by an agreement, it is open to the parties to the contract, to stipulate in respect of the employees of the undertaking transferred but no such right has been allowed to the parties when the transfer of the undertaking is by the operation of law; held that there is no discrimination. Moreover, the two modes of transfer—one by mutual agreement, the other by operation of law-cannot be equated with each other. In spite of that, s 25FF makes the same provision with regard to the payment of retrenchment compensation to the workmen in both cases. There is, thus, no question of discrimination or denial of equality before law as guaranteed by Art 14 of the Constitution. The section, therefore, is a perfectly valid piece of legislation.[43]

JUDICIAL REVIEW

Before insertion of this section, a workman of the predecessor had no right to claim re-employment by the successor-in-business except in exceptional circumstances. Even where available, that claim was not a matter of absolute right but was

one of discretion, to be judicially exercised, having regard to all the circumstances. An industrial tribunal, while investigating such a claim, had to carefully consider all the aspects of the matter. It had to examine whether the refusal to give re-employment was capricious and industrially unjustified on the part of the successor-in-business or whether he could show cause for such refusal on reasonable and bona fide grounds such as want of work, inability of the applicant to carry out the available work efficiently, late receipt of the application for re-employment in view of the prior commitments or any other cause which in the opinion of the tribunal made it unreasonable to force the successor-in-interest to give re-employment to all or any of the employees of the old concern. After the insertion of this section, the discretion given to the adjudicatory authorities is no longer generally available. However, in a case where one or both of the parties are state instrumentality, having obligations under the Constitution, the writ court has a right of judicial review over all aspects of transfer of the undertaking. It is open to the court in such a situation to give appropriate directions to ensure that no injustice results from the change-over. In *Gurmail Singh* (supra), the parties to the transfer were a state on the one hand and fully owned state corporation on the other. In this situation, the Supreme Court examined the terms and conditions of the transfer and gave appropriate directions to meet the ends of the justice and directed the state Government and the corporation to carry out its directions and it also gave liberty to the corporation to amend its rules and regulations, if necessary, to give effect to the same.

In *Goodacre*, the Madras High Court held that where the transfer of an undertaking was bona fide and the statutory provisions under s 25FF had been complied with, the workmen of transferor-company could have no claim except the right to compensation.[44] In *Karnataka Power*, the facts were: During the pendency of an industrial dispute relating to the non-employment of 65 workmen, the company was taken over by the State Electricity Board. Neither the transferor-company nor the transferee-Board allowed the workmen to join duty, when they reported for work pursuant to an award passed by the tribunal directing their reinstatement. The Supreme Court held that the State Electricity Board being the successor-in-interest was bound to reinstate the workmen. The provisions of s 25FF cannot be read to mean that the existing employees of transferor-company are under a compulsion to accept transfer to a new employer.[45] Even upon the transfer of ownership of an undertaking from one owner to another, the existing employees cannot be compelled to accept employment with the new employer; and that in the event of a transfer of the undertaking, the employees would be entitled to retrenchment compensation as stipulated in ss 25FF read with s 25F.[46] In *E Hill and Co*, the facts were: A workman, who was transferred from Khamariah to another unit at Bisunderpur, challenged the said transfer which dispute was referred to the labour court. The workman, however, joined duty at Bisunderpur. Thereafter, the said unit at Bisunderpur was closed and he was paid compensation in accordance with the provisions of ch VA of the Industrial Disputes Act, which he accepted. In the meantime, the labour court passed an award holding that the transfer was invalid, which was upheld by the High Court. In special leave, a three-judge Bench of the Supreme Court quashed the order of High Court as also the award of labour court, and held that the fact that the workman has joined at Bisunderpur rendered his earlier challenge of the transfer infructuous, because by his subsequent conduct he accepted the transfer and also accepted the terminal benefits paid on the closure of the unit at Bisunderpur.[47]

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10 S 25FF and s 25FFF subs by Act 18 of 1957, s 3, for s 25FF (wref 28-11-1956).

11 *Hariprasad Shivshanker Shukla v AD Divikar* AIR 1957 SC 121 [LNIND 1956 SC 104], per SK Das J.

12 *Barsi Light Rly Co Ltd v KN Joglekar* (1957) 1 LLJ 243 [LNIND 1956 SC 104] (SC), per SK Das J.

13 *Workmen of Deccan Sugar v Nava Bharat Ferro Alloys Ltd* (1993) 1 LLJ 1211 [LNIND 1992 MAD 500], 1224 (Mad), per Srinivasan J.

14 *RS Madho Ram & Sons (Agencies) Pvt Ltd v Workmen* (1964) 1 LLJ 366 [LNIND 1963 SC 252] (SC), per Gajendragadkar J.

15 *Anakapalle CAIS v Workmen* (1962) 2 LLJ 621 [LNIND 1962 SC 345], 629 (SC), per Gajendragadkar J.

16 *South Arcot Electricity Distribution Co Ltd v Mohammed Khan* (1970) 2 LLJ 44 [LNIND 1968 SC 445], 48 (SC), per Bhargava J.

17 *South Arcot Electricity Distribution Co Ltd v NK Mohammed Khan* (1970) 2 LLJ 44 [LNIND 1968 SC 445], 48 (SC), per Bhargava J.

18 *Surajmal Mehta v Authority Under Payment of Wages Act* (1965) 1 LLJ 274 : AIR 1964 MP 312 [LNIND 1964 MP 40] (MP) (DB), per Dixit CJ.

19 *RC Sharma v CS, Government of MP* (1973) 2 LLJ 147 [LNIND 1973 SC 158] (SC), per Grover J.

20 *Choudhary Sao v Union of India* 1983 Lab IC 1224 (Pat) (DB), per PS Mishra J.

21 *Thomas Paul v IT* 1978 Lab IC 207 (Ker) (DB), per Gopalan Nambiyar CJ.

22 *RS Madhoram & Sons (Agencies) Pvt Ltd v Workmen* (1964) 1 LLJ 366 [LNIND 1963 SC 252] (SC), per Gajendragadkar J.

23 *Workmen of Subong Tea Estate v STE* (1964) 1 LLJ 333 [LNIND 1963 SC 278], 339 (SC), per Gajendragadkar J.

24 *Anakapalle Co-op Agricultural & Industrial Society v Workmen* (1962) 2 LLJ 621 [LNIND 1962 SC 345]-22 (SC), per Gajendragadkar J.

25 *Workmen of Subong Tea Estate v STE* (1964) 1 LLJ 333 [LNIND 1963 SC 278], 339-40 (SC), per Gajendragadkar J.

26 *Gurmail Singh v State of Punjab* (1991) 2 LLJ 76 [LNIND 1990 SC 618], 89 (SC), per S Ranganathan J.

27 *RS Madhoram & Sons (Agencies) Pvt Ltd v Workmen* (1964) 1 LLJ 366 [LNIND 1963 SC 252] (SC), per Gajendragadkar J.

28 *Workmen of Mettur Beardsell Ltd v Mgmt* (1992) 1 LLJ 1, 8 (Mad), per Raju J.

29 *Alex A Apcar (Jr) & Co v MN Gan* AIR 1960 Cal 14 [LNIND 1959 CAL 89], per PB Mukharji J.

30 *NJ Chavan v PD Sawarkar* (1958) 1 LLJ 36 (Bora) (DB), per Tendolkar J.

31 *Mgmt, Mettur Beardsell Ltd. v Workmen*, AIR 2006 SC 2056 [LNIND 2006 SC 311]: (2006) 9 SCC 488 [LNIND 2006 SC 311] : (2006) II LLJ 899(SC), per Pasayat J.

32 *Tirupathi MTW Union v Venkateswara Bus Union* 1968 Lab IC 1534 -35 (AP), per Seshachalapathi J.

33 *Central Inland Water Transport Corpn v Workmen* 1974 Lab IC 1018, 1024 (SC), per Palekar J.

34 *South Arcot Electricity Distribution Co Ltd v NK Mohd Khan* (1970) 2 LLJ 44 [LNIND 1968 SC 445], 48 : (1969) 1 SCC 192 [LNIND 1968 SC 445] : [1969] 2 SCR 902 [LNIND 1968 SC 445] (SC), per Bhargava J.

35 *Anakapalle CAIS v Workmen* (1962) 2 LLJ 621 [LNIND 1962 SC 345], 629 : AIR 1963 SC 1489 [LNIND 1962 SC 345] (SC), per Gajendragadkar J.

36 *Uttar Pradesh Electric Supply Corpn Ltd v HV Bawen* 1968 Lab IC 326, 330 (All), per Satish Chandra J.

37 *Payment of Wages Inspector v Surajmal Mehta* (1969) 1 LLJ 762 [LNIND 1968 SC 372], 766 (SC), per Shelat J.

38 *Akhil Bharatiya KK Union v Mgmt of Industry Colliery* (2001) 1 LLJ 1400 [LNIND 2001 SC 749] : AIR 2001 SC 1994 [LNIND 2001 SC 749]: (2001) 4 SCC 55 (SC), per Rajendra Babu J.

39 *Indian Oxygen Employees Union v Union of India* (2003) 2 LLJ 222 : 2003 (97) FLR 100 (Mad), per Kanagaraj.

40 *New Horizon Sugar Mills Ltd v ASMS Welfare Union* (2010) 1 LLJ 1 [LNIND 2009 SC 1754] (SC).

41 *Texmaco Ltd v Appellate Authority* (2003) 2 LLJ 567 : 107 CWN 383 (Cal), per Satyabrata Sinha J.

42 *Karnataka SCM Federation Ltd v Dharwad DE Assn*, (2008) 2 LLJ 193 : 2008 (1) Karlj 187 [LNIND 2007 KANT 339] (Kant).

43 *Mgmt of Ambala Cantt. ESC Ltd v Workmen* 1971 Lab IC 854, 857 (P&H), per Tuli J.

44 *Mgmt of W Goodacre & Sons Ltd v Neelakandan K* (1998) 1 LLJ 1038 [LNIND 1997 MAD 790] (Mad) (DB), per Lakshmanan J.

45 *Karnataka Power Transmission Corpn Ltd v AEC Ltd* (2001) 3 LLN 705 (SC), per Balakrishnan J.

46 *Ralli GE Union v Rallis India Ltd* (2002) 1 LLN 721 (Bom), per Dr Chandrachud J.

47 *E Hill and Co Ltd v State of Uttar Pradesh* (2002) 3 LLN 766 (SC).

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VA Lay-off and Retrenchment

[48][S. 25FFA. Sixty days' notice to be given of intention to close down any undertaking.—

(1) An employer who intends to close down an undertaking shall serve, at least sixty days before the date on which the intended closure is to become effective, a notice, in the prescribed manner, on the appropriate Government stating clearly the reasons for the intended closure of the undertaking:

Provided that nothing in this section shall apply to—

(a) an undertaking in which—

(i) less than fifty workmen are employed, or

(ii) less than fifty workmen were employed on an average per working day in the preceding twelve months,

(b) an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work or project.

(2) Notwithstanding anything contained in sub-section (1), the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like it is necessary so to do, by order, direct that provisions of sub-section (1) shall not apply in relation to such undertaking for such period as may be specified in the Order].

OBJECT OF THE SECTION

Normally every businessman would like to continue to run his business. The right to carry on business has been guaranteed to every citizen by art 19(1)(g) of the Constitution as a fundamental right. But when faced with stark situations such as recurring losses, financial difficulties caused by financial drains and stains from various sources, *i.e.*, non-availability of essential raw materials, stringency of laws, unsatisfactory state of industrial relations making it difficult to sustain production *etc.*, it may become imperative for the employer to close down the business. The closure of industrial undertakings naturally entails loss of production and unemployment of large number of workmen. This problem became acute in the state of West Bengal. Consequently, a President's Act-The Industrial Disputes (West Bengal) Amendment Act 1971—was enacted on the 28 August 1971, providing that an employer who intended to close down an undertaking should serve at least 60 day's notice on the state Government stating clearly the reasons for the intended closure of the undertaking. Since the problem of closure is not peculiar to the state of West Bengal alone, but was found in varying degrees in other states as well, the Central Government considered it desirable to promote a Central legislation on the subject. The matter was, therefore, referred to the Indian labour conference which generally indorsed the proposal for Central legislation after consideration of the question in its meeting on 22 and 23 October 1971.

SUB-SECTION (1): NOTICE OF CLOSURE

(i) Requirements of Notice

This provision requires an employer who intends to close down an undertaking to serve a notice on the appropriate Government. 'the notice should comply with the following requirements: (a) It should be in the prescribed manner; (b) It should state clearly the reasons for the intended closure; and (c) it should be served on the appropriate Government at least 60 days before the date on which the intended closure is to become effective. In *Walford Transport*, the Calcutta High Court held that the object of s 25FFA requiring the employer to give 60 days' notice, to the Government, of his intention to close down his undertaking is to prevent sudden closure and to give an opportunity to the Government to consider whether it should take any measure in respect of such intended closure in accordance with the provisions of the Act such as making a reference.[49]

(ii) Closure

The connotation of the expression 'closure' and its various aspects have been discussed under s 25FFF(1), caption 'closure'.

(iii) Effect of the Section

The right to close an undertaking is implicit in the fundamental right of an employer to carry on his business guaranteed by Art 19(1)(g) of the Constitution.[50] However, the question arises whether the failure of the employer to comply with these requirements makes the closure illegal or *non est*? The answer appears to be in the negative because from the language of the section, no prohibition of the closure is discernible. If law does not prohibit closure, the closure does not become illegal. A single judge of the Bombay High Court in *Maharashtra GK Union,* has taken the view that a closure effected without complying with the requirements with s 25FFA is illegal and invalid. The learned judge has based this view on the fact that there is a penalty provided in s 30A which is a pointer to the closure being rendered invalid and illegal by non-compliance of this section.[51] A similar view had been taken by the Gujarat High Court in *DS Vasavada.*[52]Both the decisions rendered by Bombay and Gujarat High Courts are wrong and do not reflect the true import of the provision. Sub-s (1) is somewhat analogous to the provisions in cl (c) of s 25F, which also requires the employer to serve a notice, in the prescribed manner on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the official gazette, before retrenching any workman employed in any industry carried on by him. The breach of this provision also entails the penalty of imprisonment for a term extending upto six months or fine extending upto Rs 1,000 or both under s 31(1) of the Act. In *Bombay Union of Journalists,* the Supreme Court held that cl (c) of s 25F is not a condition precedent to valid retrenchment though its breach no doubt would be a serious matter.[53]

(iv) Constitutional Validity of the Section

As far as Art 19(1)(g) is concerned, it is not available to corporate bodies as they are not citizens within the meaning of this article. This article is available to non-corporate bodies, partnership firms or individual employers.[54] The constitutional validity of this provision vis-a-vis non-corporate bodies, partnership firms or individual firms against Art 19(1)(g) is a highly debatable question and is not free from doubt. Even in case of corporate bodies, their shareholders and directors can invoke the breach of their right under Art 19(1)(g) of the Constitution.[55] However, in view of the risks involved, the restriction does not appear to be reasonable. Likewise, the provision also appears to be arbitrary. In cases of partial closure, the arbitrariness is more pronounced as there are no guidelines for deciding as to what is an 'undertaking' and who is to decide it?

(v) Proviso

The proviso exempts the following types of undertakings from the application of the requirements envisaged by sub-s (1):

(1) an undertaking in which:

  (a) less than 50 workmen are employed, or

  (b) less than 50 workmen were employed on an average per working day in the preceding 12 months; and

(2) an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work or project.

SUB-SECTION (2): POWER TO EXEMPT

This sub-section begins with the non obstante clause. It empowers the appropriate Government, notwithstanding anything contained in sub-s (1), to direct that the provisions of that sub-section shall not apply in relation to any particular undertaking. The Government may also specify the period of time in the order for which the undertaking will remain exempt. However, before making an order, the appropriate Government has to be satisfied that it is necessary to exempt the undertaking from the application of the requirement of notice owing to some exceptional circumstances, such as, accident in the undertaking or death of the employer or the like. The words 'or the like' refer to 'exceptional circumstances' and have to be construed *ejusdem generis* with such other circumstances. Though the order of the appropriate Government under this provision appears to be of administrative nature, it has to be made by the Government after applying its mind to the relevant material before it and bona fide.

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48 Ins by Act 32 of 1972, s 2 (wef 14-6-1972).

49 *Walford Transport Ltd v State of West Bengal* 1979 Lab IC 70, 72 (Cal) (DB), per Mookerjee J.

50 *Hathising Manufacturing Co Ltd v Union of India* (1960) 2 LLJ 1 [LNIND 1960 SC 122], 7, 12 (SC), per Shah J.

51 *Maharashtra GK Union v Glass Containers Pvt Ltd* (1983) 1 LLJ 326, 329 (Bom), per SK Desai J.

52 *DS Vasavada, TLA v RPFC* (1985) 1 LLJ 263, 265 : (1985) 1 GLR 499 (Guj) (DB), per PS Pori CJ.

53 *Bombay Union of Journalists v State of Bombay* (1964) 1 LLJ 351 [LNIND 1963 SC 305], 356 : AIR 1964 SC 1617 [LNIND 1963 SC 305]: [1964] 6 SCR 22 [LNIND 1963 SC 305] (SC), per Gajendragadkar J.

54 *Walford Transport Ltd v State of West Bengal* 1979 Lab IC 70, 72 (Cal) (DB), per Mookerjee J.

55 *RC Cooper v Union of India* AIR 1970 SC 564, per Shah J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VA Lay-off and Retrenchment

[56][S. 25FFF. Compensation to workmen in case of closing down of undertakings.—

(1) Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of sub-section (2), be entitled to notice and compensation in accordance with the provisions of Section 25F, as if the workman had been retrenched:

Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under clause (b) of Section 25F shall not exceed his average pay for three months.

[57][*Explanation*.—An undertaking which is closed down by reason merely of—

(i) financial difficulties (including financial losses); or

(ii) accumulation of undisposed of stocks; or

(iii) the expiry of the period of the lease or licence granted to it; or

(iv) in a case where the undertaking is engaged in mining operations, exhaustion of the minerals in the area in which such operations are carried on,

shall not be deemed to be closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this sub-section].

58[(1A) Notwithstanding anything contained in sub-section (1), where an undertaking engaged in mining operations is closed down by reason merely of exhaustion of the minerals in the area in which such operations are carried on, no workman referred to in that sub-section shall be entitled to any notice or compensation in accordance with the provisions of Section 25F, if—

(a) the employer provides the workman with alternative employment with effect from the date of closure at the same remuneration as he was entitled to receive, and on the same terms and conditions of service as were applicable to him, immediately before the closure;

(b) the service of the workman has not been interrupted by such alternative employment; and

(c) the employer is, under the terms of such alternative employment or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by such alternative employment.]

59[(1B) For the purposes of sub-sections (1) and (1-A), the expressions “minerals” and “mining operations” shall have the meanings respectively assigned to them in clauses (a) and (b) of Section 3 of the Mines and Minerals (Regulation and Development) Act, 1957 (67 of 1957).]

(2) Where any undertaking set-up for the construction of buildings, bridges, roads, canals, dams or other construction work is closed down on account of the completion of the work within two years from the date on which the undertaking had been set-up, no workman employed therein shall be entitled to any compensation under clause (b) of Section 25F, but if the construction work is not so completed within two years, he shall be entitled to notice and compensation under that section for every [60][completed year of continuous service], or any part thereof in excess of six months.

OBJECT

The objects of s 25FFF are:

(a) to provide for involuntary unemployment in case of closure of an undertaking;

(b) to create a sense of security in a worker to a reasonable extent that in case he sticks to his work he will not be thrown out when his employment is terminated either when the industry continues to run or when it is closed down for any reason including one due to transfer of business to a new employer or due to its closure on the ground of expediency; and

(c) to raise the position and status of labour and to standardise its rights in relation to industry.

SUB-SECTION (1): COMPENSATION ON CLOSURE OF AN UNDERTAKING

(i) Closure

Closure of an undertaking entails termination of employment of many employees and throws them into the ranks of unemployed. It is with the object of redressing the misery resulting from the unemployment and in the interest of general public that the legislature has made provision for payment of compensation etc., to the workmen discharged from service at the time of closure of an establishment, by this provision. The loss of service due to closure stands on the same footing as loss of service due to retrenchment for in both cases the employee is thrown out of employment suddenly and for no fault of his and the hardships, which he has to face are, whether unemployment is the result of retrenchment or closure of business, the same. [61]

According to *Webster's Third New International Dictionary*, 'closure' means 'bringing of some activity to a stop'. Now the term 'closure' has been defined by the Amending Act 46 of 1982 inserting cl (cc) in s 2 to mean 'the permanent closing down of a place of employment or a part thereof'. This has given legislative recognition to the judicial dicta holding that closure may be treated as stoppage of whole or part of the activity or business of an employer.[62] It is not necessary that the entire business of the undertaking should be closed down. The employer is free to close a part of the business. The closure of a distinct venture, though part of the business of a complex, is legal and permissible. In other words, partial closure must be of such a part of the undertaking as is distinct and independent.[63] The question has indeed to be decided on the facts of each case.[64]The distinction between lockout and closure is to be borne in mind because generally the unions plead that the purported closure is nothing but a lockout. Lockout as defined in s 2(1) of the Act, is a 'temporary closing down of a place of employment or the suspension of the work or the refusal by an employer to continue to employ any number of persons employed by him'. Such closure of the place of employment is a temporary phase as a measure of collective bargaining resorted to by an employer for pressurising the workmen to come to terms. In contra-distinction to a lockout, in a closure the employer not only merely closes down the place of employment, but closes down his business finally and irrevocably.[65]

Such closure is not a measure of collective bargaining, but is conditioned by business exigencies. The employer may close down an undertaking bona fide in such eventualities as suffering continuous loss, no possibility of revival of business and inability for various other reasons to continue the industrial activity. There may be closure for any of these reasons, though these reasons are not exhaustive, and are merely illustrative. The word 'permanent' qualifying the words 'closing down of a place of employment or a part thereof, used in the definition of closure make explicit what was implicit in the expression 'closure' as interpreted by the courts as used in this section. The expressions such as 'permanently', 'finally' or' 'irrevocably' are not to be understood to mean that the closure is perpetual, *i.e.*, the business can under no circumstances be revived till eternity. The word 'permanently' only means that at the time of the closure, the employer had unequivocal intention to permanently and irrevocably close down the business. But it does not mean that the business once closed can never be restarted or reopened. There may be circumstances in which it may be possible to restart or reopen the business subsequently by the same or a successor employer. Therefore, closure may be once for all or may even be a temporary phase. In the language of Desai J:

> To say that closure must always be permanent and irrevocable is to ignore the causes which may have necessitated closure. Change of circumstances may encourage an employer to revive industrial activity which was really intended to be closed. [66]

The only thing that is relevant, in this connection, is that closure of business whether entire or partial must be real and genuine, that is to say, it should be a closure in fact, and it should not be a ploy adopted for carrying on the same business in a different manner.[67] A sham or a mere pretense of closure will not constitute closure in the eye of law.[68] The closure or stoppage of the whole or a part of the business is the function of the management which is entirely in the discretion of the employer carrying on the business. It is not open to industrial adjudication to interfere with the discretion exercised by the employer in such a matter.[69] The carrying on of business is a right and not an obligation. It is, therefore, as much the right of the businessman to close down the business as to carry it on.[70] The industrial adjudication cannot interfere with the discretion exercised by the employer in such a matter. It has no power to direct an employer to continue the whole or part of the business which the employer has decided to shut down. Nor can it direct an employer to reopen the business which he has once closed down.[71] Where the Government decided to wind up the Corporation, the services of the entire staff of the corporation stand terminated under s 25FFF. A skeleton staff in the capacity of caretaker staff was supposed to be retained and their services may be utilised till a liquidator takes over the control of the affairs. In such a situation, where a new arrangement is made for the purpose of utility, convenience and suitability, the question of seniority and juniority would not arise. It is for the Board of Directors to see which particular official will be helpful in the given circumstances.[72]

Once an industry is down, and it is either admitted or found that the closure is real and bona fide in the sense that it is a closure in fact,[73] any dispute arising with reference thereto would fall outside the purview of the Act and that will, therefore, be so, if a dispute arises-if such can be conceived-after the closure of the business between the *quondam* employer and the employees,[74] as the definition of an 'industrial dispute' presupposes the continued existence of the industry.[75] The question whether there was a 'closure' of an undertaking or not is a mixed question of law and fact. The finding of a tribunal on the question is not reviewable unless it can be shown that the finding is perverse.[76] To determine whether the closure was a device or a pretense to terminate the services of the workmen or whether it is bona fide and far beyond the control of the employer, has to be determined on the evidence produced before the tribunal. The duration of the closure may not be a significant fact to determine the intention and bona fides of the employer at the time of the closure though it may not be decisive of the matter. The correct approach ought to be that when it is claimed that the employer has closed down the industrial activity, the tribunal must keep in view all the relevant circumstances prevailing at the time of the closure to decide and determine whether the closure was bona fide one or was a mere device or pretense, to terminate the services of the workmen. The answer to this question would enable the tribunal to come to the conclusion one way or the other.[77] Shifting of marketing division of an undertaking from a place in one state to a place in another state pursuant to a policy decision of the Government and consequent mass transfer of employees from the previous place to the new place would not constitute closure, particularly when the service conditions provided for transfer while protecting the seniority and service conditions of the employees.[78] The scope of industrial adjudication of the disputes relating to closure of an industrial undertaking has been discussed by the Supreme Court in a number of cases. *Pipraich Sugar Mills*, may be taken as the convenient starting point in which the court observed that where the business has been closed and it is either admitted or found that the closure is real and bona fide, any dispute arising with reference thereto would fall outside the purview of the Industrial Disputes Act.[79]

In *Banaras Ice Factory*, the court held that, if there is no real closure but a mere pretense of a closure or it is mala fide, there is no closure in the eye of law and the workmen can raise an industrial dispute.[80] In *Express Newspapers*, it was observed that if the action taken by the employer is a closure, bona fide and genuine, the dispute raised in respect of such a closure will not be an industrial dispute at all.[81] The use of the expression 'bona fide' in these cases does not appear to refer 'to the motive behind the closure but to the fact of the closure'.[82] In *Andhra Prabha*, in connection with the motive of closing down an undertaking, speaking for the court, Mitter J pointed out that there might be more than one motive working in the mind of the employer leading him to closure of his establishment and it was not for the industrial tribunal to examine that question meticulously and decide on the bona fides of the motive.[83] In *Indian Hume Pipe*, the company closed its factory at Barakar for the reason that most of the area occupied by and around the factory had been declared as unsuitable and dangerous for habitation, as a result of subsiding of earth in the area. The tribunal took the view that the decision to close down the factory was in retaliation of a strike notice given by the union over the question of bonus. In appeal, the Supreme Court held that it was not open to the tribunal to go into the question as to the motive of the company in closing down its factory and to inquire whether it was bona fide or mala fide with some oblique purpose, namely, to punish the workmen for union activities. On a review of the earlier dicta, the court reiterated that:

> .. . once the tribunal finds that an employer has closed his factory, as a matter of fact, it is not concerned to go into the question as to the motive which guided him and to come to a conclusion that because of the previous history of the dispute between the

> employer and the employees the closure was not justified. Such a closure cannot give rise to an industrial dispute.[84]

In *Kalinga Tubes*, reiterating this principle, Grover J held:

> ...the entire set of circumstances and facts have to be taken into account while endeavouring to find out if, in fact, there has been a closure and the tribunal or the court is not confined to any particular fact or set of facts or circumstances. In one case the management may decide to close down an undertaking because of financial or purely business reasons. In another case, it may decide in favour of closure when faced with a situation in which it is considered either dangerous or hazardous from the point of view of the safety of the administrative staff or members of the management or even the employees themselves to carry on the business. The essence of the matter, therefore, is the *factum* of closure by whatever reasons motivated.[85]

In this case, consequent upon a *gherao* of its administrative office, by the workmen, the company closed down the factory. The question of genuineness of closure was referred to an industrial tribunal for adjudication. Before the tribunal, the main controversy centered round the question, whether there was a closure of its undertaking by the company or whether there was a refusal to employ the workmen which would fall within the ambit of the expression 'lockout'. The tribunal *inter alia*, held that the closure of the factory was a direct consequence of the alleged illegal activities of the workmen and of the refusal by the officers and supervisory staff to carry on their normal work and not due to shortage of raw materials, fuel or power. Therefore, it concluded that it was a case of, lockout' and was not a 'closure'. In appeal, after noticing the relevant evidence, the Supreme Court found that the approach of the tribunal was erroneous and suffered from a number of infirmities and held that the company, in fact, has closed down the factory; In *Sur Iron and Steel*, as a sequel to the refusal of the striking workmen to report for work and assault on willing workers, the company closed its manufacturing business. The tribunal found that the closure was real and bona fide as the factory, in fact, had been closed down and the closure was also for reasons beyond the control of the management. In appeal, the Supreme Court affirmed the findings of the tribunal as it was clear that the company was not carrying on any manufacturing business at all after its closure and that the closure was bona fide and that the closure was not a cloak for a lockout or for carrying on the business under some other disguise. With respect to the findings of the tribunal holding that the closure was for reasons beyond the control of the company, the court held that, on the face of it, closure was forced upon the company by the workmen.[86] The Bombay High Court in *Imambhai*, held that the mere closure of an undertaking by itself would not result in automatic termination of service of all its employees. It can be terminated by a notice of termination by recourse to appropriate procedure for collective or individual retrenchment. A similar view has been taken by the Gujarat High Court in *DS Vasavada*.[87] In this case, the court pertinently pointed out that:

> Closure of an undertaking for any reason and which only amounts to the employer drawing the shutters need not necessarily result in the termination of the services of the workman...It is only when closure in accordance with the enactment is effected that there would be termination of service.[88]

In *Hindustan Lever*, single judge of the Bombay High Court held that mere discontinuance of manufacturing of one of the products of the undertaking, would not amount to closure of part of the undertaking. The provisions of s 25FFF or s 25O will apply only when the closure brings about retrenchment of workmen.[89]

(ii) Undertaking

The word 'undertaking' as used in this section has not been defined in the Act. This expression occurs in ss 25FF, 25FFA, and 25FFF, 25O and 25R. However, s 25F uses the word 'industry' while s 25G uses the word 'industrial establishment'. Since these two sections are cognate, the word 'industrial establishment' as used in s 25G has to be understood to mean the 'industry' as used in s 25F. Industry has been defined in s 2(j) of the Act, which *inter alia*, includes an undertaking. Thus undertaking is a narrower concept than industry. In other words, industry is a whole of which an undertaking is a part. The expression 'undertaking' as used in the definition of 'industry' was given a restricted meaning in *Banglore Water Supply*.[90] Thus, reading down the expression in the context of s 25FFF, it must mean a 'separate and distinct business or commercial or trading of industrial activity.' In *Hindustan Steel*, the court pointed out that the word 'undertaking' as used in s 25FFF appears to have been used in its ordinary sense connoting thereby 'any work, enterprise, project or business undertaking'. It is not intended to cover the entire industry or business of the employer.[91] Closure or stoppage of a part of the business or activity of the employer would seem, in law, to be covered by this sub-section. The question is, however, to be decided on the facts of each case. But the expression 'undertaking' cannot comprehend an infinitesimally small part of a manufacturing process.[92]

(iii) Closure by Stages

In *Straw Board*, the Supreme Court had to consider the question whether an employer is entitled to close down an establishment by stages? In this case the decision to dose down the unit was taken in the month of March 1967. The union of the workmen was informed about it even earlier. The Government of Uttar Pradesh was also informed subsequent to the decision. Various other authorities of the Government were also informed. Finally, on 5 April 1967, notice of closure of the factory was published stating that the first batch of 99 workmen would be discharged from service on 7 May 1967. Notices of termination of services were also served on those workmen individually on the same day. The remaining workmen were discharged from service between 7 May and 28 July 1967. As the process of closure had been spread over a period of time, the workmen took the stand that there was no closure on 7 May 1967, because the mill had been functioning till 28 July 1967, and therefore, the first batch of workmen must be treated to have been retrenched on 7 May 1967 and should be paid compensation, as on retrenchment under the UP Act. The court discountenanced this plea and observed that the timing of termination of the services of the first batch which was about three months earlier is not at all relevant in the context of the case which is one of closure of an individual unit. Speaking for the court, Goswami J enunciated the principles in the following words:

> It may not always be possible to immediately shut down a mill or concern even though a decision to close the same may at any rate at the time have irrevocably been taken. There is, therefore, nothing wrong in the employer arranging closure of S Mill in such a way as to guard against unnecessary inconvenience to both the management as well as to the labour and against possible avoidable wastage or loss to the concern, say, for not being able to complete some processes which have ultimately to be finished. Having decided to close down a unit on account of non-availability of raw materials the supply of which had stopped, it was necessary to go on with the unused stock of raw materials for some time for which a lesser number of workers would be necessary who would then naturally constitute the next batch or batches to go. We do not see anything wrong in law in electing such a step or mode in finally closing a unit or a concern. It may be in the nature of a business to take recourse to such a mode which cannot ordinarily and *per se* be considered as unfair or illegitimate. [93]

Commencement of liquidation proceedings of a company would not be tantamount to closure of an establishment run by it. Closure must relate to the establishment not to the liquidation of the company managing the establishment.[94]

(iv) Employer's Right to Close down his Business

In *Hathising*, the Supreme Court held that it is as much a fundamental right of an employer to close down his business as to carry on the business. It is a matter within the discretion of an employer to organise and arrange his business in any manner he considers best including the closure of such business.[1] In case of an actual closure, the termination of services of workmen has to be accepted as inevitable, however, unfortunate.[2] No employer can be compelled to carry on his business if he chooses to close it down, in truth and reality, for reasons of his own.[3] It is because of this, that s 25FFF has been inserted in the Act. This section lays down certain obligations on the employer to be fulfilled on closure of the business. These obligations are not even pre-conditions to the closure.[4] The right of an employer to close down his business cannot be questioned. The only requirement of law is that he should comply with the requirements of s 25FFF(1). The tribunal, therefore, cannot decide the question as to whether an employer can close down the business temporarily or for an indefinite period or permanently.[5]

(v) Adjudication

The disputes relating to 'retrenchment of workmen and closure of establishment' have been included in the third schedule to the Act in item no 10 and can be referred for adjudication to an industrial tribunal. This item does not say that all questions arising of the retrenchment of workmen and closure of establishment have to be decided by an industrial tribunal. This entry refers to cases where the right to retrenchment of workmen or to close an establishment is disputed. In such cases, the tribunal will be competent to decide whether the closure or retrenchment was justified and whether the retrenched workmen should be reinstated or the workers in the establishment purported to have been closed, should be continued to be paid on the basis that the so called closure was no closure at all. However, this item does not cover disputes relating to compensation on retrenchment or closure.[6] A dispute may arise with respect to the nature of the closure. What the employer may claim to be closure genuine and bona fide, the workman may contest and say that it is not a real or genuine closure or it is a pretense or sham of a closure or in fact it is not a closure at all and at the worst it is a lockout. Once it is found that the closure, in fact, has taken place, the jurisdiction of the tribunal comes to an end and it cannot go into the questions of motive behind the closure.[7] The essence of the matter is, the factum of closure as such which must be established.[8] The matter may be different if under the guise of closure, the establishment is being carried on in some other form or at a different place and the closure is only a ruse or pretense.[9] Similarly, if in fact and in substance,

the closure of the business is a lockout and the business has been voluntarily closed for the purpose of disguising that lockout. Also, if a dispute is raised in respect of the closure, it would be an industrial dispute and the tribunal will be competent to deal with it.[10] Thus, though the bona fides or otherwise of the closure or the necessity for the closure and the question whether the closure was necessitated by financial, economic or other considerations, could not be gone into and could not be put up as an issue or as an industrial dispute, the question whether there, in fact was a closure, or it amounted to lockout could be put as an issue or an industrial dispute. If the tribunal finds that there was no factual closure, it would amount to lockout giving rise to an industrial dispute which could be referred to the tribunal.[11] However, if there is no dispute at all, that there was in fact a closure or that the management purported to close the business as a cloak or disguise for what in fact and in substance was a lockout, the tribunal will have no jurisdiction to adjudicate.[12] The distinction between the concepts of closure and lockout though clear in theory, in actual practice, is not always easy to decide. In the words of Desai J:

> True test is that when it is claimed that the employer has resorted to closure of industrial activity, the industrial court in order to determine whether the employer is guilty of unfair labour practice, must ascertain on evidence produced before it whether the closure was a device or pretense to terminate services of workmen or whether it is bona fide and for reasons beyond the control of the employer. The duration of the closure may be a significant fact to determine the intention and bona fides of the employer at the time of closure but is not decisive of the matter...Therefore, the correct approach ought to be that when it is claimed that the employer is not guilty of imposing a lockout but has closed the industrial activity, the industrial court before which the action of the employer is questioned must keeping in view all the relevant circumstances at the time of closure decide and determine whether the closure was a bona fide one or was a device or a pretense to determine the services of the workmen.[13]

In dealing with this question, industrial adjudication has to take into account several relevant factors and these factors may be proved before the industrial tribunal either by oral evidence or by documentary evidence or by evidence of conduct and circumstance. Whenever serious doubts arise in regard: to closure which the employees allege is a lockout, the tribunal may have to make a long and elaborate inquiry and the ultimate decision would depend on a careful examination of the whole of the relevant evidence. The question as to whether there is closure of business or not is a question of fact. If a case of closure is pleaded the genuineness of which is challenged, this has got to be decided as a jurisdictional fact, because the jurisdiction of the tribunal to adjudicate the point of reference will depend upon the decision of this jurisdictional fact. In other words, the finding, which the tribunal may record on this preliminary or jurisdictional issue, will decide whether it has jurisdiction to deal with the merits of the dispute or not. If the finding is that the action of the employer amounts to a closure there would be an end of the proceedings before the tribunal so far as the main dispute is concerned. If, on the other hand the finding is that the purported closure is not a closure, in fact, but is a mere sham or pretense of closure or 'amounts to a lockout which has been disguised as closure, then the tribunal will be entitled to deal with the reference'. It is only when the jurisdictional fact is found against the employer that the industrial tribunal will have jurisdiction to deal with the merits of dispute.[14] On the finding, the tribunal may record on the preliminary issue, it may decide whether it has jurisdiction to deal with the merits of the dispute or not. If such a case has not been made out by the employer, the tribunal is under no obligation to decide this as a preliminary issue.

Illustrations

Where the tribunal found that the factory of the employer had been closed down finally and irrevocably and it was not a mere closure of place of business, it had no jurisdiction to go into the question whether the closure could have been avoided nor had it jurisdiction to suggest the ground for rationalising the company by taking into consideration the financial position of the company.[15] Where the management notified that its directors had decided to close down its mills in view of unsatisfactory financial position, difficulty in procuring cotton at reasonable prices and the possible risk involved in storing cotton, and the mills were closed down and a dispute arose about the closure but after a period of about two months the directors decided to reopen the mills, in view of the representations received from the workmen, who had been thrown out of employment, it was held that from the past history of disputes between the management and the union it would not be possible to draw the conclusion that the closure was not bona fide.[16] A company, on account of failure in business and consequent losses, decided to close down some of its agency offices. It was held that when it was found that the business at the two agency branches was actually wound up and discontinued, the finding of mala fide regarding such closure could not justify the conclusion that the business of agencies should be deemed to continue in the eye of law and that the closure in fact was not a pretense.[17] Where the tribunal found as a fact on the basis of the whole evidence that the closure was only in name, the business having been restarted with new hands with a few old ones; it was not a real and genuine closure and it was held not to be a closure at all, though it did masquerade as such for the time being.[18]

Where the closure was not pleaded, but the case of the management was only that there was no lockout, it was held that it was very much different from saying that it was a case of closure. It may be a case of lockout, it may not be a case of

lockout, that was a matter which was to be decided by the tribunal, but it was impossible to hold that it was a case of closure which was not pleaded by the employer himself.[19] In case of closure of one establishment or undertaking of the employer, the workmen have the only right to compensation under this section and they cannot claim any right for re-employment or reinstatement in any other establishment or undertaking of the employer.[20] In G *Govinda Rajulu*, the Supreme Court directed that the employees of the Andhra Pradesh State Construction Corpn. Ltd whose services were sought to be terminated on account of the closure of the corporation shall be continued in service on the same terms and conditions either in a Government department or in the corporation.[21] This is rather an unusual order particularly so, as it does not disclose any reasons for the direction. However, since there are no reasons, the order cannot be a precedent. Presumably, the order has been made on the main consideration that the employer is a state Government undertaking. This was noticed by another Bench of the court in *Dandakaranya*, where speaking for the court, Patnaik J observed:

> But in the aforesaid case neither has there been any discussion on any question of law nor any circumstances have been indicated under which the direction was given. This being the position, the aforesaid decision cannot be of universal application in all cases where there has been a closure of the project which resulted in termination of the services of the employees.[22]

In this case in view of the admitted position that the project had been completely wound up since 1990, the nominal muster roll workers were liable to be retrenched. In the circumstances of the case, the court, held that no other relief could be given to the workmen except the compensation under s 25FFF of the Act due to them on the closure of the project. In *TI Diamond Chain*, the facts disclosed that the company owned two factories, which had independent existence, separate E.S.I codes, separate employees' unions, separate agreements, no inter-transferability of employees between the two entities, and manufacturing different products, it was held that there was no functional integrality between the two units. On this view of the matter, a single judge as well as the Division Bench of Madras High Court, quashed the order of the labour court directing reinstatement of the workmen, who were affected by the closure of one of the two units.[23] In *District Redcross Society*, the facts were: The respondent-employee was appointed as a staff nurse in the Society, Karnal in 1992 and she continuously worked on the said post till her services were terminated on 30 September 1998, due to the closing down of the Red Cross Maternity Hospital, but the management had not followed the procedure laid down in ss 25F to 25H, which was a clear violation of the statutory provisions. The management had also not Disputes Act as well as 'first come last go', and thereby contravened s 25G. No retrenchment compensation was paid to her at the time of termination of her services. The alleged closing down of the Maternity Hospital was only a paper transaction as the outpatient department was still functioning and the patients were being given treatment by the doctors as well as other staff. Tubectomy operations were still being conducted in the Hospital. It was accordingly prayed that an award may be passed directing the appellant to reinstate her in service with continuity of service and full back wages. The Tribunal held that the termination of service was illegal and contrary to law and directed her reinstatement with continuity of service and full back wages. Similar awards were given in the three other adjudication cases and orders for reinstatement with continuity of service and full back wages were passed in favour of the concerned employees (respondents herein).The High Court too dismissed the writ petitions filed by the society. Allowing the appeal filed by the Society, Mathur J (for self and Balasubramanian J) held:

> .. . if the entire establishment of the employer is not closed down but only a unit or undertaking is closed down which has no functional integrity with other units or undertaking, the provisions of Section 25FFF of the Act will get attracted and the workmen are only entitled to compensation as provided in Section 25FFF of the Act which has to be calculated in accordance with Section 25F of the Act. The Tribunal and also the High Court clearly erred in holding that as other units of the appellant Red Cross Society like Drug De-Addiction-cum-Rehabilitation Centre, Family Planning Centre and Viklang Kendra were functioning, the termination of services of the respondent would amount to retrenchment. The Maternity Hospital was functioning as a distinct entity. It was not receiving any grant from the Government and was being run entirely on charitable basis from donations received from public. Due to financial stringency, the Maternity Hospital had to be closed down. The other three units, viz., Drug De-Addiction-cum-Rehabilitation Centre, Family Planning Centre and Viklang Kendra are receiving grants from Government and are functioning as separate entities and the mere fact that they have not been closed down, cannot lead to the inference that the termination of services of the respondent was by way of retrenchment which was illegal on account of non-compliance of the provisions of Section 25F of the Act. (para 9). .. In view of the findings recorded above, the respondent would be entitled to compensation only in accordance with Section 25FFF of the Act and the award for reinstatement in service with back wages passed by the Tribunal which was affirmed by the High Court cannot be sustained and must be set aside. (para 10.. . The cases of other three respondents are exactly identical to that of Babita Arora as they were all working in the Maternity Hospital. Therefore, the awards passed by the Tribunal directing their reinstatement in service and back wages have to be set aside.[24] (para 11)

In *Hondaram Ramachandra*, the facts briefly were: the appellant-company had a sales office in Mumbai, which was closed and the company transferred the employees to work in its factory at Goregaon. An application for payment of wages was

filed against the appellant before the Prescribed Authority. The said application was dismissed, inter alia, on the premise that the respondents had refused to join their duties at the transferred place. A domestic enquiry was purported to have been held in April, 1984 on the premise that the respondents had neither reported for duties at Goregaon nor at Mumbai. The services of the respondents were terminated in December, 1985. In January, 1986, the premises in which the sales office was being run was admittedly handed over to another Company. The labour court in its award held that the termination was proper and legal and that the workmen were not entitled to any relief, which was set aside by a single judge duly affirmed by the Division Bench. The Supreme Court held (in Para 12) that the relief available to the workman was compensation for closure in terms of s 25FFF and not the relief of reinstatement with back wages.[25]

(vi) *Res Judicata*

The basis on which the principle of res judicata rests is founded on consideration of public policy. It cannot be treated as irrelevant or inadmissible in industrial adjudication. In *Bijay Cotton Mills*, a textile mill was closed for nearly a year. Subsequently, the textile mill was reopened and then closed once again. The claim of the workmen for retrenchment compensation for the period of unemployment and for reinstatement as permanent workmen on reopening after the first closure was referred for adjudication. The industrial tribunal found that the first closure was bona fide and the concerned workmen were not entitled to any retrenchment compensation. The tribunal also negatived the claim of the workmen for being reinstated as permanent workmen on the reopening. The award became final and binding on the parties. After the second closure, again the claim for retrenchment compensation was referred for adjudication. The tribunal ignored the findings in the prior award and directed that the services of the concerned workmen even prior to the first closure would count for calculating compensation under s 25FFF. In a writ petition, the High Court of Rajasthan quashed the directions in the second award on the ground that the findings in the prior award would operate as *res judicata*.[26]

(vii) Quantum of Compensation on Closure

This section also like s 25FF introduces a fiction in providing that in case of closure of business, the workmen concerned are entitled to compensation as if the termination of their services was retrenchment even though, in fact or in law, it is not retrenchment. In other words, termination of the services of the workmen on closure is not 'retrenchment' in the sense in which that word has been used in s 25F of the Act, but in the circumstances in which s 25FFF is attracted, workmen are entitled both to notice or wages in lieu of notice and compensation in accordance with the provisions of s 25F, subject, of course, to the terms of the proviso to sub-s (1), limiting the amount of compensation.[27] A comparison of the language employed in s 25F and s 25FFF(1) would bring in bold relief the difference between the phraseology employed by the legislature and its impact on the resultant right of the workmen. Under s 25F, a workmen employed in an industrial undertaking cannot be retrenched by the employer until the payment is made as provided in cll (a) and (b). Section 25FFF(1) provides that the workman shall be entitled to notice and compensation in accordance with the provisions of s 25F, if the undertaking is closed for any reason.[28] In other words, the quantum of compensation under this provision is the same as payable on retrenchment under s 25F.[29] The use of the expression 'as if' in this provision shows almost conclusively that the meaning of 'retrenchment' is restrictive and does not in terms apply to the case of a bona fide closure of business,[30] as the legislature has not sought to place the closure of an undertaking on the same footing as retrenchment under s 25F of the Act.[31] In other words, by s 25F, a prohibition against retrenchment until the conditions prescribed by that section are fulfilled is imposed while by s 25FFF(1), termination of employment on closure of the undertaking and without payment of compensation and without either service of notice or payment of wages in lieu of the notice is not prohibited. Payment of compensation and payment of wages for the period of notice are not, therefore, conditions precedent to closure.[32] This provision has been enacted for the purpose of calculating compensation payable to such workmen rather than providing for payment of compensation over again. Section 25FFF makes reference to s 25F for that limited purpose. Therefore, the only claim which the employees of the closed concern can legitimately make is a claim for compensation against their employers.[33]The workmen will be entitled to get such relief as they may have the right to claim under s 25FFF of the Act.[34] In order to entitle a workman to claim compensation under this section, two conditions must exist, namely: (a) closure and (b) one year's continuous service by the concerned workmen. If these two conditions exist at the time of the closure, the workmen whose services are terminated on such closure, become entitled to notice or wages in lieu thereof as under s 25F(a) and compensation as under s 25F(b).

(viii) One Year's Continuous Service

The workmen claiming compensation under this section should have put in minimum one year of 'continuous service' on the date of the closure. In other words, in order that a workman may claim the benefit of this provision, he must establish that he has been in continuous service for not less than one year in the undertaking immediately before the closure.[35] It will have to be found out, whether he has been in continuous service for not less than one year from the date of his entry in service. It is not necessary for him to comply with any further condition of continuous service, in the year ending with the date of closure.[36] Acceding to s 25B, a workman who during the period of 12 calendar months has actually worked in an

industry for not less than 240 days is to be deemed to have completed one year's service in the industry. Consequently, an inquiry has to be made to find out whether the workman has actually worked for not less than 240 days during the period of 12 calendar months immediately preceding the retrenchment. These provisions of law do not show that a workman after satisfying the test under s 25B has further to show that he has worked during all the period he has been in service of the employer for 240 days in the year.[37] However, a *badli* workman has no right to claim compensation on account of closure.[38]

(ix) Adjudication of Compensation on Closure

The legislature has not left the notice period and quantum of compensation in dispute. The proviso mitigates the burden of the employer in cases where the closure of the undertaking is 'on account of unavoidable circumstances beyond the control of the employer' and limits the compensation payable to the workmen to a maximum extent of their average pay for three months. The explanation to sub-s (1) sets out what shall not be deemed to be closure on 'account of circumstances beyond the control of the employer'. The explanation gives some indication of the anxiety of the legislature to expressly rule out certain contingencies which could have ordinarily been pleaded by the employer as unfavourable circumstances beyond his control. The questions whether the closure is on account of unavoidable circumstances beyond the control of the employer or is due to 'any reason whatsoever' are questions of fact. A single judge of the Punjab High Court[39] has taken the view that a dispute relating to compensation under s 25FFF(1) can be validly referred as the right in such a case accrues not after the closure of business but instantaneously with it. On the other hand, a single judge of the Calcutta High Court held that the industrial tribunal which derives its power and jurisdiction from the Act, cannot deal with the question arising out of a closure including the question of payment of compensation for the termination of the services of workmen on a bona fide closure of business.[40] The Patna High Court went a step further and held that the reference made in regard to compensation payable as a result of closure itself is beyond the competence of the appropriate Government. *A priori*, the resultant award must be held as void.[41] In *Straw Board*, Goswami J observed:

> In the course of gradual development of the industrial law the legislature by engrafting a provision like s 25FFF in the Central Act, has sought to wipe out the deleterious distinction in the consequential effect on labour upon retrenchment and upon closure except that in the latter case a restricted compensation under very specified circumstances is provided for under the proviso to s 25FFF(1) itself. It is no longer open to employer to plead that there can be no industrial dispute with regard to the eligibility of workmen to compensation or to its quantum on closure of an establishment although the factum of a real and genuine or legitimate closure, admitted or proved, is outside the pale of industrial adjudication not partaking of or fulfilling the content of an industrial dispute within the meaning of section 2(k) of the Central Act. It is, however, not to be understood that the question, whether the closure is real or genuine or a mere sham or pretence of closure, cannot be referred to industrial adjudication. What is meant is that once it is admitted or proved that there is a real, genuine and legitimate closure, the dispute falls outside the pale of an 'industrial dispute' and cannot be validly adjudicated upon by industrial adjudication. The right of compensation upon closure under s 25FFF(1) unlike the retrenchment compensation under s 25F(1) is not a condition precedent to closure. This right accrues to the workman only upon the closure of the undertaking. No doubt that an industrial dispute which arose before the closure of the business can be validly referred to adjudication. Where the business has been closed, any dispute arising after such closure would fall outside the purview of the Act. A dispute arising after the closure—if one such can be conceived—a dispute between the *quondam* employer and the employees cannot partake the character of an industrial dispute and cannot be validly referred to adjudication.[42] The industry having died with the closure, any dispute relating to compensation upon closure, will fall outside the purview of the Act, and cannot become an industrial dispute within the meaning of s 2(k).[43]

The right of workmen for compensation upon closure of an undertaking arises out of statute, *viz*, s 25FFF. Therefore, even if the closure is in accordance with the provisions of the Standing Orders and due to circumstances beyond the control of the management, the employer cannot refuse to pay compensation for the closure.[44]Before the insertion of this provision in the Act, there was no such right. Nor is any such right available under the law of contract or in common law. In *Straw Board*, dealing with an appeal arising out of an award under the Uttar Pradesh Industrial Disputes Act, the Supreme Court had to deal with the question whether the workmen were entitled to relief under s 25FFF of the ID Act, as there is no analogous provision in the Uttar Pradesh Act. Though the point was abandoned by the counsel, the court held that the workmen were entitled to compensation as envisaged by s 25FFF. Goswami J held:

> Since the Uttar Pradesh Act does not make any provision for compensation in the case of closure and the Central Act has applied the lacuna, there is no repugnancy between the Uttar Pradesh Act and the Central Act and the beneficent provisions of the latter Act can be availed by labour even in their absence in the Uttar Pradesh Act. The Central Act applies to the whole of India, including Uttar Pradesh. Even if there may be slightest doubt in the matter, section 25J of the Central Act advisedly leave no scope for controversy in the matter.[45]

This opinion appears to be perfunctory and incorrect. Firstly, the court has lost sight of the fact that the reference was under s 4K of the Uttar Pradesh Act and not under s 10(1) of the ID Act. A reference under s 10 of the ID Act can only be made under s 12 of the Uttar Pradesh Act not under s 4K. If the references had been under s 10(1) of the ID Act, the observations of the court would be correct. As the reference clearly was not under the ID Act, its provisions would not be applicable to this case. A tribunal created by the Utttar Pradesh Act, adjudicating upon a dispute referred to it under that Act could not extend its jurisdiction beyond the provisions of that Act. In other words, it could not award closure compensation as envisaged by s 25FFF of the ID Act. Secondly, s 25J of the ID Act could also not be taken cognizance of by the tribunal created by the Uttar Pradesh Act and, more so, by the Supreme Court. In *Rohtas Industries*, the Supreme Court observed that the stocks of a company were the product of the industry of the workers who had contributed their labour to their production and so as a result of their hard work the stocks were produced. Hence, the wages and emoluments of the workers would rank in priority to the claim of other creditors like financial institutions with respect to the stocks manufactured before the closure of the undertaking because the subsistence and living of the workmen was of paramount importance and had to rank higher in priority. In the circumstances of the case, the court held that it would be just and proper that the goods which were lying as stock should be sold and out of the sale proceeds the workers should be paid their dues upto the date of the closure.[46]

(x) Proviso: Compensation in Unavoidable Circumstances

In *Hathising*, speaking for the Supreme Court, Shah J held:

> When the closure of an undertaking is due to 'circumstances beyond the control of the employer, the maximum limit of compensation is average pay for three months, irrespective of the service of the workman; in the residuary clause, the liability is unrestricted.[47]

There is a marked contrast in the expression 'for any reason whatsoever' used in the main s 25FFF(I) and the words 'on account of unavoidable circumstances beyond the control of the employer' used in the proviso thereto. The measure of compensation payable when an undertaking is closed down for 'any reason whatsoever' is as provided in the main sub-section which refers to the provisions of s 25F(b) as if the workmen had been retrenched.[48] On the other hand, the quantum of compensation payable to workmen, in case of 'closure' on account of 'unavoidable circumstances beyond the control of the employer', is limited to a maximum of his 'average pay for three months' as calculated under s 25F(b). In other words, where the closure is due to 'circumstances beyond the control of the employer', legislature has imposed a restriction on the liability of the employer. In order, therefore, to take advantage of the proviso, the employer has to establish that the undertaking was closed down for unavoidable circumstances beyond his control.[49] Average pay for three months is equivalent to 15 days' average pay for six years. By this limit prescribed in the proviso, a workman will be deemed to have put in a maximum number of six years' continuous service irrespective of any larger number of continuous years of service. In other words, a person who has put in even twenty years of continuous service, shall be entitled, on closure of the establishment for reasons 'beyond the control of the employer', to compensation only equivalent to his fifteen days' average pay for six years of continuous service, *i.e.*, three months' average pay in toto. However, a person who has put in only six years or a lesser number of years of continuous service, will not be adversely affected by the proviso, as he will get compensation at the rate of fifteen days' average pay for all the years of continuous service put in by him. This works injustice to the workmen who have rendered longer service. In *Kerala Cashew*, it was held that the main part of sub-s (1) provides for notice and compensation in accordance with s 25F. The proviso in force majeure cases limits the compensation payable to workmen under cl (b) of s 25F to average pay of the three months. However, the proviso does not make reference to cll (a) and (c) of s 25F. Accordingly, there is no exclusion of the notice required to be given under those clauses. In other words, even in cases where an industry is closed for reasons beyond the control of the employer, the workmen are entitled to one month's notice or wages in lieu thereof in terms of cl (a) of s 25F, in addition to the compensation under cl (b) of s 25E.[50]

(a) 'Unavoidable Circumstances beyond the Control of the Employer'

The closure on account of *vis majeure* or acts of God or enemy action or an act of State in exercise of its power of eminent domain, would undoubtedly be on account of the circumstances beyond the control of the employer. On the other hand, circumstances cannot be called 'unavoidable', if the employer by acting in a business-like way, or as a prudent man of business, could avoid them. He is not expected to take a negative attitude. However, the employer is not called upon to make any unusual effort to avoid any circumstances necessitating the closure of his business. Circumstances are not to be considered avoidable, simply because the employer might have restored peace by acceding to each and every demand of the workmen. Nor is the employer called upon to take extraordinary measures or incur extraordinary expenses in order to run his business, say by employing an army to restore peace. Where an employer was faced with threat, intimidation,

violent methods, like stabbing and bomb-throwing, it would be a circumstance beyond the control of the employer for closure of the business, even though the business was not running at a loss.[51] The acid test, therefore, appears to be that if there is the slightest possibility of a businessman exerting himself and prudently trying to tide over the difficulty which has arisen as a mushroom one and make every possible effort to see that his business is continued then avoidance of such a duty on the part of the businessman cannot be an equation of an unavoidable circumstance.[52] The legislative intent is to limit the scope of the expression 'unavoidable circumstances' to such cases where the closure is for reasons connected with the business. Circumstances, howsoever, unavoidable and uncontrollable, may not attract the proviso unless they are relevant and related to the functioning of the undertaking. If the closure was on account of unavoidable circumstances beyond the control of the employer, but those circumstances are not connected with the functioning of the undertaking although they are personal to him, such closure cannot be regarded as coming within the ambit of the proviso. For instance, an employer who is suffering from a serious disease such as tuberculosis is naturally not in a position to run his business. The cause of his personal difficulty is something beyond his control to prevent. Nevertheless, his disease is not a reason connected with the running of the business, but is only personal to him. Closure of undertaking in such circumstances shall not deny the workmen, their full compensation.[53]

Illustrations

Mere financial impossibility to carry on the business would not be a circumstance beyond the control of the employer and the closure will not fall within the proviso to section 25FFF(1) of the Act.[54] Likewise, the closure due to financial condition of the employer, non-availability of orders for supply of goods and noncooperation from workmen in standardisation of the working force and reduction of the high percentage of rejection, were held not to be unavoidable circumstances beyond the control of the employer.[55] Where the closure was caused by the circumstances created by a gherao practised by the workmen, but there had been no incidents involving physical violence nor any incidents for any length of period preceding the gherao nor had there been any speech delivered by any of the representatives of the workmen threatening or inciting bodily injury, it was held that the closure of the undertaking was not due to unavoidable circumstances beyond the control of the employer.[56] Upon passing of a preliminary decree for dissolution of partnership business, the closure of business ordered by the decree was held to be for unavoidable circumstances.[57]

Where a bank was closed down under a winding-up order of the High Court, it was held to be a closure on account of unavoidable circumstances beyond the control of the employer and the question that it was misconduct or mismanagement that brought about the winding-up was not held to be a relevant consideration.[58] A sudden slump in the world market of tea and the consequent financial difficulties of the tea estates resulting in closure of their tea gardens was held to be a cause 'beyond the control' of the employers.[59] Where a firm was closed because of *inter se* differences of its partners, it was not a case of closure on account of the circumstances beyond the control of the employer.[60] Where the tribunal on the basis of the evidence on record had found that the colliery was closed as a result of financial losses and not for reasons alleged by the management, viz, that the mine was nearly exhausted, by bad roofing and presence of gas, it was held that the management was not entitled to the benefit of the proviso.[61] Where the closure was forced on the company by the workmen resiling from a negotiated set dement and on account of their insistence to take back certain suspended workmen unconditionally and without even an apology which led to strike involving the use of force against the willing workmen, it was held that in the circumstances, the closure was for reasons beyond the control of employer and, as a matter of fact, it was within the control of the workmen themselves and primarily it were they who were responsible for the closure being the main agitators at all stages.[62]

Where a petrol pump was closed on account of termination of the agency it was held to be a case of unavoidable circumstances beyond the control of the employer.[63] The case where the closure was not merely on account of financial loss or accumulation of undisposed stocks but was because of inability of the company to produce standard products and in accordance with the requirements of law, the closure was held to be on account of unavoidable circumstances beyond the control of the employer.[64] Closure of a sugar factory on account of unavailability of sugarcane was held to be due to unavoidable circumstances beyond the control of the employer.[65] Wherever complete lawlessness is prevailing in the undertaking over a course of years, it cannot be said that the circumstances were 'unavoidable circumstances beyond the control of the employer'.[66] The closure of an undertaking as a result of the order of minding up at the instance of a creditor on account of inability to pay tax will be a closure due to financial strains and as such will not take away the right of the workman to claim full compensation under the section.[67]

(b) Burden of Proof

Once it is found that there is, in fact, a closure of the undertaking, the question of applicability of sub-s (1) of s 25FFF or the proviso thereto will automatically arise for consideration in determining the question of compensation. The requirements of the proviso, which limits the quantum of compensation under the conditions specified therein will have to be carefully considered in order to arrive at the conclusion whether the onus in that behalf to justify lesser amount of

compensation has been discharged by the employer or not. The decision against the employer after considering all the aspects of the matter in relation to the said proviso read with the explanation will lead to the granting of higher compensation under this section by reason of the legal fiction contained therein for payment of compensation in accordance with s 25F of the Act.[68]

(xi) Explanation

The following causes are excluded from the purview of the expression 'unavoidable circumstances beyond the control of the employer' used in the proviso:

(a) financial difficulties, including financial losses;

(b) accumulation of undisposed of stocks;

(c) the expiry of the period of the lease or the licence granted; or

(d) in a case where the undertaking is engaged in mining operations, exhaustion of the minerals in the area in which such operations are carried on.

The explanation gives some indication of the anxiety of the legislature to expressly rule out the above contingencies which would have ordinarily been pleaded by the employer as unavoidable circumstances beyond his control. The legislature apparently was very stringent and strict about the nature of the circumstances which would bring a closure, within the meaning of the proviso, though in normal working of the business of a commercial undertaking financial losses will go a long way in establishing that it has virtually become impossible to run the business. Likewise, accumulation of undisposed of stocks and the expiry of the period of the lease or the licence or the exhaustion of minerals in a mining undertaking would also be sufficient to establish that it has virtually become impossible to carry on the business. For instance, if a company is heading towards liquidation, its business will, in normal course, have to be closed down. Similarly, if the period of lease of the site on which a factory has been set up has expired and there is no provision for its renewal or extenuation, it would ordinarily present insurmountable difficulty in the way of working of an undertaking by the employer. Notwithstanding all this, the legislature has provided that, in spite of the aforesaid difficulties, impediments or bottlenecks, the conditions of the proviso would not be satisfied merely by the happening or existence of the circumstances embodied in the explanation. The reason for doing so seems to be that whenever such difficulties arise, the employer is not expected to sit idle and not to make an all-out effort like a prudent man of business in the matter of tiding over these difficulties for saving his business.[69] The explanation shuts out any investigation as to whether the closure was due to unavoidable circumstances beyond the control of the employer, where the closure was due to reasons enumerated therein. In such cases, the court is bound to apply the deeming part of the explanation and to hold that the closure was not due to unavoidable circumstances beyond the control of the employer and that the proviso had no application. The use of the word 'merely' in the explanation, makes it clear that, if the financial difficulties or accumulation of undisposed stocks was only one of the several contributory causes to the closure, the explanation may not apply. It is only when it can be said that the financial difficulties or accumulation of undisposed stocks was the sole cause of the closure that the explanation should be attracted.[70]

The closure of an undertaking, therefore, merely due to these contingencies is, by the explanation, excluded from the benefit of the restricted liability of the employer, but coupled with other circumstances, financial difficulties, accumulation of stock or expiry of lease or licence or exhaustion of mineral may justify the view that closure is due to unavoidable circumstances beyond the control of the employer and attract the application of the proviso notwithstanding the explanation. It will be a wrong interpretation of the proviso to hold that where the closure is solely due to financial difficulties and those difficulties were brought about by several contributory causes, the deeming provisions of that explanation would not apply. Thus, where the undertaking is closed down on account of persistent losses due to no fault of the employer or accumulation of stocks having regard to the persistent unfavourable market conditions, the closure may normally be regarded due to unavoidable circumstances beyond the control of the employer. By the explanation, the jurisdiction of the tribunal which may be called upon to ascertain whether in a given case, the closure was on account of circumstances, beyond the control of the employer and whether on that account the employer was entitled to the benefit of the proviso, may be restricted. However, it is not provided that in no case of financial difficulty or accumulation of stocks coupled with other circumstances, the closure is to be regarded as due to unavoidable circumstances beyond the control of the employer.[71] It is only in cases where closure is merely on account of any of the reasons enumerated in the explanation that it is not to be deemed as due to unavoidable circumstances beyond the control of the employer. For instance, where a company had to be wound-up due to adverse trade restrictions on imports and heavy losses, it was considered to be a closure due to unavoidable circumstances beyond the control of the employer.[72] On the other hand, where a company had to be wound-up by a winding-up order under s 445(3) of the Companies Act 1956 owing to financial difficulties, it would not justify the inference that the undertaking was closed down on account of unavoidable circumstances beyond the control

of the employer.[73]

(xii) Payment of Compensation under s 25FFF not a Condition Precedent

By the use of the words 'as if the workmen had been retrenched' in s 25FFF, the Legislature did not seek to place closure of an undertaking on the same footing as retrenchment under s 25F. Payment of compensation and payment of wages for the period of notice are not conditions precedent to closure.[74] What would be reasonable time for making the payment cannot be fixed rigidly, but in the given circumstances it is always easy to hold what is not reasonable. In other words, the reasonable period will depend on the facts and circumstances of each case.[75] A single judge of the Madras High Court has taken the view that since the payment of compensation on closure is not a condition precedent to closure, the parties can in the case of closure compensation, contract themselves out of the statute.[76]This view has been taken by taking into consideration the provisions of some analogous statutes where specific provision has been made that parties can contract themselves out of the statute. This view is not correct, as there is no such provision in this Act.

(xiii) Compensation Payable only to Workmen of Industry

The question of compensation payable on closure of an undertaking can only arise where such undertaking is an industry within the meaning of s 2(j). If the business or the undertaking is not an industry, compensation as contemplated by s 25FFF cannot be awarded to its employees.[77]

(xiv) Transfer and Closure

In order to decide whether s 25FF or s 25FFF will apply to a particular case, it has to be determined whether the transaction in question is transfer or closure. Section 25FF lays down the requirement of payment of compensation in case of transfer of an undertaking whereas s 25FFF prescribes the compensation in case of closure of an undertaking. There is a clear difference between transfer and closure. In case of closure, the business completely ceases to run. But in case of transfer of the undertaking, the business continues in the hands of the transferee, though it ceases in the hands of the transferor. It is the continuation of the business which distinguishes transfer from closure. In *Anakapalle CAIS*, it was held that the purchaser of a going concern is a successor-in-interest of the previous employer and he had no right to claim re-employment under the successor and the employees were entitled to retrenchment compensation from the transferor in accordance with s 25FF.[78] In *Upper Ganges Valley*, the licence of the Upper Ganges Valley Electricity Company expired and the State Electricity Board purchased the electrical undertaking under s 6 read with s 71 of the Indian Electricity Act 1910. Thereafter, the electricity supply business was run and managed by the state electricity board. It was held that the taking over of the company's undertaking did not entail any closure of the undertaking as the undertaking was never closed down. It continued in the hands of the board. The case, therefore, was not of closure but of transfer.[79] The MP High Court followed this decision and held:

> ...the power house at *Katni* which was previously run by the petitioner company has not closed down. It has been taken over by the Madhya Pradesh Electricity Board on the expiration of the petitioner's licence and is now being run by the board. Section 25FFF (1) and the proviso apply where an undertaking 'is closed down' and as in the instant case the undertaking has merely changed hands but is still running, it cannot be said that the case falls under s 25FFF(1) or the proviso.[80]

(xv) Gratuity and Compensation under Section 25FFF

Gratuity is a kind of retiral benefit, and is essentially different from the statutory compensation for termination of employment due to closure of an undertaking. The objects intended to be achieved by two types of benefits, *i.e.* gratuity and compensation for termination of services on closure under s 25FFF are also distinct.[81] Therefore, workmen will be entitled to compensation under s 25FFF on closure of business and also to the benefits of a gratuity scheme under an agreement or award.

(xvi) Constitutional Validity

The provisions of s 25FFF apply equally to all the industries which fall within a certain group and the classification made therein cannot be said to be unrelated to the object sought to be achieved by the enactment, hence it is not arbitrary. The requirement of reasonability has been followed in legislating this provision. There is no classification involved in the section which is either arbitrary or unreasonable. Hence, there is no violation of Art 14 of the Constitution.[82] It is, no doubt, the fundamental right of an employer to carry on or to close down his business, particularly when it yields no profit.[83] However, this fundamental right is subject to reasonable restrictions imposed by law in the interest of general public. Applying the test of reasonability laid down by the Supreme Court in several decisions,[84] the provision of s 25FFF

is not violative of the fundamental right under Art 19(1)(g) of the Constitution.[85] Nor does the section contravene the provisions of Art 20 by reason of its penalising the acts which when committed were not offences.[86] Thus, from any aspect, the provisions of s 25FFF are not unconstitutional.

SUB-SECTION (1A): COMPENSATION IN MINING UNDERTAKINGS

This provision has been engrafted in the Act by the Industrial Disputes (Amendment) Act 1971 (Act 45 of 1971) and came into force wef 15 December 1971. It is in the nature of an exception to cl (iv) of the explanation to sub-s (1) which provides that where an undertaking is engaged in mining operations, the closure of the undertaking on account of exhaustion of the minerals in the area in which the operations are carried on, shall not be deemed to be closed on account of 'unavoidable circumstances beyond the control of the employer' within the meaning of the proviso to that sub-section. Sub-section (1A) further provides that in such cases, a workman will not be entitled to the benefit of notice or compensation contemplated by sub-s (1) if:

(i) from the date of the closure, the employer provides the workman with an alternative employment at the same remuneration as he was entitled to receive, and on the same terms and conditions of service as were applicable to him, immediately before the closure;

(ii) there is no interruption of the service of the workman by such alternative employment, that is to say, the continuity of his service is maintained; and

(iii) the employer is, under the terms of such alternative employment or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by such alternative employment. These conditions are somewhat analogous to the conditions provided in the proviso to s 25FF.

SUB-SECTION (1B): 'MINERALS' AND 'MINING OPERATIONS'

This sub-section has also been engrafted in the Act by the Industrial Disputes (Amendment) Act 1971 (Act 45 of 1971) and came into force wef 15 December 1971. It assigns the meaning to expression 'minerals' and 'mining operations' for the purposes of sub-s (1) and sub-s (1A) as given to them by cll (1) and (d) of s 3 of the Mines and Minerals (Regulations and Development) Act 1957.

SUB-SECTION (2): EXEMPTION FROM PAYING COMPENSATION UNDER SECTION 25FFF

Sub-section (2) completely exempts an employer from paying any compensation on closure of the undertaking, under s 25FFF(1) or the proviso thereunder, where:

(i) the undertaking is set up for the construction of buildings, and bridges, roads, canals, dams or other construction work; or

(ii) where the construction work is closed down on account of the completion of the work within two years from the date on which the undertaking had been set up.

On the plain and unambiguous language of this provision, it is quite clear that in case of closure of categories of undertaking as mentioned therein, no workman employed in those undertakings can claim compensation under cl (b) of s 25F of the Act.[87] These conditions however, are cumulative and not alternative. Thus, if anyone of these requirements is missing, the employer shall give notice or wages in lieu thereof and pay compensation in accordance with the provisions of s 25F. More often than not, large engineering and construction companies have establishments comprising administrative offices, branches and undertakings located at different work-sites in the country. This provision in contradistinction to the word 'establishment' uses the word 'undertaking' qualified by the words 'set up for construction of buildings, bridges, roads, canals, dams or other construction works'. In other words, for being entitled to the benefits of this provision, the undertaking must have been set up for one or more of such purposes and its closure also must be 'on account of the completion of the work within two years from the date on which the undertaking had been set up'. If such an undertaking is closed within the period of two years, the workman whose services are terminated upon such closure shall not be entitled to 'notice and compensation' under s 25F. If the work is not completed within two years, the workman will be entitled to such compensation. In *Hindustan Steel Works*, the company was engaged in construction of industrial and engineering plants, both within the country and abroad. It *inter alia* had undertaken the construction of a super-alloy project and a nuclear fuel-complex at Hyderabad for which it had employed about 230 workmen. This project was completed in January 1980 except for some very minor works. Apprehending that the workers may be retrenched on completion of the work at Hyderabad, the union suggested that these 230 workers may be transferred from Hyderabad to Vizag including those

belonging to non-transferable category. However, the management pointed out that to the extent of requirement that will arose immediately at Vizag in the transferable categories, transfers would be done from Hyderabad to Vizag. But in the case of employees of non-transferable category, they may have to be retrenched at Hyderabad and re-employed at Vizag if requirements arise there later. Accordingly, 130 workers were transferred to Visakhapatnam, but the remaining 100 could not be absorbed at any other place. Consequently, the management issued retrenchment notices as required under s 25F of the Act on the ground that the construction works at Hyderabad had come to an end and the workers in question had become surplus. The dispute relating to this retrenchment was referred to the industrial tribunal for adjudication. The tribunal found the retrenchment illegal and awarded reinstatement of the workmen with full backwages and continuity of service. The Supreme Court held that the works at Hyderabad, in fact, had come to an end. Therefore, there was no question of absorption of the surplus workmen, and in the circumstances of the case, the undertaking at Hyderabad was distinct from other units. Hence, the demand of the workmen for absorption of the remaining 100 workmen in units other than Hyderabad was not justified. Speaking for the court, Jeevan Reddy J held:

> In our opinion, however, the fact that the management reserved to itself the liberty of transferring the employees from one place to another did not mean that all the units of the appellant constituted one single establishment. In the case of a construction company like the appellant which undertakes construction works, wherever awarded does that work and winds up its establishment there and particularly where a number of local persons have to be and are appointed for the purpose of a particular work, mere unity of ownership, management and control are not of much significance. Having regard to the facts and circumstances of this case and the material on record, the conclusion is inevitable that the units at Hyderabad were distinct establishments. Once this was so, the workmen of the said unit had no right to demand absorption in other units on the Hyderabad units completing their job.[88]

56 S 25FF and s 25FFF subs by Act 18 of 1957, s. 3, for s 25FF (wref 28-11-1956).

57 Subs by Act 45 of 1971, s 4, for *Explanation* (wef 15-12-1971).

58 Ins by Act 45 of 1971, s 4 (wef 15-12-1971).

59 Ins by Act 45 of 1971, s 4 (wef 15-12-1971).

60 Subs by Act 36, of 1964, s 15, for "completed year of service" (wef 19-12-1964).

61 *Hathising Manufacturing Co Ltd v Union of India* (1960) 2 LLJ 1 [LNIND 1960 SC 122], 8 : AIR 1960 SC 923 [LNIND 1960 SC 122]: [1960] 3 SCR 528 [LNIND 1960 SC 122] (SC), per Shah J.

62 *Workmen of ILTD Co v ILTD Co Ltd* (1970) 1 LLJ 343, 345 (SC), per Bhargava J.

63 *Raj Hans Press v KS Sidhu* 1977 Lab IC 1633 -36 (Del), per DK Kapur J.

64 *Mgmt of Hindustan Steel Ltd v Workmen* 1973 Lab IC 461 [LNIND 1973 SC 12], 465 (SC), per Dua J.

65 *Express Newspaper Ltd v Workers* (1962) 2 LLJ 227, 231 (SC), per Gajendragadkar J.

66 *General Labour Union (RF) Bombay v BV Chavan* 1985 Lab IC 726, 728 : AIR 1985 SC 297 [LNIND 1984 SC 316]: (1985) 1 SCC 312 : (1985) I LLJ 82(SC), per Desai J.

67 *Rajasthan SSIE Union v State of Rajasthan* 1990 Lab IC 1668, 1672 (Raj) (DB), per Byas J.

68 *Banaras Ice Factory Ltd v Workmen* (1957) 1 LLJ 253 [LNIND 1956 SC 105], 257 (SC), per SK Das J.

69 *Express Newspaper Ltd v Workmen* (1962) 2 LLJ 227, 235 (SC), per Gajendragadkar J.

70 *Hathising Manufacturing Co Ltd v Union of India* (1960) 2 LLJ 1 [LNIND 1960 SC 122] (SC), per Shah J.

71 *Workmen of ILTD Co Ltd v ILTD Co Ltd* (1970) 1 LLJ 343, 345 (SC), per Bhargava J.

72 *PC Sharma v State of Haryana* (2002) 4 LLN 333 (P&H), per Anand J.

73 *Express Newspaper Ltd v Workers* (1962) 2 LLJ 227, 235 (SC), per Gajendragadkar J.

74 *Pipraich Sugar Mills Ltd v PSM Mazdoor Union* (1957) 1 LLJ 235 [LNIND 1956 SC 84], 239 (SC), per Venkatarama Ayyar J.

75 *Indian Metal & Metallurgical Corpn v IT* (1952) 1 LLJ 364 [LNIND 1951 MAD 272] (Mad) (DB).

76 *Subrata Majumda v State of West Bengal* 1982 Lab IC 1574 -75 (Cal) (DB), per MM Dutt J.

77 *General Labour Union (Red Flag) Bombay v BV Chavan* 1985 Lab IC 726, 728 (SC), per Desai J.

78 *Fertilizer Corpn of India v Hindustan Fertilizer Corpn Ltd* 1992 Lab IC 991, 995 (MP) (DB), per Chouhan J.

79 *Pipraich Sugar Mills Ltd v PSM Mazdoor Union* (1957) 1 LLJ 235 [LNIND 1956 SC 84], 239 : AIR 1957 SC 95 [LNIND 1956 SC 84]: [1956] 1 SCR 872 [LNIND 1956 SC 84] (SC), per Venkatarama, Ayyar J.

80 *Banaras Ice Factory Ltd v Workmen* (1957) 1 LLJ 253 [LNIND 1956 SC 105], 257 : AIR 1957 SC 168 [LNIND 1956 SC 105]: [1957] 1 SCR 143 [LNIND 1956 SC 105] (SC), per SK Das J.

81 *Express Newspapers Ltd v Workers* (1962) 2 LLJ 227 : AIR 1963 SC 569 [LNIND 1962 SC 253]: [1963] 3 SCR 540 [LNIND 1962 SC 253] (SC), per Gajendragadkar J.

82 *Indian Hume Pipe Co Ltd v Workmen* (1969) 1 LLJ 242 [LNIND 1968 SC 34], 245 (SC), per Mitter J.

83 *Andhra Prabha Ltd v Madras Union of Journalists* (1968) 1 LLJ 15, 24 : AIR 1967 SC 1869 [LNIND 1967 SC 185]: [1967] 3 SCR 901 [LNIND 1967 SC 185] (SC), per Mitter J.

84 *Indian Hume Pipe Co Ltd v Workmen* (1969) 1 LLJ 242 [LNIND 1968 SC 34] : AIR 1968 SC 1002 [LNIND 1968 SC 34]: [1968] 3 SCR 130 [LNIND 1968 SC 34] : 1968 Labic 1229(SC), per Mitter J.

85 *Kalinga Tubes Ltd v Workmen* (1969) 1 LLJ 557 [LNIND 1968 SC 155], 563 : AIR 1969 SC 90 [LNIND 1968 SC 155]: [1969] 1 SCR 287 [LNIND 1968 SC 155] (SC), per Grover J.

86 *Workmen of Sur Iron and Steel Co Pvt Ltd v Mgmt* (1971) 1 LLJ 570, 573-75 : (1970) 3 SCC 618 [LNIND 1969 SC 33] (SC), per Bhargava J.

87 *DS Vasavada, TLA v RPFC* (1985) 1 LLJ 263, 265 : (1985) 1 GLR 499 : 1985 (51) FLR 308 (Guj) (DB), per PS Poti CJ.

88 *Imambhai G Shaikh v RPFC* 1982 Lab IC 1036 (Guj) (DB), per Thakkar CJ.

89 *Hindustan Lever Employees Union v State of Maharasthra* 1990 Lab IC 104 (Bom), per Ashok Agarwal J.

90 *Banglore Water Supply and Sewerage Board v A Rajappa* (1978) 1 LLJ 349 [LNIND 1978 SC 70] : AIR 1978 SC 969 [LNIND 1978 SC 70]: (1978) 2 SCC 213 [LNIND 1978 SC 70] (SC), per Krishna Iyer J.

91 *Mgmt of Hindustan Steel Ltd v Workmen* 1973 Lab IC 461 [LNIND 1973 SC 12] : AIR 1973 SC 878 [LNIND 1973 SC 12]: (1973) 3 SCC 564 [LNIND 1973 SC 12] (SC), per Dua J.

92 *Avon Services (Production) Agencies Ltd v IT* (1979) 1 LLJ 1 [LNIND 1978 SC 284] (SC), per Desai J.

93 *Workmen of Straw Board Mfg Co Ltd v Mgmt* (1974) 1 LLJ 499 [LNIND 1974 SC 114], 508 : AIR 1974 SC 1132 [LNIND 1974 SC 114]: (1974) 4 SCC 681 [LNIND 1974 SC 114] : 1974 Labic 730(SC), per Goswami J.

94 *United Provinces Electric Supply Co Ltd v IT* 1974 Lab IC 902, 904 (Cal), per Amiya Kumar Mookerjee J.

1 *Hathising Manufacturing Co v Union of India* (1960) 2 LLJ 1 [LNIND 1960 SC 122], 7 (SC), per Shah J.

2 *Mgmt of Hindustan Steel Ltd v Workmen* 1973 Lab IC 461 [LNIND 1973 SC 12], 465 (SC), per Dua J.

3 *Workmen of Straw Board Mfg Co Ltd v Mgmt* (1974) 1 LLJ 499 [LNIND 1974 SC 114] (SC), per Goswami J.

4 *Hathising Manufacturing Co Ltd v Union of India* (1960) 2 LLJ 1 [LNIND 1960 SC 122], 7 (SC), per Shah J.

5 *H Chinnappan v Kaleeswarar Mills Ltd* (1968) 1 LLJ 352, 354 (Mad), per Kailasam J.

6 *Sahu Minerals and Properties Ltd v PO; LC* (1975) 2 LLJ 341 [LNIND 1975 SC 256], 345 (SC), per Alagiriswami J.

7 *Andhra Prabha Ltd v Madras Union of Journalists* (1968) 1 LLJ 15, 24 (SC), per Mitter J.

8 *Mgmt of Eifco Oil Engine Industries v PO, LC* 1985 Lab IC 705, 706 (Mad), per Nainar Sundram J.

9 *Workmen of Straw Board Mfg Co Ltd v Mgmt* (1974) 1 LLJ 499 [LNIND 1974 SC 114] (SC), per Goswami J.

10 *Express Newspapers Ltd v Workmen* (1962) 2 LLJ 227, 234 (SC), per Gajendragadkar J.

11 *Mgmt of Hacklbridge Howittie & Easum Ltd v PO, IT* 1979 Lab IC 307 -08, (Mad), per Ramaswami.

12 *Pottery Mazdoor Panchayat v Perfect Pottery Co Ltd* 1979 Lab IC 827, 829 (SC), per Chandrachud CJI.

13 *General Labour Union (Red Flag) Bombay v BV Chavan* (1985) 1 LLJ 82 [LNIND 1984 SC 316], 84 (SC) : AIR 1985 SC 297 [LNIND 1984 SC 316], per Desai J.

14 *Express Newspapers Ltd v Workmen* (1962) 2 LLJ 227, 232 : AIR 1963 SC 569 [LNIND 1962 SC 253].

15 *Tatanagar Foundry Co Ltd v Workmen* (1970) 1 LLJ 348 [LNIND 1969 SC 429] (SC), per Ramaswami J.

16 *Workers of Pudukottah Textile Mills v Mgmt* CA No 1005 of 1963 (SC).

17 *Tea Districts Labour Assn v Ex-employees of Tea Districts Labour Assn* (1960) 1 LLJ 802 [LNIND 1960 SC 68] (SC), per Gajendragadkar J.

18 *Jagadish Majhi v Bidi Mazdoor Union* 1968 Lab IC 1543 (Cal), per Bijayesh Mukerjee J.

19 *Mgmt of Radio Foundation Engineering Ltd v State of Bihar* 1970 Lab IC 1119 (Pat) (DB), per Untwalia J.

20 *Workmen of ILTD Co Ltd v ILTD Co Ltd* 1970 Lab IC 755, 758 (SC), per Bhargava J.

21 G *Govinda Rajulu v Andhra Pradesh State Corpn Ltd* (1988) 1 LLJ 328 (SC) : AIR 1987 SC 1801 [LNIND 1986 SC 481].

22 *Mgmt of Dandakaranya Project, Koraput v Workmen* (1997) 1 LLJ 833 [LNIND 1997 SC 10] (SC) : AIR 1997 SC 852 [LNIND 1997 SC 10]: (1997) 2 SCC 296 [LNIND 1997 SC 10], per Patnaik J.

23 *D Ravi Kumar v Mgmt, TI Diamond Chain Ltd* (2013) 3 LLJ 120 : 2013 (139)FLR1029 (Mad.) (DB).

24 *District Red Cross Society v Babita Arora & Ors,* AIR 2007 SC 2879 [LNIND 2007 SC 956]: (2007) 7 SCC 366 [LNIND 2007 SC 956], per Mathur J.

25 *Hondaram Ramchandra v YM Kadam* AIR 2008 SC (supp) 1250, per SB Sinha J.

26 *Bijay Cotton Mills Ltd v Rashtriya Mills Mazdoor Sangh* (1965) 2 LLJ 83 (Raj) (DB) : AIR 1965 Raj 213 [LNIND 1965 RAJ 105], per Dave CJ.

27 *Daya Shankar Pandey v State of West Bengal* (1964) 1 LLJ 137 (Cal), per Banerjee J.

28 *Avon Services (Production) Agencies Ltd v IT* (1979) 1 LLJ 1 [LNIND 1978 SC 284], 8 (SC), per Desai J.

29 *Aroor Carpet Factories Pvt Ltd v KN Henry* (1966) 1 LLJ 513 (Ker), per Vaidialingam J.

30 *Ram Hari De v Official Liquidator* (1965) 2 LLJ 230 [LNIND 1965 CAL 112], 233 (Cal) (DB), per Sinha J.

31 *Anakapalle CAIS Ltd v Workmen* (1962) 2 LLJ 621 [LNIND 1962 SC 345] (SC), per Gajendragadkar J.

32 *Hathising Manufacturing Co Ltd v Union of India* (1960) 2 LLJ 1 [LNIND 1960 SC 122] (SC), per Shah J.

33 *Anakapalle CAIS Ltd v Workmen* (1962) 2 LLJ 621 [LNIND 1962 SC 345], 629-30, per Gajendragadkar J.

34 *KT Rolling Mills v MR Meher* (1962) 2 LLJ 667 (FB) (Bom), per Shah J.

35 *Ramakrishna Ramnath v LC* (1970) 2 LLJ 306 [LNIND 1970 SC 86], 314 (SC), per Mitter J.

36 *A Parthasarthi v Mgmt of Standard Motors Products of India Ltd* 1979 Lab IC (NOC) 136 (Mad) (DB).

37 *Ramakrishna Ramnath v LC* (1970) 2 LLJ 306 [LNIND 1970 SC 86], 314 (SC), per Mitter J.

38 *Prakash Cotton Mills Pvt Ltd v Rashtriya Mills Mazdoor Sangh* (1987) 1 LLJ 97 [LNIND 1986 SC 242], 101 (SC), per MM Dutt J.

39 *Maharaj Weaving Mills v State of Punjab* AIR 1958 Punj 210, per Bishan Narain J.

40 *Jewel Filter Co Ltd v State of West Bengal* (1969) 2 LLJ 221 (Cal), per BC Mitra J.

41 *Hind Shippers Pvt Ltd v Central Government Industrial Tribuna* (1968) 1 LLJ 365 (Pat) (DB), per ABN Sinha J.

42 *Pipraich Sugar Mills Ltd v PSM Mazdoor Union* (1957) 1 LLJ 235 [LNIND 1956 SC 84], 239 (SC), per Venkatarama Ayyar J.

43 *Workmen of Straw Board Mfg Co Ltd v Mgmt* (1974) 1 LLJ 499 [LNIND 1974 SC 114], 512 (SC) : AIR 1974 SC 1132 [LNIND 1974 SC 114], per Goswami J.

44 *Prakash Cotton Mills Pvt Ltd v RMMS* (1987) 1 LLJ 97 [LNIND 1986 SC 242], 101 (SC), per MM Dutt J.

45 *Workmen of Straw Board Mfg Co Ltd v Mgmt* (1974) 1 LLJ 499 [LNIND 1974 SC 114], 511 (SC) : AIR 1974 SC 1132 [LNIND 1974 SC 114], per Goswami J.

46 *Workers' of Rohtas Industries Ltd v Rohtas Industries Ltd* (1987) 2 LLJ 1 [LNIND 1987 SC 426] (SC), per Oza J.

47 *Hathising Manufacturing Co Ltd v Union of India* (1960) 2 LLJ 1 [LNIND 1960 SC 122], 10 (SC) : AIR 1960 SC 923 [LNIND 1960 SC 122], per Shah J.

48 *Kalinga Tubes Ltd v Workmen* (1969) 1 LLJ 557 [LNIND 1968 SC 155], 565 (SC), per Grover J.

49 *Hathising Manufacturing Co Ltd v Union of India* (1960) 2 LLJ 1 [LNIND 1960 SC 122], 9 (SC).

50 *Kerala Cashew Staff Workers' Union v IT* (1979) 1 LLJ 485 (Ker), per Thommen J.

51 *Bhattacharjee Rubber Works Pvt Ltd v BRWW Union* (1960) 2 LLJ 198, 203 (Cal), per Sinha J.

52 *Venkatarama Naidu v PO, LC* 1980 Lab IC 923, 926 (Mad) (DB), per Rama Prasada Rao CJ.

53 *Antony v Kumaran* (1979) 1 LLJ 406 [LNIND 1979 KER 6] (Ker), per Thommen J.

54 *Ramakrishna Ramnath v LC* (1970) 2 LLJ 306 [LNIND 1970 SC 86], 314 (SC), per Miner J.

55 *Tatanagar Foundry Co v Workmen* (1970) 1 LLJ 348 [LNIND 1969 SC 429], 350-51 (SC), per Ramaswami J.

56 *Kalinga Tubes Ltd v Workmen* (1969) 1 LLJ 557 [LNIND 1968 SC 155], 565 (SC), per Grover J.

57 *N Desai Conder & Co v LC* [1962] 4 FLR 68.

58 *Palai Central Bank Employees' Union v Palai Central Bank Ltd* (1966) 1 LLJ 533, 534 (Ker) (DB), per Raghvan J.

59 *Cachar Chah Sramik Union v Tea Estate of Cachar* (1966) 1 LLJ 420 [LNIND 1965 SC 272], 423 (SC), per Ramaswami J.

60 *Avtar Singh Anand v E Krishna* 1968 Lab IC 1155 [LNIND 1967 DEL 28] (Del), per HR Khanna J.

61 *West Jamuria Coal Co Ltd v Workmen* (1971) 1 LLJ 549 (SC), per Vaidialingam J.

62 *Workmen of Sur Iron and Steel Co Pvt Ltd v SISCO Pvt Ltd* (1971) 1 LLJ 570, 573-75 (SC), per Bhargava J.

63 *Venkatarama Naidu v PO, LC* 1975 Lab IC 1226 -27 (Mad), per Ismail J.

64 *Engg Metal and Gen Workers' Union v M Jeevanlal Ltd* (1981) 1 LLJ 317, 326 (Mad) (DB), per Ismail CJ.

65 *Ramchandra Keshav Gadhave v Belapur Sugar Mills Ltd* 1982 Lab IC 27, 30-31 (Bom) (DB), per Chandurkar J.

66 *Rameshwar Dass v State of Haryana* 1987 Lab IC 637 -38 (SC), per Chinappa Reddy J.

67 *A Shanmughan v Official Liquidator* (1992) 2 LLJ 221 [LNIND 1992 MAD 171], 229-30 (Mad), per Lakshmanan J.

68 *Workmen of Straw Board Mfg Co Ltd v Mgmt* (1974) 1 LLJ 499 [LNIND 1974 SC 114] (SC), per Goswami J.

69 *Kalinga Tubes Ltd v Workmen* (1969) 1 LLJ 557 [LNIND 1968 SC 155], 567 (SC), per Grover J.

70 *Bharat Collieries Ltd v LC* 1969 Lab IC 1424 (Pat) (DB), per Narasimham CJ.

71 *Hathising Manufacturing Co v Union of India* (1960) 2 LLJ 1 [LNIND 1960 SC 122], 10 (SC) :: A, IR 1960 SC 923 per Shah J.

72 *John v Coir Yarn Textiles* (1960) 1 LLJ 304 (Ker), per Raman Nayar J.

73 *Re Shree Madhav Mills Ltd* (1966) 2 LLJ 827 (Bom), per KK Desai J.

74 *Hathising Manufacturing Co v Union of India* (1960) 2 LLJ 1 [LNIND 1960 SC 122], 7 (SC), per Shah J.

75 *Maharashtra General Kamgar Union v Glass Containers Pvt Ltd* (1983) 1 LLJ 326, 330 (Bom), per SK Desai J.

76 *Andhra Laundry v Addl LC* (1968) 1 LLJ 356 (Mad), per Venkatadri J.

77 *Rama Krishna Ayyar Vaidyanathan v Fifth IT* (1968) 2 LLJ 597 [LNIND 1967 CAL 98] (Cal), per BC Mitra J.

78 *Anakapalle CAIS v Workmen* (1962) 2 LLJ 621 [LNIND 1962 SC 345] (SC) : AIR 1963 SC 1489 [LNIND 1962 SC 345], per Gajendragadkar J.

79 *Workmen of UPSEB v Upper Ganges VES Co* (1966) 1 LLJ 730 [LNIND 1965 SC 283] (SC), per Hidayatullah J.

80 *Central India Electric Supply Co Ltd v District LC* (1969) 1 LLJ 840, 844 (MP) (DB) : AIR 1969 MP 196 [LNIND 1968 MP 94], per GP Singh J.

81 *Hathising Mfg Co Ltd v Union of India* (1960) 2 LLJ 1 [LNIND 1960 SC 122], 7 (SC), per Shah J.

82 *Indian Metal & Metallurgical Corpn v IT* (1952) 1 LLJ 364 [LNIND 1951 MAD 272] (Mad) (DB).

83 *Hathising Manufacturing Co v Union of India* (1960) 2 LLJ 1 [LNIND 1960 SC 122] (SC), per Shah J.

84 For instance: *State of Madras v VG Row* AIR 1952 SC 196 [LNIND 1952 SC 23], per Patanjali Sastri CJI.

85 *Hathising Manufacturing Co v Union of India* (1960) 2 LLJ 1 [LNIND 1960 SC 122] (SC), per Shah J.

86 *Hathising Manufacturing Co v Union of India* (1960) 2 LLJ 1 [LNIND 1960 SC 122] (SC), per Shah J.

87 *Mgmt of Hindustan Steel Ltd v Workmen* 1973 Lab IC 461 [LNIND 1973 SC 12], 465 (SC), per Dua J.

88 *Hindustan Steel Works Construction Ltd v HSWCE Union* 1995 Lab IC 1599, 1603 (SC), per Jeevan Reddy J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VA Lay-off and Retrenchment

S. 25G. Procedure for retrenchment.—

Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman.

'LAST COME, FIRST GO' RULE

The Act permits an employer to effect retrenchment of workmen in his industrial establishment, but there are certain condition precedent which he have to be complied with in effecting such retrenchment.[89] In the first instance, the Act requires an employer to comply with the requirements of s 25F or s 25N, as the case may be, before he can validly retrench a workman. In addition to this requirement, he has also to comply with the requirement of s 25G. Section 25G is independent of ss 25F and 25N. Whereas ss 25F and 25N stipulate conditions precedent to be complied with while effecting retrenchment, s 25G casts an obligation to follow the procedure prescribed therein. In other words, the employer cannot utilise the weapon of 'hire and fire' in violation of the provisions of ss 25F, 25G and 25N of the Act.[90] A workman employed in an independent project of temporary nature for installing the instruments manufactured by the company including civil works like construction of buildings etc. would be governed by the provisions of this sub-section and the provisions of s 25N would not be applicable to him, and he is entitled to only notice and compensation.[91] The provisions of this section are not confined to factories only, but they apply with equal force to all industrial establishments of certain magnitude. Hence, the workmen working in god owns of FCI, will be governed by the provisions of this section.[92] Failure to comply either with s 25F or s 25N, as the case may be, or to follow the procedure prescribed by s 25G, will render the retrenchment invalid.[93]Section 25G prescribes the procedure for retrenchment. It provides that where any workman in an establishment, who is a citizen of India, is to be retrenched and who belongs to a particular category of workman in that establishment, then in the absence of any agreement between the employer and the workmen in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded, he retrenches any other workman.[94] The industrial rule relating to retrenchment 'last come, first go' or 'first come, last go' where other things are equal, has been recognised for long and affords a healthy safeguard against discrimination. This principle was given legislative recognition by the Amending Act in 1953.[95] In other words, this provision means that generally when termination of service of one or more of workmen in an industry has to be made owing to abolition or reduction of post or posts, the workman who should be selected for retrenchment in a particular category, must be the last appointed one. The section does not recognise the principle of 'last come, first go', and 'first come, last go', as the last portion of the section specifically states that the principle can be departed and deviated from in case of agreement to the contrary or due to extraordinary reasons which must be recorded in writing. To this extent, s 25G is directory and not mandatory in nature.[96]

From the analysis of the section, the following principles are discernible. The first is, that where the employer and the workmen have agreed between themselves to abide by certain procedure for retrenchment in their establishment, then that agreement will prevail and the statutory procedure will not apply. The rule of 'last come, first go' can be altered, modified or completely abrogated by an agreement between the employer and each workman or workmen as a whole by making a provision in the contract of service, in a collective bargaining agreement or the Standing Orders of the establishment to that

effect. Retrenchment in such cases will have to strictly conform to the terms of the agreement and if a question is raised whether a given retrenchment is or is not valid, the question will have to be determined purely as a matter of construction and application of the terms of the agreement between the parties. In the absence of any such agreement relating to retrenchment, the statutory procedure, *viz*, 'last come, first go' rule will apply. Where retrenchment is to be effected from among a particular category of workmen, an individual who happens to have been recruited in that category last would have to be first retrenched and so on in that reverse order. It is, however, clear from the language of the section that the rule envisaged by it, is not rigid or uniform. The section itself recognises the existence of discretion in the employer to deviate from this normal procedure and proceed to retrench any workman other than the one who has been taken in employment last. This discretion can be exercised if there are valid reasons for doing so and these reasons are actually disclosed in the notice of retrenchment. The discretion cannot be exercised otherwise.[1] The section also prescribes certain conditions to be satisfied by an employee before he can claim protection given thereunder, which are:

1. the person claiming protection of this section should be a workman within the meaning of s 2(s) of the Act;
2. he should be a citizen of India;
3. the 'industrial establishment' employing such workman should be an industry within the meaning of s 2(j) of the Act;
4. the workman should belong to a particular category of workmen in that industrial establishment; and
5. there should be no agreement between the employer and the workman contrary to the procedure of 'last come, first go'. In other words, if there is an agreement between the employer and the workman making an exception to the rule, the rule would not apply.[2]

The use of the word 'ordinarily' indicates that though the procedures of 'first come, last go' or 'last come, first go' enacted by s 25G should normally be adhered to, where the exigencies of an industry so demand, the procedure can be departed from. The only requirement that the section prescribes in case of departure from this procedure is that the employer should record reasons for the departure. The doctrine of 'last come, first go' has to be borne in mind only with respect to different categories of workmen working in an industrial establishment and not to the whole of the industrial establishment.[3] There is, however, a clear distinction between a class or category, and a grade. The class or category is a group in which posts of particular description are included and the grade has reference exclusively to scales of pay. The word 'category' as mentioned in s 25G is, therefore, not synonymous with grade. Category means a class or trade such as turner, motor mechanic, electrician *etc*.[4] Ordinarily, industrial rule of retrenchment is 'last come, first go', and where other things are equal, this rule has to be followed by the employer in effecting retrenchment of a workman, as it is intended to afford a very healthy safeguard against discrimination of workmen in the matter of retrenchment. The principle, that in the matter of retrenchment, the management should commence with the latest recruit and progressively retrench employees higher up in the list of seniority, has been well accepted in industrial law. The statutory obligation prescribed by s 25G to follow the rule restricts the employer's common law right to decide which of his employees he should retrench. Nonetheless, in the application of the rule, the interests of the business cannot be overlooked. The rule has to be applied where other things are equal. The management of a business must act fairly to the employees. Where the management bona fide retains staff possessing special qualification in the interest of the business, that action cannot be discarded merely because the rule is not observed, *i.e.* the workman retained on account of special qualification is not the senior-most. The rule 'last come, first go' is not immutable, and for valid and sufficient reasons, an employer may depart from it. The action of the management in the process of retrenching a person which lacks bona fides will not be sustainable in law.[5]

In *Suraj Prakash*, the facts disclosed that the workman was originally appointed as a welder in the central tractor organisation of the Army at Jagdalpur in the State of Madhya Pradesh. Subsequently, he was re-designated as a senior welder. Nearly one and a half year thereafter he was declared as surplus and was relieved from his post. However, he was told that he could be re-employed as a welder on a lower scale at the workshop of the military department at Jullundur Cantonment. The workman challenged the termination of his service on the ground that it was illegal retrenchment and further that the new scale offered to him amounted to demotion. The Union of India in contest contended that the workman was employed as a welder against a temporary post, and there was no such post in the project and in order to accommodate him, he was re-designated as a senior welder. Subsequently, when the post was abolished, the workman was declared as surplus, but he was offered re-employment in the military department at Jullundur Cantonment as welder. Since he did not accept the post, he was not entitled to any relief. The Supreme Court discountenanced this procedure and observed that the easiest course for a reasonable management to adopt in such cases would have been to revert him to the place wherefrom he was promoted and give him the emoluments which he was drawing before such promotion.[6] In *Assn of Planters*, a workman, John, who was working as a head-clerk in an industrial establishment resigned from his job and his resignation was accepted by the employer. After a period of about four months, John was again re-employed and the period of break in his service was condoned under the terms of agreement. During the period of John's break in service, another clerk, George, was employed. Subsequently, on a question arising regarding the relative seniority in service of John and George,

for the purpose of applying the principle of 'last come, first go', the Kerala High Court held that John's service as against George's must be counted as from the date of his re-appointment.[7] However, in a case, where there is closure of one department of an industrial concern and the closure is held or conceded to be bona fide, the rule of s 25G will not apply.[8] The question whether the workman is the junior most on the appropriate date is a question of fact which requires investigation and should be investigated by the adjudicatory authorities under the Act rather than the writ court.[9]

DEPARTURE FROM THE RULE

In other words, this rule is not inflexible and extraordinary situations may justify variations. For instance a junior recruit who has special qualifications needed by the employer may be retained even though another who is one up is retrenched.[10] Normally, where the rule if departed from, there should be reliable evidence, preferably in the recorded history of the workmen concerned, showing their inefficiency, unreliability or habitual irregularity. It is not as if industrial tribunals insist inexorably upon compliance with the rule, but what they insist on their being satisfied that whenever the rule is departed from, the departure is justified by sound and valid reasons.[11] It, therefore, follows that wherever it is proved that the rule in question has been departed from, the employer must satisfy the tribunal that the departure was justified.[12] For instance, it cannot be insisted on that this principle must be applied where the employer has lost confidence in the workman. The only requirement of law is that the employer must state this as a reason while recording his reasons for departing from the principle.[13] In *R Sankaran*, the employer retrenched the concerned workman who was not a qualified typist while retaining a junior employee who was a qualified typist. In view of the fact that there was no rigid allocation of work and the work of the typists was of inter-changeable nature, a single judge of the Madras High Court held that the departure from the rule of 'last come, first go' was not justified on the ground that the other employee was a qualified typist.[14] This view is not correct because the writ court cannot assume the functions of the employer and decide for him which workman to retain and which not to retain. The tribunal has to determine in each case whether the management has, in ordering the retrenchment acted fairly and properly, and not with any ulterior motive. It cannot be assumed from mere departure from the rule that the management was actuated by improper motives or that the management had acted in a manner amounting to an unfair labour practice. Nor has the tribunal the authority to sit in appeal over the decision of the employer, if for valid and justifiable reasons, the management has departed from the rule and retrenched the senior employee before his junior. The tribunal has to determine, in each case, whether the management has in ordering the retrenchment acted fairly and properly and not with any ulterior motive.[15] However, the finding of the tribunal that retrenchment of a workman was in violation of the principle 'last come, first go' will not be interfered with in a writ petition or in appeal under Art 136 of the Constitution, when it is neither without materials on record nor perverse.[16]

REASONS TO BE RECORDED BY EMPLOYER

The requirement of recording reasons for the departure by the employer from the rule of 'last come, first go' in affecting retrenchment has been engrafted in s 25G by the legislature with a view to make the order a 'speaking order', so that the industrial tribunals may be able to look into the reasons to determine whether the departure is justified by sound, sufficient and valid reasons. The employer has to write down the reasons in the order of retrenchment itself and the reasons cannot be improved later on.[17] If termination of service of a senior workman is effected for good reasons it would not contravene the provisions of this section.[18] If the preferential treatment given to juniors ignores the rule without any acceptable or sound reasoning, the tribunal will be well Justified to hold that the action of the management is not bona fide.[19] The reasons must be disclosed in the order of retrenchment itself. It will not be sufficient that such reasons could be seen from the records of the employer.[20]

BURDEN OF PROOF

If amongst several probationers employed in an industry, a probationer appointed earlier is discharged by the management retaining the later appointed probationer for the reason that the former was found unsuitable for the job, it would not be invalid on the ground of violation of the principle of 'last come, first go'. In a case where it is proved that the rule in question has been departed from, the employer must satisfy the industrial tribunal that the departure was justified, and in that sense the onus would undoubtedly be on the employer. In other words, the employer should be able to justify the departure before the industrial tribunal whenever an industrial dispute is raised by the retrenched workmen on the ground that their impugned retrenchment amounts to an unfair labour practice and victimisation.[21]

INDUSTRIAL ESTABLISHMENT

Categories of Workmen

From the scheme of the Act, it is clear that it envisages each of the following expressions as a distinct concept:

(i) an industry;

(ii) an industrial concern within an industry;

(iii) an industrial establishment, which may itself be the whole of the industrial concern, or which may be part of a larger industrial concern;

(iv) a section of an industrial establishment; and

(v) categories of workmen in an industrial establishment or in section thereof.

Section 25G makes it clear that the unit of an industry to which the statutory principle governing retrenchment applies is an 'industrial establishment'. The provision insists on the rule being applied category wise. That is to say that those who fall in the same category shall suffer retrenchment only in accordance with the principle of 'last come, first go'.[22] The obligation of this section will operate not only within the limitation of the establishment in which retrenchment is to be made bur also within the added limitation of the category to which the retrenched workmen belong. The definition of an 'industrial establishment' in the explanation to s 25A(2) is limited in its scope to ss 25C, 25D and 25E of the Act.[23] It is the essence of the concept of industrial establishment that it is local in its set up and there is one code governing the grades of workmen and their scales of wages, and this is ordinarily possible only when the establishment is functioning at a given place.[24] If an industrial or business concern runs different departments, whether some or all of them can be regarded as one establishment or separate establishments depends on the facts and circumstances of each case. The rule laid down in s 25G is to be applied unit wise, and if the rule has not been followed in the matter of retrenchment, the workmen are entitled to reinstatement.[25]The tests to determine whether one establishment is part of another, have been discussed under s 25E of the Act. However, the retrenchment is to be effected on the basis of seniority of employees working category wise and not on the basis of seniority on a particular job on the date of award.[26] In *Tulsidas Khimji*, the Bombay High Court has laid down the test to determine whether in a given case there is a single establishment or different establishments or single category or different categories as follows:

(i) Have the employers recruited the workmen on the basis that they belong to one particular category of the various departments, branches or units taken as an integrated whole, or is the recruitment made on the basis of that particular category belonging to each of the different departments separately?

(ii) Can the employment of a clerk be regarded as employment in a single category of clerks by reason of the unity of ownership of the different departments or by reason of:

(a) geographical proximity of different departments? or

(b) the fact that there is a head office supervision of different departments and ultimate amalgamation of the accounts?

(iii) Are the different departments functionally integrated or by reasons of the condition of transferability or seniority amongst the clerical cadre, can the departments be treated as forming a single integrated industrial establishment? [27]

However, in *Indian Cable Co*, the Supreme Court observed:

> Having regard to the principles deducible from the language of the section already stated, the decisive elements in our judgment are the location of the establishment and the functional integrality, i.e., the existence of one code relating to the categories of workmen and their scales of wages.. .. It is, perhaps, impossible to lay down anyone test as an absolute and invariable test for all cases. The real purpose of these tests is to find out the true relation between the parts, branches, units etc. If in their true relation they constitute one integrated whole, we say that the establishment is one; if on the contrary they do not constitute one integrated whole, each unit is then a separate unit...Thus, in one case the unity of ownership, management and control may be the important test; in another case functional integrality or general unity may be the important test; and in still another case, the important test may be the unity of employment. Indeed, in a large number of cases several tests may fall for consideration at the same time.[28]

A single undertaking of one owner may have branches in different localities and at the same time, the owner can deal with the branches as distinct establishments and the staff on an independent basis for those establishments. It cannot be said that such branches constitute one industrial establishment for the purposes of the rule. The existence or non-existence of a system of 'pooled seniority' in respect of the staff of different establishments belonging to the common owner must be viewed only subject to the principles that are relevant for the application of s 25G of the Act, when the question of absorption of retrenched personnel on the 'last come, first go' rule arises for consideration. Thus the company had its head office at Bombay and one of its branch offices at Madras which had sub-depots at Ernakulum, Bangalore and Vijayawada. On re-organisation of the business of the company at Madras, 12 workmen in the Madras branch were retrenched. On the question whether the retrenchment was in accordance with the principle laid down in s 25G, it was held, that the office of the company at Madras was an industrial concern and each of the sub-depots was a separate industrial establishment of the

same industrial concern.[29] An employer may place a workman at a particular place of his industrial establishment. However, that will not provide basis for the categorisation of the workman for the purpose of *inter se* seniority of the workers. The employer, therefore, cannot prepare separate seniority list on the basis of the place of work of the workmen as it will defeat the very purpose of preparing the seniority list.[30] In *Eastern Engineers*, the labour court upheld the retrenchment ordered by the company, which was challenged by the workman. Upholding the award, Kochar J of Bombay High Court took note of the fact that (i) the company sent the retrenchment letter by post and had also sent money order towards the retrenchment compensation, (ii) the company had squarely complied with the provisions of Section 25-F, (iii) that the workman had refused to accept the money order, and hence the blame would not lie at the door of the employer, (iv) there was no illegality, impropriety or perversity in the conclusions recorded by the Labour Court in respect of ss 25-F & 25-G of the Act.[31] The rule of '*last come, first go*' should be followed, even in respect of daily wagers.[32] However, in *Narendra Kumar*, a workman who was appointed as a peon-cum-*Farrash* on a casual basis in a leave vacancy was terminated after 3 months. Before the labour court, he claimed that he was discharging the duties of permanent nature on a permanent post and alleged violation of ss 25G & 25H by the management. The Labour Court held that there was no permanent vacancy of Peon in that branch of the bank and that the petitioner had not worked on a permanent post but was engaged to meet the exigencies of work. The High Court held that there was no pleading that some other person was engaged in the worker's place and that he was the last person in his category. Besides, he had taken the examination for the post of Peon but was unsuccessful. There was no infirmity or illegality in the impugned award as ss 25G & H were not attracted.[33] In *Maruti Udyog Ltd.*, the Supreme Court categorically held that in the event of transfer or closure of the undertaking under ss. 25FF or 25FFF respectively, the workmen would be entitled to compensation only. They will not be entitled to preferential treatment under s 25H and the said section would not apply to a case of transfer or closure.[34] The pendency of an adjudication proceeding before a tribunal does not operate as a bar to the right of employer to transfer his undertaking under s 25FF, and the provisions of s 33 are not attracted in the event of such transfer.[35] A daily wager, who was not engaged in a regular post and has worked only for 58 days, has no right to hold regular post. His disengagement cannot be treated as arbitrary, and he is not entitled to any relief under s 25G. Accordingly, the direction to reinstate him is illegal and is liable to be set aside.[36] Where the service of a seasonal workman who has not worked for 240 days was terminated, such termination is not retrenchment in view of s 2(oo) (bb), and hence the provisions of s 25G and s 25H are not applicable.[37]

Illustrations

However, when a business is run in various departments and the departments are not treated as water-tight compartments and workmen from one department are transferred to another department, the staff employed in the business as a whole must be taken as a unit for applying the principle of 'last come, first go', in effecting retrenchment,[38] provided that all the departments are situated at one place.[39] A limited company carrying on its business in various places in India had its registered office in Calcutta and factory at Jamshedpur, closed down one of its branches (at Ambala) and retrenched 11 employees working there. Each branch was having different categories of workmen on different scales of wages. It was held that in the circumstances, each branch was a separate industrial establishment.[40] A partnership firm had different departments dealing with different lines of business and such departments were situated in the same locality and were under the supervision of the head office. Separate accounts were maintained by different departments and finally amalgamated in one account of the firm. Recruitment of employees in each department was made separately. Promotions of employees were also determined department-wise. Conditions of service of employees were fixed department wise. Employees in one department were not transferable to any other department as a rule except for a few stray cases. Each department was managed and conducted as a separate unit. It was held that the departments were distinct and different industrial establishments.[41] There was inter-changeability between different categories of workers in New Globe Theatre of the corresponding categories in Roxy Talkies. There was unity of management. The difference in the location of theatre was only within the same city and this difference in location was held not to be sufficient to render the two units different in the sense of constituting two different establishments.[42] The workmen working at two places were appointed by the same authority. On completion of work at one place, most of the workmen were retrenched, but some were transferred to another place, and a common seniority list for all workmen at both places was maintained at the office of appointing authority. It was held that the workmen working at both the places could be regarded as one establishment.[43] A company being juristic person, cannot always be identical with the concept of industrial establishment for the purposes of this section. Two establishments of the company Hindustan Aeronautics Ltd at Begumpet and Hyderabad were held to be two different establishments for the purposes of this section.[44] Technical Supervisor (Civil) and Technical Supervisor (Electrical) are two different categories.[45]

Judicial Review

The question whether a branch or a department is in itself an industrial establishment within s 25G is a mixed question of fact and law, as its determination involves the application of the correct test underlying s 25G, and the correct inference to be drawn from the fact established is one of law open to consideration by the High Court under Art 226 of the

Constitution.[46]

CONSEQUENCES OF NON-COMPLIANCE WITH THE RULE

Failure to comply with the rule of 'last come, first go', or in case of departure from this principle by the employer, the reasons for such departure not being recorded, would make the retrenchment invalid.[47] The validity or invalidity of the order of retrenchment has to be examined in the light of the state of things when the order was passed and subsequent events cannot make the order valid, if it was otherwise invalid or vice-versa.[48] Once it is found that retrenchment is unjustified and improper, it is for the tribunal to consider as to what relief the retrenched workmen are entitled. Ordinarily, if a workman has been improperly and illegally retrenched, he is entitled to claim reinstatement and the fact that in the meanwhile the employer has engaged other workmen would not necessarily defeat the claim for reinstatement of the retrenched workmen; nor can the fact that the protracted litigation in regard to the dispute has inevitably meant delay, defeat such a claim for reinstatement. Once the tribunal finds or it is conceded that a particular department of an establishment was closed down for economic reasons and the work was divided amongst the other employees of the establishment, it cannot be held that the conduct of the employer was improper or amounted to unfair labour practice. The direction of the industrial tribunal for reinstatement of a particular retrenched workman, in such a case, on the ground that some other employee should have been retrenched, cannot be held justified and the relief of reinstatement cannot be given.[49] If the tribunal comes to the conclusion that an order of retrenchment was not properly made, and directs reinstatement, an order for payment of remuneration for the period during which the employee remained unemployed, or a part thereof may appropriately be made. Where retrenchment has been properly made and that order has not been set aside, there is no principle of law which may justify an order directing payment of compensation to employees properly retrenched in addition to the retrenchment compensation statutorily payable.[50]Where certain employees, who were seniors, were terminated by the university while retaining in service employees junior to them, the High Court ordered reinstatement of the said employees, holding that the said termination offended s 25G of the Industrial Disputes Act as well as art 14 and 16 of the Constitution.[51] Rule 77 of the Industrial Disputes (Central) Rules 1957 requires preparation and publication of a list of all workmen in the concerned category at least seven days in advance of the actual retrenchment. This rule has been framed so that the object of s 25G may be effectively achieved and with a view to facilitate a retrenched workman to verify that he is not being discriminated against, otherwise it may be impracticable for him to collect relevant information and enforce his right. The minimum time of seven days allowed for this purpose is not unnecessarily long for the workman to get an adequate opportunity to scrutinize the correctness of the seniority list before he is thrown out. This requirement of the rule is mandatory and its violation would render an order of retrenchment illega1.Furthermore, the object of the rule is to give seven clear days' notice before the actual date of retrenchment. The period, therefore, cannot be cut down by including in it both the date of publication and the date of retrenchment.[52]

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89 *Nippani Electricity Co Pvt Ltd v Bhimmo Laxman Patil* (1969) 1 LLJ 268, 270 (Mys), per Katagate J.

90 *Bhanwarlal v Rajasthan SRTC* 1984 Lab IC 1794, 1851 (Raj) (FB).

91 *Dinesh Kumar v Union of India* 1993 Lab IC 678, 689 (Raj), per Saxena J.

92 *Food Corpn of India Workers' Union v FCI* (1993) 1 LLJ 359 [LNIND 1992 CAL 155], 364 (Cal), per Kalyanmoy Ganguli J.

93 *Navbharat Hindi Daily v Navbharat Shramik Sangha* 1984 Lab IC 445, 450 (Bom) (DB), per Patel J.

94 *Viney Kumar Majoo v State of Rajasthan* (1968) 2 LLJ 398 (Raj), per Kan Singh J.

95 *Gaffar v Union of India* (1983) 2 LLJ 285, 286 (Pat) (DB), per LM Sharma J.

96 *Bhanwarlal v Rajasthan State Road Transport Corpn* 1984 Lab IC 1794, 1851 (Raj) (FB).

1 *Industrial Chemicals Ltd v LC* (1977) 2 LLJ 137 [LNIND 1976 MAD 318], 140-41 (Mad) (DB), per Balasubramanyan J.

2 *Kashmira Singh v Haryana State Electricity Board* 1976 Lab IC 348, 351 (P&H) (DB).

3 *Indian Cable Co Ltd v Workmen* (1962) 1 LLJ 409 [LNIND 1962 SC 100] (SC), per Venkatarama Ayyar J.

4 *Jorehaut Tea Co Ltd v Workmen* 1971 Lab IC 1459 (Assam & Nag) (DB), per Pathak J.

5 *Om Oil & Oil Seeds Exchange Ltd v Workmen* (1966) 2 LLJ 324 [LNIND 1966 SC 99] (SC) : AIR 1966 SC 657 [LNIND 1965 SC 278], per Shah J.

6 *Suraj Prakash Bhandari v Union of India* 1986 Lab IC 671 [LNIND 1986 SC 32], 672 (SC) : AIR 1986 SC 958 [LNIND 1986 SC 32], per Khalid J.

7 *Assn of Planters v IT* (1962) 1 LLJ 491 (Ker) (DB), per Ansari CJ.

8 *Hotel Ambassador v Workmen* (1963) 2 LLJ 87 [LNIND 1963 SC 69], 88 (SC), per Gajendragadkar J.

9 *Rabinarayan Kumar v Union of India* 1976 Lab IC 602 -04 (Ori) (DB), per RN Misra J.

10 *Workmen of Sudder Workshop of JTC Ltd v Mgmt* (1980) 2 LLJ 124 [LNIND 1980 SC 223], 126 (SC), per Krishna Iyer J.

11 *Swadesamitran Ltd v Workmen* (1960) 1 LLJ 504 [LNIND 1960 SC 102] (SC), : AIR 1960 SC 762 [LNIND 1960 SC 359] per Gajendragadkar J.

12 *Tamilnad Transports v M Marippan* (1970) 1 LLJ 90, 92 (Mad), per Ramakrishnan J.

13 *Bhanwarlal v Rajasthan State Road Transport Corpn* 1984 Lab IC 1794, 1851 (Raj).

14 *R Sankaran v PO, Additional LC*, 1977 Lab IC 1338, 1342 (Mad), per Mohan J.

15 *Om Oil & Oil Seeds Exchange Ltd v Workmen* (1966) 2 LLJ 324 [LNIND 1966 SC 99] (SC) : AIR 1966 SC 1657 [LNIND 1966 SC 99], per Shah J.

16 *Gladstone Lyall & Co Ltd v State of West Bengal* 1983 Lab IC 1425 (Cal) (DB), per Ghose CJ.

17 *Swadesamitran Ltd v Workmen* (1960) 1 LLJ 504 [LNIND 1960 SC 102] (SC), per Gajendragadkar J.

18 *Hutchiah v Karnataka State Road Transport Corpn* (1983) 1 LLJ 30, 41 (Kant) (DB), per Jois J.

19 *JK Iron & Steel Co Ltd v Workmen* (1960) 2 LLJ 64 [LNIND 1960 SC 35] (SC), per Subba Rao J.

20 *Abdul Rahiman v DS, Southern Rly* 1981 Lab IC 217, 218 (Ker), per Thommen J.

21 *Swadesamitran Ltd v Workmen* (1960) 1 LLJ 504 [LNIND 1960 SC 102] (SC), per Gajendragadkar J.

22 *Workmen of Sudder Workshop of JTC Ltd v Mgmt* (1980) 2 LLJ 124 [LNIND 1980 SC 223], 127 (SC), per Krishna Iyer J.

23 *Indian Cable Co Ltd v Workmen* (1960) 1 LLJ 409, 416 (SC), per Venatarama Ayyar J.

24 *Provat Kumar Kar v WTC Parkar* AIR 1950 Cal 116 (DB), per Harries CJ.

25 *Somu Kumar Chatterjee v Dist STC Engineer* (1970) 2 LLJ 179 (Pat) (DB) : 1969 PLJR 444, per BN Jha J.

26 *Borthan Kumar v Asst PO, Indian Oil Corpn* (1971) 1 LLJ 50, 56 (Pat) (DB), per UN Sinha J.

27 *Tulsidas Khimji v F Jeejeebhoy* (1961) 1 LLJ 42 [LNIND 1960 BOM 39] (Bom) (DB) : 961 Bom LR 972, per VS Desai J.

28 *Indian Cable Co Ltd v Workmen* (1962) 1 LLJ 409 [LNIND 1962 SC 100], 419 (SC) : AIR 1962 Supp SCR 589, per Venkatarama Ayyar J.

29 *Indian Tyre & Rubber Co v Workmen* (1957) 2 LLJ 506 (Mad), per Rajagopalan J.

30 *Sriam Bachan v GM, NE RIJ, Gorakhpur* 1981 Lab IC 1196, 1198 (All) (DB), per Hari Swamp J.

31 *Anand P Mhaskar v Eastern Engineering Works*, (2003) 4 LLJ 231 [LNIND 2002 BOM 476] (Bom), per Kochar J.

32 *Ram Sahay Patel v MP Pollution Control Board* (2003) 4 LLJ 863 (MP), per Arun Mishra J.

33 *Narendra Kumar v PO, CGIT* (2005) 4 LLJ 144 (All), per Rakesh Tiwari J.

34 *Maruti Udyog Ltd v Ram La* l, AIR 2005 SC 851 [LNIND 2005 SC 81]: (2005) 2 SCC 638 [LNIND 2005 SC 81], per Sinha J.

35 *Rasayanik Kamdar Sangh v Amal Products Ltd* (2005) 4 LLJ 850 (Guj .), per Jayant Patel J.

36 *Manager, RBI v Gopinath Sharma* , AIR 2006 SC 2614 [LNIND 2006 SC 516] (2006) 6 SCC 221 [LNIND 2006 SC 516], per Lakshmanan J.

37 *Bhogpur Coop Sugar Mills Ltd v Harmesh Kumar* , AIR 2007 SC 288 (2006) 13 SCC 28, per Sinha J.

38 *Supdtg Engr v Workmen of Machkund HE Project* AIR 1960 Ori 205 [LNIND 1959 ORI 47] (DB), per Barman J.

39 *Provat Kumar Kar v WTC Parkar* AIR 1950 Cal 116 (DB), per Harries CJ.

40 *Indian Cable Co Ltd v Workmen* (1962) 1 LLJ 409 [LNIND 1962 SC 100] (SC), per Venkatarama Ayyar J.

41 *Tulsidas Khimji v F Jeejeebhoy* (1961) 1 LLJ 42 [LNIND 1960 BOM 39] (Bom) (DK), per VS Desai J.

42 *Globe Theatres Pvt Ltd v LC* (1968) 1 LLJ 343, 345-46 (Mad), per Ramakrishnan J.

43 *Somu Kumar Chatterjee v Dist STC Engineer* 1970 Lab IC 629, 639 (Pat) (DB), per BN Jha J.

44 *Mohd Yosuf v IT* (1978) I LLJ 329(AP) (DB).

45 *Dinesh Kumar v Union of India* 1993 Lab IC 678, 689-90 (Raj), per Saxena J.

46 *Indian Cable Co Ltd v Workmen* (1962) 1 LLJ 409 [LNIND 1962 SC 100], 419 (SC), per Venkatarama Ayyar J.

47 *Workmen of Subong Tea Estate v STE* (1964) 1 LLJ 333 [LNIND 1963 SC 278], 341 (SC), per Gajendragadkar J.

48 *Vinay Kumar Majoo v State of Rajasthan* (1968) 2 LLJ 398 (Raj), per Kan Singh J.

49 *Swadesamitran Ltd v Workmen* (1960) 1 LLJ 504 [LNIND 1960 SC 102] (SC), per Gajendragadkar J.

50 *Om Oil & Oil Seeds Exchange Ltd v Workmen* (1966) 2 LLJ 324 [LNIND 1966 SC 99] (SC) : AIR 1966 SC 1657 [LNIND 1966 SC 99], per Shah J.

51 *Alok K Pathak v VC, Rani Durgawati Vishwavidyalaya* (2002) 3 LLN 983 (MP), per Mishra J.

52 *Gaffar v Union of India* (1983) 2 LLJ 285, 287 (Pat) (DB), per LM Sharma J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VA Lay-off and Retrenchment

S. 25H. Re-employment of retrenched workmen.—

Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity [53][to the retrenched workmen who are citizens of India to offer themselves for re-employment, and such retrenched workmen] who offer themselves for re-employment shall have preference over other persons.

LEGISLATION

This section was enacted as a part of Ch VA and was inserted along with the chapter by s 3 of the Industrial Disputes (Amendment) Act 1956. There has been a minor amendment to this section by the Industrial Disputes (Amendment) Act 1964. The significant words inserted by the amendment are 'who are citizens of India'. This amendment seems to have been made with a view to bring this section also in line with s 25G. Now, like s 25G, the benefit of this section also is restricted only to those workmen who are citizens of India. Hence, the workmen who though fall within the definition of s 2(s), if are not citizens of India, will not be entitled to the benefits of ss 25G and 25H. This chapter providing for retrenchment is not enacted only for the benefit of the workmen to whom s 25F applies, but it would apply to all classes of retrenchment. Therefore, there is no reason to restrict application of s 25H therein only to one category of retrenched workmen. This section for re-employment of retrenched workmen merely gives a preference to a retrenched workman in the matter of re-employment over other persons and it is enacted for the benefit of all retrenched workmen.[54]

RE-EMPLOYMENT OF RETRENCHED WORKMEN

Re-employment within the meaning of this section imports the significance of taking back a retrenched workman in the same category to which he belonged.[55] If the retrenched workmen offer themselves for re-employment, the employer is bound to give preference to them over other persons. If this is not done and the appointments are given in violation of this provision, the retrenched workmen can raise an industrial dispute.[56] However, it is pertinent to note that this section only gives the right to a retrenched employee to be 're-employed' in the event a vacancy arises in the establishment. But such re-employment is not to be confused with reinstatement. In case of such re-employment the question of backwages would not arise.[57]However, it is only the retrenched workmen who have the right of re-employment under this section. If the service of a workman has been terminated for any other reason than retrenchment, he would not be entitled to re-employment under this section. For instance, if the workman has resigned from service he would not be entitled to re-employment. If the termination of service consequent upon resignation is induced by any act on the part of the employer, it may tantamount to retrenchment. In *Saroop Vegetable*, a single judge of the Allahabad High Court held that where a unit of a factory was closed on which the workman resigned, the termination of the service of such workmen consequent upon closure in reality was retrenchment, qualifying the workman for re-employment under this section.[58] Likewise, the termination of the service of an employee in terms of the contract which has been excluded from the definition of retrenchment by sub-cl (bb) of s 2(oo) will not attract the provisions of s 25H.[59] According to the *Oxford Dictionary*, the word 're-employ' means 'employ again' or 'take back into employment'. 'Re-employment', therefore, means taking back into service. This section gives a right to a worker to have preference in the matter of re-employment.

On the question, whether the expression 're-employment' connotes taking back into employment or service on the same terms or conditions to which the employee was entitled previously, the Andhra Pradesh High Court took the view that the obligation to employ the workmen on the same conditions as to emoluments, etc., is implicit in the concept of re-employment.[60] The Punjab High Court had gone to the extent to say that an employer has no discretion to make promotion from lower cadres to vacancies which should be filled only with the retrenched employees.[61] On the other hand, the Bombay High Court held that there is nothing in the section or any other provision in the Act which gives the workman a right to secure re-employment on his previous terms and conditions of service.[62] The view taken by the Bombay High Court appears to be correct, because re-employment is not the same thing as re-instatement. It is also not correct law to say that the employer cannot fill in the vacancy by promoting workmen from lower cadres. This section must be considered along with s 25G. That is to say, in a particular category of workmen, the last employed person must go, as a rule, first, when retrenchment occurs. If after retrenchment, the employer proposes to take into his employment again, persons in the same category of work, this section indicates what he must do. Otherwise, the expression 're-employment' will lose all significance.[63] In *Ram Chandra Yadav*, some workmen were retrenched and they sought re-employment subsequently in terms of s 25H, but the employer filled in the vacancies with persons junior to the retrenched employees and such juniors were continued in employment for four months. Subsequently, the junior persons were also removed from employment. In the circumstances of the case, the Rajasthan High Court directed the employer to pay wages for the period when the junior persons remained in service at rates at which they were paid.[64]

The opportunity provided by this section should be given in the manner prescribed, *i.e.*, in accordance with the relevant rules framed under the Act. Rules 76, 77 and 78 of the Industrial Disputes (Central) Rules 1957, are the relevant rules in this behalf. Rule 76 prescribes the requirement of notice of retrenchment which shall be in Form P. Rule 77 prescribes the requirement of maintenance of seniority list of workmen and r 78 details out the procedure of re-employment. For instance, r 82 of the Industrial Disputes (Gujarat) Rules 1966 provided that opportunity to the retrenched employees must be given by intimating them by registered notice and the failure to comply with this requirement was held to be vital to the requirements of giving opportunity to the retrenched employees.[65]

REQUIREMENTS OF THE SECTION

This section prescribes certain conditions for the workmen to be entitled to claim the benefit under it. In order to claim preference in employment, the following conditions should be satisfied:

(i) he should be a citizen of India;

(ii) the workmen should have been 'retrenched' prior to re-employment. This right is not available to a dismissed, discharged or superannuated workman;

(iii) he should have been retrenched from the same category of service in the industrial establishment in which the re-employment is proposed; and

(iv) he should have offered himself for re-employment in response to the notice by employer under r 76 of the Industrial Disputes (Central) Rules 1957, or under any rules framed by a state. Failure so offer himself for re-employment as aforesaid, will disentitle a workman to the benefit of this section.

In *Cawnpore Tannery*, a person whose work was substantially of a clerical nature, though designated as assistant storekeeper, was retrenched. Subsequent to the retrenchment, the company employed three new hands in the clerical cadre. The industrial tribunal found that the workman was wrongfully kept out of employment at least from the date on which the company employed a new clerk and consequently directed the company to re-employ the concerned workman with effect from the date on which the award would become enforceable on the highest consolidated pay which was then being paid to the three clerks subsequently employed. The appeal to the labour appellate tribunal was dismissed. In appeal by special leave, the Supreme Court held that the retrenched workman must be given an opportunity of re-employment when the employer has to employ an additional hand. The principle is not only contained in s 25H, it is of general application too in industrial law, as it is based on fair play and justice. The fact that the retrenchment and subsequent re-employment of the three new hands took place before the introduction of ch VA in the Act, was not material. Permission or approval to discharge a workman under s 33 does not affect his right under s 25H.[66] Where the tribunal is satisfied that the employer has made out a *prima facie* case to discharge a workman by way of retrenchment, and accords approval or permission to such retrenchment, the right of the workman so retrenched under s 25H to re-employment is not affected by such permission or approval.[67] The Kerala High Court held that the rights of the temporary workmen under s 25H of the Act cannot operate to defeat the constitutional right of the recruits appointed by the public service commission.[68] In *S Satyam*, the Supreme Court held:

> The plain language of s 25H speaks only of re-employment of 'retrenched workmen'. The ordinary meaning of the expression 'retrenched workmen' must relate to the wide meaning of 'retrenchment' given in s 2(oo). Section 25F also used the word 'retrenchment' but qualified it by use of the further words 'workman...who has been in continuous service for not less than one year'. Thus, s 25F does not restrict the meaning of retrenchment but qualifies the category of retrenched workmen covered therein...and it does not restrict or curtail the meaning of retrenchment merely because the provision therein is made only for the retrenchment of a workman who has been in continuous service for not less than one year. Chapter V-A deals with all retrenchments while s 25F is confined only to the mode of retrenchment of workmen in continuous service for not less than one year. Section 25F prescribes the principles for retrenchment and applies ordinarily the principle of 'last come, first go' which is not confined only to workmen who have been in continuous service for not less than one year, covered by s 25F.[69]

The above interpretation placed on s 2(oo), s 25F and ch VB calls for a detailed analysis. It is conceded that once the action of the employer falls within the four corners of the definition under s 2(oo) read with s 25F, the workmen so retrenched will be governed by the cognate provisions of ch VA, *ie*, s 25G (last come, first go) and s 25H (re-employment of retrenched workmen), whether they have worked for more than 240 days or less than 240 days. However, to say that s 25F 'does not restrict the meaning of retrenchment, but only qualifies the category of retrenched workmen by extending the application to a workman who has completed one year continuous service' is a misconstruction of the provision. If the termination of service of a workman does not fall within the ambit of s 2(oo), which means and implies that it is not a case of retrenchment, then admittedly s 25F does not come into the picture regardless of the fact whether the workman has put in more than 240 days' service or less. In other words, in order to press s 25F or s 25G or s 25H into service, it should, *in the first place*, be shown that the action of management falls within the four corners of the definition in s 2(oo). If the answer is yes, ss 25F, 25G and 25H automatically apply without anything more. If the answer is 'no', they have no application whatsoever. *Secondly*, there is no warrant for the Court to read into s 25F something that is neither expressly provided therein nor was intended by the legislature. As an example, let us take the case of a workman appointed on a temporary basis either (i) for a period of six months, or (ii) for a period of 18 months, with a stipulation in the contract that his temporary employment comes to an end automatically on the expiry of the date mentioned therein. Such termination in either case falls outside the purview of s 2(oo) in view of the fact that sub-cl (bb) excludes termination of such fixed tenure employment from the definition. The fact that the said workman has put in less than one year of continuous service as in case (i), or more than one year as in case (ii) above, has no bearing on the nature of the action. In both cases, the action is outside the scope of s 2(oo) and, by the same token, the notice and compensation prescribed under s 25F have no application. Once the applicability of s 25F stands ousted, it logically follows that neither the rule of 'last come, first go' (s 25G), nor the requirement of giving 'preferential treatment in the event of re-employment' (s 25H) can have any application. Thus, the doctrine of 'qualification' attributed by the Supreme Court to the phraseology used in s 25F is only productive of confusion and is unwarranted. *Thirdly*, the observation, 'Ch VA deals with all retrenchments while s 25F is confined only to the mode of retrenchment' is wrong on facts. Chapter VA does not in its entirety deal with the so called 'all retrenchments'. With the sole exception of the three sections, *i.e.*, ss 25F, 25G and 25H, no other section of ch VA deals with retrenchment. The other sections refer to (i) the applicability of the chapter to establishments (s 25A), (ii) continuous service (s 25B), (iii) lay-off (ss 25C-25E), (iv) compensation in case of transfer of undertakings (s 25FF), (v) 60 days' notice to close down an undertaking (s 25FFA), and (vi) compensation in case of closure of undertakings (s 25FFF). *Fourthly*, the distinction drawn by the Court between '*all retrenchments*' in ch VB and s 25F on the basis of one year of continuous service is equally baseless. It is not as if the requirement of 'one year continuous service' is exclusively confined to s 25F. Even in the case of lay-off (s 25C), or transfer (s 25FF) or closure of undertaking (s 25FFF), a workman who has not been in continuous service for not less than one year is not entitled to compensation. Thus, the distinction sought to be made between s 25F on the one hand, and other provisions of ch VA on the other, is not well founded. From the above discussion, it can be seen that s 25F, much less s 25G or s 25H, have no application whatsoever in respect of a termination, which does not fall within the ambit of the definition in s 2(oo). The sole deciding factor of the applicability of the aforementioned three sections of ch VA is 'whether the action can be termed as retrenchment within the meaning of s 2(oo) ', and not the 'length of service' put in by a workman. Length of service has a limited significance for the purpose of eligibility to compensation, subject to the rider that the first condition, *i.e.*, the termination falls within the ambit of s 2(oo), is satisfied. In a case where the management retrenches a group of workmen, some of whom had put in one year of continuous service and others less than one year, the action of management does not cease to be retrenchment, regardless of the fact that the latter class of workmen are not entitled to notice wages or compensation because of the shortfall in the threshold level of service. *Lastly*, again, it has to be clearly understood that all the three sections, *i.e.*, ss 25F, 25G & 25H, either apply or do not apply to a particular case *en bloc* and *uno flatu.* This legal position is further buttressed by the fact that the language used in ss 25G & 25H is so unequivocal that they do not cover a case of termination occasioned by transfer or closure of undertaking, even though the employer is required to pay compensation in both the cases in accordance with s 25F under the deemed provision appearing in ss 25FF & 25FFF. In *Aravali KG Bank*, the labour court as well as a single judge of the Rajasthan High Court followed the defective decision of Supreme Court

rendered in *Central Bank*, and held that a workman, notwithstanding that he has worked for less than 240 days before termination, would be entitled to the beneficial provisions of s 25H. The above decision of the Apex Court requires to be reviewed by a larger Bench and correct law pronounced.[70] The case of *Vasant Kumbhare*, furnishes one more illustration of judicial indiscipline compounded by a freewheeling misinterpretation of the provisions of the Industrial Disputes Act. Referring to *Punjab LDRC*, on the nature and scope of s 25FFF, Deshmukh J of the Bombay High Court observed:

> To my mind, what the Supreme Court intended to say...was that in case the closure applied (sic) on account of the unavoidable circumstances beyond the control of the employer, it may be said that the workmen would not be entitled to the application of s 25H ....[71]

The above commentary of Deshmukh J is as misplaced and flawed as that of the very decision of the Constitution Bench in *Punjab LDRC*, which aspect has been discussed at some length in the preceding sections under the head s 2(oo). There is nothing to guess in the language used in s 25H in order for the court to bring into play such extraneous considerations, as whether the undertaking was closed due to avoidable or unavoidable reasons for the purpose of re-employment. Even so, the Supreme Court in *Punjab LDRC* observed:

> In our view, the principle of harmonious construction implies that in a case where there is a genuine transfer of an undertaking as contemplated in the aforesaid sections, it would be inappropriate to read into the provision a right given to workman 'deemed to be retrenched' a right to claim re-employment as provided in s 25H.

Equally, there is nothing in the above observation, which could sustain the gloss added by Deshmukh J. That being the position, to read into the provision a right to claim re-employment on the ground that the closure was not on account of unavoidable circumstances is a judicial perversion of the highest order. This decision can also be attacked on a more fundamental legal principle enshrined in s 25F read with s 25H. Even in a case where the employer validly retrenches the workmen under s 25F and, subsequently, proposes to take some persons in his employment, the liability imposed on him is limited to giving an opportunity and preference to the retrenched workmen, and nothing more. The section casts no obligation on the employer either to necessarily employ them or, when so employed, to offer the same job or the same terms and conditions which they were enjoying at the time of retrenchment. This decision runs counter to binding precedents and should be treated as *per incuriam*. In *Industry Colliery*, the Supreme Court held that the workmen of coalmines, who were retrenched prior to the nationalisation of coalmines in 1972, were entitled to preferential treatment under s 25H in the event of re-employment after the takeover of the mines.[72] Under s 25H, the tribunal cannot direct the employer to absorb temporary workmen, who worked for less than 240 days and whose services were terminated, as regular employees by giving them preferential treatment.[73] Having retrenched a workman, if the employer does not send intimation about a subsequent vacancy while re-employing his juniors, it amounts to violation of s 25H read with r 78 of Central Rules.[74] The termination of a daily-wager, while fresh recruitment was made, is not violative of s 25H, and a daily wager had no right to be considered in the event of future employment.[75] The provisions of s 25H are applicable to a case where any workman is retrenched and the employer proposes to take into his employment any person. The said provisions have no application to a case of termination of the service of a workman on the expiry of the period stipulated in the order of appointment, whose relationship with the employer comes to an end automatically on the said expiry of the period stipulated therein.[76]

Re-employment contemplated by s 25H cannot be equated with 'reinstatement' and, hence, the claim for backwages cannot be entertained.[77] In *Hari Krishan*, the facts were: two clerks were appointed on an *ad hoc* basis for six months and their services were regularised a few months later. Three months thereafter, their services were terminated on the ground that the same were no longer required. They assailed the termination before the labour court. The labour court answered the reference against the workmen holding that their termination was justified and that they were not liable to be reinstated in service. Dismissing the writ petition filed by the workmen, the High Court held that there neither any violation of s 25G nor s 25H. The Court further observed that the original appointment being against rules, the challenge to termination was not sustainable, and held that the petitioners had to blame themselves for not applying when the post was advertised.[78] Where the services of a few daily wagers were terminated in contravention of ss 25G & 25H, even though s 25F was not violated as they had not worked for 240 days, the award of the labour court directing reinstatement with 50% backwages was partly allowed.[79] In order to invoke s 25H, the employee has to prove that he was retrenched, and, if it was a case of termination under s 2(oo)(bb), he could not assert any right under s 25H.[80] The above renditions disclose a tendency on the part of the learned judges to read more into the s 25H than what it is really stipulates, bordering on an absolute misconstruction of the provision.

In striking contrast to the misinterpretation placed by several High Courts on s 25H, it is refreshing to come across the

decision of Tarun Agarwal J of Allahabad High Court in *Anurag Sharma.* The learned judge held, and very rightly so, that s 25H does not confer any absolute right on retrenched workmen to re-employment, except preferential right hedged with certain conditions.[81] It is submitted that the interpretation placed by Tarun Agarwal J on s 25H is right, whereas the decisions rendered in *Hari Krishan*, *Narender Kumar* and *Tarsem Lal* are clearly misconceived, overreaching and wrong. *What was the provocation for the learned judges to travel beyond the plain language and place uncalled for emphasis on s 25H, which is patently out of step with the spirit of it?* It is not as if they were called upon to re-write the provision according to their whims! There is nothing so complex in the phraseology of s 25H as to warrant interpretational gymnastics of the kind displayed in the above three cases! What all the said section stipulates is very simple and clear. It says that, in the event of re-employment, the employer *shall give an opportunity to the retrenched workmen, and preference to those of them who present themselves for re-employment,* and nothing more. There is nothing in the language of the section, *which imposes an obligation on the employer either to compulsorily employ the retrenched workmen or, when so employed, to engage them in the same job or position, much less on the same wages, terms and conditions which they were enjoying at the time of retrenchment*. It is rather disquieting that a few judges at the level of High Courts and even that of Supreme Court persuaded themselves to see in s 25H more than what it plainly conveys!

Where an undertaking was closed resulting in the termination of the services of the workmen, s 25H has no application in the event of the employer starting another unit, and the benefit of the said section would not be available to the workmen who lost their jobs as a result of closure.[82] In a dispute relating to Hindustan Zinc, a similar question arise under s 25-O read with s 25N falling under ch VB. A single judge of the AP High Court held that in the event of bonafide closure of the establishment under s 25-O, the consequential discharge of the workmen was not 'retrenchment' within the meaning of s 2(oo) and hence the workmen were not entitled to be benefit of s 25H.[83] In *Rakesh Kumar Tewari*, the facts briefly were: The respondent-workman was employed as a messenger on a daily wage in the State Bank of India. No appointment letter was issued to him but he worked for 87 days in that capacity. After the workman ceased to serve with the appellant, he raised an industrial dispute claiming that his services had been wrongfully terminated by the appellant. The Central Government referred the following disputes to the Industrial Tribunal in terms *whether the termination of services of the workman and not considering him for further employment under s 25H of the ID Act was justified.* The tribunal held that the termination *was in violation of s 25G and s 25H* and directed reinstatement with full back wages, *etc*. Writ petitions followed finally culminating in an appeal before the apex court. Setting aside the orders of the courts below, Ms Ruma Pal J (for self and Lakshmanan J) held:

> Indeed the order of reference by the Central Government did not also refer to Section 25-G but only to Section 25-H. In the circumstances it was not open to the Tribunal to "go off on a tangent" and conclude that the termination of service of the respondent was invalid because of any violation of Section 25-G by the appellant. (). .. the High Court upheld the decision of the Tribunal as if the Tribunal had proceeded under Section 25H. As we have said Section 25H proceeds on the assumption that the retrenchment has been validly made. Therefore, the High Court's view that the termination was invalid under Section 25H cannot in any event be sustained. (). .. Besides in the second appeal admittedly several persons had been appointed prior to the respondent on a temporary basis. They would have prior rights to reemployment over the respondent on the basis of the principles contained in Sections 25G or 25 H (). .. In the circumstances, the award of the Tribunal and the decision of the High Court holding that the respondent's services were wrongfully terminated were both incorrect. They are accordingly set aside. There is as such no question of payment of any back wages. Additionally the only other reason given by the High Court for directing reinstatement of the respondent in the second appeal was based on an equitable consideration of the respondent having allegedly been reinstated. The factual basis for this conclusion was erroneous.[84] ()

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53 Subs by Act 36 of 1964, s 16, for "to the retrenched. .. workmen." (wef 19-12-1964).

54 *Central Bank of India v SSATYAM* 1996 Lab IC 2248, 2252 (SC), per JS Verma J.

55 *Cawnpore Tannery Ltd v S Guha* (1961) 2 LLJ 110 [LNIND 1960 SC 266] (SC) : AIR 1967 SC 667 [LNIND 1960 SC 266], per Gajendragadkar J.

56 *Ram Chandra Yadav v Rajasthan SRTC* (1990) 2 LLJ 408 (Raj) (DB), per SS Byas J.

57 *Jaswinder Singh Passi v Registrar, Co-op Societies* (1992) 2 LLJ 177, 179 (P&H), per Ashok Bhan J.

58 *Saroop Vegetable Product Inds Ltd v State of UP* 1987 Lab IC 1286, 1288 (All), per Sahai J.

59 *K Rajan v Kerala State Electricity Board* 1992 Lab IC 1208, 1210 (Ker) (DB), per Jagannadha Rao CJ.

60 *Indian Hume Pipe Co v LC* (1963) 1 LLJ 770 (AP) (DB), per Chandra Reddy CJ.

61 *Muller & Phipps (India) Pvt Ltd v Employees' Union* (1967) 2 LLJ 222 (Punj), per SB Capoor J.

62 *Indian Hume Pipe Co Ltd v Bhimarao B Gajbhiya* (1965) 2 LLJ 402 [LNIND 1965 BOM 37] (Bom) (DB), per Chainani CJ.

63 *Bihar Sugar Works v SG Prasad* 1969 Lab IC 1430, 1432 (Pat) (DB), per UN Sinha J.

64 *Ram Chandra Yadav v Rajasthan SRTC* (1990) 2 LLJ 408 (Raj) (DB) : 1990 (60) FLR 267, per SS Byas J.

65 *Gujarat State MT Corpn v Deepak J Desai* 1987 Lab IC 1361, 1362 (Guj) (DB), per Gokulakrishnan CJ.

66 *Cawnpore Tannery Ltd v S Guha* (1961) 2 LLJ 110 [LNIND 1960 SC 266] (SC) : AIR 1967 SC 667 [LNIND 1960 SC 266], per Gajendragadkar J.

67 *MD Thakur v Labour Appellate Tribunal* (1956) 1 LLJ 246 [LNIND 1955 BOM 70] (Bom) (DB), per Chagla CJ.

68 *OM Viswambharan v State of Kerala* 1983 Lab IC 369, 374 (Ker) (DB).

69 *Central Bank of India v S Satyam* (1997) 2 LLN 31, 36 (SC).

70 *Aravali KG Bank v PO, CIT* (2002) 2 LLN 700 (Raj), per Verma J.

71 *Vasanta K Kumbhare v Industrial Court* (1999) 2 LLN 145 (Bom), per Deshmukh J.

72 *Workmen v Mgmt of Industry Colliery, BCCL* (2001) 2 LLN 819 (SC), per Rajendra Babu J.

73 *Mgmt of Punjab National Bank Ltd v PO , CGIT* (2001) 3 LLN 316 (P&H), per Sudhalkar J.

74 *Union of India v Bachu Badia* (2002) 1 LLN 1098 (Guj) (DB), per Patel J.

75 *Union Bank Employees Assn v Union Bank of India* (2002) 4 LLN 1063 (Raj), per Keshote J.

76 *Yusuf Khan v MP Electricity Board, Jabalpur* (2000) 2 LLJ 576 (MP) (DB), per Srivastava J.

77 *Eastern Coalfields Ltd v SK Mukhopadhyaya* (2003) 3 LLJ 1082 : 2003 (3) JCR 296 (Jhar) (DB).

78 *Hari Krishan v PO, LC* (2003) 4 LLJ 606 (P&H), per Saron J.

79 *Municipal Corpn of Delhi v Narender Kumar* [2008] 1 LLJ 571(Del) : ILR (2007) Supp. (2) Del 189, per Gambhir J.

80 *Tarsem Lal v Haryana LRD Corpn Ltd* (2010) 2 LLJ 9 (P&H) : (2009) 156 PLR 289 [LNIND 2009 PNH 76], per Kannan J.

81 *State Bank of Bikaner and Jaipur v Anurag Sharma* (2010) 2 LLJ 251 [LNIND 2009 ALL 429] (All) : 2010 (5) SLR 358, per Tarun Agarwal J.

82 *Somayya S Bhandari v Oriental Rubber Industries Ltd* (2011) 1 LLJ 193 (Bom) : 2011 (1) SLR 331.

83 *IL Naidu v Union of India* (2003) 2 LLJ 857 (AP) : 2003 (2) ALT 470, per Raghuram J.

84 *RM, State Bank of India v Rakesh Kumar Tewari,* AIR 2006 SC 839 [LNIND 2006 SC 6]: (2006) 1 SCC 530 [LNIND 2006 SC 6] : (2006) 1 LLJ 748 [LNIND 2006 SC 6] SC, per Ms Ruma Pal J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VA Lay-off and Retrenchment

S. 25-I. Recovery of moneys due from employers under this Chapter.—

[Rep. by Industrial Disputes (Amendment and Miscellaneous Provisions) Act 1956 (36 of 1956), s 19 (wef 10-3-1957).]

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VA Lay-off and Retrenchment

S. 25J. Effect of laws inconsistent with this Chapter.—

(1) The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law [including standing orders made under the Industrial Employment (Standing Orders) Act 1946 (20 of 1946)]:

[85][*Provided* that where under the provisions of any other Act or rules, orders or notifications issued thereunder or under any standing orders or under any award, contract of service or otherwise, a workman is entitled to benefits in respect of any matter which are more favourable to him than those to which he would be entitled under this Act, the workman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that he receives benefits in respect of other matters under this Act].

(2) For the removal of doubts, it is hereby declared that nothing contained in this Chapter shall be deemed to affect the provisions of any other law for the time being in force in any State in so far as that law provides for the settlement of industrial disputes, but the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accordance with the provisions of this Chapter.

SUB-SECTION (1)

(i) Inconsistency with Chapter VA

Sub-section (1) only provides that the provisions of ch VA shall have effect notwithstanding the provisions of any other law including the provisions of the Standing Orders which are inconsistent with it.[86] Hence, the only effect of s 25J(1) is that in so far as the provisions of the Standing Orders are inconsistent with any provisions of ch VA the provisions of ch VA will override the inconsistent provisions of the Standing Orders. But an inconsistency with ch VA in a certain provision of a Standing Order will make the entire Standing Order nugatory, if it can be severed from the rest of the Standing Order which is not inconsistent.[87] The provisions of s 25J(1) are again subject to the proviso thereto, *i.e.*, if the inconsistent provision of any other law or the Standing Orders is more favourable to the workman, such provision will have the effect of overriding the provisions of ch VA. It determines not merely the right of workmen to receive compensation for lay-off or retrenchment and the liability of employers to pay such compensation, but it also determines the wider rights and liabilities with respect to lay-off and retrenchment itself. Though the legislature has not used clear and explicit words conferring such powers and obligations, looking to the whole scheme of ch VA, that power or obligation is implicit in the provisions of the chapter.[88] By virtue of this section, ch VA would have overriding effect over any inconsistent provision in any other law. For instance, the requirements of s 25F (which is in ch VA) of this Act will override the provisions of rr 149(1) and (6) of railway establishment board, in the matter of retrenchment.[89] The provisions of ss 25F, 25G & 25H have overriding effect over any other law which necessarily includes service rules. The service rules which are inconsistent with these provisions cannot be given effect to and have to be simply ignored.[90] In *Harmohinder Singh*, the Supreme Court held that s 25J provides that the provisions of ch VA would have overriding effect irrespective of any other law including Standing Orders made under the Industrial Employment (Standing Orders) Act 1946. Chapter VA deals with lay-offs and retrenchment. There is no substantive provision in ch VA, which pertains to the period of

service of an employee. Consequently, s 25J has no application to a case of fixing the maximum age limit for employees and the maximum permissible service, *etc*.[91]

In *Devidayal Sharma,* the management of a concern removed a workman from its service on offering one month's salary in lieu of notice, under its Standing Orders in which it was not provided that an opportunity to show cause against the termination of service will be provided to the workman. The tribunal awarded compensation for such termination. In a writ petition against the award, the Bombay High Court held that the employer was not entitled to rely on the Standing Orders, for that would be subject to the provisions of ch VA as specifically provided for by s 25J.[92] In *RB Bansilal,* the Supreme Court discountenanced the plea that in view of the relevant Standing Orders, the quantum of compensation had to be scaled down or measured in terms of the Standing Orders. In this case, under the relevant Standing Orders, the employer could in the event of fire, breakdown of machinery *etc.*, stop any machine or machines or department or departments, wholly or partially, or the whole or a part of the establishment for any period, without notice and without compensation in lieu of notice. Further, any operative so laid-off, was not to be considered as dismissed from service but as temporarily unemployed and was not to be entitled to wages during such unemployment except to the extent mentioned in the Standing Orders. The plea was rejected in view of the clear language of s 25 J under which the provisions of ch VA are to have effect notwithstanding anything inconsistent therewith contained in any other law including Standing Orders made under the Industrial Employment (Standing Orders) Act 1946.[93] In *TR Aluminium*, the employer inflicted, as it were, a punishment on the employee, who was suffering from injuries to his right hand sustained arising out of and in the course of employment and had accordingly sought compensation under the Workmen's Compensation Act, which led to the company availing of insurance benefits by relying on the plea that the respondent was its workman. Having done that, the company terminated the services of the workman on the ground that he was incapacitated to do any work. The labour court directed the employer to reinstate the workman. Rejecting the arguments advanced on behalf of the petitioner-employer to the effect that in terms of s 56 of the Contract Act, the contract of employment got frustrated as the workman was incapacitated to do any work, a single judge of Delhi High Court observed that s 25J read with s 25F has overriding effect over any other legislation and the plea of 'frustration of contract' under s 56 of the Contract Act was not available to the employer.[94]

(ii) Proviso

This proviso has been substituted for the old one by the Industrial Disputes (Amendment) Act 1964. The new proviso further clarifies that the workman will continue to receive the favourable benefit to which he is entitled in certain cases notwithstanding that he receives benefits in respect of other matters under this Act. The proviso now provides that if a workman is entitled to something more as 'retrenchment compensation' than under s 25F or as 'lay-off compensation under s 25C ', under any Act or rules, orders or notifications issued thereunder or under any Standing Orders or under any award, contract of service or otherwise, he shall be entitled to get that and the provisions of s 25F or s 25C will not reduce the compensation available to the workman as aforesaid.[95] In *T Venkateswarlu,* the Andhra Pradesh High Court held that the provisions in a bi-partite settlement confers far more beneficial rights on the employees than the ones covered by s 25F. The case, therefore, would fall under the proviso to s 25J and could not be said to override the relevant provisions of the bi-partite settlement.[96] In *Mumbai Mazdoor Sabha,* a single judge of the Bombay High Court held that a settlement arrived at between the employer and the labour union *inter alia* providing that the employer would not resort to any retrenchment or termination of service or discharge of its workmen during the currency of the settlement except after obtaining the consent of the union was unfair, unreasonable and opposed to the criteria laid down in s 25J of the Act.[97]By virtue of the proviso, the rates of minimum wages fixed under the provisions of the Minimum Wages Act would prevail over the rate of wages fixed under an award passed by an industrial tribunal under the provisions of this Act, in case the latter rates of wages are lower than the rates fixed under the provisions of the Minimum Wages Act, even for the period during which the award is in force.[98]

SUB-SECTION (2): REMOVAL OF DOUBTS

Sub-section (2) has been added by way of abundant caution and as an explanation to sub-s (1). In so far as provision has been made in the Act about any rights and liabilities of employers and workmen, the same shall be determined in accordance with those provisions, but where the Act is silent on any particular aspect of retrenchment or lay-off and if an express provision in regard to it exists in any other law in force in any state and such provision is not by necessary implication inconsistent with this chapter, then the provisions of that other law will determine any dispute relating to such aspect.[1] There is nothing in this sub-section to supersede laws dealing with matters about which this chapter is silent.[2] In *Rohtak Hissar,* the Supreme Court held that the last part of s 25J(2) categorically provides that the rights and liabilities of the employers and workmen in relation to lay-off shall be determined in accordance with the provisions of ch VA of this Act.[3]In other words, in regard to the payment of compensation for the lay-off and retrenchment, the relevant provisions of this Act will apply and not those of the Uttar Pradesh Industrial Disputes Act 1947. By virtue of this provision, notwithstanding the provision of ss 6K and 6R of the Uttar Pradesh Act, the proviso to s 25J(1) under which the Standing

Orders which give very favourable benefits to the employers in respect of the compensation for lay-off will prevail over the provisions of the ID Act. In *Sawatram Ramprasad*, dealing with the question whether the Central Provinces and Berar Industrial Disputes (Settlement) Act 1947 was applicable to the case involving the determination of rights and liabilities of the management and workmen in the case of lay-off or whether the provisions of ch VA of the ID Act were applicable, the Supreme Court found that the former Act contained no provisions either for recovery of money or compensation for lay-off and, therefore, held that where a workmen had a claim arising out of lay-off, it could only be dealt with under the I D Act in view of clear and unambiguous language of s 25J(2) of the ID Act. It was further observed that even if s 31 and s 25 J save the application of the State Act, they do so subject to the condition that the question of lay-off must be decided in accordance with ch VA of the ID Act.[4]

In *Krishna DMS*, the court had to deal with the question as to 'whether retrenchment of an employee in an establishment governed by the Andhra Pradesh Shops and Establishments Act 1966 is governed by the provisions of that Act or by the provisions of ch VA, which deal with lay-off and retrenchment'. The court noticed that both the enactments were enacted by the state and the central legislature in exercise of their powers given by Entry 22 of List 3 of the Seventh Schedule of the Constitution of India. The court also recognised the fact that the state Act was the later Act and it had received the assent of President. However, the court found that there was no repugnancy between the two statutes as to make the provisions of the ID Act relating to retrenchment ineffective in the State of Andhra Pradesh. It was therefore, observed that by enacting s 25J(2), the Parliament intended that the rights and liabilities arising out of lay-off and retrenchment, should be uniform throughout India where the ID Act was in force and did not wish that the states should have their own laws inconsistent with the central law. If really the state legislature intended that it should have a law of its own regarding the rights and liabilities arising out of retrenchment or lay-off, it would have expressly provided for it and submitted the Bill for the assent of the President. Since the court did not see any express or implied repugnancy between the central and state statutes, the rights and liabilities of the employees in connection with retrenchment and lay-off were governed by the provisions of ch VA of the ID Act which could be enforced through the machinery of ss 41 (1) and 41 (3) of the State Act. The court, however, suggested that the ID Act itself should be suitably amended making it possible to an individual workman to seek redress in an appropriate forum regarding illegal termination of service which may take the form of dismissal, discharge, retrenchment *etc*., or modification of punishment imposed in a domestic inquiry. Speaking for the court, Venkataramiah J suggested the law reform in the following words:

> An amendment of the Central Act introducing such provisions will make the law simpler and also will reduce the delay in the adjudication of industrial disputes. Many learned authors of books on industrial law have also been urging for such an amendment. The state Act in the instant case has, to some extent, met the above demand by enacting s 41 providing for a machinery for settling disputes arising out of termination of service which can be resorted to by an individual workman. In this connection, we have one more suggestion to make. The nation remembers with gratitude the services rendered by the former labour appellate tribunal which was manned by some of our eminent judges by evolving great legal principles in the field of labour law, in particular with regard to domestic inquiry, bonus, gratuity, fair wages, industrial adjudication etc. The Industrial Disputes (Appellate Tribunal) Act 1950 which provided for an all-India appellate body with powers to hear appeals against the orders and awards of industrial tribunals and labour courts, in India was repealed in haste. If it had continued, by now the labour jurisprudence would have developed perhaps on much more satisfactory lines than what it is today. There is a great need today to revive and to bring into existence an all India labour courts, industrial tribunals and even of authorities constituted under several labour laws enacted by the state so that a body of uniform and sound principles of labour law may be evolved for the benefit of both industry and labour throughout India. Such an appellate authority can become a very efficient body on account of specialisation. There is a demand for the revival of such an appellate body even from some workers' organisation. This suggestion is worth considering. All this we are saying because we sincerely feel that the Central Act passed forty years ago needs a second look and requires a comprehensive amendment.[5]

In *Straw Board*, the Supreme Court held that by virtue of s 25J, a tribunal created under Uttar Pradesh Industrial Disputes Act, is competent to award compensation on the closure of an undertaking as contemplated by s 25FFF of the ID Act.[6]This view is not correct. A tribunal created under a State Act has to confine itself to the provisions of that Act and cannot extend its jurisdiction beyond that. Section 25J being a provision in the ID Act is *de hors* the jurisdiction of the tribunal created by the Uttar Pradesh Act. Furthermore, s 25J(2) has no reference to closure-compensation. It only refers to lay-off and retrenchment. The question, therefore, requites reconsideration.

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85 Subs. by Act 36 of 1964, s. 17, for the proviso (w.e.f. 19.12.1964).

86 *Brahmachari Research Institute v Workmen* (1959) 2 LLJ 840 [LNIND 1959 SC 184], 843 (SC), per Wanchoo J.

87 *British India Corpn v IT* (1962) 1 LLJ 577 (Punj), per AN Grover J.

88 *MA Veirya v CP Fernandez* (1956) 1 LLJ 547 [LNIND 1955 BOM 261] (Bom) (DB), per Chagla CJ.

89 *Nand Lal v Union of India* 1978 Lab IC 1267 (All) (DB), per Seth J.

90 *Bhaskaran v Sub-divisional Officer* (1982) 2 LLJ 248, 250 (Ker), per MP Menon J.

91 *Harmohinder Singh v Kharga Canteen* (2001) 3 LLN 715 (SC).

92 *Devidayal Nanackchand Sharma v State IC* (1961) 1 LLJ 167 (Bom) (DB) : AIR 1959 Bom 65 [LNIND 1958 BOM 82]: 1958 (60) Bom LR 1253, per Mudholkar J.

93 *RB Bansilal Abirchand Mills Co Pvt Ltd v LC* 1972 Lab IC 285 [LNIND 1971 SC 598], 292-93 (SC) : (1972) I LLJ 231SC : (1972) 1 SCC 154 [LNIND 1971 SC 598], per Mitter J.

94 *TR Aluminium Mfg Ltd v PO, LC* (2003) 4 LLJ 776 [LNIND 2003 DEL 504] (Del), per Mukul Mudgal J.

95 *Brahmchari Research Institute v Workmen* (1959) 2 LLJ 840 [LNIND 1959 SC 184], 843 (SC), per Wanchoo J.

96 *T Venkateswarlu v BM, State Bank of India* (1990) 1 LLJ 533, 537 (AP) : 1989 (3) ALT 549, per M Jagannadha Rao J.

97 *Mumbai Mazdoor Sabha v SA Patil* 1993 Lab IC 2283, 2299 (Bom), per Dhanuka J.

98 *Shib Prasad Ghosh v District Judge* , 24 *Parganas* (1963) 2 LLJ 184 (Cal), per BN Banerjee J.

1 *National Art Silk Mills Ltd v Mill Mazdoor Sabha* (1954) 1 LLJ 678 (LAT).

2 *JH Clarke v Glaxo Laboratories (India) Ltd* (1954) 2 LLJ 649 (LAT).

3 *Rohtak Hissar DES Co Ltd v State of UP* (1966) 2 LLJ 330 [LNIND 1965 SC 350], 340 (SC) : AIR 1966 SC 1471 [LNIND 1965 SC 350]: [1966] 2 SCR 863 [LNIND 1965 SC 350], per Gajendragadkar CJI.

4 *Sawatram Ramprasad Mills Co Ltd v Baliram Ukandaji* (1966) 1 LLJ 41 [LNIND 1965 SC 217] (SC) : AIR 1966 SC 616 [LNIND 1965 SC 217]: [1966] 1 SCR 764 [LNIND 1965 SC 217], per Hidayatullah J.

5 *Krishna DMS Ltd, v NV Purna Chandra Rao* (1987) 2 LLJ 365 [LNIND 1987 SC 536] (SC) : (1987) 4 SCC 99 [LNIND 1987 SC 536] : AIR 1987 SC 1960 [LNIND 1987 SC 536], per Venkatramiah J.

6 *Workmen of Straw Board Mfg Co Ltd v Mgmt* (1974) 1 LLJ 499 [LNIND 1974 SC 114], 510 : (1974) 4 SCC 681 [LNIND 1974 SC 114] : AIR 1974 SC 1132 [LNIND 1974 SC 114], per Goswami J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VB Special Provisions Relating to Lay-off, Retrenchment and Closure in Certain Establishments

S. 25K Application of Chapter VB.—

(1) The provisions of this Chapter shall apply to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than [5][one hundred] workmen were employed on an average per working day for the preceding twelve months.

(2) If a question arises whether an industrial establishment is of a seasonal character or whether work is performed therein only intermittently, the decision of the appropriate Government thereon shall be final.

SUB-SECTION (1): ESTABLISHMENTS EMPLOYING ONE HUNDRED WORKMEN

The provisions of this chapter have been made applicable to establishments in which one hundred or more workmen are employed on an average per working day for the preceding twelve months. For determining the question as to where this chapter applies to a particular industrial establishment on a particular day, it is not sufficient that on the particular day or for some days, one hundred or more workmen were employed in it but it will have to be shown that such number of workmen were employed in the establishment on an average calculated for the twelve months preceding that day on the basis of each working day. Thus, the days of weekly rest and other holidays are not to be counted for taking the average. The Bombay High Court held that for the purpose of computation of the total number of workmen employed on an average per working day for the last twelve months, as contemplated under s 25K(1), only those persons who answer to the definition of 'workman' as contained in s 2(s) of the Industrial Disputes Act were liable to be included.*Mathadi* workmen and contractors' workers should not be included in computing such number. As far as 'workmen' of other establishments are concerned, they could be included only if there was functional integrality between the industrial establishment whose case under s 25K is being considered and such other establishments.[6] However, the industrial establishments of a seasonal character or in which, work is performed only intermittently even though employing one hundred or more workmen have been excluded from the application of the provisions of this chapter.

SUB-SECTION (2): DECISION OF THE APPROPRIATE GOVERNMENT

In view of the complex nature of the industrial organisation, questions, occasionally do arise as to whether an industrial establishment, infact, is of a seasonal character or whether work performed therein is done only intermittently. With a view to obviate such controversies, the appropriate Government has been empowered to decide such questions finally. In other words, such decisions of the appropriate Government are not liable to be questioned in a court of law. The question whether an establishment is of a seasonal character or not, has to be decided by the Government and not by the writ court[7] Such decision may, however, be amenable to judicial review if it is mala fide or in deciding the question, the appropriate Government has not applied its mind to the material on record or has not taken into account the relevant and vital materials or has left out of consideration the relevant and vital materials or has proceeded on extraneous and irrelevant considerations.

5 Subs by Act 46 of 1982, s 12, for "three hundred" (wef 21-8-1984).

6 *Dyes and Chemical Workers Union v BOI Ltd* (2001) 2 LLN 679, 668 (Bom) (DB), per Srikrishna J.

7 *Andhra Pradesh Fedn of ILTD Workers v Govt of AP* 1983 Lab IC (NOC) 91 (AP), per Jayachandra Reddy J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VB Special Provisions Relating to Lay-off, Retrenchment and Closure in Certain Establishments

S. 25L. Definitions.—

For the purposes of this Chapter,—

(a) "Industrial establishment" means—

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

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

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

(b) notwithstanding anything contained in sub-section (ii) of clause (a) of section 2,—

(i) in relation to any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or

(ii) in relation to any corporation [not being a corporation referred to in sub-clause (i) of clause (a) of section (2)] established by or under any law made by Parliament.

the Central Government shall be the appropriate Government.

CLAUSE (a): INDUSTRIAL ESTABLISHMENT

For the purpose of this chapter, 'industrial establishment' has been defined to mean:

(i) a factory as defined in cl (m) of section 2 of the Factories Act 1948;

(ii) a mine as defined in cl (j) of sub-s (1) of s 2 of the Mines Act 1952; or

(iii) a plantation as defined in cl (f) of s 2 of the Plantations Labour Act 1951.

This definition of 'industrial establishment' is the self-same as in explanation to s 25A which defines an industrial establishment for the purposes of ss 25A, 25C, 25D & 25E. But that definition is meant specifically for those provisions only, while the present definition governs the application of the provisions of this chapter (s 25K to s 25S) entirely. These provisions, therefore, do not apply to an establishment which is not a 'factory', 'mine' or 'plantation', because such an establishment is not an 'industrial establishment' as defined by this section. Hence, the provisions of this chapter will not apply to a commercial establishment even if it employs one hundred or more workmen. From a combined reading of the definition of 'lay-off' in s 2(kkk), the Explanation to ss 25A & 25E, it appears that 'lay-off' can normally be effected in a 'factory', 'mine', or 'plantation' only and not in a commercial establishment but 'retrenchment' and 'closure' can be

effected in a commercial establishment as well. A commercial establishment which is not a 'factory', 'mine' or 'plantation', is not an 'industrial establishment', and thus, the provisions of this chapter relating to 'retrenchment' and 'closure' will not be attracted to it. In other words, the 'retrenchment' in or 'closure' of an office of a company employing one hundred or more persons will be governed by the provisions of ch VA and can be effected without complying with the provisions of ch VB. From the scheme of this section, it is evident that the industrial establishment as defined in this section is a much narrower concept than industry as defined in s 2(j). An establishment even if 'industry' will not be an industrial establishment for the purposes of this chapter unless it is a 'factory', 'mine' or 'plantation'.

The Orissa High Court in *State Transport Accountants*, held that the Orissa State Road Transport Corporation which has several factories, plants, repair workshops being engaged in 'manufacturing process' will be factory within the meaning of s 2 (m) of the Factories Act 1948 and as such, would fall within the definition of industrial undertaking as defined in this section.[8] In *Lal Mohammed*, the Supreme Court held that the term 'premises' in s 25(m) of the Factories Act 1948 read with s 25L of the ID Act covers not only buildings but even open land, and the laying of a railway line which has to be carried on in a phased manner must necessarily be on a given fixed site which could constitute 'premises', and the entire length of land would be phase-wise factories for construction of railway lines over them. A company employing more than 100 workmen engaged in a specific project of laying railway line, having a site adapting manufacturing process is an 'industrial establishment' within the meaning of s 25L, which is factory as defined under s 25(m) of the Factories Act 1948. Consequently, such a project would be squarely attracted by s 25N.[9] In *Seelan Raj*, the Supreme Court referred to a larger bench the question, whether a data processing unit falls within the definition of 'industrial establishment' under s 25L, in the sense whether it could be said to be 'factory' as defined in s 2(m) of FA, for the application of ch VB.[10] In *Ramesh*, a single judge of the Bombay High Court held that compliance with the provisions of s 25N was necessary only in respect of three types of establishments as stipulated in s 25L, *i.e.*, factory, plantation and mine. The irrigation division of the Jayakwadi Project was not covered by it and, consequently, ch V-B, not to speak of s 25N, was not at all applicable to such a project.[11]

2.CLAUSE (b): APPROPRIATE GOVERNMENT

In relation to industrial disputes concerning an industry carried on by or under the authority of the Central Government or by a railway company or concerning any such controlled industry as may be specified in this behalf by the Central Government or certain types of corporations, Central Government has been made the appropriate Government by sub-cl (i) of d (a) of s 2. By this provision, the Central Government has further been made the appropriate Government in relation to:

(i) any company in which not less than fifty-one per cent of the paid-up share capital is held up by the Central Government, or

(ii) any corporation established by or under any law made by Parliament which has already not been included in subclause (i) or cl (a) of s 2.

In *RICWE Union*, Seth J of the Calcutta High Court held that the mere fact, that the powers of Central Government had been delegated to the state Government in terms of the notification issued under s 39 of the ID Act, could not substitute Central Government, and that the state Government could never be the appropriate Government under s 25L(b) in respect of Rehabilitation Industries Corporation, which was a wholly owned Central Government company.[12] In respect of Mining and Allied Machinery Corporation, which is a Government of India undertaking with Central Government holding more than 51 per cent of paid-up share capital, the Central Government is the appropriate Government within the meaning of s 25L(b).[13]

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8 *State Transport Accountants Assn v Orissa SRTC* 1990 Lab IC 1378 (Ori) (DB).

9 *Lal Mohammed v Indian Rly Construction Co Ltd* (1999) 1 LLN 663, 676 (SC), per Majmudar J.

10 *Seelan Raj v PO, First LC* (2001) 2 LLN 617 (SC), per Rajendra Bahu J.

11 *Ramesh v EE, Jayakwadi Project* (2000) 4 LLN 986, 990 (Bom), per Kochhar J.

12 *RICWE Union v Union of India* (2002) 2 LLN 575 (Cal), per Seth J.

13 *Mining & Allied MCS Union v Union of India* (2002) 3 LLN 47 (Cal) (DB), per Mathur J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VB Special Provisions Relating to Lay-off, Retrenchment and Closure in Certain Establishments

S. 25M. Prohibition of Lay-off.—

(1) No workman (other than a *badli* workman or a casual workman) whose name is borne on the muster rolls of an industrial establishment to which this Chapter applies shall be laid-off by his employer except [14][with the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority), obtained on an application made in this behalf, unless such lay-off is due to shortage of power or to natural calamity, and in the case of a mine, such lay-off is due also to fire, flood, excess of inflammable gas or explosion].

15[(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended lay-off and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where the workman (other than badli workmen or casual workmen) of an industrial establishment, being a mine, have been laid-off under sub-section (1) for reasons of fire, flood or excess of inflammable gas or explosion, the employer, in relation to such establishment, shall, within a period of thirty days from the date of commencement of such lay-off, apply, in the prescribed manner, to the appropriate Government or the specified authority for permission to continue the lay-off.

(4) Where an application for permission under sub-section (1) or sub-section (3) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the persons interested in such lay-off, may, having regard to the genuineness and adequacy of the reasons for such lay-off, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(5) Where an application for permission under sub-section (1) or sub-section (3) has been made and the appropriate Government or the specified authority does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which such application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.

(6) An order of the appropriate Government or the specified authority granting or refusing to grant permission shall, subject to the provisions of sub-section (7), be final and binding on all the parties concerned and shall remain in force for one year from the date of such order.

(7) The appropriate Government or the specified authority may, either on its own motion or on the application made by the employer or any workman, review its order granting or refusing to grant permission under sub-section (4) or refer the matter or, as the case may be, cause it to be referred, to a Tribunal for adjudication:

Provided that where a reference has been made to a Tribunal under this sub-section, it shall pass an award within a period of thirty days from the date of such reference.

(8) Where no application for permission under sub-section (1) is made, or where no application for permission under sub-section (3) is made within the period specified therein, or where the permission for any lay-off has been refused, such lay-off shall be deemed to be illegal from the date on which the workmen had been laid-off and the workmen shall be entitled to all the benefits under any law for the time being in force as if they had not been laid-off.

(9) Notwithstanding anything contained in the foregoing provisions of this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the establishment or death of the employer or the like, it is necessary so to do, by order, direct that the provisions of subsection (1), or, as the case may be, sub-section (3) shall not apply in relation to such establishment for such period as may be specified in the order.]

16[(10)] The provisions of section 25C (other than the second proviso thereto) shall apply to cases of lay-off referred to in this section.

Explanation.—For the purposes of this section, a workman shall not be deemed to be laid-off by an employer if such employer offers any alternative employment (which in the opinion of the employer does not call for any special skill or previous experience and can be done by the workman) in the same establishment from which he has been laid-off or in any other establishment belonging to the same employer, situate in the same town or village, or situate within such distance from the establishment to which he belongs that the transfer will not involve undue hardship to the workman having regard to the facts and circumstances of his case, provided that the wages which would normally have been paid to the workman are offered for the alternative appointment also.

LEGISLATION

Section 25M as originally enacted in ch VB was struck down by the Madras High Court in *Simpson & Co*, following the ratio of the Supreme Court decision in *Excel Wear v Union of India* (supra) holding that:

(i) no guidelines are available from the statute; and

(ii) that there is no provision for scrutiny of the order passed by the authority, by any higher authority or tribunal in appeal or revision. [17]

Consequently, the legislature has enacted the new section by removing the defects.[18] Sub-section (1) has been amended while sub-ss (2) to (9) have been substituted for the previous sub-ss (2) to (5) and the previous sub-s (6) has been renumbered as the present sub-s (10). The validity of the amended section has been upheld by the Supreme Court in *Papanasam.*[19] The court adopted the reasoning in workmen of *Meenakshi Mills.*[20]

SUB-SECTION (1): PRIOR PERMISSION TO LAY-OFF

Section 2(kkk) defines 'lay-off' to mean 'the failure, refusal or inability of an employer on account of shortage of coal or power or raw material or accumulation of stocks or break down of machinery or natural calamity or for any other connected reason to give employment to a workman'. In these contingencies, previously in all cases it was open for an employer to lay-off his workmen. Now this provision prohibits an employer to 'lay-off' any workman (other than a *badli* workman or a casual workman) whose name is borne on the muster rolls of his 'industrial establishment' employing one hundred or more workmen (which is not of a seasonal character or in which work is performed only intermittently) without the 'prior permission' of the appropriate Government or the specified authority except in cases where the 'lay-off is due to shortage of power or a natural calamity. But where such establishment is a mine, apart from a natural calamity or shortage of power, if the lay-off, also due to 'fire, flood, excess of inflammable gas or explosion', the prior permission to lay-off will not be necessary in the first instance. The Andhra Pradesh High Court held that 30 per cent power cut would be sufficient to justify the lay-off.[21] Natural calamities are natural disasters. The expression 'natural calamity' is of much wider amplitude than 'fire, floods, excess of inflammable gas or explosion'. Apart from these disasters, natural calamity may comprehend other disasters like tempests, earthquakes, lightening and tornados *etc*. If any of these contingencies happens whether in a mine or any other establishment, the employer is exonerated from the requirement of seeking prior permission for lay-off. The permission as required by this sub-section may be accorded either by the appropriate Government or by the specified authority. However, to clothe the authority with the power to grant such power, such authority must be specified by the appropriate Government in the Official Gazette, by a notification. In other words, an

authority which has not been specified by a notification in the Official Gazette will not be a 'specified authority' in the eye of law for the purposes of this sub-section.

SUB-SECTION (2): APPLICATION FOR PERMISSION

The application for permission under sub-s (1) is to be in the prescribed manner in which the employer has clearly to state his reasons for the intended lay-off. The employer is further required to serve a copy of the application simultaneously on the workman concerned. Rule 75B (1) of the Central Rules prescribes that an application for prior permission to lay-off any workman shall be in form O3 and delivered to the specified authority either personally or by registered post acknowledgement due. The date on which the application is delivered to the specified authority will be deemed to be the date on which the application is made for the purposes of sub-s (5). Rule 75B(2) requires the application to be made in triplicate along with a sufficient number of copies of the application for service on the workman concerned. Where the facts disclosed that the management served simultaneously copies of the application on the two unions and also affixed on the notice-board, it is sufficient compliance with the requirements of s 25M.[22]

SUB-SECTION (3): APPLICATION FOR PERMISSION TO CONTINUE LAY-OFF IN A MINE

Though sub-s (1) exempts an employer from obtaining prior permission for laying off workmen in case of a mine where the lay-off is on account of 'fire, flood, excess of inflammable gas or explosion', in the first instance, where the layoff is of a prolonged duration, the employer is required to apply to the 'appropriate Government' or the specified authority for permission to continue the lay-off, within a period or thirty days from the commencement of the lay-off. Such application is also to be made in the prescribed manner. The relevant rule for making such application for continuing lay-off is also to be made in form 03 prescribed under r 75B.

SUB-SECTION (4): GRANT OR REFUSAL OF PERMISSION

The appropriate Government or the specified authority is vested with the power to grant or refuse permission to the employer to 'lay-off the workmen. But before deciding to grant or refuse to grant permission, the appropriate Government or the specified authority is required:

(i) to make such inquiry in the manner of lay-off as it may think fit;

(ii) to give a reasonable opportunity to the employer, the workmen concerned and the persons interested in such lay-off to be heard; and

(iii) then to consider—

  (a) the genuineness and adequacy of the reasons for the 'lay-off'

  (b) the interests of the workmen, and

  (c) all other relevant factors;

(iv) to record its reasons, for its decision, in writing in the order granting or refusing permission; and

(v) to communicate the order to the employer and the workmen.

The previous s 25M was struck down as it provided no guidelines and also made no provision for scrutiny of the orders passed by the specified authority or the appropriate Government by any higher authority. Now, the legislature has sought to remove these defects by engrafting the above requirements in the section. This provision requires compliance with the rules of natural justice by providing a reasonable opportunity to the parties concerned of being heard, in support and against the proposed lay-off. It also requires the authority not only to take necessary inquiry in the facts and circumstances of the lay-off but it also requires it to apply its mind to the question of genuineness and adequacy of the reasons for the lay-off stated by the employer. Furthermore, the authority is also required to take into account the interests of the workmen and all other relevant factors while deciding whether permission to lay-off should be granted or not. The requirement of the statement of reasons in writing in the order granting or refusing the lay-off, makes such order reviewable. In other words, the order of the specified authority will be open to scrutiny either by the tribunal on reference under sub-s (7) or by a High Court in writ jurisdiction under art 226 of the Constitution, if the reasons stated by it are irrelevant and extraneous, to the question of granting permission for lay-off. The order will also be reviewable if while coming to the decision to grant or refuse to grant permission, the authority has left out of consideration, vital and material factors which it ought to have been taken into account.

Where the management, having laid-off the workers due to shortage of power caused by hike in electricity tariff and

disablement of its captive power source, applied to the Labour Commissioner under s 25M to continue the lay-off, and the labour commissioner rejected the application without giving an opportunity to the management of being heard, the High Court quashed the order as being violative of principles of natural justice and remitted the matter to the labour commissioner for consideration.[23] Rule 75B(3) of the Central Rules requires the employer to furnish to the 'appropriate Government' or the 'specified authority', 'such further information as the authority considered necessary for arriving at a decision on the application'. Such information, however, is in addition to the information sought in annexure to form O-3. The information that the authority may require the employer to furnish under this sub-rule is to be furnished by the employer only when called for by the 'appropriate Government' or the 'specified authority' for deciding as to whether the permission should be granted or not. From the language of sub-s (5), it would appear that the Government or the specified authority has to grant or refuse to grant permission applied for within sixty days from the making of the application under sub-s (1) of sub-s (3). Rule 75B(4) requires the employer to give notice to the regional labour commissioner (central) concerned, of the commencement and termination of 'lay-off' in forms 01 and 02 respectively, where the permission to lay-off has been granted. Likewise, where the permission to continue lay-off which had been commenced in the case of a mine, has been granted by the authority, the employer is required to give the regional labour commissioner (central) concerned, a notice of commencement of such lay-off in form 01 in case such notice has not already been given under r 75A(1) and the notice of termination of lay-off is to be given in form 02. In *Tamil Nadu Magnesite*, a single judge of the Madras High Court, while quashing the order passed by the Government and remanding the matter for fresh disposal held that the power to grant permission for lay-off under s 25M was quasi-judicial in nature, and the orders passed thereunder were subject to judicial review.[24]

SUB-SECTION (5): DEEMED PERMISSION

The legislature has provided a maximum period of sixty days during which the appropriate Government or the specified authority has to decide the question as to whether it should grant or refuse to grant permission to the employer to lay-off his workmen and communicate the same to him. If the Government or the specified authority fails to communicate its order granting, or refusing to grant permission to the employer within the period of sixty days from the date of making the application, the permission shall be deemed to have been granted on the expiration of that period. As is obvious from its definition, the exigency of 'lay-off' arises on sudden happening of certain contingencies, *viz*, 'shortage of coal, power, or raw materials or the accumulation of stocks or the breakdown of machinery or natural calamity or any other connected reason'. It is now settled law that neither the definition of 'lay-off' nor any provision in the Act vests a right on the employer to lay-off his workmen. But by a contract either in the Standing Orders or in a collective bargaining agreement, an employer may get the right to lay-off workmen on the happening of such contingencies. More times than not, these contingencies are of short duration. In sudden situations, it cannot be possible for an employer to presage the happening of such contingencies particularly the shortage of coal, power, break-down of machinery or any other connected reason.

Firstly, the scrutiny of the reasons and the other particulars stated in form 03 is apt to take quite a considerable time by the Government or the specified authority. Secondly, even after this scrutiny, the procedure before the authority is also likely to take quite some time before it can make and communicate its order. The maximum period fixed is sixty days after which the permission will be deemed to have been granted. But by the expiration of that time, the necessity to lay-off may itself vanish. The provisions of this section will over-ride the contractual right of the employer to lay-off the workmen. But the section still subjects the employers' right to carry on his business to unreasonable restrictions. Rule 75B (1) fixes the date of making the application as the date on which the application has been delivered personally or by registered post to the Government or the 'specified authority'. The time of sixty days is to be reckoned from that date. After such deemed permission, the employer is required to give notices in Forms 01 and 02 of the commencement and termination of the lay-off respectively in terms of r 75B(4).

SUB-SECTION (6): FINALITY OF THE ORDER

This provision makes the order of the 'appropriate Government' or the 'specified authority' granting or refusing to grant permission to 'lay-off' final and binding on all parties for a period of one year from the date of the making of such order. Though such order is final, it is reviewable by a writ court under Art 226 of the Constitution. It is not possible to understand the purpose of keeping the order in force 'for one year' from the date on which it was made. The exigency of 'lay-off' arises on the happening of anyone of the contingencies enumerated in the definition of 'lay-off' at a particular point of time. Normally, such contingencies are not of long duration. Nor can any employer afford to lay-off his workmen for a period of one year. The Bombay High Court observed that it was incumbent on the employer to commence lay-off on the date mentioned in the application for permission to lay-off, or if the date had already expired, then from the date of the order granting permission or the deemed grant of permission.[25] Could it be said that the employer can keep the workmen laid-off upto a period of one year from the date on which permission is granted? Will the workmen remain bound by such order for one year? Furthermore, does it mean that the employer can lay-off the workmen at any time within one year from the date of the order for any other reasons, if the reasons for lay-off have disappeared? These questions baffle

understanding. The time-limit provided for keeping the order binding on the parties for a period of one year from the date on which it was made, is vague and without any guidelines. This portion of the sub-section is *prima facie* arbitrary and deserves to be struck down as violative of the guarantees of Arts 14 and 19(1)(g) of the Constitution. In *SAE Mazdoor Union*, a single judge of MP High Court held that an order passed under s 25M granting permission for lay-off could be challenged by a minority union and every workman affected by it.[26]

SUB-SECTION (7): REVIEW OR ADJUDICATION OF THE ORDER

The appropriate Government or specified authority has been given the discretion to review its order *suo motu* or on the application made by the employer or any workman. It is implicit in the provision that while reviewing the order, the Government or the specified authority will hear the concerned parties before reviewing its order. If there are complicated questions of fact or law involved in the matter, the Government, directly or at the instance of the specified authority may refer the matter to an industrial tribunal for adjudication. The proviso requires the tribunal to pass its award within a period of thirty days from the date of such reference. The period of thirty days appears to be merely directory and not mandatory. One of the reasons for which the previous section was struck down was that there was no machinery provided in the Act for scrutinising the order of the Government or the specified authority for deciding its legality, validity and justifiability. This section purports to fill in the hiatus but the purported benefits of this section are illusory because by the time the award of the tribunal becomes enforceable the exigency under which the need for lay-off arises generally, would have passed off.

SUB-SECTION (8): CONSEQUENCES OF COMMENCING OR CONTINUING LAY-OFF WITHOUT PERMISSION

Originally, there was no provision in the Act which made 'lay-off' illegal. This provision renders the commencement or continuance of the 'lay-off' illegal where:

(i) no application for permission to 'lay-off' under sub-s (1) has been made within the specified period;

(ii) no application for permission to continue 'lay-off' after the commencement under sub-s (2) has been made within the period specified therein; or

(iii) the permission for such commencement or continuance of lay-off has been refused.

Apart from being exposed to the penal consequences of an illegal 'lay-off' under s 25Q, the employer who commences or continues such lay-off, will be liable to the workmen to 'all the benefits under any law for the time being in force as if they had not been laid-off' for the period of such illegal lay-off. In other words, such a lay-off will be *non-est* in the eye of law.

SUB-SECTION (9): POWER TO EXEMPT

In exceptional circumstances, the appropriate Government has been empowered to exempt an establishment from complying with the requirements of sub-s (1) and sub-s (3) for a specified period of time. The circumstances enumerated in the provision are: accident in the establishment, the death of the employer or the like. The expression 'the like' has to be construed *ejusdem generis.* The question of the death of the employer may arise only where the establishment is run and carried on by an individual entrepreneur. But, by and large, the establishment to which the provisions of this chapter apply are run and carried on by corporate bodies. In such cases, the question of the death of the employer would not arise.

SUB-SECTION (10): LAY-OFF COMPENSATION UNDER SECTION 25C

This provision makes it clear that where permission to commence or continue a 'lay-off' has been granted by the 'specified authority', the laid-off workman or workmen shall be entitled to lay-off compensation in terms of s 25C. In other words, the quantum of 'lay-off' compensation in cases governed by the provisions of ch VB shall also be the same as envisaged by s 25C. However, the provisions of the second proviso to s 25C will not apply to cases of 'lay-off' falling under this section.

EXPLANATION: ALTERNATIVE EMPLOYMENT

This explanation is analogous to cl (1) of s 25E which disentitles a workman to receive compensation under s 25C, if he refuses to accept the alternative employment. This provision lays down that where after 'laying-off' a workman in his establishment, an employer offers an alternative employment, which in his opinion does not call for any special skill or previous experience and can be done by the workman, in the same establishment from which he has been 'laid-off' or in any other establishment belonging to him, situate in the same town or village, or situate within such distance from the

establishment to which he belongs and the transfer will not involve undue hardship to the workman and the workman is offered the same wages for the alternative appointment which would have been normally paid to him, such workman will not be deemed to be 'laid-off'.

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14 Subs by Act 49 of 1984, s 4, for certain words (wef 18-8-1984).

15 Subs by Act 49 of 1984, s 4, for sub-sections (2) and (5) (wef 18-8-1984).

16 Sub-section (6) re-numbered as sub-section (10) by Act 49 of 1984, s 4 (wef 18-8-1984).

17 *K Gurumurthy v Simpson & Co Ltd, Madras* (1981) 2 LLJ 362 -65 (Mad)(DB), per Ramanujam J.

18 By s 4 of the Amending Act 49 of 1984 brought into force with effect from 18 August 1984.

19 *Papanasam Labour Union v Madura Coats Ltd* 1995 Lab IC 735, 744 (SC) per GN Ray J.

20 *Workmen of Meenakshi Mills v Meenakshi Mills Ltd* (1992) 2 LLJ 294 [LNIND 1992 SC 411], 306 (SC) : (1992) 3 SCC 336 [LNIND 1992 SC 411] : AIR 1994 SC 2696 [LNIND 1992 SC 411], per Agrawal J.

21 *T Gattiah v Commr of Labour* 1981 Lab IC 942 [LNIND 1981 AP 38], 945 (AP), per Choudhury J.

22 *SAE Mazdoor Union v Labour Commissioner* (2001) 4 LLN 1105, 1112 (MP), per Kulshreshta J.

23 *Ferro Alloys Corpn Ltd v Labour Commissioner* (2002) 4 LLN 411 (Ori) (DB), per Patra J.

24 *CMD, TN Magnesite Ltd v Union of India* (2003) 2 LLJ 750 (Mad), per Padmanabhan J.

25 *Rashtriya MEK Sangh v KB Satpute* 1984 Lab IC 324, 327 (Bom) (DB), per Jamdar J.

26 *SAE Mazdoor Union v Labour Commissioner* (2001) 4 LLN 1105 (MP), per Kulshreshta J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VB Special Provisions Relating to Lay-off, Retrenchment and Closure in Certain Establishments

[27][S. 25N. Conditions precedent to retrenchment of workmen.—

(1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,—

(a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf.

(2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the persons interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where an application for permission has been made under sub-section (1) and the appropriate Government or the specified authority does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which such application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.

(5) An order of the appropriate Government or the specified authority granting or refusing to grant permission shall, subject to the provisions of sub-section (6), be final and binding on all the parties concerned and shall remain in force for one year from the date of such order.

(6) The appropriate Government or the specified authority may, either on its own motion or on the application made by the employer or any workman, review its order granting or refusing to grant permission under sub-section (3) or refer the matter or, as the case may be, cause it to be referred, to a Tribunal for adjudication:

Provided that where a reference has been made to a Tribunal under this sub-section, it shall pass an award within a period of thirty days from the date of such reference.

(7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of

retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.

(8) Notwithstanding anything contained in the foregoing provisions of this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the establishment or death of the employer or the like, it is necessary so to do, by order, direct that the provisions of subsection (1) shall not apply in relation to such establishment for such period as may be specified in the order.

(9) Where permission for retrenchment has been granted under sub-section (3) or where permission for retrenchment is deemed to be granted under sub-section (4), every workman who is employed in that establishment immediately before the date of application for permission under this section shall be entitled to receive, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months.]

LEGISLATION

This section has been introduced to assure prior scrutiny of the reasons for retrenchment with a view to prevent avoidable hardship to the employees resulting from retrenchment by protecting existing employment and check the growth of unemployment which would otherwise be the consequence of retrenchment in industrial establishments employing large number of workmen. The section is also intended to maintain a higher tempo of production and productivity by preserving industrial peace and harmony. This provision gives effect to the mandate contained in the Directive Principles of the Constitution.[28]Section 25N as originally enacted was struck down by the High Courts of Madras,[29] and Rajasthan,[30]holding that the section suffered from arbitrariness and unreasonableness as neither the section nor any provision in the Act provided any guidelines as to how the application for permission by an employer for retrenchment has to be disposed of And on what grounds permission can be refused. Furthermore, there was no provision for any appeal or revision against the arbitrary order of refusal. The restrictions imposed by the section were held to be unreasonable having regard to the fact that the employer was forced to continue to employ the personnel who were found to be surplus for his requirement and this resulted in incurring unnecessary expenditure in connection with his undertaking, leading ultimately to curtailment of the margin of his profits. The Madras and Rajasthan High Courts in striking down the section mainly relied on the decision of the Supreme Court in *Excel Wear* and held that the reasons for which s 25-O was struck down were fully applicable for judging the validity of s 25N. On the other hand, the Andhra Pradesh High Court in *IDL Chemicals*, had upheld the validity of the section.[31] The present section, therefore, has been substituted by the Amending Act 49 of 1984,[32] for the old section.

The correctness of the holdings of the full bench of the Rajasthan High Court *in JK Synthetics* and of the Division Bench of the Madras High Court in *KV Rajendran* was considered by a Constitution Bench of the Supreme Court in *Meenakshi Mills*, in which the court has upheld the validity of the section as originally enacted. It noticed that the Madras and Rajasthan High Courts had held the section to be unconstitutional on two grounds, *viz*: (a) no principle or guidelines have been laid down for the exercise of the power conferred by sub-s (ii) of s 25N ; and (b) there is no provision for appeal or revision against the order passed under sub-s (ii). Rejecting both these contentions, the court held that s 25N does not suffer from the vice of unconstitutionality on the grounds that it was violative of the fundamental rights guaranteed by Art 19(1)(g) of the Constitution and was not saved by Art 19(6) of the Constitution. Thus, while upholding the constitutional validity of the section as originally enacted, the court had put the validity of the section after its enactment beyond the pale of doubt.[33]Section 25A makes the provisions of ss 25C to 25E inapplicable to industrial establishments to which ch VB applies. *A priori*, ss 25C to 25E would not apply to cases of lay-off falling under s 25M. In other words, though s 25C will be applicable to the cases of lay-off falling under s 25M, the provisions of its second proviso will be inapplicable to such cases of lay-off. Therefore, the retrenchment of laid-off workmen after the expiry of 45 days in terms of the second proviso to s 25C in an establishment to which ch VB applies will be illegal.[34]Section 25N(1) corresponds to s 25F, but these two provisions are mutually exclusive because the former applies only to the establishment to which ch VB applies, *viz*, 'industrial establishments defined in s 25L employing hundred or more workmen'. In other words, it will not apply to industrial establishments or other establishments employing less than hundred persons. On the other hand, s 25F will not apply to establishments to which s 25M applies. It will apply only to other establishments or industrial establishments employing less than hundred workmen.

SUB-SECTION (1): PRECONDITIONS TO VALID RETRENCHMENT

This section prohibits an employer from retrenching a workman who has been in 'continuous service' for one year or more in an 'industrial establishment' which employs hundred or more workmen until conditions precedent to retrenchment set out therein have been complied with. The opening part of sub-s (1) is the same as s 25F with the exception that s 25N

applies only to those establishments to which ch VB applies. The employer is required, to give three months' notice in writing to the workman indicating the reasons for the retrenchment, or to pay him wages for the period of notice in lieu of the notice, by cl (a) of this sub-section. This clause corresponds to cl (a) of s 25F with the exception that this clause requires 'three months', notice or wages in lieu of that period of notice to be paid to the workman while cl (a) of s 25F requires only one month's notice or wages in lieu thereof to be given to the workman. Then cl (b) enjoins on the employer to make an application to the 'appropriate Government' or the 'specified authority' to obtain its prior permission to retrench a workman. The requirement of prior permission to retrench workmen is the foremost pre-condition of valid retrenchment. The pre-conditions to retrenchment have been placed in the section in a rather jumbled manner. The cll (a) and (b) have to be read with sub-s (9).

After deciding to retrench workmen, the first thing the employer is required by law is to make an application to obtain permission of the 'appropriate Government' or the 'specified authority', as the case may be, under this sub-section or sub-s (3). Then, he should wait till the permission is given or the period of sixty days from the date of making the application has expired when permission will be deemed to have been granted. In so far as the requirement of giving notice to the workmen is concerned, it is open to the employer to give such notice to the workmen, after taking the decision to retrench them, at any time, before or after obtaining the permission. He may even give such notice to the workmen before applying for the permission and wait for the permission. After the permission is granted, he may either retrench the workmen on the expiry of the period of three months from the date of notice or he may retrench them immediately on receipt of permission by paying them wages in lieu of unexpired period of three months from the date of service of the notice. Alternatively, the employer may give three months' notice of retrenchment to the workmen on obtaining permission to retrench and then retrench them on the expiry of the period of three months' or retrench them forthwith on obtaining the permission by paying three months' wages in lieu of the notice. Apart from giving such a notice or paying wages in lieu of the notice, the employer is also required by sub-s (9) to pay compensation to the workman proposed to be retrenched 'at the time of retrenchment'. Thus, in a case where after obtaining permission to retrench, the employer chooses not to give notice but to pay wages in lieu of such notice, the payment of such wages, the payment of retrenchment compensation and the act of the retrenchment should be simultaneous, as parts of the same transaction. These are the mandatory conditions precedent to a valid retrenchment. In other words, non-compliance of these requirements will render the retrenchment illegal and inoperative in law and the workmen shall be entitled to all the benefits which they are entitled to for the time being.[35]

In *Lal Mohammed*, Majumdar J held that the exception contained in the proviso to s 25O(1) in favour of undertakings set up for construction of buildings, bridges, roads, *etc*., has no application to a case of retrenchment falling within the ambit of s 25N, as the two provisions address different situations, the former deals with the closure of the undertaking and the latter with conditions precedent to retrenchment, and retrenchment pre-supposes the termination of surplus workmen in a going concern which is not closed down. Section 25N deals with industrial establishment while s 25-O deals with the undertaking of an industrial establishment. An industrial establishment may be a factory and its undertaking may not be. Before s 25N can be held applicable to an 'industrial establishment, the establishment itself must be found to be a 'factory' as defined by s 25L *qua* such an 'industrial establishment', and for deciding this question, the provisions of s 25O(1) or its proviso would not offer any assistance.[36]

SUB-SECTION (2): FORM OF THE APPLICATION FOR PERMISSION

The notice for permission for retrenchment to be given by an employer under cl (b) of sub-s (1) of s 25N of the Act is to be given in Form 'PA' prescribed by r 76A of the Industrial Disputes (Central) Rules 1957. It shall be served on the Central Government or such authority as may be specified by that Government either personally or by registered post acknowledgement due and where the notice is served by registered post the date on which the same is delivered to the Central Government or the authority shall be deemed to be the date of the service of notice for the purpose of sub-s (iv) of that section. In *EID Parry*, a settlement was arrived at between the employer and the union agreeing to retrench upto 60 workmen but there was no provision in the settlement that the provisions of this section will not be complied with. The retrenchment, therefore, was held to be illegal for non-compliance with the requirements of this provision. Dealing with the question as to whether in view of the settlement the prior permission of the Government under this section was necessary, a single judge of the Andhra Pradesh High Court held:

> The question as to whether the settlement between the parties dispensed with the requirement of the provisions of the Act, has to be answered depending on the nature of the dispute [***] and this has to be done on the facts of each case.[37]

In *Voltas*, a single judge of the Bombay High Court held that before offering a voluntary retirement scheme, it was obligatory for the management to place necessary details before the industrial court to demonstrate as to how many employees/workers were surplus, in the absence of which, *prima facie*, it would appear that, in the garb of voluntary retirement scheme, attempt was being made to retrench all the workmen, if possible.[38]This decision merits some analysis.

It is rather trite for a High Court judge to say that VRS was an attempt to retrench the workmen. Of course, any VRS offered in any sector, be it public or private or even in the Government, is exclusively meant for reducing surplus labour or staff. If not for dispensing with surplus staff, in the face of restrictions imposed under ch VB of the Industrial Disputes Act, why should an employer frame and offer a VRS at all with a fat compensation running into a few lakh rupees per employee? Is it the presumption of the learned judge that employers have so much of disposable funds to be squandered by offering compensation which is exponentially higher than that payable under s 25F or s 25N ? The further observation of the learned judge (in para 38, p 549) is as follows: 'if the benefit of VRS was intended to be extended to all the workers then, in that event,*prima facie* it was an attempt to close down the factory without following the provisions of s 25N of the ID Act ' is not only bereft of any substance, but is also a misstatement of both fact and law. *In the first place*, there was no material on which the said surmise could be reasonably based, and, at any rate, it is not for a judge to go about drawing hypothetical inferences founded on wild conjectures. *Secondly*, 'closure of undertakings' falls, not under s 25N, as wrongly observed by the learned judge, but under s 25-O. Thus, the stay granted against VRS by the industrial court as well as the order of the learned judge upholding the said stay, are without merit. *Thirdly*, an employer is under no legal obligation to inform the industrial court of the number of surplus staff before offering VRS, which by implication is purely voluntary, with the initiative to opt for the scheme resting solely with employees, and not with the employer. Instances where there was no response to VRS from the employees are numerous. *Fourthly*, if no employee opts for VRS, then the scheme falls flat, dies it natural death for want of takers. In such an event, what records and materials should the employer furnish to the industrial court about the surplus staff, and for what ostensible purpose? And, *lastly*, it has to be clearly understood that there is nothing like '*retrenchment of all workmen*' in industrial law, as averred by the learned judge. Retrenchment occurs only in a continuing business and not in its closure, and it pre-supposes that the employer carries on the business with the residual labour force after retrenching surplus manpower. It is not worth its while to discuss this mediocre decision any further, as it is wholly misconceived, full of grave errors, wrong on all counts and deserves to be rejected outright without a second look. In *Shaw Wallace*, the facts were that a workman was terminated from service but was reinstated on court orders for non-compliance with s 25F. The management subsequently terminated the workman once again after paying retrenchment compensation on grounds that the post was abolished. While the labour court dismissed the workman's claim, the industrial court in appeal ordered reinstatement with full backwages on the ground that the establishment was covered by ch V-B and that s 25N was not complied with. Kulshreshta J of the Madhya Pradesh High Court held that the order of the industrial court could not be interfered with, and modified it to 50 per cent backwages.[39]

SUB-SECTION (3): GRANT OR REFUSAL OF PERMISSION

The appropriate Government or the specified authority is vested with the power to grant or refuse to grant the permission to the employer to retrench the workman. But before granting or refusing to grant permission, these authorities are required to:

(i) make an inquiry into the question of retrenchment as it may think fit;

(ii) give a reasonable opportunity of being heard to—

  (a) the employer;

  (b) the workman concerned; and

  (c) all the persons interested in such retrenchment;

(iii) consider—

  (a) the genuineness and adequacy of reasons stated by the employer,

  (b) the interest of the workman, and

  (c) other relevant factors; and

(iv) pass an order granting or refusing to grant the permission.

(v) Such order should—

  (a) state in writing reasons for the decision; and

  (b) communicate such reasons to the employer as well as to the workmen.

The powers vested in the appropriate Government by this sub-section are not purely administrative but are quasi-judicial in nature. This power has to be exercised on an objective consideration of the relevant facts after affording an opportunity to the parties having interest in the matter and reasons have to be recorded in the order that is passed. In other words, this power requires the appropriate Government or the specified authority to pass a speaking order on an objective consideration of relevant facts after affording an opportunity to the parties concerned. Furthermore, in exercise of this

power, the Government and the specified authority is to bear in mind the fact that the basic idea underlying the scheme of the Act is to settle industrial disputes and promote industrial peace and harmony and in particular that this section has been enacted to prevent avoidable hardship of unemployment to those already employed and maintain a higher tempo of production and productivity. This power granted to the executive instead of an industrial adjudicator, is not unconstitutional or invalid. Likewise, the delegated power conferred on the appropriate Government to specify the authority too is not unreasonable.[40] In *Electro-Steel*, the Calcutta High Court held that since the reasons stated by the Government in its order refusing to grant permission were not irrelevant, the order was not reviewable.[41] A similar view has been taken by the Madhya Pradesh High Court,[42] but in *Mukund Iron & Steel*, the Bombay High Court held that the labour commissioner who was the 'specified authority' under the section should not have given permission to retrench the workmen when on the admission of the employer, employment opportunities were in existence but they were unable to afford opportunities of work to the workmen because they were not willing to co-operate to give the agreed norms of production. It was observed if the workmen failed to co-operate and did not give agreed norms of production, they were liable to be dealt with in disciplinary action and could be removed from service for lack of co-operation. And any such lack of co-operation could not be the basis for retrenchment where no inquiry had been made and no opportunity to dispute the allegation was given.[43]

Another Division Bench of the same High Court in *Maharashtra GK Union*, distinguished *Mukund Iron & Steel* on facts. In this case, the bench upheld the order of the 'specified authority' holding that the 'dispute relating to detailed working of the company involving a scrutiny of contracts entered into by the company with third parties in the normal course of its work cannot be gone into or reopened by authorities granting permission' under this provision.[44] In *Straw Products*, the Madhya Pradesh High Court held that where the reasons given by the Government are not extraneous or irrelevant, the order refusing permission would not be amenable to interference in judicial review. The scope of inquiry in a writ petition is limited to seeing whether the ultimate opinion formed by the Government is vitiated on account of ignoring any relevant factor or taking into account irrelevant, extraneous or non-existent factors so as to disclose an error apparent on the face of the record. But the writ court cannot examine the correctness of the conclusions relating to the adequacy of the reasons unless the finding thereon is vitiated by an error of law apparent on the face of the record.[45] This section does not contemplate any elaborate judicial or quasi-judicial inquiry, at the stage of permission. The very scheme of the section precludes an elaborate inquiry. Sub-sections (3) and (4) are to be read together because they prescribe the manner of granting or refusing permission in response to the application made under sub-s (2), for permission to retrench the workmen. Under sub-s (2) the Government or the specified authority, as the case may be, after making such inquiry as it thinks fit, and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the persons interested in such retrenchment, may grant or refuse such permission. Since any grant or refusal of permission after the inquiry has to be done within a period of 60 days from the date on which the application is made, such an inquiry by its very nature cannot be an elaborate inquiry into detailed working of the company in question and assessment of its economic viability and so on. From a juxtaposition of these two provisions, it would appear that the inquiry before granting or refusing to grant permission to retrench is of a preliminary nature and presumably, it should show *prima facie* that the employer has a reasonable cause for retrenching the workmen in question. The order of the specified authority granting permission passed after taking into account all the relevant facts and circumstances and for fairly detailed reasons for granting permission, will not be vulnerable to judicial review.[46]Though the appropriate Government or the specified authority under this sub-section is required to act judicially while granting or refusing permission for retrenchment of workmen, it is not invested with the judicial power of the state and it cannot be regarded as a 'tribunal' within the meaning of Art 136 of the Constitution. Therefore, an appeal by special leave under Art 136 will not lie against the order passed under this sub-section, but such orders will be reviewable by the High Court in its writ jurisdiction under Art 226 of the Constitution.[47]

SUB-SECTION (4): DEEMED PERMISSION

After applying for permission to retrench workmen, the employer has to wait till the order of the authority is received by him. In case permission is refused, he cannot retrench the workmen. If permission is granted, he can proceed with the process of retrenchment. But if the Government or the specified authority fails to communicate its order granting or refusing to grant permission to retrench, within a period of sixty days from the date of making the application, by the fiction introduced by sub-s (4), the permission applied for shall be deemed to have been granted on the expiry of the period of sixty days. Then, it will be open to the employer to proceed with the retrenching process. In *OCL India*, the facts were that in an application filed under s 25N, the Labour Commissioner communicated the order after the expiry of 60 days from the date of the application. The Orissa High Court quashed the order of the Labour Commissioner as not sustainable in law, and held that the permission applied for was deemed to have been granted as per the legal fiction contained in sub-section (4) of s 25N.[48] In *Orissa Concrete*, the facts were: The Labour Commissioner, Madhya Pradesh passed an order on 11 July 1995 holding that there was a deemed permission for retrenchment of 40 workers employed by the appellant under s 25N(4). A single judge of MP High Court held that in view of the facts and circumstances of the case, there should not have been any deemed permission under s 25N(4), which was confirmed by the Division Bench in so far as it directed the

labour commissioner to pass a revised order after considering whether any permission is to be granted to the appellant for retrenching the 40 workers employed by them. During the pendency of the appeal, the labour commissioner passed a revised order declining the permission under s 25N. Before the Supreme Court, counsel for the petitioner-company submitted that the company would like to withdraw the appeal because of a change in the factual situation, but with liberty challenge the order of the labour commissioner, by which he declined to grant permission. While permitting the company to withdraw the appeal, a Bench comprising Balakrishnan and Venkarama Reddy JJ made it clear that it was not open to the company to re-agitate the question whether there should have been a deemed permission under s 25N(4).[49]

Sub-section (5): Finality of the Order

The order of the appropriate Government or of the specified authority granting or refusing to grant permission shall be final and binding on all the parties concerned and shall remain in force for one year from the date of such order but the finality of the order is subject to the provisions of sub-s (6) which provides for review or reference of the order to adjudication. In other words, if the order is not reviewed or referred for adjudication under sub-s (6), it will be final and binding on the parties. However, if in the matter of granting or refusing to grant permission to retrench, the Government or the specified authority has violated the rules of natural justice or the order is perverse or is vitiated by errors of law apparent on the face of the record, it will be reviewable by a writ court on a writ of *certiorari*. It is not clear as to what is the purpose of making the order to remain binding on the parties for a period of one year. Can the employer retrench workmen proposed to be retrenched at any time during the period of one year from the date of grant of permission for reasons set out in the application for permission to retrench? Alternatively, if the reasons for the retrenchment as set out in the application for retrenchment have vanished, can the employer still retrench the workman up to a period of one year from the date of grant of permission for some other reason? Likewise, where the Government or the specified authority refuses to grant permission, is the employer barred from approaching the Government or the specified authority during the period of one year to ask permission for retrenchment for any other set of reasons? In a case, where permission is refused how does the order bind the workmen for a period of one year? These are some of the questions which defy understanding about the purpose of making the order binding for a period of one year.

SUB-SECTION (6): REVIEW OR REFERENCE OF THE ORDER

The appropriate Government as well as the specified authority have been vested with the power either on their own motion or on the application of the employer or any workman, to review its order granting or refusing to grant permission under sub-s (3). Furthermore, the Government has the further discretion to refer the matter, of its own accord or at the instance of the specified authority, to an industrial tribunal for adjudication. The proviso prescribes the time limit of thirty days from the date of reference during which the tribunal should pass its award. From the use of the word 'shall', it would appear that the requirement of the proviso that the award should be made within thirty days from the date of reference, is mandatory. Furthermore, there is no power vested in the tribunal to extend the period of adjudication. Doubt arises as to whether it can be said that an award made beyond thirty days will be invalid and inoperative. From the scheme of the section, the answer should be in the negative. Though making of the award is mandatory, the requirement to make the award within thirty days appears merely to be directory. The Bombay High Court in *Engineering Workers*, held that the requirement of the proviso that the tribunal 'shall pass an award within a period of 30 days from the date of such reference' is merely directory and not mandatory. Hence, on the expiry of this time-limit the reference will not lapse but will survive for adjudication.[50]

In *Cable Corporation*, the facts disclosed that the company filed an application under s 25-N(2) seeking permission to retrench 280 workmen out of 509 workmen working at its Borivli Unit. The Specified Authority, after giving an opportunity of being heard to the company, workmen and other interested persons, partly allowed the application preferred by the company by granting permission to retrench 276 workmen on certain conditions. The unions filed applications under Section 25-N(6) for a review of the decision or to refer the matter for adjudication, which were rejected by the Government. The writ petition filed by the workmen was partly allowed by a single judge of Bombay High Court, who, *inter alia*, held that merely because review application is rejected, reference could not be said to be barred under Section 25-N(6) of the Act and, accordingly, directed the specified authority to refer the matter for adjudication to the Industrial Tribunal, which decision was upheld by the Division Bench. In appeal, Pasayat J (for self and Sathasivam J) reversing the said decision, observed:

A plain reading of the provision of s 25-N (6) makes the position clear that two courses are open to appropriate Govt. Power is conferred on the appropriate Government to either on its own motion or on an application made, review its order granting or refusing permission to retrench or refer the matter to the Tribunal. Whether one or the other of the courses could be adopted depends on the fact of each case, the surrounding circumstances and several other relevant factors. Once the appropriate Govt. rejects the review petition, a reference to Tribunal thereafter would not be maintainable.[51]

SUB-SECTION (7): CONSEQUENCES OF RETRENCHMENT WITHOUT PERMISSION

Any retrenchment of a workman without permission or in contravention of the order refusing permission, will be deemed to be illegal and inoperative in law *ab initio*. In other words, such retrenchment will be a nullity from the date on which the notice of retrenchment was given to the workman. Such retrenchment will not affect the right of the workman and he shall be entitled to' all the benefits under the law as if there was no retrenchment. Besides, the employer will be exposed to the penal consequences of s 25Q. In *Hindustan Wire Products*, the facts disclosed that the company was referred to the Board of Industrial and Financial Reconstruction (BIFR) due to financial constraints, and while the proceedings were pending before BIFR, the management retrenched 219 workmen without permission from the Government as required under s 25N. The Supreme Court held that, in the circumstances of the case, the workmen should be paid a sum of Rs 1 lakh each in lieu of reinstatement and backwages.[52] In *Empire Industries*, the employer-company, which was covered by ch-VB had, instead of making an application under s 25N for permission to retrench workmen, raised a demand to retrench workmen and asked the Government to refer the dispute so raised by it for adjudication under s 10(1). The issues passed through several vicissitudes and reached Supreme Court. Dismissing the appeal filed by the employer-company, Aftab Alam J (for self and Chauhan J) cited the decision rendered in *Meenakshi Millls*, and observed:

> To say, that even without following the provisions of section 25N of the Act, it is open to the employer to raise a demand for retrenchment of workmen and to ask the Government to refer the ensuing dispute to the Industrial Tribunal for adjudication, would tantamount to substituting a completely different mechanism in place of the one provided for in the Act to determine the validity and justification of the employer's request for retrenchment of workers. It is true that under section 25N the authority to grant or refuse permission for retrenchment is vested in the appropriate Government which in this case would be the State Government or the authority specified by it. Under section 10(1) too it is the State Government that would make a reference of the industrial dispute. But the two provisions are not comparable. The nature of the power of the State Government and its functions under the two provisions are completely different. In making the reference (or declining to make the reference) under section 10(1) of the Act the State Government acts in an administrative capacity whereas under section 25N(3) its power and authority are evidently quasi-judicial in nature … [Meenakshi Mills Ltd.][53]… Further, though section 25N(6) has the provision to refer the matter to the tribunal for adjudication, that provision is completely different from section 10(1). A reference under section 10(1) of the Act cannot be used to circumvent or bypass the statutory scheme provided under section 25N of the Act. This is, however, not to say that there cannot be any dispute on the subject of retrenchment that can be referred to the tribunal for adjudication. A dispute may always be raised by or on behalf of the retrenched workmen questioning the validity of their retrenchment. Similarly, the employer too can raise the dispute in case denied permission for retrenchment by the Government. [It is another matter that the chances of the disputes being referred for adjudication are quite remote: see Workmen of Meenakshi Mills Ltd., (supra) paragraphs 56 and 57]. But the point to note is that the occasion to raise the demand/dispute comes after going through the statutory provisions of section 25N of the Act.[54]

A CRITICAL ANALYSIS OF THE DECISION IN *MEENAKSHI MILLS*

The learned judge *inter alia* relied mostly upon *Meenakshi Mills*, in the light of the fact that it was a decision by the Constitution Bench of Supreme Court, which is a landmark decision, though for all the wrong reasons. It is therefore considered expedient to deal with the said case in some detail and highlight the misconceptions of Herculean proportions that informed the judicial mind of Agarwal J and his brother judges therein. Instead of handling afresh the perplexing observations made by the learned judge in the said case, it is considered expedient to cite the relevant portion of the analysis from the book '*Industrial Jurisprudence: A Critical Commentary*',[55] below:

In *KV Rajendran*, the Madras High Court, following the decision of the Supreme Court in *Excel Wear*,[56] struck down ss 25N (prior permission for retrenchment) and 25Q (punishment for violation) on the ground that the restrictions imposed on the fundamental right to carry on business were unreasonable and violated Art 19(1)(f) and (g), and that no guidelines were provided as to how the applications for permission should be disposed of by the Government.[57] With special reference to sub-sec. (4) of s 25N, Ramaujan J rightly placed reliance on *Dwarka Prasad*, in which one of the issues was whether cl 4(3) of the UP Coal Control Order 1953, suffered from the vice of conferring arbitrary power on the licensing authority. Briefly stated, the said clause ran thus: *'The Licensing Authority may grant, refuse to grant, renew or refuse to renew a licence and may suspend, cancel, revoke of modify any licence or any terms thereof granted by him under the Order for reasons to be recorded'*. Striking down the clause, Mukherjea J observed:

> …the phrase "reasonable restriction" connotes that the limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. Legislation, which arbitrarily or excessively invades the right, cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed under Article 19 (1) (g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in reasonableness. …No rules have been framed and no directions given on these matters to regulate or guide the discretion of the

> Licensing Officer. Practically the Order commits to the unrestrained will of a single individual the power to grant, withhold or cancel licenses in any way he chooses and there is nothing in the Order which could ensure a proper execution of the power or operate as a check upon injustice that might result from improper execution of the same. …This safeguard, in our opinion, is hardly effective…[58]

Section 25N(2), as enacted in 1976, reads thus: '*On receipt of a notice under clause (c) of sub-section (1), the appropriate Government or authority may, after making such inquiry as such Government or authority thinks fit, grant or refuse, for reasons to be recorded in writing, the permission for the retrenchment.*' The said provision was worded in the identical phraseology as cl 4(3) of the UP Coal Control Order, which was struck down in Dwarka Prasad. Justice Ramanujan of the Madras High Court rightly followed the above decision and held that, '*in addition to the absence of guidelines, any order passed is not subject to scrutiny by higher authority*'. The learned judge further held that neither the requirement of recording reasons nor the provision for deemed permission on the expiry of two months was a sufficient safeguard against arbitrary refusal to give permission. Against this backdrop, let us examine Meenakshi Mills, in which the constitutional validity of s 25N was upheld by SC Agarwal J (for self, Verma, Jayachandra Reddy, Ray and Patnaik JJ).[59]*The said decision is a conglomerate of conjectures, abstractions and paradoxes, and stands in a class by itself unmatched in the judicial history of India. It is disquieting that the five learned judges should have handled the case with no perceptible seriousness, whatsoever, much less application of judicial mind to a matter of vital importance to the industry and the economy*. Further, the judgment of Agarwal J is full of *prescriptive platitudes and utopian desiderata such as 'the power has to be exercised on objective considerations', etc*., in a case having major constitutional implications. A few observations of the learned judge, some of them perplexing and others frightening, have been selected for analysis in some detail.

Observation - I

> *'The restriction imposed* u/s *25N was in the interests of general public'*. (para 26)

This is a ready-made excuse devised by some of the later phase judges for justifying an otherwise baseless and irrational decision, which cannot be defended upon any other known legal principle. If an employer has surplus labour, which cannot be gainfully absorbed, thereby pushing up labour costs and along with it the price of his product thus placing him in a 'comparative disadvantage', should he be denied the right to dispense with the surplus manpower and save the unit from a major catastrophe of complete closure and mass unemployment? Should that right be subjected to the whims of a Government Officer, who has no stake in the enterprise? At a more fundamental level, does the right to carry on business include the right to close it down, as an intrinsic part of it? If a citizen doesn't have to submit to the authority of Government while starting a business, why should he be compelled to do so while closing it down? It is one thing to say that, in the event of termination, the employer should pay adequate monetary compensation to the workmen, and quite another to suggest that he cannot exercise that right without permission from a third party. In *Rustom Cavasjee* (*Bank Nationalisation case*), a 11-judge Bench, by a majority of 10 to 1 (Ray J dissenting), struck down the whole enactment, namely, the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970 on the ground that ss 4, 5 and 6 r/w Sch II, which impaired the fundamental guarantee under Art 31(2), were not severable from the rest of the Act, and observed:

> Protection of the right to property or personal freedom is most needed when there is an actual threat. To argue that State action which deprives a person permanently or temporarily of his right to property or personal freedom, operates to extinguish the right or the remedy is to reduce the guarantee to an empty platitude. Again to hold that the extent of, and the circumstances in which, the guarantee of protection is available depends upon the object of the State action, is to seriously erode its effectiveness (para 46A). …In determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of Legislature nor by the form of the action, but by its direct operation upon the individuals rights. (para 56). …Where the law provides for compulsory acquisition of property for a public purpose it may be presumed that the acquisition or the law relating thereto imposes a reasonable restriction in the interest of the general public. If there is no public purpose to sustain compulsory acquisition, the law violates Article 31 (2). If the acquisition is for a public purpose, substantive reasonableness of the restriction which includes deprivation may, unless otherwise established, be presumed…if a Tribunal is authorised by an Act to determine compensation for property compulsorily acquired, without hearing the owner of the property, the Act would be liable to be struck down under Article 19 (1) (f).[60] (paras 58-60)

The above decision is a landmark decision on fundamental rights. On the relevance of 'interests of the general public', the court held (para 63): '*If property is compulsorily acquired for a public purpose, and the law satisfies the requirements of*

Articles 31 (2) and 31 (2A), the Court may readily presume that by the acquisition a reasonable restriction on the exercise of the right to hold property is imposed in the interests of the general public.' Where the Government acquires property for a public purpose, it can be justified on the ground that the interests of private owners of property must subserve the larger interests of the general public. But what 'public interest' is involved in a situation where an employer retrenches a few workmen who were rendered surplus to his operational requirements? Could it be said that the unemployment of a few workmen affects the interests of general public; if so, in what manner and to what extent? Let us now take a look at what another Constitution Bench had to say on 'public interest' in *Excel Wear*, in which the Constitutional validity of ss. 25-O and 25-R was at issue. Justice Untwalia rightly observed:

> Public interest and social justice do require the protection of the labour. But is it reasonable to give them protection against all unemployment after affecting the interests of so many persons interested and connected with the management apart from the employers. Is it possible to compel the employer to manage the undertaking even when they do not find it safe and practicable to manage the affairs? Can they be asked to go on facing tremendous difficulties of management even at the risk of their person and property? Can they be compelled to go on incurring losses year after year?[61]

It is an undisputed fact that ch V-B suffers from the vice of oppressive provisions touching upon the fundamental right to carry on business, reminding of the dark ages of slavery and serfdom. This was richly exposed in *Excel Wear*, in which ss. 25-O and 25-R were struck down as being *ultra vires* the Constitution.

Observation - II

> *…while exercising its powers under sub-section (2) of section 25-N in the matter of granting or refusing permission for retrenchment, the appropriate Government or the authority does not exercise powers which are purely administrative but exercises powers which are quasi-judicial in nature. (para 30)* (Emphasis added).

This gives rise to the basic question: does the phraseology of s 25N(2) refer to a quasi-judicial proceeding or an administrative proceeding? There is nothing in the said sub-section to show that it is a quasi-judicial proceeding, notwithstanding the faint attempt made by the learned judge to establish that it is of quasi-judicial nature. The very theme and spirit of IDA is not to invest the labour commissioner with the power to adjudicate any dispute or matter between employer and workmen, as is discernible from s 12. Adjudication has been entrusted to Labour Courts and Tribunals. An *en bloc* retrenchment of surplus workmen or a permanent closing down of the undertaking is undoubtedly a situation of serious magnitude in contrast to a dispute relating to discharge or dismissal of an individual workman. If the labour commissioner has no power to impose his decision on the parties or do anything that would affect the rights of parties even in a case of individual dismissal, how could the same authority be invested, in the same breath, the power to adjudicate an application for permission to layoff and retrench his workmen or to close down the undertaking? If this is not a contradiction in the legal status of labour commissioner, what else could it be? In *Corporation of Dublin*, May CJ observed:

> It is established that the writ of *certiorari* does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connection the term 'judicial' does not necessarily mean acts of a judge or legal Tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others. [62]

The relevant part of s 25N(4) runs thus: '*Government or the authority may, after making such inquiry as such Government or authority thinks fit, grant or refuse.*' What does the expression 'enquiry' connote? Applying the above dictum of May CJ to s 25N(2), the only issue that requires to be answered is, '*would an order passed by the Government or the authority impose a liability and/or affect the rights of others (the employer and workmen, here) or would it not?'* The answer undoubtedly is: '*Yes, it does!*' There is nothing in that section to enlighten the reader as to the nature or scope of enquiry contemplated therein. It *prima facie* implies that the power conferred on the authority is arbitrary, unilateral and uncanalised as no guidelines were prescribed for exercising the said power properly. Thus, the above observation of Agarwal J is wholly wrong on facts.

Observation - III

> *In view of the time limit of three months prescribed in sub-section (3) there is need for expeditious disposal which may not be*

> *feasible if the proceedings are conducted before a judicial officer accustomed to the judicial process. Moreover, during the course of such consideration it may become necessary to explore the steps that may have to be taken to remove the causes necessitating the proposed retrenchment which may involve interaction between the various departments of the Government. (para 39)*

The above reading is not free from serious fallacies. To say that a judicial process may take a longer time than three months prescribed in sub-sec. (3) is based neither on facts nor on law. In terms of the proviso to sub-sec (2A) of s 10 of the ID Act, labour courts and tribunals are mandated to submit the award *within three months*, where the dispute relates to discharge, dismissal, retrenchment or termination. This legal position demolishes much of his rhetoric on the non-feasibility of expeditious disposal by a labour court as against labour commissioner. *Secondly*, what was the nature of '*interaction between various departments of Government*' that the learned judge was visualising? In a case, where an application for retrenchment of a few workmen is pending before the labour commissioner, what kind of lateral material is needed by him from other departments such as 'revenue', 'education', 'commercial taxes', *etc*., before taking a decision? Is it possible to hold that any department other than 'labour' could have any meaningful part to play? What was the need for assuming so many wild possibilities in a direct, short and simple provision?

Observation - IV

> …*it is not invested with the judicial power of the State and it cannot be regarded as a Tribunal* within the meaning of Article 136 of the Constitution*and no appeal would, therefore, lie to this Court against an order* passed under sub-section (2) of section 25-N. (para 35)….*the power that is exercised by the appropriate Government or the authority while refusing or granting permission under sub-section (2) and have found that the said power is not purely administrative in character but partakes exercise of a function which is judicial in nature.* …There is need for such principles or guidelines when the discretionary power is purely administrative in character to be exercised on the subjective opinion of the authority. *The same is, however, not true when the power is required to be exercised on objective considerations by a speaking order after affording the parties an opportunity* to put forward their respective points of view. (para 42) (Emphasis added).

It is startling to find a battery of self-contradictory statements in a single decision of a Constitution Bench. The pendulum of interpretation kept swinging menacingly from one extreme of '*quasi-judicial*' (para 30: *observation-II* above) to '*non-judicial*' (para 35) and to '*judicial character*' (para 42). Is it possible that a judge at the level of Supreme Court with decades of experience at the Bar and the Bench could display grave confusion of this magnitude as to the connotation of '*judicial*' function in contradistinction to '*quasi-judicial*' and '*administrative*' functions? The mutually inconsistent positions taken by the learned judge at regular intervals in the same judgment throw the reader into total disarray. This decision hardly displays any clarity as to the nature and character of the different functions, which is dwelt upon at some length below. It is well settled that there is a real and substantial difference between *judicial* and *quasi-judicial* proceedings and so is the case with *quasi-judicial* and *administrative* functions. In *Cooper v Wilson* , it was held:

> A true judicial decision presupposes an existing dispute between two or more parties, and involves four requisites: (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties, and involves (1) and (2), but does not necessarily involve (3) and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice.[63]

This decision was cited with approval by Supreme Court in *Bharat Bank*.[64] For an authoritative exposition of the expression '*quasi-judicial body*', we should turn to *Rex v Electricity Commissioners* , wherein the Lord Atkin observed:

> *Whenever any body of persons having legal authority, to determine questions affecting rights of subjects and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.*[65]

Where to place the earlier observation of Agarwal, J, that the order passed u/s 25N was 'not appealable' (para 35), in the face of his subsequent observation that it is a 'judicial' function (para 42)? If it is a judicial function, could it still be held

that the order passed by the authority is '*not appealable*'? *If this is not a grave paradox, what else is it?* It is true that the judicial power of the state has not been conferred on the labour commissioner acting u/s 25N *in full flow*, but then the said power was not conferred on the Labour Court and Tribunal either, while acting under the said section. *If an order of the Tribunal is appealable under Art 136,* as was peremptorily held in *Bharat Bank* (supra), *by what legal yardstick could it be denied to an order passed by the Labour Commissioner, more so, when there was no provision in the Act for a review of the said order?*

In this connection, it is pertinent to note that the Supreme Court distinguished Indian Constitution from s. 71 of the Australian Constitution and held that, unlike Australia where judicial power can only be conferred on *'courts' properly so-called*, there is no rigidity or exclusiveness involved in the Indian Constitution as it was based on a *'broad' separation of powers*.[66] This position clearly predicates that, in order to exercise jurisdiction under Art 136, it is not necessary to show that the inferior Tribunal has been vested with the judicial power of the state. Even so, the point for consideration is: "does Article 136 confer an inalienable right on the aggrieved party to move a SLP or is it a discretionary power vested in SCI to interfere selectively on the *prima facie* appearance of circumstances of grave and substantial injustice?" In *Bengal Chemicals*, Subba Rao J (for self, Gajendragadkar and Sarkar JJ), brilliantly explained this particular aspect in the following words:

> Article 136 of the Constitution*does not confer a right of appeal to any party from the decision of any tribunal, but it confers a discretionary power on the Supreme Court to grant special leave to appeal* from the order of any tribunal in the territory of India. *It is implicit in the discretionary reserve power that it cannot be exhaustively defined. It cannot obviously be so construed as to confer a right to a party where he has none under the law.* The Industrial Disputes Act is intended to be a self-contained one and it seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration. Awards are given on circumstances peculiar to each dispute and the tribunals are, to a large extent, free from the restrictions of technical considerations imposed on courts….*The limits to the exercise of the power under Article 136 cannot be made to depend upon the appellant obtaining the special leave of this Court, for, two reasons, viz: (i) at that stage the Court may not be in full possession of all material circumstances to make up its mind; and (ii) the order is only* an *ex parte* one… The same principle should, therefore, be applied in exercising the power of interference with the awards of tribunals irrespective of the fact that the question arises at the time of granting special leave or at the time the appeal is disposed of. *It would be illogical to apply two different standards at two different stages of the same case*.[67] (Italics supplied)

Reverting to the distinction between quasi-judicial and administrative functions, if it were to be held that the authority performs a purely administrative function, there can be no escape from the conclusion that *the provision had to be struck down on the ground that the power conferred on the authority is arbitrary, uncanalised and bereft of guidelines*. In *AK Kraipak*, which is an authority on the issue, Hegde J observed:

> The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power, one has to look to *the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised*… The concept of rule of law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. *The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously*. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision.[68] (Italics supplied)

To sum up, Hegde J identified five criteria to determine whether the power conferred was quasi-judicial or merely administrative, as indicated below:

(i) the nature of the power;

(ii) the person on whom it is conferred;

(iii) the legal framework under which the power is conferred;

(iv) the consequences arising from the exercise of the power; and

(v) the manner in which the power is expected to be exercised.

Notwithstanding the fact that the line of demarcation between administrative and quasi-judicial power is thin and is on the verge of getting completely obliterated, it is not in dispute that the distinction is real and substantial in so far as the process

and the procedure prescribed for exercising the said powers. What was the statutory basis for Agarwal J to hold: '*the power is required to be exercised on objective considerations by a speaking order after affording the parties an opportunity*'? *In the first place*, is there anything in s. 25N which requires the authority to give an opportunity to the parties, let alone the need for passing a 'speaking order'? If the section itself is silent about affording an 'opportunity', can a judge re-write the provision by supplying the omission? *Secondly*, assuming that it were there, does the mere fact of affording an opportunity *per se* lead to the inference that the decision of the authority would be 'objective'? In the light of the further observation of Agarwal J to the effect that the order passed u/s 25N was not appealable, what recourse is available to the employer, if the labour commissioner passes a subjective, arbitrary and tyrannical order? To put it briefly, the entire judgment running into more than 30 pages in cold print is full of inconsistent and mutually contradictory positions taken by the learned judge. *Lastly*, what is the distinction between (i) discretionary administrative power which *can be exercised on subjective satisfaction*; and (ii) a power, which *has to be exercised objectively by a speaking order, after affording opportunity* to the parties? With the exception of a few provisions relating to '*preventive detention*', '*maintenance of internal security*' and certain others falling under '*land acquisition*', can the learned judge cite at least one statute, which has manifestly granted unbridled license to an authority performing a 'public duty' of the kind contemplated u/s 25N, to *decide matters on purely 'subjective' opinion?*

I would like to cite two decisions relating to *preventive detention* and *land acquisition*. In *Khudiram*, it was held that the subjective satisfaction of the detaining authority was not wholly immune from judicial reviewability. The court could certainly require the detaining authority to produce and make available to the court the entire record of the case which was before it.[69] Justice Bhagwati supportively cited the observation of Lord Halsbury to the effect: '*when it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be, not arbitrary, vague, fanciful, but legal and regular*.'[70] In *Khusaldas Advani*, interpreting s 3 of Bombay Land Requisition Ordinance 1947, which was in terms: "If in the opinion of the Provincial Government, it is necessary or expedient to do so, the Provincial Government may, by order in writing, requisition any land for any public purpose", Kania CJI (for self, Fazl Ali, Sastri and Das JJ; Mahajan and Mukherjea JJ dissenting), observed that the words of the said section did not import into the decision of public purpose the judicial element required to make the decision judicial or quasi-judicial, and held that the decision of the Provincial Government about public purpose was an administrative act and no application for a writ of *certiorari* would lie.[71]

A few landmark decisions touching upon the limit imposed on the discretionary power of administrative nature are cited below. In *Hamdard*, s 3(d) of the Drugs and Magic Remedies (Objectionable Advertisements) Act 1954, which gave power to the Central Government to add to the diseases falling within the mischief of s 3, was struck down on the ground that it conferred uncanalised power to include any disease it thought fit.[72] In *Ramesh Birch*, it was held that the power of Parliament to entrust legislative powers to some other body or authority is not unbridled and absolute. It must lay down essential legislative policy and indicate the guidelines to be kept in view by that authority in exercising the delegated powers. In delegating such powers, Parliament cannot 'abdicate' its legislative functions in favour of such authority.[73] In *Chandrakant Saha*, while dealing with the constitutional validity of ss 5 & 6 of the Rice Milling Industry (Regulation) Act 1958, '*discretionary power*' was clearly distinguished from '*mandatory power*' which is in the nature of a duty imposed. Justice Fazl Ali (for self, Chandrachud CJI, Bhagwati, Singhal and Desai JJ), held that the statute did not leave any discretion in the licensing officer to grant or refuse to grant a license. He had a mandatory duty to perform and, therefore, there was no question of the licensing officer having been conferred unrestricted or uncanalised powers under the Act.[74]

While striking down s 12A of HP General Sales Tax Act 1968, Rajendra Babu J held that arbitrary and uncanalised powers were conferred on the concerned person to deduct up to four percent from the sum payable to the works contractor, irrespective of whether the transaction is ultimately liable for payment of any sales tax at all.[75] In striking contrast, it was rightly held in *CP Sarathy* that the power conferred on the Government u/s 10 of IDA was absolute and discretionary in so far as the factual existence of a dispute and the expediency of making a reference are matters entirely for the Government to decide upon, and it would not be competent for the court to hold the reference bad for want of jurisdiction merely because there was, in its opinion, no material before the Government.[76] In this regard, it should be noted that, while making the reference of a dispute for adjudication, the Government would be acting merely as a forwarding agency and does not adjudicate the dispute itself, and, therefore, such reference does not *per se* affect the rights of parties. The above discussion is sufficient to expose the uneasy wavering and lack of conviction on the part of Agarwal J on almost every aspect covering - quasi-judicial *vs.* judicial power, administrative *vs.* quasi-judicial power, subjective opinion *vs.* objective decision, speaking order *vs.* silent order, appealability *vs.* non-appealability - and so forth.

Observation - V

> We are also unable to agree with the submission that the requirement of passing a speaking order containing reasons as laid down

in sub-section (2) of section 25N does not provide sufficient safe-guard against arbitrary action. (para 49)

Justice Agarwal cited his own decision in *SN Mukherjee*, in support of the proposition that "irrespective of the fact whether the decision was subject to appeal, revision or judicial review, the recording of reasons by an administrative authority by itself serves a salutary purpose; *viz*., it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision making".[77] It should be noted by the judicial fraternity that, in *SN Mukherjee*, neither counsel nor the learned judge referred to the ratio of *Dwarka Prasad*,[78] which squarely covered the issues raised therein. In *Dwarka Prasad*, it was clearly held (para 8) that a provision, which had otherwise conferred arbitrary power on the Executive without prescribing any guidelines, could not be resuscitated and sustained by taking a softer view that it '*requires the authority to record reasons'* for the order. Reverting to *SN Mukherjee*, the facts disclosed that it was a case of dismissal of the petitioner (an Army officer) after holding court martial. While confirming his dismissal, the Chief of the Army Staff did not record reasons, nor did the Government do so while disposing of the post-confirmation appeal made by the petitioner. *What is the relevance of the said case* to the issues raised in *Meenakshi Mills*? The various authorities discussed in this section (*supra* and *infra*) expose the hollowness of the reasoning advanced by Agarwal J, and reinstate the legal position that the mere requirement of passing a speaking order does not by itself, without anything more, breathe *ex-post facto* life into an otherwise uncanalised power conferred on the executive *de hors* any intelligible guidelines for its exercise.

Observation - VI

> *We are unable to accept this contention of Shri Nariman for the reason that the principles aforementioned governing retrenchment were laid down by this Court at a time when retrenchment, as defined in Section 2(oo) of the Act, was confined to mean discharge of surplus labour or staff.* There has been a change in the law relating to retrenchment since the decision of this Court in *State Bank of India v. N. Sundara Money* ,[79]*…In view of these decisions, it cannot be said that retrenchment means termination by the employer of the service of a workman as surplus labour…* (para 32) (Emphasis added)

This observation is no less formidable, if not frightening, as Agarwal J failed to notice two fundamental issues involved, *i.e*., (i) the general right of the employer to reorganise his business, which may or may not involve, as an accessory thereto, the right or the need to retrench; and (ii) the true meaning and scope of the expression 'retrenchment' as defined in s. 2(oo) r/w ss 25F, 25G, 25H, 25N and so forth. With utmost respect, the learned judge seems to have confused himself with several cases, provisions and propositions for no perceptible reason or warrant. The three cases cited by counsel and dealt with by Agarwal J, namely, *Macropollo*,[80]*Subong*,[81] and *Parry*,[82] which have already been discussed in the preceding paragraphs, *confined to the question of the general right of employer to reorganise his business*, and have nothing to do with the *definition or concept of retrenchment*. It is an undisputed fact that both *Macropollo* (Venkatarama Ayyar, Gajendragadkar and Sarkar JJ) and *Parry* (Shelat, Bhargava and Vaidialingam JJ) were decided by three-judge Benches, whereas *Subong* was decided by a two-judge Bench (Gajendragadkar and Das Gupta JJ). *Secondly*, the *interpretation of the definition of 'retrenchment' in s. 2(oo) was not in issue in any of the above cases*. While referring to the above cases, Agarwal J proceeded to observe that in view of the subsequent decision in *Sundarmoney* et al, the law laid down in the above cases should be treated as no longer a good law on the connotation of retrenchment. *This is a manifest mis-statement of fact and law apart from being an atrocious observation*, as he merely mentioned the three decisions cited by counsel without apparently going through any of them including *Sundaramony*, on which he relied heavily. *Thirdly*, in *Sundaramony*, neither counsel nor Iyer J did cite any of the afore-said three cases. *Fourthly*, for any meaningful analysis on the concept of retrenchment, one has to look elsewhere, and none of the three cases is of any help. Assuming for the sake of argument that the meaning of 'retrenchment' underwent a change overnight after *Sundaramony*, could it be said that a three-judge bench in *Sundaramony* (Chandrachud, Iyer, and Gupta JJ) could overrule *sub silentio*, two earlier decisions of co-ordinate benches to the contrary, without being held guilty of judicial indiscipline? *Lastly*, what is the truth value of the proposition (para 32) that, in view of *Sundaramony*, the said three cases (*Macropollo*, *Subong* and *Parry*) no longer hold good, in view of the fact that those cases had nothing whatsoever to do with the concept or definition of retrenchment? *If this is not an observation made by Agarwal J rather recklessly and blindfold, what else could it be?*

I now propose to deal with the second aspect, *i.e*., the definition of retrenchment. For any meaningful discussion on the concept of 'retrenchment' as defined in s 2(oo) of ID Act, one has to invariably refer—*not to Macropollo, Subong and Parry—but to Hariprasad*,[83]*Barsi Light Railway*,[84]*Pipraich*,[85] and *Anakapalle*.[86] In *Sundaramony*, again, neither counsel nor Iyer J did refer to any of the aforesaid four decisions, without which no discussion on the definition of retrenchment could be said to be either complete or valid, much less meaningful. In addition, Iyer J went about in his neo-radical, creative style and gave a wild interpretation to 'retrenchment' as meaning '*termination howsoever produced*' and held that it includes '*both transitive and intransitive senses*' - a ghastly interpretation in the face of a phrase, which stipulates that retrenchment means '*termination by the employer*', which cannot admittedly include '*intransitive sense*.' For all these

reasons, *Sundaramony* is manifestly perverse, baseless and *per incuriam*, with no binding force on any Bench of Supreme Court or any court at any level. *The sole fact that a few later judges endorsed it by putting on blinkers* cannot clothe *Sundaramony* with binding authority. Further, *Hariprasad, Barsi Light Railway* and *Anakapalle* were decided by Constitution Benches and *Pipraich* by a four-judge bench, which means all of them are binding on subsequent benches of five or less number of judges. Thus, *Sundaramony*, which was decided by a three-judge bench, was as much bound by those decisions. This aspect has been analysed at some length elsewhere. This discussion is adequate to establish the gravity of misconceptions that beset the judicial mind of Agarwal J.

Observation - VII

> Absence of a *provision for appeal or revision against an order under sub-section (2) is not of much consequence especially when it is open to an aggrieved party to invoke the jurisdiction of the High Court under Article 226* (para 55). …An employer proposing retrenchment of workmen who feels aggrieved by an order refusing permission for retrenchment under sub-section (2) of section 25N can also move for reference of such a dispute relating to retrenchment u/s. 10 of the Act. *It is permissible for both the workmen and the employer to raise an industrial dispute. In both the cases, the possibility of a reference by the appropriate Government would be remote. Hence both the workmen and the employer are treated alike and there is no discrimination.* (para 57) (Emphasis added)

To say the least, *this is an outrageous observation made by no less a person than a Supreme Court Judge, who was speaking for a Constitution Bench of five judges!* The availability of a remedy in litigation extending up to the highest court is not something unique to s 25N (2) exclusively. An award passed by a Labour Court or Tribunal is as much challengeable under Art 226, notwithstanding s 17(2) which confers absolute finality on it. It is not so much the power of judicial review that was at issue as the very competence of labour commissioner to adjudicate or, for that matter, to perform an administrative function of a *public duty character*, with no guidelines prescribed therefor. The learned judge stopped with the observation *'it is permissible for both the workmen and the employer to raise an industrial dispute'*, and did not thankfully give expression to the other possibility of '*resorting to a strike or declaring a lockout.*' With great respect, his argument (para 57) that '*there is no discrimination, etc.,*' exposes itself to public ridicule, as it predicates that the '*indifference, lethargy and inaction of Government in not making a reference, and the consequent denial of a right to both the parties in an equal measure', is the sole touchstone on which the Right to Equality enshrined in Art 14 is tested!* Is it possible to envisage a terrible situation in which *a responsible Judge of Supreme Court travels to the length of making such a macabre statement in his judgment?*

Observation - VIII

The expression *'interests of workers'…covers the interests of all the workers…not only the workers who are proposed to be retrenched but also the workers who are to be retained.* It would be in the interests of the workers as a whole that the industrial establishment in which they are employed continues to run in good health because sickness leading to closure of the establishment would result in unemployment for all of them. …We are, therefore, unable to accede to the contention of Shri Nariman that sub-section (2) of section 25N by enabling the appropriate Government or authority to take into consideration the condition of employment in the industry or the condition of employment in the State imposes an unreasonable restriction on the right of the employer under Article 19(1)(g). (para 48)

Does the observation - *interest of workers means the interest of all workers including those proposed to be retrenched and those retained - make any sense even to a man-in-the-street, let alone a lawyer, jurist or a student of law?* In a case, where permission to retrench has been granted, could it be said that such permission is in the *interest of the very workmen who are proposed to be retrenched?* If, on the contrary, where permission has been refused and the employer is forced to carry excess manpower paying idle wages resulting in industrial sickness and eventual closure, could it be said that such closure is '*in the interest of the residual workers'*? *Is it possible, by any stretch of imagination, to reconcile the interests of workers to be retrenched, with those to be retained?* That is the extent to which *fallacies of Himalayan proportions made their way into the reasoning process of Agarwal J!* Adverting to the unreasonability of the restriction canvassed by counsel, a glance at a few earlier decisions may throw useful light on the subject. The concept of 'reasonableness' and the manner of handling it in a judicial decision were lucidly explained by Sastri CJI in *VG Row*, wherein the learned Chief Justice observed:

> It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter

> into the judicial verdict.[87]

A case in point is that of *Jagannath Ramanuj Das*, in which ss 38 & 39 of Orissa Hindu Religious Endowments Act 1939 were held invalid on the ground that they imposed an unreasonable restriction on the right of the Head of the *Math* as they provided for settling of a scheme in regard to a religious institution by an executive officer without the intervention of any judicial Tribunal.[88]

Observation - IX

> The matter now stands concluded by the decision of the Constitution Bench of this Court in *Punjab Land Development and Reclamation Corporation Ltd*.[89] (para 32)

This is yet another *blatant mis-statement* made by the learned judge *qua* judge, in so far as it does not reflect the true legal position relating to Judicial Discipline or Judicial Precedent. *Punjab LDRC* was decided by a Constitution Bench and, being a co-ordinate Bench, was very much bound by the decision given by an earlier Constitution Bench, until overruled by a larger Bench or amended by the legislature. And all the cases starting from *Hariprasad to Anakapalle* were decided by Constitution Benches (except *Pipraich*, decided by a four-judge Bench) and, accordingly, they were very much binding on *Punjab LDRC*. It is a well settled law that if the subsequent bench of same number of judges is of the opinion that the earlier bench did not lay down correct law, the only course available to it is to lay the papers before the CJI for constituting a larger bench and get the matter examined all over. In no case, can it proceed to overrule either overtly or *sub-silentio* the earlier decision of a coordinate bench. If it does not choose to get it referred to a larger bench, then it has to abide by the earlier decision, even if the earlier decision was patently wrong. That is the sum and substance of the principle of *stare decisis*. In the face of this settled legal position, could it be said that *Punjab LDRC* has any binding force on any subsequent Bench of Supreme Court or on any lower court? In the light of a clumsy crop of decisions showered from *Sundaramony* to *Punjab LDRC*, in manifest violation of all canons of judicial propriety, decorum, decency and discipline, the present legal position with regard to the definition of retrenchment in s 2 (oo) can be stated thus: If a subsequent Bench of Supreme Court or a High Court is confronted with the issue, "*what is the true meaning of retrenchment*", it would be absolutely free to follow either *Hariprasad-Anakapalle* or *Punjab LDRC*, even though there is a direct clash between the two renditions!

With great respect for the five learned judges who were members of the Bench, it is submitted that the decision in *Meenakshi Mills* was plagued by (i) *perplexing statements*, (ii) *conceptual confusion*, (iii) *misconstrued provisions*, (iv) *outrageous observations*, (v) *misquoted decisions*, (vi) *misplaced comparison*, (vii) *misinterpretation of law*, (viii) *hysterical approbation and reprobation*, (ix) *sub-standard reasoning*, and (x) *fatal infirmities of rudimentary nature*, and is manifestly and undoubtedly wrong. *By no standard of judicial process can this rendition - coming as it were from a Constitution Bench - be elevated to the status of a 'judicial decision' properly so-called!* In striking contrast, the decision of Ramanujan J in *KV Rajendran* is consistent with settled legal principles, which distinguish adjudicatory and administrative powers as well as the reasonability or otherwise of the restrictions imposed on the Fundamental Right guaranteed under Art 19(1)(g), and is right. *I have shed more ink on this mediocre and insipid decision than what it really deserves, and there is no need to extend it to the rest of the text*. *Meenakshi Mills* was wrongly decided on every count without exception, and needs review by a larger Bench, *and comprehensively overruled, if for nothing else, to uphold the reputation and standing of the Supreme Court*.[90] The reliance placed by Aftab Alam J in *Empire Industries* (supra) on the Constitution Bench decision in *Meenakshi Mills* is understandable and deserves full sympathy of legal fraternity from the standpoint of judicial discipline, which, on the principle of *stare decisis*, mandates that a coordinate or subordinate Bench has to invariably follow the decision of a larger Bench, *regardless of the fact that the latter is patently misconceived and blatantly wrong*.

SUB-SECTION (8): POWER TO EXEMPT

In exceptional circumstances, such as accident in an establishment or the death of the employer or the like, the appropriate Government has been given the power to exempt such establishment from the provisions of sub-s (1) for a specified period, if it thinks it necessary to do so. This sub-section commences with a non obstante clause and carves out an exception to sub-s (1). The words 'the like' are to be construed *ejusdem generis* with the preceding contingencies. Normally, the death of the employer is relevant only where the establishment is carried on by an individual entrepreneur. But, by and large, large scale establishments are carried on by corporate bodies and are rarely carried on by individual employers. Therefore, in cases of establishments carried on by corporate bodies, the exemption under this sub-section may be granted if there is an accident or a natural disaster *etc*.

SUB-SECTION (9): COMPENSATION FOR RETRENCHMENT

This provision quantifies the amount of compensation payable to a workman at the time of his retrenchment at the rate of fifteen days' average pay of every completed year of continuous service or part thereof in excess of six months. The payment of this compensation to be made at the time of retrenchment, is also a pre-condition to a valid retrenchment. [The provisions of this sub-section corresponds to the provisions of cl (b) of s 25F. Notes and comments under s 25F(b)].

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27 Subs by Act 49 of 1984, s 5, for s 25N (wef 18-8-1984).

28 *Workmen of Meenakshi Mills v Meenakshi Mills Ltd* (1992) 2 LLJ 295, 306 (SC), per Agrawal J.

29 *KV Rajendran v Deputy Commr of Labour* 1981 Lab IC 799, 805-06 (Mad), per Ramanujan J.

30 *JK Synthetics v Union of India* 1984 Lab IC (NOC) 40 (Raj) (FB).

31 *IDL Chemicals Ltd v T Gattiah* WA No 16 of 1981 decided on 4 December 1981.

32 Section 5 of the Amending Act 49 of 1984 brought into force with effect from 18 August 1984.

33 *Workmen of Meenakshi Mills Ltd v Meenakshi Mills Ltd* (1992) 2 LLJ 294 [LNIND 1992 SC 411] (SC) : (1992) 3 SCC 336 [LNIND 1992 SC 411] : AIR 1994 SC 2696 [LNIND 1992 SC 411], per Agrawal J.

34 *T Gattiah v Commr of Labour* 1981 Lab IC 942 [LNIND 1981 AP 38], 945 (A), per Choudhury J.

35 *Indian Farmers Fertiliser Co-op Ltd v IT* 1991 Lab IC 1747, 1753 (All), per Mehrotra J.

36 *Lal Mohammed v Indian Rly Constn Co Ltd* (1999) 1 LLN 663, 673, 678 (SC), per Majumdar J.

37 *EID Parry (India) Ltd v LC* (1992) 2 LLJ 580, 587 (AP) : 1991 (3) ALT 161, per Quadri J.

38 *Voltas Ltd v VMP Union* (2001) 3 LLN 542 (Bom), per Daga J.

39 *Shaw Wallace Gelatim Ltd v OP Singh* (2001) 4 LLN 503 (MP), per Kulshreshta J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VB Special Provisions Relating to Lay-off, Retrenchment and Closure in Certain Establishments

[91][S. 25-O. Procedure for closing down an undertaking.—

(1) An employer who intends to close down an undertaking of an industrial establishment to which this Chapter applies shall, in the prescribed manner, apply, for prior permission at least ninety days before the date on which the intended closure is to become effective, to the appropriate Government, stating clearly the reasons for the intended closure of the undertaking and a copy of such application shall also be served simultaneously on the representatives of the workmen in the prescribed manner:

Provided that nothing in this sub-section shall apply to an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work.

(2) Where an application for permission has been made under sub-section (1), the appropriate Government, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen and the persons interested in such closure may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the general public and all other relevant factors, by order and for reasons to be recorded in writing, grant or refused to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(3) Where an application has been made under sub-section (1) and the appropriate Government does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which such application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.

(4) An order of the appropriate Government granting or refusing to grant permission shall, subject to the provisions of sub-section (5), be final and binding on all the parties and shall remain in force for one year from the date of such order.

(5) The appropriate Government may, either on its own motion or on the application made by the employer or any workman, review its order granting or refusing to grant permission under sub-section (2) or refer the matter to a Tribunal for adjudication:

Provided that where a reference has been made to a Tribunal under this sub-section, it shall pass an award within a period of thirty days from the date of such reference.

(6) Where no application for permission under sub-section (1) is made within the period specified therein, or where the permission for closure has been refused, the closure of the undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down.

(7) Notwithstanding anything contained in the foregoing provisions of this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like it is necessary so to do, by order, direct that the provisions of sub-section (1) shall not apply in relation to such undertaking for such period as may be specified in the order.

(8) Where an undertaking is permitted to be closed down under sub-section (2) or where permission for closure is deemed to be granted under sub-section (3), every workman who is employed in that undertaking immediately before the date of application for permission under this section, shall be entitled to receive compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months.]

CONSTITUTIONAL VALIDITY

The original 25-O was enacted as a part of ch VB by the Amending Act 32 of 1976,[92] but it was struck down by the Supreme Court in *Excel wear*,[93] being violative of the fundamental right to carry on business guaranteed by Art 19(1)(g) of the Constitution of India. The court discountenanced both the extreme contentions put forward by the parties as to the nature of the right to dose down business. It rejected the contention of the employer that the right to dose down a business was at par with the right not to start a business at all. Equally emphatically, the court rejected the rival contention of the workmen that the right to close down a business is not an integral part of the right to carry on business but it was merely a right appurtenant to the ownership of the property or that it was not a fundamental right at all. On examination of the nature of the restrictions imposed on the fundamental right of the employer, the court held that the section was violative of the fundamental right of the employer to close down the business on the ground that it suffered from the vice of excessive and unreasonable restriction in not permitting him to close down his business which is essentially an interference with the fundamental right to carry on business. It was observed that all the comprehensive and detailed information given in the application Form is of no avail to the employer if the law permits the authority to pass a 'cryptic, capricious, whimsical and one-side order.' The present section has been enacted by the Amending Act 46 of 1982,[94] purporting to remove the vices from which the pervious provision suffered.

The question as to whether the section so far, it empowers the 'appropriate Government' to force an unwilling employer to carry on his business by refusing to grant permission to close down his undertaking, does not infringe the Fundamental Rights guaranteed by Arts 14 and 19(1)(g), still remains unresolved. This question has not been answered either in *Hathising* or in *Excel Wear* case. The question is debatable. In a case where the employer is left with no funds at all to carry on the business and the Government refuses to grant permission to him for closing the undertaking, the statutory remedy available to him is to apply for having the matter referred for adjudication under sub-s (5). This is the commencing point of the litigation which may pass through the stages of writ petitions under Art 226 and appeals to the Supreme Court by special leave under Art 136 of the Constitution. In the meanwhile, the employer is forced to carry on his business albeit the complete lack of financial resources with him. Insofar as this section empowers the Government to refuse permission to the employer even on compliance with the requirements of the provisions of this section, appears to be arbitrary and violative of the guarantees of Arts 14 and 19(1)(g) of the Constitution. Likewise, where the consequences of continuing the business may be disastrous on account of the acrimonious relations between the employer and the workers or for some other reasons, to force the employer to continue to carry on his business by refusing to grant permission to close down, is an arbitrary and unreasonable restriction on his fundamental right to carry on business guaranteed by Art 19(1)(g). The tragedy resulting from the refusal of the Government to grant permission to Union Carbide Company to close down its undertaking at Bhopal is in the point. The consequences are too well-known to be stated. It is significant to note that the power to deal with 'closure' matters under the section is vested only with the appropriate Government unlike ss 25M & 25N where in addition to the 'appropriate Government', the powers to deal with 'lay-off' and 'retrenchment' cases is vested with the 'specified authority' as well. In *Stumpp Scheule*, Rama Jois J, while striking down s 25-O, in its amended form too as being violative of Fundamental Right guaranteed under Art 19(1)(g), and hence *ultra vires* the Constitution, observed:

> Section 25-O does not specify the conditions, which, if fulfilled, permission would be granted. On the other hand, securing of permission of the Government, which is not within the hands of the owner, itself is a condition to be complied with for exercising the right of closure. To put it in a nutshell, the *section is not in the nature of a fetter on the exercise of the right, but a provision which empowers the Government to put a shutter on the exercise of the right,* irrespective of the fact that the reasons to close down the industry are valid and may be even beyond the control of the employer. [1]

In *Molins*, while striking down the amended sections 25-O and 25 R as being ultra vires of the Constitution, Babulal Jain J of the Calcutta High Court observed:

> A law which compels an employer to run the industry cannot be regarded as reasonable and in some cases it might become tyrannical…This will introduce another form of slavery and would amount to an unreasonable restriction on the fundamental right guaranteed by Art. 19(1)(g) of the Constitution of India …How can the employer be asked, in the form of restrictions, to continue to run his business even at the risk of it collapsing, financially and/or physically, and be forced to face extinction.[2]

In *Associated Cement Companies*, the Gujarat HC quashed both the order of the labour commissioner and the award of the tribunal, and held:

> A right to close down a business being an integral part of the fundamental right to carry on business, the words 'genuine and adequate' must have that meaning which is consistent with the nature of that right…it is not the function of the state Government or the tribunal…to decide whether an employer has managed his undertaking properly or not, or so to advise him as to what he should have done…Merely because the employer has not managed his undertaking properly, it cannot be made a ground for refusing permission to close down his undertaking.[3]

In *DCM*, a Full Bench of the Delhi HC, while quashing the order of the Lt Governor and directing him to grant the permission prayed for (to close down the unit) within seven days from the date of the judgment, observed:

> The law is well settled that if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to or has been arrived at by the authority misdirecting itself by adopting a wrong approach, or has been influenced by irrelevant or extraneous matters, the Court would be justified in interfering with the same.[4]

In *Jay Engineering Works*, where the labour commissioner refused permission to close down, the said order was quashed by the Calcutta High Court. The court found that the order was not only defective for not recording the reasons for refusal, but it also gave truncated and segregated hearings to the parties. It was further found that the workmen were heard behind the back of the employer, and that the employer did not have any opportunity of refuting the contentions of the workmen.[5]

The constitutional validity of the amended s 25-O finally came up before a Constitution Bench in *Orissa Textile*. Variava J (for self, Bharucha CJI, Quadri, Hegde and Patil JJ), following the ratio of *Meenakshi Mills*,[6] held that the section was not violative of the fundamental rights guaranteed under Art 19(1)(g) of the Constitution, and further observed:

> The making of an enquiry, the affording of an opportunity to the employer, the workmen and all interested persons and the necessity to pass a written order containing reasons envisages the exercise of functions which are not purely of an administrative character but *quasi-judicial* in nature. As held in *Meenakshi Mills'* case the words 'the appropriate Government, after making such enquiry as it thinks fit' does not mean that the Government may dispense with the enquiry at its discretion. These words only mean that the Government has discretion about the nature of the enquiry it is to make. ()…The sub-section provides that the order of the appropriate Government shall remain in force for one year from the date of such order...*In our view if the reasons were genuine and adequate, the very fact that they have persisted for a year more is sufficient to necessitate a fresh look. Also if the reasons have persisted for a year, it can hardly be said that they are the same.* The difficulties faced during the year, provided they are genuine and adequate, would by themselves be additional grounds. Also by the end of the year the interest of the general public or the other relevant factors, which necessitated refusal of permission on the earlier occasion, may not prevail. ()…We must also take a note of sub-section (7) of Amended section 25-O which provides that if there are exceptional circumstances or accident in the undertaking or death of the employer or the like, the appropriate Government could direct that provision of sub-section (1) would not apply to such an undertaking…It must however be clarified that this Court is not laying down that some difficulty or financial hardship in running the establishment would be sufficient. The employer must show that it had become impossible to continue to run the establishment. Looked at from this point of view, in our view, the restrictions imposed are reasonable and in the interest of general public. ()…The observation relied on, in *Excel Wear's* case, are (sic.) in the context of An order under section 25-O (as it then stood), based on subjective satisfaction and capable of being arbitrary and whimsical below the amended section 25-O for an enquiry after affording an opportunity of being heard and provides that the order has to be a reasoned order in writing. The order cannot be passed arbitrarily and whimsically. Now the appropriate Government is exercising quasi-judicial functions. Thus the principles laid down in *Meenakshi Mills'* case would now apply. ()… In our view, the phrase 'in the interest of the general public' is the phrase of a definite connotation and a known concept. This phrase, as used in amended section 25-O, has been bodily lifted from Article 19(6) of the Constitution of India. As stated in *Maneka Gandhi's* case,[7] if it is not vague in the Constitution, one fails

to see how it becomes vague when it is incorporated in amended section 25-O.[8] ().

With great respect, this is the second case in a row, which was dealt with by another five-judge Bench in an absolutely reckless and perfunctory manner. *Meenakshi Mills*, on which Variava J based his decision, itself suffers from a battery of infirmities of fatal dimensions, as highlighted extensively in the preceding paragraphs. A few observations of the learned judge have been identified for analysis here, if for nothing else, to expose the colossal fall in judicial standards, not to speak of the casual approach of apex court to a matter having far-reaching Constitutional implications. It is considered expedient to cite the following analysis from the book "*Industrial Jurisprudence: A Critical Commentary*" on the quality of judicial decision-making process.[9]

While stuffing his judgment with such platitudes as '*the very fact that the difficulties have persisted for a year more is sufficient to necessitate a fresh look'*, what Variava J failed to notice is the fact that the said provision forces an employer, who has no financial capacity, to go on paying wages to the workmen for a whole year during which the refusal order of the government remains in force. That, in the final analysis, is the essence of the verdict given by a Constitution Bench of the Supreme Court, while playing its enviable role as the supreme custodian of the Constitution! The reliance placed by Variava J on *Maneka Gandhi* in support of his doctrine 'interest of general public', is wholly misconceived. In the first place, *Maneka Gandhi* cannot be taken as a judicial or even a judicious yardstick as regards fundamental rights or administrative action. The facts of the said case disclosed, as admitted by all the judges who delivered separate judgments, that the Passport Officer acted in an arbitrary, unjust and unreasonable manner in impounding the passport of the petitioner, that he did not give her an opportunity of being heard, and on that count, the said order was *prima facie* invalid as it offended Art 19(1). Justice Bhagwati, with whom the majority concurred, had committed a basic error of fatal dimensions in so far as he went about infusing irrelevant philosophy into the reasoning process to justify his lop-sided conclusion on the only ground that the *Attorney General, while admitting the arbitrariness of passport authorities, gave an assurance to the court that the said defect would be cured by giving the petitioner an opportunity of being heard*. Under what legal principle could an order, which was as good as dead *ab initio* for all constitutional purposes, be resuscitated by the Court on the basis of an *ex post-facto* assurance given rather apologetically by the Attorney General? The concurring judgment of Iyer J was loaded with rhetoric, while that of Chandrachud J was paradoxical. The following passage (para 35) betrays his total lack of conviction:

> …the findings arrived at by my learned brethren…*indicate that it cannot be said that a good enough reason has been shown to exist for impounding the passport* of the petitioner…the *petitioner has had no opportunity of showing that the ground for impounding it finally given in this Court either does not exist or has no bearing on public interest or that public interest cannot be better served in some other manner. …I would quash the order and direct the opposite parties to give an opportunity to the petitioner to show cause against any proposed action on such grounds as may be available*." (Italics supplied).

The above observation needs some analysis. It was not a case of *certiorari*, where the superior court in some cases, after quashing the order passed by lower court, states the correct legal principle and remands the matter to the latter for re-consideration. Admittedly, it was a case of patent arbitrariness displayed by an administrative authority, which violated the principle of *audi alteram partem*, as acknowledged by the learned judges themselves. In other words, the order so passed arbitrarily is stillborn and is *non est* for all purposes. That being the position, what sense does it make to quash the order and, at the same time, direct the opposite party to give opportunity to the petitioner? Once the order is quashed by the court, the transaction is complete and nothing more is left to be done. *On this view of the matter, does the majority decision qualify itself to be called a 'judgment' at all? Does it reflect the 'judicial conscience' of the learned judges?* The solitary minority judgment of Beg CJI was right and that of the majority repugnant to all notions of freedom enshrined in Art 19(1) as well as the settled law. Adverting to the reliance placed by Variava J on *Maneka Gandhi* with reference to '*interests of general public*', regrettably, the said case throws no light, whatsoever, on what is meant by the expression, except a bare and bald statement made by Bhagwati J (para 65) to the effect that the "words '*in the interest of the general public'* have a clearly well defined meaning and the courts have often been called upon to decide whether a particular action is '*in the interest of the general public*' or in 'public interest' and no difficulty has been experienced by the Courts in carrying out this exercise. These words are in fact borrowed *ipsissima verba* from Article 19(5) ." [10]

The Latin expression *ipsissima verba* means: 'in the same words; the exact words'.[11] Mere copying an expression from somewhere on an *as-is-where-is* basis is not the same thing as explaining it. Is there anything in the above observation to enlighten the reader on what exactly does the often misquoted, and frequently abused, expression '*interest of the general public*', mean in terms of its nature, scope, sweep and limitations? Justice Variava went on to state that the above decision had cleared the decks for the extension of the concept of 'public interest' to s. 25-O. Is it possible that, while dealing with a crucial question of far-reaching constitutional implications, the judges of the Supreme Court could afford the luxury of

revelling in nebulous expressions as '*interest of the general public*' without dilating upon what exactly it means or how it could be pressed into service in a case like this? Assuming that it is relevant, what is the magnitude of the so-called 'public' in terms of number, denomination and dispersion? If the employer has no financial resources even to pay wages and the workmen have to starve for the whole period of one year, how does the court propose to protect the so-called '*interest of the general public*'—a hollow slogan raised in *Maneka Gandhi* and followed in *Orissa Textile*? Justice Variava then proceeded to observe:

> Also by the end of the year the interest of the general public or the other relevant factors, which necessitated refusal of permission on the earlier occasion may not prevail. The appropriate Government would necessarily have to make a fresh enquiry, give a reasonable opportunity of being heard to the employer, workmen and all concerned. In our view providing for a period of one year makes the restriction reasonable. (para 12)

Does the observation, '*by the end of the year, the interests of the general public may not prevail'* make any sense even to a layman? Are these 'interests' so transitory and fleeting that they keep changing at such a high frequency? If so, would it be wise to place so much reliance on a short-lived phenomenon, while dealing with weighty issues touching upon fundamental rights of an employer? What is meant by the latter part of his observation, *'[by the end of the year] other relevant factors may not prevail'?* How can a factor which is found irrelevant or not so relevant at the time of making the first application become relevant in the second - or *vice versa* - within a short span of one year? At a more fundamental level, what are the factors which generally force an employer to take the extreme decision of closing down his business? These factors can be broadly categorised under three heads: (i) continuous downhill trend and financial losses year after year; (ii) a near-permanent, drastic fall in the demand due to changes in customer preferences and/or life-styles; and (iii) a permanent loss of competitive edge due to a relatively high cost of production or technological stagnation. These are crises of grave magnitude which drive an employer to the edge of closing down his business. Could it be said that these factors are only a passing shadow so much so that after a lapse of just one year, things start looking up? What should the employer do for one year during which there is no taker for his products? Should he be forced keep the workforce intact and go on paying idle wages running into a few crores? If so, where should he secure the funds from? These are the right questions, which a judge sitting on the Constitution Bench of the Summit Court should ask and also find dispassionate and convincing answers thereto, before, unleashing jejune rhetoric or, threatening to administer justice!

It is too far-fetched for the Parliament to assume that an employer is so insane as to close down his business abruptly at a time when it is doing well or when better options are available to him. It is also conceded that the Parliament, with its legislative omnipotence and a brute majority enjoyed by the ruling party, choose to pass a *prima facie* tyrannical and absurd law, making a mockery of Fundamental Rights. Indian Parliament did, in fact, pass many such laws. *But then, what is the duty of the Supreme Court in its envious role as the custodian of the Constitution and, particularly, of Part-III?* The disturbing events witnessed during the mid-1970s which included - (i) the declaration of internal emergency by Mrs Indira Gandhi, consequent upon the decision of the Allahabad High Court against her; (ii) her high-handed and outrageous role in promoting AN Ray J out-of-turn as CJI. superseding three senior judges (M/s. Shelat, Grover and Hegde JJ), admittedly after the decision in *Rustom Cavasjee* (Bank Nationalisation case),[12] and thereby impinging upon the independence of judiciary; (iii) the abrogation of Fundamental Rights; (iv) the illegal arrest and confinement of opposition leaders and Members of Parliament; (v) the unilateral and arbitrary sacking of civil servants across States and in the Centre; (vi) her proclamation of the doctrine of *committed judiciary*, which was rather submissively patronised by Ray CJI, Bhagwati, Iyer, Reddy, Desai JJ, and a few other judges; (vii) the gagging of the press and opponents alike; and (viii) the passing of tyrannical laws with the sole object of serving her personal and political interests - all these events lead to only one conclusion, *i.e*., the traditional presumption, that "*the Parliament always and invariably acts fairly or reasonably, while determining the legislative policy*", is not well-founded. It cannot be gainsaid that ch VB of IDA, and several other laws enacted during that period, were the finished products of the Black Days of post-Independence Indian history and were repugnant to all notions of freedom, democracy and civilisation. For that matter, even the amended s. 25-O, which is materially no different from the original section, took its birth during the terminal innings of Mrs Gandhi. By the same token, the decision rendered in *Excel Wear* applies to the amended section with the same force as it applied to the original one, notwithstanding the superficial, legislative white-washing done to the said provision. The other portions of the decision in *Orissa Textile* do not deserve elaborate treatment as the reasoning and conclusion reached by Variava J proceeded on the same obnoxious lines as Agarwal J in *Meenakshi Mills*. With great respect, the decision in *Orissa Textile* is as perverse, arbitrary and absurd as the very provisions of ch VB. Both *Meenakshi Mills* and *Orissa Textile* need review by a larger Bench and the damage done by the five-judge Benches needs to be undone sooner than later.[13]

CONFLICT WITH SECTION 433 OF THE COMPANIES ACT

An interesting question of law as to whether there is a conflict between closure provisions in s 25-O and s 433(a) & s 433(e) of the Companies Act 1956, arose before the Bombay High Court in *Bombay Metropolitan Transport Corpn Ltd v*

Servants of BMTC (CIDCO). [14] After considering the scheme of the two enactments, the court held that there was no conflict in these two provisions because they operate in distinct and separate fields. Permission under s 25-O is required to be taken when an employer intends to close down, an undertaking of his industrial establishment. The provision, therefore, applies when the industrial establishment, excluding the undertaking which is sought to be closed down is intended to be operated by the employer. It contemplates the continued existence not only of the company but also of the industrial establishment minus the undertaking which is intended to be closed down. On the other hand, the order for winding-up of a company initiates the process of winding-up through the official liquidator and it culminates in dissolution of the company. From the date of this order, the company ceases to do business. If the company is an industrial establishment, it ceases to function upon passing of winding-up order. This order is deemed to be a notice of discharge of the officers and employers of the company. The services of the employees, therefore, come to an end by operation of law.

UPID ACT - WHETHER REPUGNANT TO CHAPTER VB OF CENTRAL ACT?

In *Engineering Kamgar Union*, the issue of repugnancy between s 6W of Uttar Pradesh Industrial Disputes Act 1947 and s 25-O of the ID Act, within the meaning of Art 254(2) of the Constitution, came up before the Supreme Court. The facts, in brief, were: The Engineering Kamgar Union was a registered trade union of workmen employed by Electro Steel Castings Ltd., having its factory in Ghaziabad and employing more than 100 persons. The company issued a notice on 21 September 1998 declaring its intention to close down the said factory with effect from 23 September 1998 as a result whereof it was notified that services of 99 workmen would be terminated. An industrial dispute was raised by the union against the validity of the said notice raising a factual plea that more than 300 workmen were employed by company and thus ID Act would be applicable. Thereupon, the Assistant Labour Commissioner served a show-cause notice on the company against prosecution for contravening the provisions of the ID Act. In its reply dated 03 October 1998, the company raised a plea to the effect that as the number of employees in the said industrial undertaking was less than 300, no permission for closure was required in view of s 6-W r/w s 6-V of UPIDA,*i.e.* the State Act. Two recovery certificates were issued against the company towards the salary of the workmen under the State Act. Three writ petitions came to be filed by the first respondent questioning the show cause notice as also the recovery certificates aforementioned. The union also filed a writ petition questioning the closure notice issued by the company. The High Court allowed the writ petitions filed by the company, and dismissed the one filed by the union. In appeal by special leave, the union raised the question of repugnancy between the State Act and Central Act and pleaded that s 25-O of the ID Act overrides the provisions of the State Act and, hence the employer-company was required to obtain prior permission before closing down the establishment in view of the fact that it was employing more than 100 workmen. Repelling the contention relating to repugnancy, and dismissing the appeal, Sinha J (for self and Sabharwal J) held:

> In a case, thus, where both the State Act and the Central Act have been enacted in terms of List III of the Seventh Schedule of the Constitution of India, the question of repugnancy as envisaged under Art. 254 would arise. In that type of cases, it is well settled that in absence of Presidential assent, the Parliamentary Act would prevail and where the assent has been received, the State Act would. () … .Keeping in view the constitutional scheme vis-a-vis the Central Act and the State Act, we are of the opinion that there exists a conflict and, thus, Art. 254 of the Constitution would be attracted. Date of coming into force of the Central Act - Is it material? () … The phraseology used in Art. 254 of the Constitution of India is clear and unambiguous. It does not contemplate coming into effect of a law having regard to the nature of the legislation as a conditional one. It in no uncertain terms states that the conflict is required to be found out keeping in view a law which has already been made. The makers of the Constitution deliberately and consciously used past tense. It has, thus, to be given its ordinary meaning. () … The question, however, is to be considered having regard to the fact situation obtaining herein. The conflict between the Central Act and the State Act was apparent. The State of Uttar Pradesh inserted S. 6V by Act No. 26 of 1983 being conscious of the fact that an Act had been passed to the contrary by the Parliament in terms of Act No. 46 of 1982. … The provisions contained in S. 6V by reason of the 1988 Amendment by the Legislature of the State of Uttar Pradesh must have made consciously in relation whereto only the legislation was reserved for the Presidential assent. () … Section 114(e) of the Indian Evidence Act raises a presumption that all official acts must have been performed regularly. Section 114(f) of the said Act raises a presumption that the common course of business has been followed in particular cases. The said presumptions, therefore, would apply in this case also. In any event, we do not find any reason to allow the appellant to raise the said plea before this Court for the first time. () … Section 25S does not introduce a non obstante clause as regard ch VA. Furthermore, s 25J is not a part of ch V-B. By reason of s. 25S, the provisions of ch V-A were made applicable only in relation to certain establishments referred to in ch VB. The Parliament has deliberately used the words “so far as may be” which would also indicate that provisions of chvb were to apply to the industrial establishments mentioned in ch VA. The non obstante clause contained in S. 25J does not apply to the entire ch VB. Applicability of ch VA in relation to the industrial establishments covered by ch VB in terms of s 25J vis-a-vis s 25S is permissible but the contention cannot be taken any further so as to make s 25-O of the Central Act prevail over the State Act by taking recourse to the non obstante clause. Non obstante clause contained in s 25J is, thus, required to be kept confined to ch VA only and in that view of the matter we have no hesitation in holding that ch VB does not have an overriding effect over the State Act.[15] ().

SUB-SECTION (1): APPLICATION FOR PERMISSION TO CLOSE DOWN

An employer intending to close down an undertaking or an industrial establishment to which the chapter applies, is required to apply to the 'appropriate Government' in the prescribed manner for permission to close down the establishment or undertaking within ninety days on which the closure has to become effective. He is further required to state clearly the reasons for the intended closure in the application and to serve a copy of the application on the representatives of the workmen in the prescribed manner. Rule 76C(2) prescribes that the application under this section shall be in Form QB while sub-r (3) requires the application to be made in triplicate and sub-r (4) enjoins the employer to furnish to the Central Government such further information as the Government may consider necessary and call from him for arriving at the decision on the application. Though in s 25-O there is no specific reference to the retrenchment, from the scheme of the Act, it is evident that the provisions of this section will be attracted only when closure of an undertaking brings about retrenchment of workmen.[16] In *Rehabilitation*, a single judge of the Calcutta High Court held that where the Central Government, being the appropriate Government, had delegated its power to the state Government under s 39 of the ID Act, both the State and Central Governments would have parallel jurisdiction and the fact, that the state Government referred the issue relating to closure under s 25-O(5) to the tribunal, would not take away the jurisdiction of the Central Government to issue a notice convening a meeting for holding a hearing on the application for closing down the factory.[17] The proviso excludes the undertakings set up for the construction of buildings, bridges, roads, canals, darns or for other construction work from the requirements of this subsection. *A priori*, the following sub-sections will not apply to such undertakings. In a case, where the application for withdrawal of the first petition under s 25-O(1) was made because the company had received a letter from the Deputy Labour Commissioner calling for a meeting of the parties so that an effort could be made for an amicable settlement and Company did not wait for the expiry of 60 days from the date of filing of its application under s 25-O(1), on the expiry of which the application would have deemed to have been allowed under s 25-O(3), Markandey Katju J (for self and Thakker J) held:

> … we are satisfied that the application for withdrawal of the first petition under Section 25-O(1) was made bona fide because the respondent-company had received a letter from the Deputy Labour Commissioner on 5.4.2007 calling for a meeting of the parties so that an effort could be made for an amicable settlement. In fact, the respondent-company could have waited for the expiry of 60 days from the date of filing of its application under Section 25-O(1), on the expiry of which the application would have deemed to have been allowed under Section 25-O(3). The fact that it did not do so, and instead applied for withdrawal of its application under Section 25-O(1), shows its bona fide. The respondent-company was trying for an amicable settlement, and this was clearly bona fide, and it was not a case of bench hunting when it found that an adverse order was likely to be passed against it…[18]

SUB-SECTION (2): ORDER GRANTING OR REFUSING PERMISSION

The appropriate Government is vested with the discretion to grant or refuse to grant permission to the employer to close down his undertaking. But before granting or refusing permission, the Government is required to:

(i) make necessary inquiry into the facts and circumstances of the case, as it may think necessary;

(ii) give reasonable opportunity of being heard to:

  (a) the employer;

  (b) the workman; and

  (c) the persons interested in such closure;

(iii) consider the:

  (a) genuineness and adequacy of the reasons for the closure stated by the employer;

  (b) the interests of the general public; and

  (c) other relevant factors.

(iv) pass an order in writing granting or refusing to grant permission applied for stating the reasons therein for grant or refusal to grant permission; and

(v) communicate the order to the employer and the workmen.

In *Excel Wear*, the Supreme Court struck down the previous section on the ground that it permitted the Government to dispose of the application for permission to close down the undertaking by passing a 'cryptic, capricious, whimsical and

one sided order'. To remedy this vice, the legislature has now provided the above requirements. In the first instance, the appropriate Government is required itself to inquire into the matter as it may think fit. Then it has to give a reasonable opportunity of being heard not only to the employer and the workman but also the persons interested in the closure. Then the Government has to consider the genuineness and adequacy of the reason for the closure not only as disclosed by the employer in his application but also in his representation on being heard. The Government is further required to apply its mind to the representations of the workmen and other persons interested in the closure. It has also to take into account the interests of the general public and all other relevant factors in coming to its decision. These requirements are aimed at making the scrutiny of the order, either by the tribunal under sub-s (5) or the High Court in its jurisdiction under Art 226 of the Constitution, possible.

The Madhya Pradesh High Court in *Straw Products*, held that where the reasons given by the Government for refusing permission of closure of an industrial undertaking are not extraneous or irrelevant, the order refusing permission to close down cannot be interfered with by the writ court. The scope of the inquiry in the writ jurisdiction is limited to seeing whether the ultimate opinion formed by the state is vitiated on account of ignoring any relevant factors or taking into account irrelevant, extraneous or nonexistent factors so as to disclose an error apparent on the face of the record but the writ court cannot examine the correctness of the conclusions relating to the adequacy of reasons.[19] In *Associated Cement Companies*, the Gujarat High Court on the true construction of the words 'genuineness' and 'adequacy' occurring in sub-section held that the question whether the reasons given by the employer are 'genuine' and 'adequate' or not will have to be considered by the appropriate Government and the tribunal in the context of the nature and incidents of the right of the employer to close down his business which right though not fundamental is an integral part of it. Refusal to grant permission either on the ground of the interests of the general public or on the relevant factors being in the nature of a restriction on the right of the employer to close down his business, can be justified only in those cases where giving of an overriding effect to such a ground can be said to be reasonable. If the employer wants to close down his business bona fide and the reasons given by him are 'genuine' and 'adequate', it will not be proper to refuse permission on the ground that it will result into unemployment unless for such reasons or because of some extraordinary circumstances refusal on that ground can be regarded as reasonable. For justifying refusal on the ground of the interests of the general public or other relevant factors, reasons must be just and more weighy. In this view of law, the court quashed the order passed by the Government as being without the proper application of mind and proper appreciation of the nature and incidence of the right of the employer and also the nature and extent of the power available under s 25-O. Likewise, the court also struck down the award of the tribunal holding that the reasons given by the company were not genuine and adequate. It held that the conclusion of the tribunal was reached on grounds which were irrelevant and speculative in nature and without considering all the aspects which the tribunal was expected to consider.[20]

A body corporate may have one or more undertakings. Therefore, a company is not to be taken as a synonym for an undertaking. Precisely, a company is the owner of the undertakings. Therefore, the considerations for closing down an undertaking under this section are different from those for winding-up a company under s 433 of the Companies Act 1956. A single judge of the Bombay High Court in *Bombay Metropolitan Transport*, held that rejection of an application under s 25-O would not be a bar to a winding-up petition on the principles of *res judicata* or principles analogous thereto. The judge went a step further in observing that to the extent that certain factual aspects have been agitated, considered and decided in an application for closure under s 25-O, 'the same cannot be permitted to be re-agitated' in a winding-up petition under s 433 of the Companies Act.[21] This statement of law does not take note of the fact that the grant or refusal to close-down an undertaking under s 25-O is an administrative function of the Government having some quasi-judicial strains while the winding up of a company under s 433 is a purely judicial function entrusted to the High Courts by the Companies Act. Therefore, the decision of the Government on facts or law cannot operate as *res judicata* to the same question of law or fact being agitated before the company court. The two jurisdictions are entirely different. In this case, the application of the employer company was rejected by the Government and subsequently the company filed an application under s 433(a) for winding-up the company by a 'special resolution'. The court held that the company's intention was mala fide because winding-up was a cloak for terminating the services of the workmen which could not be achieved as the permission to close down the undertaking under s 25-O was refused. The court observed that the provisions of the ID Act which is a special statute would prevail on the provisions of the Companies Act which is a general legislation. The Calcutta High Court held that the expressions 'genuineness', 'adequacy of reasons' and 'interests of general public' appearing in sub-s (2) are mere guidelines, which are meant for guidance only. The expression 'having regard to' in a statutory provision does not mean that there must be very strict compliance with the statutory provisions but the provisions should be taken for guidance only. It is not open to the court to sit in appeal over the decision of the Government in this regard.[22] In *Dayakar Reddy*, one of the issues raised was that the Government appeared to be pre-determined and was a judge in its own cause, while granting permission for closing the undertaking. Repelling the contention, the Supreme Court observed:

> It was contended by Sri PS Mishra, learned counsel for the petitioner, that in this case the State had suggested that the company should be closed down and it was the same State which then decided under s 25-O to grant permission for closure. In a case where

> the company is a State Government Undertaking, such a situation may arise. It has to take an administrative decision under s 25-O. What we find is that while exercising its power under s 25-O, it did follow the proper procedure and consider all the relevant aspects. It is not possible to find any fault with the decision of the State Government. The facts of this case are very eloquent. Moreover, by the time the Government took the decision, out of 1800 workers, 1200 workers had shown their willingness to accept the voluntary retirement scheme. Government Order dated 16 June 1997, clearly discloses the reasons why the company had become unviable and why it was not able to carry on its activities any further. The reasons appear to be genuine and adequate and therefore the Government was justified in granting permission for closure of the company. The special leave petition is therefore dismissed.[23]

In *BPMEL*, where the workmen challenged the order passed under s 25-O granting permission to close down the undertaking on the ground that the said order was not maintainable in view of the status quo order passed the by BIFR, a single judge of the Calcutta High Court held that the order of status quo passed by BIFR under the Sick Industrial Companies (Special Provisions) Act 1985, related to the proceedings under the said Act, and it had nothing to do with the ID Act, and that it would not prevent the company from taking steps for closure.[24]The decision by the state Government to close down the public sector textile mill or, for that matter, the making of application under s 25-O, could not be said to be inconsistent with or contrary to or in derogation of the Maharashtra Textile Companies (Acquisition and Transfer of Undertakings) Act 1982, and the said Act does not prohibit the state Government from making application for the closure of mills because of its unviability and heavy losses incurred by the mill. An application made under s 25-O was not beyond its authority or competence.[25] Mere pendency of a writ petition in the High Court against closure is not a valid ground for the labour commissioner to refuse permission under s 25-O, so long as the reasons for closure were found to be genuine and reasonable. The order of the labour commissioner was set aside and the application under s 25-O stands allowed.[26]

SUB-SECTION (3): DEEMED PERMISSION

This sub-section is analogous to subs (5) of s 25N and sub-s (4) of s 25N. In *KMPPT Sangam*, the facts were: On an application made by the employer seeking permission for closure, the Government did not pass any order within 60 days resulting in the deemed grant of permission to close down the undertaking. A single judge of the Madras High Court held that the matter should be decided by an independent tribunal and directed the Government to refer the matter for adjudication under s 25 - O(5).[27] The learned judge had misdirected himself. Why should the matter be heard and decided by a tribunal when the permission sought for stood granted under the legal fiction contained in the sub-section? Once it is admitted that the Government did not communicate its decision within 60 days, the legal consequences stipulated in the provision would automatically follow and there is no provision in s 25-O, which requires that, in the event of a failure on the part of the Government to communicate its order within 60 days, the matter should be referred to an industrial tribunal. Balasubramanian J travelled far beyond his legitimate confines to the point of re-writing the law. This decision offends the provisions of s 25-O and is wrong.

SUB-SECTION (4): FINALITY OF THE ORDER

This provision is analogous to sub-s (6) of s 25N and sub-s (5) of s 25N. [Notes and Comments thereunder]

SUB-SECTION (5): REVIEW OR ADJUDICATION OF THE ORDER

This provision is analogous to sub-s (7) of s 25M and sub-s (6) of s 25N. [Notes and comments thereunder]

This provision vests two-fold power on the appropriate Government, *viz*:

(a) itself to review, *suo motu* or on an application made by the employer or any workman, its order granting or refusing to grant permission under sub-ss (i) and

(b) to refer the question of granting or refusing permission to an industrial tribunal for adjudication.

In the former case, the power to review is not limited to the power of review as contemplated by O XLVII, r 1 of the Code of Civil Procedure. It is open to the Government, under this provision, to reconsider the entire matter including the facts and the law omitted in its order granting or refusing permission to close down the industry. It can also take into consideration the new developments that took place after the order granting or refusing permission was passed. The object of the power for review is to do justice between the parties by considering whether the original decision is legal or correct. In the latter case, whether such reconsideration is necessary or not is treated as an industrial dispute. However, making of reference is optional with the Government. On reference being made, the industrial tribunal has all the powers of the Government to consider all the relevant questions in order to decide the question as to whether the order refusing

permission requires reconsideration and whether permission has to be given. In *Dhanalakshmi Mills,* a single judge of the Madras High Court held that once the Government had referred the review application filed by the management to a tribunal under s 25-O(5), the order passed thereon by the tribunal granting permission to close down the undertaking would supersede the initial order passed by the labour commissioner rejecting the application.[28]

Judicial Review

Like any order or award of an industrial tribunal, the award of the tribunal granting or refusing to grant permission to close down an industry is amenable to judicial review. However, the wide discretion and powers exercisable by the tribunal are not available to the writ court. The writ court, can only scrutinise the order or award of the tribunal within the parameters of the acceptable limits. Though the writ court is entitled to quash an award, in an appropriate case, and remand the matter or even decide the matter itself, it, however, is not entitled to sit as an appellate court over the order or award of the industrial tribunal.[29] In *Ujjain Mill Mazdoor Sangh,* a single judge of the Madhya Pradesh High Court held that the word 'may' occurring in s 25-O(5) makes it optional for the Government to either review the order of granting or reusing permission for closure or to refer the matter to the industrial tribunal for adjudication. It is not mandatory for the Government to resort to both the options simultaneously or one after the other. The word 'or' assumes significance in this context. It may or may not resort to either option or may take one option. When it elects to take the review option, there ends the matter. The provisions of s 25-O cannot be interpreted in a manner to cast an obligation on the Government to necessarily refer the matter to the tribunal for adjudication.[30] Where the state Government, on an application under s 25-O to close down the undertaking accorded approval to close down the undertaking on being found that the reasons for closure were genuine and adequate, it is not open to the tribunal to set aside the order granting approval to close down.[31] The tribunal, while granting permission under s 25-O(5) to close down the undertaking, need not wait for the outcome of proceedings pending BIFR, unless there is an agreement or settlement or an award creating a liability to that effect.[32]

In *Voltas,* the facts were: the Labour Commissioner granted permission under s 25-O(4) to the employer to close down the undertaking. On an application by the Voltas Employees Union, the Government referred the matter to tribunal for adjudication under s 25-O(5). The tribunal entered upon adjudication and issued notices to the parties. While this was so, the union filed a writ petition challenging the order of labour commissioner granting permission to close down the undertaking. A single judge of the Bombay High Court held that a writ under Art 226 was maintainable even when the reference for adjudication was pending. In support of this conclusion, the learned judge went on to hold that merely making a reference would not be an adequate or efficacious remedy unless the tribunal was seized of the matter.[33]The learned judge of the High Court misconstrued not only the provisions of the ID Act but also of the powers conferred on the High Court under Article 226. What is meant by the observation *'unless the tribunal is seized of the matter the reference would not be an efficacious remedy'*, in the face of the glaring fact that the said reference for adjudication was made by the Government as an application made by the petitioner-union itself? Further, it is also an admitted fact that the tribunal had issued notices to the parties with a direction to the management to file the statement of claim by 30 January 2002. In the face of this factual position, what was the basis for the learned judge to come to the conclusion that the tribunal was not seized of the matter and hence the writ petition was maintainable? Does the mere fact that the union did not receive the notice issued by the tribunal permit the High Court to draw an inference that the tribunal did not enter upon adjudication, in disregard of the documentary evidence produced by the respondent-management? Further it should be clearly understood that a decision either granting or refusing permission under s 25-O(4) is a condition precedent to the passing of an order either for review or for reference under sub-section (5). Where no proceeding was held under sub-s (4), there can be no review, much less reference under sub-s (5). That is the essence of s 25-O in its comprehensive connotation. In other words, nowhere does s 25-O confer a right to a party to directly approach a tribunal with a request for adjudication. The said sub-sections confer power on the Government either:

(i) to review on its own motion or on an application made by the employer or a workman, or

(ii) to refer the matter to a tribunal for adjudication. In the instant case, the Government rightly followed the procedure prescribed under s 25-O(5) by referring the application filed by the employer along with the order passed by the labour commissioner for adjudication.

This decision is a repository of misstatement of facts, misconstruction of law and suffers from fatal infirmities on almost every count, including the jurisdiction of High Court to issue a writ in a matter which has already been referred for adjudication and is pending before a competent tribunal, and deserves to be rejected *in limine* as being perverse and baseless.

SUB-SECTION (6): CONSEQUENCES OF CLOSURE WITHOUT PERMISSION

This sub-section is analogous to sub-s (8) of s 25M and sub-s (7) of s 25N. [Notes and Comments thereunder]. Apart from

making the closure innocuous and inoperative in law, this provision specifically makes the closure, without permission, illegal. An employer, who closes down an undertaking without obtaining prior permission or in contravention of the refusal to close down the undertaking, will be exposed to penal consequences of s 25R. In *Hindalco Industries*, the issue was whether s 25-O applied at all to the mining activities carried on by the company. On behalf of the appellant-company, it was contended that s 25-O had no application and no prior permission was required for the closure of the mining activities as the appellant never intended to close it down before the expiry of the lease period. It was further contended that, in view of this legal position, the company was liable to pay compensation to the workmen only under s 25-FFF. Rejecting the contention, Balakrishnan J (for self and Venkatarama Reddi J) held:

> … the appellant had an establishment where more than 100 workmen were employed on an average per working day. This fact is not disputed by the appellant. In that event, the provisions contained in Chapter V-B of the I.D. Act would apply to the appellant. Section 25-O being the provision contained in Chapter V-B of the I.D. Act, they are the relevant provisions regarding the procedure for closing down of an undertaking. This clearly shows that S. 25-FFA and S. 25-FFF of Chapter V-A would not apply in respect of the closure of the mining operations of the appellant. The appellant admits that about 211 employees had been retrenched. Under sub-section (8) of S. 25-O special provision has been made for the payment of compensation to workers when a permission for closure is granted…. In view of the aforesaid circumstances, the plea of the appellant that S. 25-O of the I.D. Act applies to only planned and intended closure by the employer is devoid of merits and S. 25-O of the I.D. Act will govern the situation. We find no error of jurisdiction or illegality in the impugned judgment. The appeal is without any merits and is dismissed.[34]

SUB-SECTION (7): POWER TO EXEMPT

This sub-section is analogous to sub-s (9) of s 25M and sub-s (8) of s 25N. [See Notes and Comments thereunder]

SUB-SECTION (8): COMPENSATION

This sub-section corresponds to sub-s (1) of s 25FFF. The quantum of compensation payable to a workman where permission for closure of an undertaking or establishment is granted or is deemed to have been granted, is the same as under sub-s (1) of s 25FFF. Accordingly, every workman, who is employed in such undertaking or establishment, immediately before the date of the application for permission under this section, shall be entitled to receive compensation equivalent to fifteen days average pay for every completed year of continuous service or any part thereof in excess of six months. From the language of this provision, it is clear that the payment of compensation is not a condition precedent to closure. The liability of the employer to pay compensation and the entitlement of the workman to receive compensation arises upon the closure of the undertaking. However, this provision makes the workman entitled to receive compensation in all circumstances, It does not contain any provision like the proviso to s 25FFF reducing the quantum of compensation in 'unavoidable circumstances beyond the control of the employer'. In *Gordon Woodroffe*, the facts briefly were: The Company named Gordon Woodroffe Agencies Private Ltd., employing less than 50 workman was closed w.e.f. 31 May 1984 because it had incurred heavy losses in its business, and offered to all its workmen, closure compensation as prescribed by law and other legal entitlements like provident fund, gratuity *etc*. due to the workmen. While many workmen received the said compensation a few did not choose to receive the same, primarily contending that they were entitled to alternative employment in a sister concern of the appellant known as Gordon Woodroffe Ltd., which was a manufacturing company, which was rejected by the company on the ground that Gordon Woodroffe Ltd. was a separate company and the question of providing alternative employment in the said company did not arise. The labour court upheld the validity of closure, but directed the management to pay additional compensation at the rate of 15 days' wages for every year of residual service till the date of superannuation and a further sum of Rs. 3000/- as a solatium to each workman. The said award was upheld by the two tiers of Madras High Court. Quashing the orders of the courts below, Hegde J (for self and Sinha J), observed:

> … the Labour Court came to the conclusion that the closure of the establishment was legally justifiable and the management had as required under the law, offered apart from the compensation payable for the closure, all other statutory dues which some of the employees collected without demur and in the case of respondent-workmen even though the same were offered on time, they did not accept it, therefore, the question of paying any additional ex-gratia compensation which is not contemplated under the statute, does not arise. This Court in the case of N. S. Giri (supra),[35]held : "An award under the Industrial Disputes Act cannot be inconsistent with the law laid down by the Legislature or by the Supreme Court and if it does so, it is illegal and cannot be enforced. "Thus, it is clear from the pronouncements of this Court that the Labour Court or for that matter the High Court had no authority in law to direct payment of any additional sum by way of ex-gratia payment otherwise than what is provided under the statute when the act of the management in closing down the establishment is found to be valid and all legally payable amounts have been paid or offered in time. In such a situation, contrary to the statute, the principle of social justice cannot be invoked since

> the Legislature would have already taken note of the same while fixing the compensation payable…. For the reasons stated above, this appeal succeeds, the judgments of the Courts below are set aside. The appeal is allowed.[36]

In *Karnataka Forest Development Corporation* (KFDC), the facts disclosed that the Government of Karnataka took a decision in October 1991 to wind up Karnataka Pulpwood Ltd. (KPL), which is a joint sector company with KFDC holding 51% of the share capital, for a variety of reasons including public hostility and a PIL, *etc*., making it difficult for the company to carry on its operations. Having decided to wind up, the Government took another decision in November 1993 to merge it with KFDC. A proposal was also mooted to offer VRS to the workmen of KPL. However, no merger took place officially. In the meantime, the Government granted permission in November 2004 to KPL to close down the undertaking under s 25-O, and the company was closed. Writ petitions followed and the matter came up before Supreme Court. The main issue was whether the workmen of KPL were entitled to be absorbed in KFDC consequent upon the proposed merger. Allowing the appeal by KFDC and setting aside the orders of Karnataka High Court, Sinha J (for self and Bedi J) held:

> Before the Division Bench of the High Court, as we have noticed hereinbefore, the order of the State Government directing prior permission for effecting closure of the industrial undertaking has not been questioned. In fact, even the learned Single Judge had made observations to the effect that the closure may be effected…. The 1991 decision was modified by a subsequent or der that the undertakings also as that of the company are merging with each other. No order of merger has been passed. No decision by a competent authority under the Companies Act had been taken. Indisputably, the appellant and the company have not merged. In absence of any valid order of merger of two different entities, evidently the relationship of employer and employee between the respondents and the said company, as had been obtaining, continued. Furthermore, as soon as the closure of an undertaking became effective, it is trite that the said relationship ceased to exist…. The right of the workmen, therefore, was only to receive the amount of compensation. If the State is not in a position to take upon itself the financial burden of the appellant-Corporation for appointing the concerned workmen, direction to continue their services could not be issued. There cannot be any doubt whatsoever that the said order dated 24.10.1991 has been superseded by necessary implication. Both merger of two undertakings and the closure of one undertaking do not stand together. If the workmen, therefore, think that any other or further right has accrued to them in terms of the purported assurance given by the State, it may take recourse thereto before an appropriate forum but a writ petition was not maintainable.[37]

JUDICIAL REVIEW OF THE REFUSAL ORDER

In *DCM*, the management of the company had decided to close down its industrial undertaking as if it was located in non-conforming area as prescribed by the authority under the master plan for Delhi and under the Delhi Development Authority Act 1957 as under the regulations made thereunder it could no longer continue the industrial activity. The textile site mill undertaking discharging heavy toxic effluents and the conditional consent of discharging effluents previously granted by the pollution board was revoked as the conditions could not be fulfilled on account of paucity of land. The further reason for closure was on the ground that the undertaking suffered substantial losses. The Delhi administration refused permission to close down the undertaking. A Full Bench of the Delhi High Court held that the impugned order was capricious and as such liable to be struck down because the adjudicating authority had not recorded the reasons for refusal. The necessary inference, therefore, was that there were no good reasons to advance. Furthermore, the order of refusal of the Delhi administration to close down the undertaking on the ground that the mill was using refusal of consent by pollution board as a ground for closure, was in complete disregard of the material on the record and larger public interest and the finding of the authorities that the losses cannot be said to be representative of irretrievable situation, was merely illusory. The court further observed that in view of the settlement between the employer and majority of its workmen entitling the workmen to receive an amount equivalent to their pay packet for seventy-two months after closure of the undertaking, it could not be said, that the management had ignored the interest of labor. In the circumstances it was held that it was a fit case for grant of permission and the authority was directed to accord permission for closure.[38]

Inadequacy of Power Supply and Over-staffing *etc*

In *Laxmi Starch*, on a reference of the question by the appropriate Government as to whether the permission to the employer to close down an industry should be granted or not on grounds of financial loss, non-availability of raw material, increased cost of labour, the tribunal found that the plea of non-availability of raw-material was not bona fide and the financial loss was the creation of the employer and increase in the cost of material and labour was compensated by the increased price of the products. Hence, the tribunal refused to grant permission. In a writ petition against the order of the tribunal, a single judge of the Kerala High Court held that the order of the tribunal was not reviewable because it suffered from no impropriety.[39] This decision does not lay down the correct law. All these factors render it not only unprofitable but

impossible to run the industry. To force an employer to continue to run the undertaking, in such a situation, would be arbitrary and tyrannical.

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91 Subs by Act 46 of 1982, s 14, for s 25-O (wef 21-8-1984).

92 Brought into force wef 5 March 1976.

93 *Excel wear v Union of India* (1978) 2 LLJ 527 [LNIND 1978 SC 270] (SC) : AIR 1979 SC 25 [LNIND 1978 SC 270]: (1978) 4 SCC 224 [LNIND 1978 SC 270], per Untawalia J.

94 Brought into force wef 21 August 1984.

1 *Stump, Scheuk & Somappa Ltd v Karnataka* (1985) 2 LLJ 543, 559-60 (Kant), per Rama Jois J.

2 *Molins of India Ltd v West Bengal* (1989) 2 LLJ 400, 413 (Cal) : 93 CWN 737, per Babulal Jain J.

3 *Associated Cement Companies Ltd v Union of India* (1989) 1 LLJ 599, 610 (Guj) : 1989 GLH (1) 30 : (1988) 2 GLR 1295.

4 *DCM Ltd v Ltd Governor of Delhi* (1989) 2 LLJ 250 [LNIND 1989 DEL 111], 256 (Del) (FB) : 37 (1989) DLT 425 : 1989 Lab IC1 652.

5 *Jay Engineering Works Ltd v West Bengal* (1993) 3 LLJ 779, 784 (Cal) : 96 CWN 774.

6 *Workmen of Meenakshi Mills v Meenakshi Mills Ltd* (1992) 1 LLN 1055 (SC), per Agarwal J.

7 *Maneka Gandhi v Union of India* AIR 1978 SC 597 [LNIND 1978 SC 25].

8 *Orissa Textile & Steel Ltd v Orissa* (2002) 2 LLN 853 (SC), per Variava J.

9 Rao, EM (2015), *Industrial Jurisprudence: A Critical Commentary*, 2nd ed. Lexis Nexis, pp. 263-66.

10. Ibid, para 65.

11 P Ramanatha Iyer, *The Law Lexicon*, Reprint edn, Wadhwa, 1995, p 623.

12 *Rustom Cavasjee v Union of India* AIR 1970 SC 564 : [1970] 40 Comp Cas 325 (SC) : (1970) 1 SCC 248 : [1970] 3 SCR 530, *per* Shah J.

13 Rao, EM, ibid.

14 (1991) 2 LLJ 443 [LNIND 1990 BOM 485] (Bom) (DB), per Bharucha J.

15 *Engineering Kamgar Union v Electro Steel Castings Ltd* AIR 2004 SC 2401 [LNIND 2004 SC 508]: (2004) 6 SCC 36 [LNIND 2004 SC 508] : (2004) II LLJ 815SC, per Sinha J.

16 *Hindustan Lever EU v State of Maharashtra* 1990 Lab IC 104 -105 (Bom), per Ashok Agarwal J.

17 *Rehabilitation ICWE Union v Union of India* (2002) 2 LLN 575 (Cal), per Seth J.

18 *Sarva Shramik Sanghatana (VK) v State of Maharashtra*, AIR 2008 SC 946 [LNIND 2007 SC 1379]: (2008) II LLJ 501SC : (2008) 1 MLJ 137 [LNIND 2007 SC 1379] (SC) : (2008) 1 SCC 494 [LNIND 2007 SC 1379], per Katju J.

19 *Straw Products Ltd Bhopal v Union of India* 1986 Lab IC 1831 -32 (MP) (DB), per Verma CJ.

20 *Associated Cement Companies Ltd v Union of India* (1989) 1 LLJ 599, 607-08 (Guj) : 1989 GLH (1) 30 : (1988) 2 GLR 1295, per Nanavati J.

21 *Bombay Metropolitan Tpt Corpn Ltd v Employees* (1988) 1 LLJ 281 (Bom), per Variava J.

22 *Hindustan Copper Ltd v Copper Mazdoor Union* 1998 (2) LLN 767 (Cal) (DB), per BP Banerjee J.

23 *Dayakar Reddy v MD., Allwyn Auto Ltd.*, (2000) 3 LLN 44, 45 (SC).

24 *BPMEL Employees' Union v Union of India* (2002) 1 LLN 606 (Cal), per Seth J.

25 *Rashtriya SGMS v Govt of Maharashtra* (2002) 1 LLN 877 (Bom) (DB), per Lodha J.

26 *Rashtriya SGMS v Govt of Maharashtra* (2002) 1 LLN 877 (Bom) (DB), per Lodha].

27 *Genl Secy. KMPPT Sangam v Tamil Nadu* (2002) 2 LLN 1159 (Mad), per Balasubramanian J.

28 *Workmen of Dhanalakshmi Mills Ltd v PO* (2002) 1 LLN 532 (Mad), per Kalifulla J.

29 *Laxmi Starch Ltd v Kundara Factory Workers Union* 1992 Lab IC 1337, 1345-46, per Padmanabhan J.

30 *Ujjain Mill Mazdoor Sangh v State of Madhya Pradesh* (1999) 1 LLN 443 (MP) (DB), per Khan J.

31 *Bombay Gas Public Ltd v BGE Employees Union* (2000) 2 LLJ 509 [LNIND 2000 BOM 227] (Bom), per Desai J.

32 *Workmen of Dhanalakshmi Mills Ltd v PO* (2002) 1 LLN 532 (Mad), per Kalifulla J.

33 *Voltas Employees Union v Voltas Ltd* (2002) 2 LLN 540 (Bom), per Mhatre J.

34 *Hindalco Industries Ltd v Union of India*, AIR 2004 SC 989, per Balakrishnan J.

35 *N S Giri v. Corporation of City of Mangalore*, AIR 1999 SC 1958 [LNIND 1999 SC 1466]: (1999) II LLJ 690SC : 1999 (3) SCALE 610 : (1999) 4 SCC 697 [LNIND 1999 SC 1466].

36 *Mgmt of Gordon Woodroffe Agencies Pvt Ltd v PO, Principal LC*, AIR 2004 SC 4124 [LNIND 2004 SC 748]: (2004) 8 SCC 90 [LNIND 2004 SC 748] : (2004) III LLJ 539SC, per Hegde J.

37 *MD, KFDC Ltd v Workmen of Karnataka Plywood Ltd*, AIR 2007 SC (supp) 624, per Sinha J

38 *DCM Ltd v Lieutenant Governor, Delhi* 1989 Lab IC 1652 (Del) (FB) : (1989) II LLJ 250Del : 37 (1989) DLT 425, per Chadha J.

39 *Laxmi Starch Ltd v Kundara Factory Workers Union* 1992 Lab IC 1337, 1348 (Ker), per Padmanabhan J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VB Special Provisions Relating to Lay-off, Retrenchment and Closure in Certain Establishments

S. 25P. Special provision as to restarting of undertakings closed down before commencement of the Industrial Disputes (Amendment) Act 1976.—

If the appropriate Government is of opinion in respect of any undertaking of an industrial establishment to which this Chapter applies and which closed down before the commencement of the Industrial Disputes (Amendment) Act, 1976 (32 of 1976),—

(a) that such undertaking was closed down otherwise than on account of unavoidable circumstances beyond the control of the employer;

(b) that there are possibilities of restarting the undertaking;

(c) that it is necessary for the rehabilitation of the workmen employed in such undertaking before its closure or for the maintenance of supplies and services essential to the life of the community to restart the undertaking or both; and

(d) that the restarting of the undertaking will not result in hardship to the employer in relation to the undertaking;

it may, after giving an opportunity to such employer and workmen, direct, by order published in the Official Gazette, that the undertaking shall be restarted within such time (not being less than one month from the date of the order) as may be specified in the order.

OPINION OF THE GOVERNMENT

This section empowers the appropriate Government to direct an employer to restart an undertaking of an industrial establishment to which this chapter applies and which was closed down before the commencement of the Amending Act of 1976 inserting this chapter. But before such a direction can be made, the Government has to form its opinion in respect of such undertaking that:

(a) the undertaking was closed down otherwise than on account of unavoidable circumstances beyond the control of the employer;

(b) There are possibilities of restarting the undertaking;

(c) It is necessary for the rehabilitation of the workmen employed in the undertaking before its closure or for the maintenance of supplies and services essential to the life of the community or both; and

(d) the restarting of the undertaking will not result in hardship to the employer in relation to the undertaking.

From the use of semi-colons at the end of cll (a) and (b) and the conjunctive 'and' used at the end of the cl (c), it appears that all these four conditions must cumulatively exist before the Government can consider the question of directing the employer to restart the undertaking. If any one of these conditions does not exist, there will be no case for restarting the undertaking. Furthermore, the Government must have material before it for satisfying itself that these conditions exist. The opinion formed without any material before it or on extraneous considerations will be no opinion in the eyes of law and may be vulnerable to judicial review.

THE OPPORTUNITY TO PARTIES

After the Government has formed the opinion that the four conditions enumerated in this section exist, it is required to give 'an opportunity to such employer and workmen'. This provision is a specimen of obscure and careless drafting. The 'opportunity' to do what? Is it the opportunity to the employer and the workmen to restart the undertaking without an order being made by the Government? Or is it the opportunity to the employer and the workmen to be heard against and in favour of restarting of the undertaking? It is presumably the latter. If it is the opportunity of being heard, the scope of hearing before the Government is also not spelt out.

ORDER OF RESTARTING

After forming its opinion and giving an 'opportunity' to the employer and the workmen, the Government has been given the discretionary power to direct the employer to restart the undertaking by an order published in the Official Gazette. The Government may specify the period of time within which the undertaking has to be restarted. But the time, in any case, shall not be less than one month from the date of the order.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VB Special Provisions Relating to Lay-off, Retrenchment and Closure in Certain Establishments

S. 25Q. Penalty for Lay-off and Retrenchment without previous permission.—

Any employer who contravenes the provisions of section 25M or [40][* * *] section 25N shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

Scope of the Penalty—'Lay-off' in contravention of s 25M or retrenchment of a workman in contravention of cl (c) of sub-s (1) or sub-s (4) of s 25N exposes an employer to the punishment of imprisonment for a term which may extend to one month or with fine which may extend to one thousand rupees or both. From the language of the section, it appears that mens rea has not been made a condition precedent for conviction. The mere factum of the contravention of the provisions of s 25M or 25 N (1)(c) or (4) is sufficient to warrant conviction.

40 The words "clause (c) of sub-section (1) or sub-section (4) of" omitted by Act 49 of 1984, s 6 (wef 18-8-1984).

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VB Special Provisions Relating to Lay-off, Retrenchment and Closure in Certain Establishments

S. 25R. Penalty for closure.—

(1) Any employer who closes down an undertaking without complying with the provisions of sub-section (1) of section 25-O shall be punishable with imprisonment for a term which may extend to six months, or with fine, which may extend to five thousand rupees, or with both.

(2) Any employer, who contravenes [41][an order refusing to grant permission to close down an undertaking under sub-section (2) of section 25-O or a direction given under section 25P] shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both, and where the contravention is a continuing one, with a further fine which may extend to two thousand rupees for every day during which the contravention continues after the conviction.

[42][* * *]

SUB-SECTION (1): SCOPE OF PENALTY

The original s 25-O was struck down by the Supreme Court in *Excel Wear v Union of India* , as imposing unreasonable restrictions on the fundamental rights of employer to close down his establishment. As a sequel to that, sub-s (1) of s 25R which provided penalty for closure without complying with the requirements of s 25-O, was also struck down. But now since the original s 25-O has been substituted by the present one, sub-s (1) of s 25R has been revived in the self-same language as of the original sub-section. It provides a penalty of punishment of imprisonment up to six months or a fine up to rupees five thousand or both in a case where the employer closes down his establishment without complying with the requirement of s 25-O(1). In *IOL Limited*, the company closed its unit in which some 156 workmen were employed without obtaining prior permission of the Government. The Allahabad High Court had set aside the prosecution launched by the Deputy Commissioner of Labour on the ground that the establishment was covered by the UP Industrial Disputes Act under which the threshold limit was 300 workmen for the purpose of obtaining prior permission.[43]

SUB-SECTION (2): PENALTY FOR CONTRAVENTION OF DIRECTIONS

The penalty provided by this provision is still more stringent than the penalty provided in sub-s (1). It exposes an employer who contravenes an order refusing to grant permission to close down his undertaking under sub-s (2) of s 25-O or a direction given under s 25P, to the punishment of imprisonment up to a term of one year or with fine up to an amount of rupees five thousand or both. Furthermore, continuing contravention of these provisions, after conviction at the first instance, has been made punishable with recurring fine extending up to rupees two thousand for every day of continuing contravention.

SUB-SECTION (3)

This sub-section was also struck down by the Supreme Court in *Excel Wear v Union of India.* [44]

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41 Subs by Act 46 of 1982, s 15, for certain words (wef 21-8-1984).

42 Sub-sec (3) omitted by Act 46 of 1982, s 15 (wef 21-8-1984).

43 *IOL Limited v State of UP* (2004) 4 LLJ 369 (All), per Ambwani J.

44 Ibid.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VB Special Provisions Relating to Lay-off, Retrenchment and Closure in Certain Establishments

S. 25-S. Certain provisions of Chapter VA to apply to an industrial establishment to which this Chapter applies.—

The provisions of sections 25-B, 25-D, 25-FF, 25-G, 25-H and 25-J in Chapter VA shall, so far as may be, apply also in relation to an industrial establishment to which the provisions of this Chapter apply.

This section makes the provisions of ss 25B, 25D, 25FF, 25G, 25H and 25J in ch VA applicable in relation to the industrial establishments to which the provisions of ch VB apply. It is significant to note that the provisions of sections 25C, 25E, 25F, 25FFA, being excluded by this chapter will not apply to the 'industrial establishments' to which this chapter applies.

The Industrial Disputes Act, 1947 (Act 14 of 1947)

[1]CHAPTER VC Unfair Labour Practices

S. 25T. Prohibition of Unfair Labour Practice.—

No employer or workman or a trade union, whether registered under the Trade Unions Act, 1926 (16 of 1926), or not, shall commit any unfair labour practice.

LEGISLATION

Though the judicial dicta constantly and unequivocally condemns unfair labour practice and victimisation of workmen, neither the legislature nor any judicial pronouncement has endeavoured to precisely define as to what these expressions mean. By the Amending Act 46 of 1982 (brought into force wef 21 August 1984), cl (ra) was inserted in s 2 defining 'unfair labour practice' to mean 'the practices specified in the fifth schedule'. The fifth schedule was also inserted by the same Amending Act which has enumerated unfair labour practices 'on the part of the employers and trade union of employers' as well as 'on the part of workmen and Trade Union of Workmen'. Section 25T prohibits commission of the unfair trade practices by the employers as well as the workmen while s 25U prescribes stringent penalties for commission of unfair labour practices. This amending Act was given presidential assent on 1 August 1982 and brought in force with effect from 21 August 1984. In *HD Singh*, the Reserve Bank of India had issued a confidential circular directing the officers that workmen like the appellants should not be engaged continuously but should as far as possible be offered work on rotation basis. In view of the provisions of item 10 of the fifth schedule, the Supreme Court held that it had no option but to hold that the Bank indulged in methods amounting to 'unfair labour practice'.[2] The Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 (MRTU & PULP Act) has been enacted with the avowed purpose of regulating the activities of the trade unions and for preventing certain unfair labour practices both on the part of unions of employees as well as employers. However, this Act does not offer any remedy to the workmen to raise a disputeregarding prevention of any unfair labour practice on the part of the employer who had set in motion the machinery for discharging or dismissing a workman by way of an unfair labour practice. Even the Industrial Disputes Act has no provision for preventing any proposed discharge or dismissal by way of an unfair labour practice on the part of the employer. Thus, the Maharashtra Act seeks to supplement and cover the field for which the industries governed by the Industrial Disputes Act and the Bombay Act did not get any coverage and that field was obviously amongst others the field pertaining to prevention of unfair labour practice as defined in the Act.[3]

UNFAIR LABOUR PRACTICE

Before the insertion of cl (ra) in s 2 and s 25T of the Act, there was no legislative or judicial definition of the expression 'unfair labour practice'. But what an 'unfair labour practice' actually meant could only be felt though not precisely known. But 'unfair labour practices' have been defined in s 26 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 to mean 'the practices listed in Sch 2, 3 and 4 thereof. Schedule 2 enumerates 'unfair labour practices' on the part of the employers, Sch 3 enumerates 'unfair labour practices' on the part of the trade unions and Sch 4 enumerates 'unfair labour practice' on the part of the employee. There is a clear difference in s 25T of this Act and s 27 of the Maharashtra Act. The former prohibits an employer or a workman or a trade union from committing any

unfair labour practice while the latter prohibits an employer or a union or an employee from engaging in any unfair labour practice. In other words, the prohibition under this Act is against 'commission' of an unfair labour practice which may include the final acts of such commissions while the Maharashtra Act prohibits the concerned parties even from engaging in any unfair labour practice. The word 'engage' is more comprehensive in nature as compared to the word 'commit'. In *RP Sawant*, the issue before the Bombay High Court was whether, by reason of Art 254(2) of the Constitution, the entire gamut of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 (MRTU & PULP Act), pertaining to unfair labour practices must be deemed to have been repealed, in the light of the insertion of ch VC in the ID Act, which is a Central Act. Srikrishna J of the Bombay High Court observed that there were glaring distinctions between the two enactments, such as the number of unfair labour practices enumerated therein, the treatment of unfair labour practices as offence under the ID Act whereas under the State Act it was not so, and so forth, which lead to the conclusion that the intention of the Parliament in adding ch VC to the Industrial Disputes Act was not to make a consolidated law on the subject.[4]

The term 'unfair labour practice' is a comprehensive one and would appear even to include 'victimisation' in its scope, even though it has received no statutory definition, the term has received judicial attention and interpretation. Its connotation is by no means uncertain, indefinite or vague. It is, however, neither desirable nor possible to lay down the limits of unfair labour practices' in the fast developing course of industrial law. Broadly speaking, 'unfair labour practice' is committed by an employer when he does or omits to do something, which act or omission is the invasion of the legitimate rights or interests of the workmen. Within this class would be included any act or omission of the employer aimed at punishing a workman for his trade union activities or for organised opposition to any proposal of the management. A breach of promise may be illegal, it may amount to breach of contract, it may be a mala fide act, it may even be a fraudulent act, but in so far as it is not inseparably connected with the relationship of employer and employee, it cannot be said to be 'unfair labour practice'.[5] The basic principle in the concept of 'unfair labour practice' is the involvement of the relationship of employer and employee. In other words, the question of 'unfair labour practice' can arise only when something is done or omitted in connection with a matter which has something to do with regulating the relationship of the employer and employee. It is not permissible to ascribe 'unfair labour practice' to something done or omitted in connection with a matter which has nothing to do with the relationship of employer and employee. This is the basic or the fundamental principle underlying the concept of 'unfair labour practice'. A breach of promise or assurance or undertaking by an employer, whatever other consequences it may have, cannot be an 'unfair labour practice'.

Whether an act would constitute an unfair labour practice or not is a question of fact dependent upon the circumstances of each case. For instance, the mere fact of giving promotion to one person and not giving to another without anything further or any other circumstances to lend support, will not lead to the inference of 'unfair labour practice.[6] The Punjab and Haryana High Court in *Kapurthala CCB*, held that termination of the service of workmen on their completing 230 days, despite the fact that their work was satisfactory, disabling them from completing 240 days of service as required by s 25B with a view to deprive them of the protection of s 25F amounts to 'unfair labour practice' particularly so when other persons were employed in their place.[7] In *Balmer Lawrie*, on the construction of the words 'failure to implement award' used in item 9 of Sch 4 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, a single judge of the Bombay High Court held that every case of non-implementation of a settlement irrespective of the facts and circumstances or reasons would not necessarily constitute 'failure' so as to be characterised as unfair labour practice. For instance, where a party bona fide is ready and willing to abide by any interpretation of a settlement by a competent court or authority, it cannot be said that such a party 'failed' to implement the settlement so as to be treated as 'unfair labour practice.[8] In *Rajasthan SBCC*, a single judge of Rajasthan High Court held that if the work was not of a perennial nature and the project was likely to be finished after some time then it could not be held that giving repeated appointment letters for each tenure amounted to unfair labour practice under s 25T.[9]

Victimisation

The line of demarcation between the case of 'unfair labour practice' and 'victimisation' is very slender and quite often indistinct. The two concepts if not synonymous at least considerably overlap. The expression 'victimisation' has not been defined in the statute and is not in any sense a term of law or art. It is an ordinary English word which means that a certain person has become a victim, in other words, that he has been unjustly dealt with. In *Bharat Bank*, it was suggested to the Supreme Court that 'victimisation' has acquired a special meaning in industrial law and connotes a person who became a victim of the employer's wrath by reason of his trade union activities and that the word could not relate to a person who has been merely unjustly dismissed. However, in the peculiar facts and circumstances of the case, his submission was not considered by the court.[10] In *Williamson Magor*, the court accepted the interpretation of the word 'victimisation' as the normal meaning of being the victim of unfair and arbitrary action.[11] The concept 'victimisation' has acquired considerable significance in the area of disciplinary action, in the context of the industrial law.[12] Broadly speaking, 'victimisation' means one of the two things. The first is, where the workman concerned is innocent and yet he is being punished because

he has in some way displeased the employer, for example, by being an active member of a trade union of workmen who were acting prejudicially to the employer's interest.[13] Likewise, where an employer terminates the services of a workman for refusal to carry out some work which is not part of his duty, it would be a case of victimisation.[14] 'Ordinarily, a person is 'victimised', if he is made a victim or a scapegoat and is subjected to persecution, prosecution or punishment for no real fault or guilt of his own, in the manner, as it were, of a sacrificial victim'.[15]It is not open to an employer to punish or dismiss his employees solely or principally for the reason that he had joined a trade union. Where, therefore, the circumstance that an employee had joined a trade union had at least partially weighed with the employer in punishing him, it would be an act of victimisation, and the punishment inflicted on the workman on this consideration would be vitiated.[16] The second instance of victimisation is, where an employee has committed an offence but is given a punishment quite out of proportion to the gravity of the offence, simply because he has incurred the displeasure of the employer,[17] or the punishment is such as no reasonable employer would impose under the circumstances.[18]

'Victimisation' may partake of various forms, such as pressurising an employee to leave the union or union activities, treating the employee unequally or in a obviously discriminatory manner, for the sole reason of his connection with the union or his particular union activities; inflicting a grossly monstrous punishment which no rational person would impose upon such an employee.[19] For instance, if for a very trifle or venial breach of duty, the employer proposes to dismiss a workman, the tribunal may well consider, whether the employer in imposing the punishment, which was out of proportion to the misconduct of which the workman was guilty, was not motivated by some other factor than the maintenance of discipline and the just protection of the employer.[20] Likewise, if an employer, punishes an employee for a wrong which someone else has committed, it would be right to infer that the employee is victimised by being made a scapegoat or if the employer punishes an employee for something which he has done in another context which has no relation to or bearing on the charge which has been framed against him, the charge and inquiry being only a pretext to punish him, it would be right to infer that the employee is victimised.[21] Similarly, where the material in support of the charge is so flimsy as to be non-existent, it would be a case of 'victimisation'.[22] 'Victimisation' is a serious charge by an employee against an employer which reflects to a degree, upon subjective attitude of the employer evidenced by certain acts and conduct. The onus of establishing 'victimisation' will be upon the person who alleges it. The charge of 'victimisation' being a serious one, it must be properly and adequately pleaded giving all particulars upon which the charge is based to enable the employer to fully meet them. In other words, the charge must not be vague and indefinite. The act of 'victimisation' being an amalgam of facts relating to acts and conduct, inferences and attitudes, these have to be established by safe and sure evidence. Mere allegations, vague suggestions and insinuations are not enough. For instance, the fact that there is a union espousing the cause of the employee in a legitimate trade union activity and an employee is a member or active office bearer thereof, is *per se*, no crucial instance of 'victimisation'. All particulars of the charge brought out, if believed, must be weighed by the tribunal and a conclusion should be reached on a totality of the evidence produced.

In the words of Goswami J, 'victimisation' is a 'multi-headed monster' to tackle with by industrial adjudication. Whether and under what facts and circumstances a tribunal will accept the plea of victimisation against the employer will depend upon its judicial discretion. But once the tribunal finds that the dismissal of an employee is by way of 'victimisation' or 'unfair labour practice', it will have complete jurisdiction to interfere with the order of dismissal passed by the employer. In that event, the fact that there is no violation of the principles of natural justice, in the course of domestic inquiry, will absolutely lose its importance and efficacy. The mere fact that there is an employees' union and that the concerned employee is a member or an active office-bearer is not sufficient to establish the plea of 'victimisation'. Nor the mere allegations, vague suggestions and insinuations are enough to establish the plea of victimisation. An inference of 'victimisation' in the absence, of evidence on record to show that there was any strained relationship between the employee and the employer on account of the employee's union activities, will not be permissible.[23] In other words, the mere fact that the domestic inquiry was held after due observance of the rules of natural justice, will not show that there could be no 'victimisation.' The two are entirely different. Hence, even after finding in favour of the employer, that the inquiry was in compliance of the rules of natural justice, it is open to the tribunal to examine the question whether there was victimisation or unfair labour practice.[24] It would be open to the tribunal to examine whether the findings of the inquiry officer were perverse, despite its finding that the inquiry was properly held. Though, normally, once it is held that the findings of misconduct alleged against the delinquent workman were properly arrived at and the domestic inquiry was not in any way vitiated, the question of victimisation or the management having a bias against the workman would not arise,[25] the order of punishment itself may be a measure of victimisation if the punishment is shockingly disproportionate to the act of misconduct.[26]

The fact that the relations between the employer and the employee are not happy and the workman was an active trade union member, would by itself be no evidence to prove victimisation. 'Victimisation' must be directly connected with the activities of the delinquent workman inevitably leading to the penal action without necessary proof of a valid charge against him. The question to be asked is; Is the reason for the punishment attributable to a gross misconduct about which there is no doubt or to his particular trade union activity which is frowned upon by the employer? The tribunal will not

readily accept the plea of 'victimisation' as an answer to gross misconduct when an employee, be he an active office bearer of the union, commits the misconduct and there is a reliable legal evidence to that effect. In such a case, the employee found guilty cannot be equated with a victim or scapegoat and the plea of 'victimisation' as advanced will fall flat. 'It is, therefore, manifest that if actual fault or guilt meriting the punishment is established, such action will be rid of the taint of victimization.[27] In other words, if it is found that the employee is guilty of gross misconduct then, there can be no question of victimisation because gross misconduct merits dismissal,[28] and in such a case the inference of victimisation from the severity of punishment would not be justified. Once, therefore, in the opinion of the tribunal gross misconduct is established, on legal evidence either by fairly conducted inquiry or before the tribunal on merits, the plea of victimisation will not carry the case of the employee any further because a proved misconduct is an antithesis of victimisation as understood in industrial relations. In such a case, the inference of victimisation from the severity of punishment will not be justified. This is not, however, to say that the tribunal has no jurisdiction to interfere with the order of dismissal on proof of victimisation.[29]

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1 Chapter V-C (containing s 25T and s 25U) ins by Act 46 of 1982, s 16 (wef 21 August 1984).

2 *HD Singh v Reserve Bank of India* (1986) 1 LLJ 127 [LNIND 1985 SC 278], 132 (SC) : AIR 1986 SC 132 [LNIND 1985 SC 278]: 1985 Lab IC 1733, per Khalid J.

3 *Hindustan Lever Ltd v Ashok Vishnu Kate* 1995 Lab IC 2714, 2720-21 (SC), per Majumdar J.

4 *RP Sawant v Bajaj Auto Ltd* (2002) 1 LLN 891 (Bom) (DB), per Srikrishna J.

5 *Assam Rly & Trading Co Ltd v SK Sen* 1973 Lab IC 1650, 1652 (Cal) (DB), per BC Mitra J.

6 *Tulsipur Sugar Co Ltd v Workmen* CA No 1070 of 1966 (SC), per Vaidialingam J.

7 *Kapurthala Central Co-op Bank Ltd, v PO, LC* 1984 Lab IC 974 (P&H) (DB), per Punchhi J.

8 *Balmer Lawrie & Co Ltd v SM Limaye* 1992 Lab IC 205 (Bom), per Dhanuka J.

9 *Resident Engineer, Rajasthan SBCC Ltd v Om Prakash* (1999) 1 LLJ 1225 (Raj), per Chauhan J.

10 *Bharat Bank Ltd v Employees* (1950) 1 LLJ 921 [LNIND 1950 SC 4], 943 (SC) : [1950] 1 SCR 459 [LNIND 1950 SC 4] : AIR 1950 SC 188 [LNIND 1950 SC 4], Mahajan J.

11 *Workmen of Williamson Magar & Co Ltd v Mgmt* (1982) 1 LLJ 33 [LNIND 1981 SC 452], 38 (SC), per Baharul Islam J.

12 *Aditya Mills Ltd v Rizm Dayal* 1974 Lab IC 25, 27 (Raj) (DB), per Beri J.

13 *National Tobacco Co of India Ltd v Fourth IT* (1960) 2 LLJ 175 [LNIND 1959 CAL 197], 187 (Cal) per Sinha J.

14 *Mercantile Bank Ltd v PO, CGIT* 1982 Lab IC 203, 206 (Cal), per Basak J.

15 *Bharat Iron Works v Bhagubhai Balubhai Patel* 1976 Lab IC 4 [LNIND 1975 SC 406], 7 (SC), per Goswami J.

16 *Assam Oil Co Ltd v Workmen* (1960) 1 LLJ 587 [LNIND 1960 SC 108] (SC), per Gajendragadkar J.

17 *National Tobacco Co of India Ltd v Fourth IT* (1960) 2 LLJ 175 [LNIND 1959 CAL 197] (Cal), per Sinha J.

18 *Mgmt of FICCI v RK Mittal* (1971) 1 LLJ 630, 647 (SC), per Jaganmohan Reddy J.

19 *Bharat Iron Works Ltd v Bhagubhai Balubl at Patel* 1976 Lab IC 4 [LNIND 1975 SC 406], 7 (SC), per Goswami J.

20 *Asher Textiles Ltd v IT* (1958) 1 LLJ 482 (Mad), per Rajagopala Ayyanagar J.

21 *Sridharan Motor Service v IT* (1959) 1 LLJ 380 (Mad), per Balakrishna Ayyar J.

22 *Presidency Talkies v NS Natarajan* (1968) 2 LLJ 801 [LNIND 1967 MAD 205], 803 (Mad) (DB), per Anantanarayanan CJ.

23 *Bharat Iron Works v Bhagubhai Balubhai Patel* 1976 Lab IC 4 [LNIND 1975 SC 406], 8 (SC) : AIR 1976 SC 98 [LNIND 1975 SC 406]: (1976) 1 SCC 518 [LNIND 1975 SC 406], per Goswami J.

24 *National Tobacco Co of India Ltd v Fourth IT* (1960) 2 LLJ 175 [LNIND 1959 CAL 197] (Cal), per Sinha J.

25 *Lala Ram v Mgmt of DCM Chemical Works* 1978 Lab IC 716, 722 (SC), per Jaswant Singh J.

26 *Hind Construction & Engineering Co Ltd v Workmen* (1965) 1 LLJ 462 [LNIND 1964 SC 313] (SC), per Hidayatullah J.

27 *Bengal Bhatdee Coal Co v Ram Prakesh Singh* (1963) 1 LLJ 291 [LNIND 1963 SC 13], 294 (SC) : AIR 1963 SC 486 [LNIND 1963 SC 13]: (1963) I LLJ 291SC, per Wanchoo J.

28 *Toposi Colliery v Workmen* (1967) 2 LLJ 182, 184 (Pat) (DB), per Narasimham CJ.

29 *Bharat Iron Works v Bhagubhai Balubhai Patel* 1976 Lab IC 4 [LNIND 1975 SC 406], 8 (SC), per Goswami J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VC Unfair Labour Practices

S. 25U. Penalty for committing Unfair Labour Practices.—

Any person who commits any unfair labour practice shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both.

PENALTY FOR COMMITTING AN UNFAIR LABOUR PRACTICE

This section provides penalty for committing an unfair labour practice and mandates that whoever is guilty of any unfair labour practice can be prosecuted before the competent court on a complaint being made by or under the authority of the appropriate Government under s 34(1) of the Act. On the other hand, the Maharashtra Act does not provide for direct prosecution of a party having been engaged in any unfair labour practice. Under that Act, the prosecution has first to be preceded by adjudication by a competent court regarding such engagement in unfair labour practice which may result in a direction under s 30(1)(b) or it may be a subject-matter of interim relief order under s 30(2) of that Act. It is only thereafter that prosecution can be initiated against the party disobeying such order of the court under s 48(1). Therefore, engaging in any unfair labour practice by itself is not an offence under the Maharashtra Act while such commission of unfair labour practice itself is an offence under the Industrial Disputes Act.[30]

30 *Hindustan Lever Ltd v Ashok Vishnu Kate* 1995 Lab IC 2714, 2726 (SC), per Majumdar J.

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VI Penalties

S. 26. Penalty for illegal strikes and lockouts.—

(1) Any workman who commences, continues or otherwise acts in furtherance of, a strike which is illegal under this Act, shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to fifty rupees, or with both.

(2) Any employer who commences, continues or otherwise acts in furtherance of a lock-out which is illegal under this Act, shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

PUNISHMENT FOR ILLEGAL STRIKES AND LOCKOUTS

The right of the workmen to go on strike and the right of the employer to declare a lockout are now well-recognised as coercive weapons in their battles for collective bargaining. However, these rights, if allowed *as* an unbridled exercise, would create chaos in the industry. With a view, therefore, to ensure industrial peace and harmony, the legislature has imposed certain restrictions on their use. Section 24 prescribes the circumstances in which strikes and lockouts would become illegal. Section 26(1) prescribes punishment in cases where a workman commences or continues or otherwise acts in furtherance of an illegal strike, which may extend to one month imprisonment or fine which may extend to 50 rupees or both. Section 26(2) prescribes punishment in cases where an employer commences, continues or otherwise acts in furtherance of an illegal lockout, which may extend to one month imprisonment or fine which may extend to one thousand rupees or both. To sustain action under this section, the prosecution has to prove that the accused had the knowledge that the strike or the lockout in question was illegal. In *Coats India*, a single judge of the Patna High Court quashed the prosecution launched under s 26(2) read with s 10(3) on the ground that the labour court did not record any finding to the effect that the 'closure' of the branch located in Bihar was a lockout.[1]

COGNISANCE OF OFFENCE

Section 34 lays down that no court can take cognisance of any offence punishable under the Act or any abetment of any such offence save on a complaint made by or under the authority of the appropriate Government. Thus, it is not the adjudicatory authorities under the Act, who can punish a person under this section. It is a court of criminal jurisdiction which can take cognisance of the offence on a complaint being made by the appropriate Government or a person authorised by it.[2]

WAIVER

The act of workmen to participate in an illegal strike gives the employer certain rights against the workmen, which are not the creation of the statute but are based on policy, and the employer has every right to waive such rights. In a dispute before the tribunal, waiver can be a valid defense by the workman. Further, the doctrine of waiver by election cannot be made applicable to procedure available for a particular remedy. But the participation itself in an illegal strike cannot be condoned by an employer so as to make that legal which has been made illegal by the statute. In other words, waiver by the employer would not be a defense, to prosecution under this section. The prohibition of strike or lockout in the

circumstances mentioned in ss 22 and 23 is based on public policy. Hence strikes or lockouts commenced or continued in contravention of either of these two sections have been made punishable under the Act, subject, however, to the safeguard that a prosecution cannot be started save and except on a complaint made by or under the authority of the appropriate Government.[3]It is now well-settled that to make out a case of implied waiver of a legal right, there must be a clear, unequivocal and decisive act of a party showing such purpose or acts amounting to an estoppel on his part.[4]

STRIKES AND LOCKOUTS CANNOT BE RENDERED ILLEGAL BY SUBSEQUENT LEGISLATION

In *ReCalicut Hosieries*, a reference of certain disputes, for adjudication made by the State of Madras, was quashed by the Madras High Court being too vague and general. But during the pendency of that reference before the tribunal, the employer had declared a lockout for which he was prosecuted for commencing an illegal lockout. After the reference was quashed, the Madras Government enacted the Madras Act (Act 14 of 1949) validating certain references including the one in this case. The prosecution, proceeding on the basis of the reference being validated by this Act, was prohibited by the court holding that the reference being initially bad, the lockout was not illegal. It was observed that subsequent enactment validating the invalid reference would not turn a legal lockout into an illegal one, as a criminal statute cannot be retrospective in operation in any civilised country without clearest words to that effect.[5]

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1 *Coats India v State of Bihar* (2011) 4 LLJ 872 (Pat), per SP Singh J.

2 *Vijay Kumar Oil Mills v Workmen* [1952] 1 AC 342 (LAT).

3 *Punjab National Bank Ltd v Workmen* (1952) 2 LLJ 648 (LAT).

4 *Braja Nath Ganguly v Central Inland WT Corpn* 1988 Lab IC 1612, 1616 (Cal), per Sudhir Ranjan Roy J.

5 *In Re: The Calicut Hosieries* AIR 1950 (Mad) 231 : 1949-62-LW8 66, per Panchapakesa Ayyar J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VI Penalties

S. 27. Penalty for instigation, *etc*.—

Any person who instigates or incites others to take part in, or otherwise acts in furtherance of, strike or lock-out which is illegal under this Act, shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

PUNISHMENT

From a comparison of this section with the previous one, it would appear that the punishment for instigating or inciting strikes or lockouts is far more severe than for commencing or continuing illegal strikes. This is because the legislature intended to deter outside elements from disturbing industrial peace and harmony by instigating and inciting strikes and lockouts. The reason appears to be that the Workers and employers have their own stakes when they have to resort to strikes and lockouts, while the outside element have no such stakes, and they may be motivated in inciting strikes and lockouts for various extraneous reasons which have no relation with the real purpose of collective bargaining. The punishment prescribed by this section is six months' imprisonment or a fine up to rupees one thousand or both.

INSTIGATION AND INCITEMENT

The words 'instigates' and 'incites' in this section should be read to signify something deeper than a mere asking a person to do a particular act. In other words, the ingredients of these two words are something more than mere asking a person to do a particular act. But for stimulating action, words must come from a person who exercises some kind of influence over his audience.[6] There must be something in the nature of solicitation to constitute instigation or incitement. The words seem to convey the meaning 'to goad or urge forward or to provoke or encourage the doing of an act'. What acts amount to instigation or incitement will depend upon the particular facts of each case. In some circumstances, a throw of a finger or a mere turning of the eye may give rise to an inference of either incitement or instigation. In others, even strong words, expressly used may not mean that the person using them was stimulating or suggesting to anyone to do a particular act. The words 'instigates' and 'incites' appear to be synonymous and there must be something tangible in evidence to show that the persons responsible for such action were deliberately trying to stir up other persons to bring out a certain object.[7]

As every strike or lockout is not illegal, any instigation or incitement would not therefore be illegal unless the particular strike or lockout complained of is 'illegal' under the Act. Hence, the person instigating or inciting would be guilty only when it is established that the strike or lockout which he incited or instigated, to his knowledge was illegal. Where apart from positive evidence on the record, the very fact that the accused were on that date, members of the union and that they were fully cognisant of the agreement which rendered the strike or lockout illegal on the grounds covered by the said agreement, was held sufficient to inculpate them.[8] Similarly, when Workers are willing to work on Sundays which entitled them to double the wages of their basic rates, any person instigating or inciting such workers not to work on Sundays will be guilty of instigation and incitement under this section.[9]

CONSTITUTIONAL VALIDITY OF SECTION 27

This section does not infringe the fundamental rights guaranteed under Arts 19(1)(a) and 19(1)(c) of the Constitution of India, as it places no restriction either upon the freedom of speech or on the right to form associations or unions. Hence the section is not unconstitutional or void.[10]

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6 *Rajasthan State Road Transport Corpn v IT* (1974) 2 LLJ 328, 338-39 (Raj), per JP Jain J.

7 *State of Bihar v Ranen Nath* AIR 1958 Pat 259 (DB), per Banerji J.

8 *PM Deshpande v Ferro Aloys Corpn* (1964) 1 LLJ 6131 (AP) : AIR 1964 AP 471 [LNIND 1961 AP 91]: 1963 (2) An WR 410 : 1964 Cr LJ 378, per Kumarayya J.

9 *Ram Naresh Kumar v State of West Bengal* (1958) 1 LLJ 567 [LNIND 1957 CAL 138] (Cal) (DB), per Guha Ray J.

10 *Raja Kulkarni v State of Bombay* (1954) 1 LLJ 1 [LNIND 1953 SC 104] (SC), per Ghulam Hasan J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VI Penalties

S. 28. Penalty for giving financial aid to illegal strikes and lockouts.—

Any person who knowingly expends or applies any money in direct furtherance or support of any illegal strike or lock-out shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

PUNISHMENT

The giving of financial aid to illegally striking Workers or illegally locking-out employers is prohibited by s 25 of the Act. The punishment for giving financial aid to illegal strikes and lockouts is the same as for instigation for illegal strikes and lockouts under s 27, *i.e.*, imprisonment up to a term of six months and a fine up to 1000 rupees or both. The intendment of the legislature in enacting this provision is also the same as for enacting the previous section.

'ANY PERSON'

The words 'any person' indicate that whether a Worker or a non-Worker who instigates, incites or gives financial aid to illegal strike calculated to disrupt industrial peace and harmony should face penal consequences thereof. However, before the prosecution can successfully bring the accused within the mischief of these two sections, it must be proved that (i) the strike or lockout complained of was illegal, and (ii) the accused had the knowledge that the strike or lockout was illegal.

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VI Penalties

[11][S. 29. Penalty for breach of settlement or award.—

Any person who commits a breach of any term of any settlement or award, which is binding on him under this Act, shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both, [12][and where the breach is a continuing one, with a further fine which may extend to two hundred rupees for every day during which the breach continues after the conviction for the first] and the Court trying the offence, if it fines the offender, may direct that the whole or any part of the fine realised from him shall be paid, by way of compensation, to any person who, in its opinion, has been injured by such breach.

LEGISLATION

The original s 29 was enacted in the original Industrial Disputes Act 1947. It made the breach of a binding settlement or award by any person punishable with a fine up to two hundred rupees on the first conviction and a fine up to 500 rupees on the subsequent conviction. This section was substituted by s 20 of the Industrial Disputes (Amendment and Miscellaneous Provisions) Act 1956 (Act 36 of 1956), whereby the limit on the quantum of fine was removed. Besides the fine, the punishment of imprisonment for a term extending up to six months was also provided. The offender could be punished with fine or imprisonment, or with both. The punishment of imprisonment was introduced with a view to make the breach deterrent.

This provision was also found lacking to have sufficient deterrent effect against some unscrupulous employers who were able to successfully thwart the implementation of settlements or awards by paying fines once, which may be far less than what the obligation would otherwise entail. Thus, workmen were unable to get the benefits flowing from awards or settlements, though employers might have been convicted for the breach thereof. Hence with a view to ensure effective implementation of settlements and awards, it was considered necessary to provide deterrent penalties for continued breaches of settlements and awards. To achieve this object, the Parliament again amended the section by s 6 of the Industrial Disputes (Amendment) Act 1965 (Act 35 of 1965). As a result of this amendment, continuing breach of a settlement or award has been made punishable with additional recurring fine up to 200 rupees for every day during the continuance of the breach after conviction for the first breach. It clearly means that if a breach, which is a continuing one, continues after conviction has been recorded for the first breach, a fresh offence has been created by this amendment and it has been made punishable as shown therein. The crux of the matter, however, is whether the breach in question is a continuing breach.

It is significant to note that continuing breach is only made further punishable by the amending Act. If a breach is not a continuing one and for such a breach conviction has been already recorded, a person for the same breach cannot be again tried and convicted.[13]The expression ‘commission of the offence’ may refer to positive acts as well as to omissions. An offence may be committed by the commission of a positive act or by the omission to do an act. In case of certain acts, the commission of the act would be complete as soon as the act is committed and the offence would be repeated only if the act is repeated. But there may be some positive acts, which by their definition imply the continuance of the commission of the act. However, omission to do a positive continuous act may be made criminal. Here again, the omission once begun does not terminate until a positive act is done.[14]An award of a labour court, though modified by the High Court, is in effect an

award of labour court. The non-implementation of such a modified award does not amount to contempt of court, and the only remedy available to the workman is to execute it under the provisions of the Industrial Disputes Act.[15] There is no need to interfere with the show cause notice issued under s 29, in writ petition, and it is open to the employer to put forth all their arguments before the magistrate.[16] Liability under this section is of 'any person' who continues a breach of any term of a pending settlement or an award. If an individual continues such a breach, he will be punishable. If the offence is committed by a firm, the manager thereof will be deemed to be guilty of the offence. It is not only the manager who will be deemed to be guilty, but also any person concerned with the management of the firm. Consequently, every person of the firm will be deemed to be guilty.[17]

Where the company nominated different authorities for different units for the purpose of signing a settlement, filing written statements and for the implementation of settlements, *etc.*, the Chief General Manager / General Manager in this case, the prosecution launched against the Secretary and Director of the company is bad in law and is liable to be set aside.[18] In *United Distillaries*, the facts were: An award was made by the industrial tribunal between SKG Sugars and its workmen, which was allegedly breached by the management of the company by retrenching a few workmen contrary to the terms of the award. Subsequently, the company was taken over by United Distillaries Ltd. The findings of the tribunal as appearing in paragraphs 27 and 28 of the said award disclosed that that the tribunal came to a definite conclusion that the question of liability of United Distillaries had to be determined and as per the law laid down by the Supreme Court. It was held that United Distillaries Ltd., was not a necessary party to the proceeding, and that it was summoned without proper cause. The tribunal further held that it was not possible to hold that United Distillaries was *successor-in-interest* of SKG Sugar Ltd. In view of this factual position, a single judge of Patna High Court quashed the complaint made by the labour commissioner for prosecuting the managerial personnel of United Distillaries Limited.[19]

PUNISHMENT

This section imposes punishment of imprisonment for a term which may extend up to six months, or fine or of both, on any person who commits the breach of any terms of any settlement or award which is binding on him under this Act. On the term of imprisonment there is the upper limit of six months whereas there is no upper limit for the imposition of fine which has been left to the judicial discretion of the court. The court has been given further discretion to impose either or both the penalties provided under this Act. These punishments are in the first instance for the first breach of a settlement or award. It is, however, relevant to bear in mind that merely seeking a reference for adjudication of a dispute covered by a settlement which is in operation will not amount to an offence under this section.[20] But, in case the breach is continuing, further penalty of fine extending up to 200 rupees for every day during which the breach continues after conviction for the first breach, has been provided. Sub-sections (3) and (5) of s 19 show that there are two categories of awards, *viz.*, (i) those which do not impose continuing obligations and decide the industrial dispute under reference once and for all; and (ii) those which impose continuing obligations over a period of time. In the former type of awards, there is no continuing obligation so as to attract any penalty under the law for the continuing breach of the terms of such an award. In such a case, the breach of the terms of Award made punishable under this section is the original breach. The award in such a case does not impose upon the employer, a continuing obligation in the sense that continued non-compliance thereof by the employer would constitute a continuing breach of offence.[21] But the breach of latter type of awards would attract stringent provisions of the recurring penalty for the continuing breach. The court has been given further discretion to pay the whole or any part of the fine realised from the offender to any person who, in its opinion, has been injured by such breach. Before directing the payment of the fine realised to a person, the court has to form its opinion that such person has been injured by the breach complained of.

PRE-REQUISITES OF PUNISHMENT

Before any person can be punished, the prosecution must prove that—

(1) there was an award or settlement in operation at the time of the breach;

(2) the award or settlement was valid in law;

(3) such award or settlement was binding on the accused;

(4) the accused has committed the breach of such award or settlement; and

(5) the complaint regarding the breach was made by the appropriate Government.

MENS REA

Section 29 makes the breach of any terms of any settlement or award, a punishable criminal offence. A criminal offence is only committed when an act which is forbidden by law is done voluntarily. The volition which is the motive force behind a

criminal act is mens rea. It is only voluntary acts which amount to offences. If a person is compelled by force of circumstances to perform an act forbidden by law, he cannot be said to do it voluntarily and he will not be held liable for the consequences of that act. In other words, if there is no mens rea, no offence is committed although the act may prove detrimental to an individual or individuals.[22] In *Caulfield Holland*, the Bombay High Court held that the broad principles which apply in deciding the question as to whether mens rea must be proved in regard to a given criminal offence are well established. Generally speaking, a person cannot be convicted unless he commits an overt act with the wrongful or illegal intention. In other words, the presence of mens rea is usually treated as a condition precedent for successful prosecution of a person. It is, however, open to the legislature to provide for offences where mens rea may not be an essential element. If the legislature expresses its intention in that behalf in an unambiguous and clear language, the principle that mens rea must ordinarily be established in a criminal case would have no application. In the absence of clear and unambiguous language indicating such an intention on the part of legislature, it may be permissible to ascertain the intention of the legislature by examining the object of the statute in question and its general scheme. As it often happens, it is not very difficult to enunciate these broad principles, the difficulty arises in applying them to the facts in a particular case.[23]

On the other hand, the Punjab High Court in *BD Meattte*, dealing with the words 'any employer who contravenes the provision of s 22 shall be punishable...' in s 29 of the Industrial Disputes (Appellate Tribunal) Act 1950, held that if there is no *mens rea*, no offence is committed although the Act may prove detrimental to an individual or individuals.[24] A single judge of the Orissa High Court, in *RD Prasad*, dealing with this section after its amendment, followed the reasoning of the Punjab High Court and dissented from the Bombay High Court as according to it, the Bombay case which was decided before the amendment of s 29 had no application.[25]The Bombay High Court view presents the correct law and the view taken by the Punjab and Orissa High Courts is not correct. The reason is that not only the word 'knowingly', unlike in s 25 and s 28 is missing in s 29, the scheme of the Act and the object of its passing indicate that the obligation to comply with the award is unqualified, absolute and categorical, and its breach attracts the penalty provided in s 29 without proof of *mens rea* as such. Further, if *mens rea* were to be treated as an essential constituent of the offence under s 29, this provision will become nugatory as it will not be possible to prove *mens rea* in such cases. *Mens rea* is a necessary ingredient to be proved for prosecuting a person under s 29 for non-implementation of settlement or award. Only such persons who are authorised by the company for implementation of the settlement or the award should be served with show-cause notices with a copy to the managing director and the secretary for information.[26]

PROSECUTION AFTER EXPIRY OF AWARD OR SETTLEMENT

An award or a settlement is binding as long as it is in operation and has not been terminated by one of the parties thereto by notice under s 19(2) or 19(6). It necessarily follows that so long as the award or settlement remains valid and operative, the employer is bound to implement it and his liability for prosecution under s 29 of the Act for non-compliance continues.[27] Once such period has run out, a person cannot be prosecuted for breach of the award or settlement nor shall he be liable to the penalties provided by s 29, in prosecution. For successfully prosecuting a person, it is necessary to show that, at the time of the breach, the award or the settlement was in operation and binding on him. In other words, a person who commits breach of any terms of any settlement or award shall be liable to the penalties provided by this section in case such breach is committed, while such award or settlement is in force and binding on the accused.[28] Appointment of special public prosecutor under ss 301 and 24(8) of Code of Criminal Procedure 1973 in a prosecution under s 29 of the Act, is in the sole discretion of the State and such appointment could not be insisted upon as of right by a union much less in favour of any particular advocate.[29]

PROSECUTION - NO BAR TO OTHER REMEDIES

The award given by an industrial tribunal in respect either of bonus or higher wages, *etc.*, is enforceable by its own force and by the coercive machinery of the Act, and it is not merely a declaration of a character that furnishes a cause of Action to the employee to bring a suit on its foot to recover the wages.[30] The provision of penalties under s 29 does not deprive individuals of the right to take other action in cases where the award confers any personal right or benefit to a particular employer or employee.[31]Section 33C provides remedy for recovery of money due from an employer under a settlement or award, which can be resorted to by an aggrieved employee to whom the right has accrued by virtue of an award or a settlement or under the provisions of ch V-A, which is not given effect to by the employer. Besides, the Payment of Wages Act 1936 also provides remedy for recovery of wages to a workman from whose wages deductions have been made by the employer. An aggrieved employee can resort to the machinery provided under the Payment of Wages Act 1936 or under s 33C for the recovery of his dues, besides prosecution of the employer under s 29.[32]

DISCHARGE FOR WANT OF PROPER SANCTION - DOES NOT BAR FRESH COMPLAINT

In *United Rubber*, a complaint was filed against the accused with respect to an offence under s 29 read with s 32 of the Act. The magistrate who took cognisance of the case, passed an order directing the accused to be released from bail bond

as the case was instituted without proper sanction and he had no jurisdiction to try it. Subsequently, a fresh complaint on a fresh authorisation was filed against the accused. The order of the magistrate releasing the accused for want of proper sanction was held not to amount to an order of acquittal so as to bar a fresh complaint after rectifying the defect in the sanction.[33]

LIMITATION

For attracting the penalty under this section, there must be breach of any term of any settlement or award, which is binding on a person under this Act. The settlement becomes binding under s 18(1) or 18(3) as soon as it is entered into upon compliance with the requirement of s 12(3) of the Act and the relevant State or Central Rules. But under s 17 A an award becomes binding under s 18(3) only after it becomes enforceable on the expiry of 30 days, from the date of its publication under s 17. Since no award is enforceable before the expiry of 30 days, it does not become binding till the expiry of 30 days from its publication; hence, no breach of the award can be committed by an employer within 30 days after the publication of the award if he does not implement it within that time. Offences under this section are punishable with imprisonment for a term not exceeding six months. Therefore, the period of limitation provided for initiation of prosecution under s 468 of the Code of Criminal Procedure 1973, is one year starting from the date of enforceability of the award.[34] A single judge of the Calcutta High Court in *Swaranjit Singh*, drew a distinction in two types of awards, namely, (1) which decide, the questions under reference once for all, involving personal rights such as directing payment of money, setting aside the discharge or dismissal and awarding reinstatement of workmen or upholding discharge or dismissal; and (2) the awards casting continued obligation on the parties bound by them such as wage-structure, dearness allowance, holidays and other allowances and benefits *etc*. The awards of the first category do not cast any continuing obligation on the parties bound by the award and there is no question of the period of operation as they decided the questions once for all.[35] A similar view has been taken by a single judge of the Bombay High Court in *Ajit Lhoksi*, holding that reinstatement as directed by the award should have been made on the 31st day after the publication of the award in the Gazette and that if such reinstatement was not made by the employer then the offence must have been deemed to have been committed on that particular date and hence a complaint filed beyond the period of one year from that date was barred by limitation.[36]

But a single judge of the Kerala high Court in *Trichur Urban Bank*, has taken a different view on the ground that in the above two cases, the scope of 'continuing offence' as mentioned in s 472 of the Code of Criminal Procedure 1973 was not considered. Accordingly, the persons bound by the award are obliged to comply with the terms thereof and that the obligation continues during the term therein and that the obligation continues during the entire period of one year when the award remains in operation. In other words, unless the employer complies with the directions contained in the award, his obligation continues until the termination of the period during which the award remains in operation. The commission of breach of the terms of the award on the first day of its operation does not absolve him from his obligation and if the obligation survives during the successive days and if he does not comply with the terms during those successive days also, the commission of the breach continues. The breach continues so long as the obligation continues.[37]*A priori*, the offence continues as a consequence. Cognisance of offences for the breach of such awards under s 29 read with s 32 of the Act will be barred by limitation under s 468(2)(b) of the Code of Criminal Procedure 1973 if the prosecution is sought to be launched after a period of one year from the date of enforceability of the award. Any prosecution on the basis of such breach of the award will be liable to be set aside. In *Subrato Roy*, the complaint was filed after a period of 21 months. Apart from holding that in view of the clear language of s 29, the provisions of s 468(2)(b) Code of Criminal Procedure 1973 were not applicable and the case was fully covered by the provisions of s 472, Code of Criminal Procedure 1973. A single judge of the Rajasthan High Court held that on the facts of the case the delay was caused not because of the complainant but because of the State Government in according sanction and which delay was caused because of the several adjournments taken by the employer to file a reply to the notice issued by the labour secretary. Thus the employer himself having contributed to the delay in filing the complaint, it was a fit case where the delay could even be condoned in the interest of justice under the provisions of s 473 of the Code of Criminal Procedure 1973.[38] In *EE, KD Panchayat*, a single judge of the Gujarat High Court held that the non-compliance of the award and commission of breach of the award was a continuing wrong. It was further held that a person who commits breach of award commits a continuous wrong and he commits the offence every day till the date he complies with the terms of the award passed by the labour court, and that action under s 29 can be taken even after one year from the date of publication of the award.[39]

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11 Subs by Act 36 of 1956, s 20, for s 29 (wef 17-9-1956).

12 Ins by Act 35 of 1965, s 6 (wef 1-12-1965).

13 *DC Chhowals v Gujarat Paper Mills Ltd* 1969 Lab IC 295,297 (Guj), per Sheth J.

14 *State of Gujarat v VL Vakharia* AIR 1964 Guj 125 [LNIND 1963 GUJ 112]-26, per VB Raju J.

15 *R Gopalakrishnan v Mgmt of Binny Ltd* (2001) 4 LLN 854 (Mad) (DB), per Padmanabhan J.

16 *Addison Paints and Chemicals Ltd v Workmen* (2000) 3 LLN 994 (Mad) per Kanakaraj J.

17 *N Viswambharan v State of Kerala* 1978 Lab IC 1341 -42 (Ker), per Thommen J.

18 *Kedar Nath Mukhopadhyay v.State of Jharkhand* (2008) 3 LLJ 420 (Jhar) : [2008 (2) JCR 478 (Jhr)], per RR Prasad J.

19 *United Distillaries Ltd v State of Bihar* (2011) 3 LLJ 75 (Pat), per SK Singh J.

20 *Mgmt of Binny Ltd v Govt of Tamil Nadu* (1989) 1 LLJ 180, 192 (Mad) (DB), per Srinivasan J.

21 *Mohd Siddiq v Raghunath Singh* 1979 Lab IC 876, 880 (Raj), per Sidhu J.

22 *State of Punjab v BD Meattle* AIR 1957 Punj 74 (DB) : 1957 Cr LJ 472, per Khosla J.

23 *State v Caulfleld Holland Ltd* AIR 1954 Born 70 -71 (DB) : 1953 (55) Bom LR 768, per Gajendragadkar J.

24 *State of Punjab v BD Meattte*, AIR 1957 Punj 74 (DB) : 957 Cr LJ 472, per Khosla J.

25 *State of Orissa v RD Prasad* (1969) 1 LLJ 428 -32 : 34 (1968) CLT 570, (Ori), per Burman CJ.

26 *Bharat Coking Coal Ltd v Union of India* (2002) 2 LLN 651 (Jharkhand), per Eqbal J.

27 *Guha & Co v RN Misra* 1984 Lab IC 1318 (Cal), per MK Mukherjee J.

28 *State of Madras v CP Sarathy* (1953) 1 LLJ 174 [LNIND 1952 SC 84], 177 (SC), per Patanjali Sastri CJI.

29 *Workmen of Addisons Paints & Chern Ltd v Tamil Nadu* (1999) 1 LLN 255 (Mad), per Sirpurkar J.

30 *Bharat Bank Ltd v Employees of Bharat Bank Ltd* (1950) 1 LLJ 921 [LNIND 1950 SC 4] (SC), per Mahajan J.

31 *Bilash Chandra Mitra v Balmer Lawrie & Co Ltd* (1953) 1 LLJ 337 [LNIND 1952 CAL 141] (Cal), per HK Bose J.

32 *Md Qasim Lari v Md Shamsuddin* AIR 1957 Pat 683 (DB), per Sinha J.

33 *State of West Bengal v United Rubber Works Ltd* AIR 1959 Cal 759 [LNIND 1959 CAL 108] (DB) : 1959 Cr LJ 1431, per Sen J.

34 *State of Maharashtra v Ajit Maneklal Chofesi* 1979 Lab IC 59 (Bom), per Jahagirdar J.

35 *Swaranjit Singh v State* 1986 Lab IC 1123 -24 (Cal), per SP Das Ghosh J.

36 *State of Maharashtra v Ajit Maneklal Lhoksi* 1979 Lab IC 59 (Bom), per Jahagirdar J.

37 *Trichur Urban Co-op Bank Ltd v District Labour Officer* (1987) 2 LLJ 38, 42 : ILR 1987 (1) Kerala 954 [LNIND 1986 KER 320], (Ker), per Thomas J.

38 *Subrato Roy v State of Rajasthan* (1990) 2 LLJ 351, 354 (Raj) : [1990 (60) FLR 206], per VS Dave J.

39 *Executive Engineer, KD Panchayat, v Govt Labour Officer* (1998) 4 LLN 668 (Guj), per Pandit J.

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The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VI Penalties

S. 30. Penalty for disclosing confidential information.—

Any person who wilfully discloses any such information as is referred to in section 21 in contravention of the provisions of that section shall, on complaint made by or on behalf of the trade union or individual business affected, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

REQUIREMENTS TO BE SATISFIED BEFORE IMPOSING PENALTY

Section 21 provides for certain matters to be kept confidential. This section provides a penalty for disclosing any information in contravention of s 21. The penalty is a severe one, *i.e.*, imprisonment up to a term of six months or a fine up to rupees one thousand or both. For exercising the power under this section, the following requirements must be satisfied:

(i) The accused must have wilfully disclosed the information prescribed by s 21. In other words, the prosecution must prove *mens rea* for successfully prosecuting the accused.

(ii) There should be a complaint made by or on behalf of (a) the trade union, or (b) the individual business affected.

(iii) Such complaint should be made to the appropriate Government.

(iv) The complaint should be tried by a court of competent jurisdiction.

This section not only provides the safeguard against double complaint, it also by use of the word ‘wilfully’ makes *mens rea* specifically, an essential constituent of the offence under it. The word ‘wilfully’ in contradistinction to the word ‘knowingly’ indicates not only that a person should have knowingly disclosed the confidential information but he should have deliberately done so. In other words, a casual or inadvertent disclosure may not attract the penal consequences of this section.[40]

40 *State v Caulfield Holland Ltd* AIR 1954 Born 70 (DB) : (1953) 2 LLJ 458 [LNIND 1953 BOM 8] (Bom), per Gajendragadkar J.

The Industrial Disputes Act, 1947 (Act 14 of 1947)

CHAPTER VI Penalties

[41][S. 30A. Penalty for closure without notice.—

Any employer who doses down any undertaking without complying with the provisions of section 25FFA, shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five thousand rupees, or with both.]

PENALTY

This section provides penalty for closing down any undertaking without complying with the provisions of s 25FFA. The penalty is of a deterrent nature. Non-compliance of the provisions of s 25FFA exposes the employer to the punishment of imprisonment for a term which may extend to six months or fine extending up to 5000 rupees, or both. If the prosecution proves two facts, *viz.*, (i) that the employer has in fact, closed down the undertaking, and (ii) that the provisions of s 25FFA(1) have not been complied with, the employer will be liable to the penalty contemplated by this section. Once that is proved, no other defense is available to the employer against the penalty except where the undertaking falls within the proviso to sub-s (1) or has been exempted under sub-s (2). The quantum of actual punishment appears to have been left to the discretion of the court. The court will take cognisance of the offence under this section only as provided under s 34.

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41 Ins by Act 32 of 1972, s 3 (wef 14-6-1972).

ANNEXURE I - The Industrial Disputes (Central) Rules, 1957[1]

In exercise of the powers conferred by section 38 of the Industrial Disputes Act, 1947 (14 of 1947), the Central Government hereby makes the following rules, the same having been previously published as required by sub-section (1) of the said section, namely:—

CHAPTER I PRELIMINARY

R. 1. Title and application.—

These rules may be called the Industrial Disputes (Central) Rules, 1957.

They extend to Union territories in relation to all industrial disputes and to the States in relation only to an industrial dispute concerning—

(a) any industry carried on by or under the authority of the Central Government or by a railway company; or

(b) a banking or an insurance company, a mine, an oil-field, or a major, port; or

(c) any such controlled industry as may be specified under section 2(a)(i) of the Act by the Central Government:

[2][***]

R. 2. Interpretation.—

In these rules, unless there is anything repugnant in the subject or context,—

(a) "Act" means the Industrial Disputes Act, 1947 (14 of 1947);

(b) "Chairman" means the Chairman of a Board or Court or, if the Court consists of one person only, such person;

(c) "Committee" means a Works Committee constituted under sub-; section (1) of section 3 of the Act;

(d) "form" means a form in the Schedule to these rules;

(e) "section" means a section of the Act;

(f) in relation to an industrial dispute in a Union territory, for which the appropriate Government is the Central Government, reference to the Central Government or the Government of India shall be construed as a reference to the Administrator of the territory, and reference to the Chief Labour Commissioner (Central), Regional Labour Commissioner (Central) and the [3][Assistant Labour Commissioner (Central)] shall be construed as reference to the appropriate authority, appointed in that behalf by the Administrator of their territory;

4[(g)with reference to clause (g) of section 2, it is hereby prescribed that—

(i) in relation to an industry, not being an industry referred to in sub-clause (ii), carried on by or under the authority of a Department of the Central or a State Government, the officer-in-charge of the industrial establishment shall be the 'employer' in respect of that establishment; and

(ii) in relation to an industry concerning railways, carried on by or under the authority of a Department of the Central Government,—

(a) in the case of establishment of a Zonal Railway, the General Manager of that Railway shall be the 'employer' in respect of regular railway servants other than casual labour;

(b) in the case of an establishment independent of a Zonal Railway, the officer-in-charge of the establishment shall be the 'employer' in respect of regular railway servants other than casual labour; and

(c) the District Officer-in-charge or the Divisional Personnel Officer or the Personnel Officer shall be the 'employer' in respect of casual labour employed on Zonal Railway or any other railway establishment independent of a Zonal Railway.]

PART-I PROCEDURE FOR REFERENCE OF INDUSTRIAL DISPUTES TO BOARDS OF CONCILIATION, COURT OF ENQUIRY, LABOUR COURTS, INDUSTRIAL TRIBUNALS OR NATIONAL TRIBUNALS

R. 3. Application.—

An application under sub-section (2) of section 10 for the reference of an industrial dispute to a Board, Court, Labour Court, Tribunal or National Tribunal shall be made in Form A and shall be delivered personally or forwarded by registered post [5][to the Secretary to the Government of India in the Ministry of Labour and Employment (in triplicate)] the Chief Labour Commissioner (Central), New Delhi, and the Regional Labour Commissioner (Central), and the 3[Assistant Labour Commissioner (Central)] concerned. The application shall be accompanied by a statement setting forth—

(a) the parties to the dispute;

(b) the specific matters in dispute;

(c) the total number of workmen employed in the undertaking affected;

(d) an estimate of the number of workmen affected or likely to be affected by the dispute; and

(e) the efforts made by the parties themselves to adjust the dispute.

R. 4. Attestation of application.—

The application and the statement accompanying it shall be signed—

(a) in the case of an employer by the employer himself, or when the employer is an incorporated company or other body corporate, by the agent, manager or other principal officer of the Corporation;

(b) in the case of workmen, either by the President and Secretary of a trade union of the workmen, or by five representatives of the workmen duly authorised in this behalf at a meeting of the workmen held for the purpose;

6[(c) in the case of an individual workman, by the workman himself or by any officer of the trade union of which he is a member or by another workman in the same establishment duly authorised by him in this behalf:

Provided that such workman is not a member of a different trade union.]

R. 5. Notification of appointment of Board, Court, Labour Court, Tribunal or National Tribunal.—

The appointment of a Board, Court, Labour Court, Tribunal or National Tribunal together with the names of persons constituting the Board, Court, Labour Court, Tribunal or National Tribunal shall be notified in the Official Gazette.

R. 6. Notice to parties to nominate representatives.—

If the Central Government proposes to appoint a Board, it shall send a notice in Form B to the parties requiring them to nominate within a reasonable time, persons to represent them on the Board.

The notice to the employer shall be sent to the employer personally, or if the employer is an incorporated company or a body corporate, to the agent, manager or other principal officer of such company or body.

The notice to the workmen shall be sent—

(a) in the case of workmen who are members of a trade union, to the President or Secretary of the trade union; and

(b) in the case of workmen who are not members of a trade union, to any one of the five representatives of the workmen who have attested the application made under rule 3; and in this case a copy of the notice shall also be sent to the employer who shall display copies thereof on notice boards in a conspicuous manner at the main entrance to the premises of the establishment.

PART II ARBITRATION AGREEMENT

R. 7. Arbitration agreement.—

An arbitration agreement for the reference of an industrial dispute to an arbitrator or arbitrators shall be made in Form C and shall be delivered personally or forwarded by registered post [7][to the Secretary to the Government of India in the Ministry of Labour (in triplicate)] the Chief Labour Commissioner (Central), New Delhi, and the Regional Labour Commissioner (Central) and the [8][Assistant Labour Commissioner (Central)] concerned. The agreement shall be accompanied by the consent, in writing, of the arbitrator or arbitrators.

R. 8. Attestation of the arbitration agreement.—

The arbitration agreement shall be signed—

(a) in the case of an employer, by the employer himself, or when the employer is an incorporated Company or other body corporate by the agent, manager, or other principal officer of the Corporation;

[9][(b) in the case of the workmen, by any officer of a trade union of the workmen or by five representatives of the workmen duly authorised in this behalf at a meeting of the workmen held for the purpose;]

[10][(c) in the case of an individual workman, by the workman himself or by any officer of a trade union of which he is a member or by another workman in the same establishment duly authorised by him in this behalf:

Provided that such workman is not a member of a different trade union.]

Explanation.—In this rule "officer" means any of the following officers, namely:—

(a) the President;

(b) the Vice-President;

(c) the Secretary (including the General Secretary);

(d) a Joint Secretary;

(e) any other officer of the trade union authorised in this behalf by the President and Secretary of the Union.

[11][R. 8A. Notification regarding arbitration agreement by majority of each party.—

Where an industrial dispute has been referred to arbitration and the Central Government is satisfied that the persons making the reference represent the majority of each party, it shall publish a notification in this behalf in the Official Gazette for the information of the employers and workmen who are not parries to the arbitration agreement but are concerned in the dispute.]

PART III POWER, PROCEDURE AND DUTIES OF CONCILIATION OFFICERS, BOARDS, COURTS, LABOUR COURTS, TRIBUNALS, NATIONAL TRIBUNALS AND ARBITRATORS

R. 9. Conciliation proceedings in public utility service.—

The Conciliation Officer, on receipt of a notice of a strike or lock-out given under rule 71 or rule 72, shall forthwith arrange to

interview both the employer and the workmen concerned with the dispute at such places and at such times as he may deem fit and shall endeavour to bring about a settlement of the dispute in question.

Where the Conciliation Officer receives no notice of a strike or lock-out under rule 71 or rule 72 but he considers it necessary to intervene in the dispute he may give formal intimation in writing to the parties concerned declaring his intention to commence conciliation proceedings with effect from such date as may be inserted therein.]

R. 10. Conciliation proceedings in non-public utility service.—

Where the Conciliation Officer receives any information about an existing or apprehended industrial dispute which does not relate to public utility service and he considers it necessary to intervene in the dispute, he shall give formal intimation in writing to the parties concerned declaring his intention to commence conciliation proceedings with effect from such date as may be specified therein.

[14]**[R. 10A. Parties to submit statements.—**

The employer or the party representing workmen [15][or in the case of individual workman, the workman himself] involved in an industrial dispute shall forward a statement setting forth the specific matters in dispute to the [16][Conciliation Officer] concerned whenever his intervention in the dispute is required.]

[17]**[R. 10B. Proceeding before the Labour Court, Tribunal or National Tribunal.—**

While referring an industrial dispute for adjudication to a Labour Court, Tribunal or National Tribunal, the Central Government shall direct the party raising the dispute to file a statement of claim complete with relevant documents, list of reliance and witnesses with the Labour Court, Tribunal or National Tribunal within fifteen days of the receipt of the order of reference and also forward a copy of such statement to each one of the opposite parties involved in the dispute.

The Labour Court, Tribunal or National Tribunal after ascertaining that copies of statement of claim are furnished to the other side by party raising the dispute shall fix the first hearing on a date not beyond one month from the date of receipt of the order of reference and the opposite party or parties shall file their written statement together with documents, list of reliance and witnesses within a period of 15 days from the date of first bearing and simultaneously forward a copy thereof to the other party.

Where the Labour Court, Tribunal or National Tribunal, as the case may be, finds that the party raising the dispute though directed did not forward the copy of the statement of claim to the opposite party or parties, it shall give direction to the concerned party to furnish the copy of the statement to the opposite party or parties and for the said purpose or for any other sufficient cause, extend the time limit for filing the statement under sub-rule (1) or written statement under sub-rule (2) by an additional period of 15 days.

The party raising a dispute may submit a rejoinder if it chooses to do so, to the written statement(s) by the appropriate party or parties within a period of fifteen days from the filing of written statement by the latter.

The Labour Court, Tribunal or National Tribunal, as the case may be, shall fix a date for evidence within one month from the date of receipt of the statements, documents, list of witnesses, etc., which shall be ordinarily within sixty days of the date on which the dispute was referred for adjudication.

Evidence shall be recorded either in court or on affidavit but in the case of affidavit the opposite party shall have the right to cross-examine each of the deponents filing the affidavit. As the oral examination of each witness proceeds, the Labour Court, Tribunal or National Tribunal shall make a memorandum of the substance of what is being deposed. While recording the evidence the Labour Court, Tribunal or National Tribunal shall follow the procedure laid down in rule 5 of Order XVIII of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908).

On completion of evidence either arguments shall be heard immediately or a date shall be fixed for arguments oral hearing which shall not be beyond a period of fifteen days from the close of evidence.

The Labour Court, Tribunal or National Tribunal, as the case may be, shall not ordinarily grant an adjournment for a period exceeding a week at a time but in any case not more than three adjournments in all at the instance of the parties to the dispute:

Provided that the Labour Court, Tribunal or National Tribunal, as the case may be, for reasons to be recorded in writing, grant an adjournment exceeding a week at a time but in any case not more than three adjournments at the instance of any one of the parties to the dispute.

In case any party defaults or fails to appear at any stage the Labour Court, Tribunal or National Tribunal, as the case may be, may proceed with the reference ex parts and decide the reference application in the absence of the defaulting party:

Provided that the Labour Court, Tribunal or National Tribunal, as the case may be, may on the application of either party filed before the submission of the award revoke the order that the case shall proceed ex parte, if it is satisfied that the absence of the party was on justifiable grounds-

The Labour Court, Tribunal or National Tribunal, as the case may be, shall submit its award to the Central Government within one month from the date of arguments oral hearing or within the period mentioned in the order of reference whichever is earlier.

In respect of reference under section 2A, the Labour Court or Tribunal, National Tribunal, as the case may be, shall ordinarily submit its awards within a period of three months:

Provided that the Labour Court, Tribunal or National Tribunal, may, as and when necessary, extend the period of three months and shall record its reasons in writing to extend the time for submission of the award for another specified period.]

R. 11. Meeting of Representatives.—

The Conciliation Officer may hold a meeting of the representatives of both parties jointly or of each party separately.

R. 12. Conduct of proceedings.—

The Conciliation Officer shall conduct the proceedings expeditiously and in such manner as he may deem fit.

R. 13. Place and time of hearing.—[18]

[Subject to the provisions contained in rules 10A and 10B] the sittings of a Board, Court, Labour Court, Tribunal or National Tribunal or of an Arbitrator shall be held at such times and places as the Chairman or the Presiding Officer or the Arbitrator, as the case may be, may fix and the Chairman, Presiding Officer or Arbitrator, as the case may be, shall inform the parties of the same in such manner as he thinks fit.

R. 14. Quorum for Boards and Courts.—

The quorum necessary to constitute a sitting of a Board or Court shall be as follows—

(i) in the case of Board	Quorum
where the number of members is 3 …….	2
where the number of members is 5 …….	3
(ii) in the case of court	
where the number of members is not more than 2 ……	1
where the number of members is more than 2 ……	2
but less than 5	

R. 15. Evidence.—

A Board, Court, Labour Court, Tribunal or National Tribunal or an arbitrator may accept, admit or call for evidence at any stage of the proceedings before it/him and such manner as it/he may think fit.

R. 16. Administration of oath.—

Any member of a Board or Court or Presiding Officer of a Labour Court, Tribunal or National Tribunal or an arbitrator may administer an oath.

R. 17. Summons.—

Summons issued by a Board, Court, Labour Court, Tribunal or National Tribunal shall be in Form D and may require any person to produce before it any books, papers or other documents and things in the possession of or under the control of such person in any way relating to the matter under investigation or adjudication by the Board, Court, Labour Court, Tribunal or National Tribunal which the Board, Court, Tribunal or National Tribunal thinks necessary for the purposes of such investigation or adjudication.

[19]**[R. 18. Service of summons or notice.—**

Subject to the provisions contained in rule 20, any notice, summons, process or order issued by a Board, Court, Labour Court, Tribunal, National Tribunal or an Arbitrator empowered to issue such notice, summons, process or order, may be served either personally or by registered post and in the event of refusal by the party concerned to accept the said notice, summons, process or order, the same shall be sent again under certificate of posting.]

R. 19. Description of parties in certain cases.—

Where in any proceeding before a Board, Court, Labour Tribunal or National Tribunal or an Arbitrator, there are numerous persons arrayed on any side, such persons shall be described as follows:—

all such persons as are members of any trade union or association shall be described by the name of such trade union or association; and

all such persons as are not members of any trade union or association shall be described in such manner as the Board, Court, Labour Court, Tribunal, National Tribunal or Arbitrator, as the case may be, may determine.

R. 20. Manner of service in the case of numerous persons as parties to a dispute.—

Where there are numerous persons as parties to any proceedings before a Board, Court, Labour Court, Tribunal or National Tribunal or an Arbitrator and such persons are members of any trade union or association, the service of notice on the Secretary, or where there is no Secretary, on the principal officer, of the trade union or association shall be deemed to be service on such persons.

Where there are numerous persons as parties to any proceeding before a Board, Court, Labour Court, Tribunal or National Tribunal or an Arbitrator and such persons are not members of any trade union or association, the Board, Court, Labour Court, Tribunal, National Tribunal or Arbitrator, as the case may be, shall, where personal service is not practicable, cause the service of any notice to be made by affixing the same at or near the main entrance of the establishment concerned.

A notice served in the manner specified in sub-rule (2) shall also be considered as sufficient in the case of such workmen as cannot be ascertained and found.

R. 21. Procedure at the first sitting.—

At the first sitting of a Board, Court, Labour Court, Tribunal or National Tribunal, the Chairman or the Presiding Officer, as the

case may be, shall call upon the parties -in such order as he may think fit to state their case.

R. 22. Board, Court, Labour Court, Tribunal, National Tribunal or Arbitrator may proceed *ex-parte*.—

If without sufficient cause being shown, any party to proceeding before a Board, Court, Labour Court, Tribunal, National Tribunal or Arbitrator fails to attend or to be represented, the Board, Court, Labour Court, Tribunal, National Tribunal or Arbitrator may proceed, as if the party had duly attended or had been represented.

R. 23. Power of entry and inspection.—

A Board, or Court, or any member thereof, or a conciliation officer, a Labour Court, Tribunal or National Tribunal, or any person authorised in writing by the Board, Court, Labour Court, Tribunal or National Tribunal in this behalf may, for the purposes of any conciliation, investigation, enquiry or adjudication entrusted to the conciliation officer. Board, Court, Labour Court, Tribunal or National Tribunal under the Act, at any time between the hours of sunrise and sunset and in the case of a person authorised in writing by a Board, Court, Labour Court, Tribunal or National Tribunal after he has given reasonable notice enter any building, factory, workshop, or other place or premises whatsoever, and inspect the same or any work, machinery, appliance or article therein or interrogate any person therein in respect of anything situated therein or any matter relevant to the subject-matter 'of the conciliation, investigation, enquiry or adjudication.

R. 24. Power of Boards, Courts, Labour Courts, Tribunals and National Tribunals.—

In addition to the powers conferred by the Act, Boards, Courts, Labour Courts, Tribunals and National Tribunals shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit, in respect of the following matters, namely:—

(a) discovery and inspection;

(b) granting adjournment;

(c) reception of evidence taken on affidavit,

and the Board, Court, Labour Court, Tribunal or National Tribunal may summon and examine any person whose evidence appears to it to be material and shall be deemed to be a civil court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898[20].

R. 25. Assessors.—

Where assessors are appointed to advise a Tribunal or National Tribunal under sub-section (4) of section 7A or sub-section (4) of section 7B or by the Court, Labour Court, Tribunal or National Tribunal under sub-section (5) of section 11, the Court, Labour Court, Tribunal or National Tribunal as the case may be, shall, in relation to proceeding before it, obtain the advice of such assessors, but such advice shall not be binding on it.

R. 26. Fees for copies of awards or other documents of Labour Court, Tribunal or National Tribunal.—

Fees for making a copy of an award or an order of a Labour Court, Tribunal or National Tribunal or any document filed in any proceedings before a Labour Court, Tribunal or National Tribunal be charged at the rate of Re. 1 per page.]

For certifying a copy of any such award or order or document, a fee of Re. 1 shall be payable.

Copying and certifying fees shall be payable in cash in advance.

Where a party applies for immediate delivery of a copy of any such award or order or document, an additional fee equal to one-half of the fee leviable under this rule shall be payable.

R. 27. Decision by majority.—

All questions arising for decision at any meeting of a Board or Court, save where the Court consists of one person, shall be

decided by a majority of the vote of the members thereof (including the Chairman) present at the meeting. In the event of an equality of votes the Chairman shall also have a casting vote.

[22]**[R. 28. Correction of errors.—**

A Board, Court, Labour Court, Tribunal, National Tribunal, or Arbitrator may at any time correct any mistake or error arising from an accidental slip or omission in any proceedings, report, award or decision either of its or his own motion or on application of any of the parties.]

R. 29. Right of representatives.—

The representatives of the parties appearing before a Board, Court, Labour Court, Tribunal or National Tribunal or an Arbitrator shall have the right of examination, cross-examination and of addressing the Board, Court, Labour Court, Tribunal or National Tribunal or Arbitrator when an evidence has been called.

R. 30. Proceedings before a Board, Court, Labour Court, Tribunal or National Tribunal.—

The proceedings before a Board, Court, Labour Court, Tribunal or National Tribunal shall be held in public:

Provided that the Board, Court, Labour Court, Tribunal or National Tribunal may at any stage direct that any witness shall be examined or its proceedings be held in camera.

PART IV REMUNERATION OF CHAIRMAN AND MEMBERS OF COURTS, PRESIDING OFFICERS OF LABOUR COURTS, TRIBUNALS AND NATIONAL TRIBUNALS, ASSESSORS AND WITNESSES

R. 31. Traveling allowance.—

The Chairman or a member of a Board or Court or the Presiding Officer or an Assessor of a Labour Court, Tribunal or National Tribunal, if a non-official, shall be entitled to draw traveling allowance and halting allowance, for any journey performed by him in connection with the performance of his duties, at the rates admissible and subject to the conditions applicable to a Government servant of the first grade under the Supplementary Rules issued by the Central Government from time to time.

R. 32. Fees.—

The Chairman and a member of a Board or Court, the Presiding Officer and an Assessor of a Labour Court, Tribunal or National Tribunal wherever he is not a salaried officer of Government may be granted such fees as may be sanctioned by the Central Government in each case.

R. 33. Expenses of witnesses.—

Every person who is summoned and duly attends or otherwise appears as a witness before a Board, Court, Labour Court, Tribunal or National Tribunal or an Arbitrator shall be entitled to an allowance for expenses according to the scale for the time being in force with respect to witnesses in civil courts in the State where the in State where the investigation, enquiry, adjudication or arbitration is being conducted.

PART V NOTICE OF CHANGE

R. 34. Notice of change.—

Any employer intending to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule [23][to the Act] shall give notice of such intention in Form E.

[24][The notice shall be displayed conspicuously by the employer on a notice board at the main entrance to the establishment in the Manager's Office:

Provided that where any registered trade union of workmen exists, a copy of the notice shall also be served by registered post

on the secretary of such union.]

R. 35. [25]**[***]**

PART VI REPRESENTATION OF PARTIES

R. 36. Form of authority under section 36.—

The authority in favour of a person or persons to represent a workman or group of workmen or an employer in any proceeding under the Act shall be in Form F.

R. 37. Parties bound by acts of representative.—

A party appearing by a representative shall be bound by the acts of that representative.

PART VII WORKS COMMITTEE

R. 38. Constitution.—

Any employer to whom an order made under sub-section (1) of section 3 relates shall forthwith proceed to constitute a Works Committee in the manner prescribed in this part.

R. 39. Number of members.—

The number of members constituting the Committee shall be fixed so as to afford representation to the various categories, groups and class of workmen engaged in, and to the sections, shops or departments of the establishment:

Provided that the total number of members shall not exceed twenty.

Provided further that the number of representatives of the workmen shall not be less than the number of representatives of the employer.

R. 40. Representatives of employer.—

Subject to the provisions of these rules, the representatives of the employer shall be nominated by the employer and shall, as far as possible, be officials in direct touch with or associated with the working of the establishment.

R. 41. Consultation with trade unions.—

Where any workmen of an establishment are members of a registered trade union the employer shall ask the union to inform him in writing—

(a) how many of the workmen are members of the union; and

(b) how their membership is distributed among the sections, shops or departments of the establishment.

Where an employer has reason to believe that the information furnished to him under sub-rule (1) by any trade union is false, he may, after informing the union, refer the matter [26][to the Assistant Labour Commissioner (Central) concerned for his decision; and the Assistant Labour Commissioner (Central)] after hearing the parties, shall decide the matter and his decision shall be final.

R. 42. Group of workmen's representatives.—

On receipt of the information called for under rule 41, the employer shall provide for the election of workmen's representative on the Committee in two groups.

those to be elected by the workmen of the establishment who are members of the registered trade unions, and

those to be elected by the workmen of the establishment who are not members of the registered trade union or unions,

bearing the same proportion to each other as the union members in the establishment bear to the non-members:

Provided that where more than half the workmen are members of the union or any one of the unions, no such division shall be made:

Provided further that where a registered trade union neglects or fails to furnish the information called for under sub-rule (1) of rule 41 within one month of the date of the notice requiring it to furnish such information such union shall for the purpose of this rule be treated as if it did not exist:

Provided further that where any reference has been made by the employer under sub-rule (2) of rule 41, the election shall be held on receipt of the decision of [27][Assistant Labour Commissioner (Central)].

R. 43. Electoral constituencies.—

Where under rule 42 the workmen's representatives are to be elected in two groups, the workmen entitled to vote shall be divided into two electoral constituencies, the one consisting of those who are members of a registered trade union and the other of those who are not:

Provided that the employer may, if he thinks fit, sub-divide the [28][electoral constituency or constituencies, as the case may be] and direct that workmen shall vote in either by groups, sections, shops or departments.

R. 44. Qualification of candidates for election.—

Any workman of not less than 19 years of age and with a service of not less than one year in the establishment may, if nominated as provided in these rules, be a candidate for election as a representative of the workmen on the Committee:

Provided that the service qualification shall not apply to the first election in an establishment which has been in existence for less than a year.

[29][*Explanation.*—A workman who has put in a continuous service of not less than one year in two or more establishments belonging to the same employer shall be deemed to have satisfied the service qualification prescribed under this rule.]

R. 45. Qualifications for voters.—

All workmen [30][***] who are not less than 18 years of age and who have put in not less than 6 months' [31][continuous service in the establishment shall be entitled to vote in the election of the representative of workmen].

[32][*Explanation.* —

A workman who has put in continuous service of not less than 6 months in two or more establishments belonging to the same employer shall be deemed to have satisfied the service qualification prescribed under this rule.]

R. 46. Procedure for election.—

The employer shall fix a date as the closing date for receiving nominations from candidates for election as workmen's representatives on the committee.

For holding the election, the employer shall fix a date which shall not be earlier than three days and later than fifteen days after the closing date for receiving nominations.

The dates so fixed shall be notified at least seven days in advance to the workmen and the registered trade union or unions concerned. Such notice shall be affixed on the notice board or given adequate publicity amongst the workmen. The notice shall specify the number of seats to be elected by the groups, sections, shops or departments and the number to be elected by the members of the registered trade union or unions and by the non-members.

A copy of such notice shall be sent to registered trade union or unions concerned.

R. 47. Nomination of candidates for election.—

Every nomination shall be made on a nomination paper in Form G copies of which shall be supplied by the employer to the workmen requiring them.

Each nomination paper shall be signed by the candidate to whom it relates and attested by at least two other voters belonging to the group, section, shop or department the candidate seeking election will represent, and shall be delivered to the employer.

R. 48. Scrutiny of nomination papers.—

On the day following the last day fixed for filing nomination papers, the nomination papers shall be scrutinised by the employer in the presence of the candidates and the attesting persons and those which are not valid shall be rejected.

For the purpose of sub-rule (1), a nomination paper shall be held to be not valid if (a) the candidate nominated is ineligible for membership under rule 44, or (b) the requirements of rule 47 have not been complied with:

Provided that where a candidate or an attesting person is unable to be present at the time of scrutiny, he may send a duly authorised nominee for the purpose.

[33]**[R. 48A. Withdrawal of candidates validly nominated.—**

Any candidate whose nomination for election has been accepted may withdraw his candidature within 48 hours of the completion of scrutiny of nomination papers.]

R. 49. Voting in election.—

If the number of candidates who have been validly nominated is equal to the number of seats, the candidates shall be forthwith declared duly elected.

If in any constituency the number of candidates is more than the number of seats allotted to it, voting shall take place on the day fixed for election.

The election shall be held in such manner as may be convenient for each electoral constituency.

The voting shall be conducted by the employer, and if any of the candidates belong to a union such of them as the union may nominate shall be associated with the election.

Every workman entitled to vote at an electoral constituency shall have as many votes as there are seats to be filled in the constituency:

Provided that each voter shall be entitled to cast only one vote in favour of any one candidate.

R. 50. Arrangements for election.—

The employer shall be responsible for all arrangements in connection with the election.

R. 51. Officers of the Committee.—

The Committee shall have among its office-bearers a Chairman, a Vice-Chairman, a Secretary and a Joint-Secretary. The Secretary and the Joint-Secretary shall be elected every year.

The Chairman shall be nominated by the employer from amongst the employer's representatives on the Committee and he shall, as far as possible, be the head of establishment.

The Vice-Chairman shall be elected by the members, on the Committee representing the workers, from amongst themselves:

Provided that in the event of equality of votes in the election of the Vice-Chairman, the matter shall be decided by draw of a lot.]

The Committee shall elect the Secretary and the Joint Secretary provided that where the Secretary is elected from amongst the representatives of the employers, the Joint Secretary shall be elected from amongst the representatives of the workmen and vice versa:

Provided that the post of the Secretary or the Joint Secretary, as the case may be, shall not be held by a representative of the employer or the workmen for two consecutive years:

[35][*Provided further* that the representatives of the employer shall not take part in the election of the Secretary or Joint Secretary, as the case may be, from amongst the representatives of the workmen and only the representatives of the workmen shall be entitled to vote in such elections.]

In any election under sub-rule (3), in the event of equality of votes, the matter shall be decided by a draw of lot.]

R. 52. Term of office.—

The term of office of the representatives on the committee other than a member chosen to fill a casual vacancy shall be two years.]

A member chosen to fill a casual vacancy shall hold office for the unexpired term of his predecessor.

A member who without obtaining leave for the Committee, fails to attend three consecutive meetings of the Committee shall forfeit his membership.

[38]**[R. 53. Vacancies.—**

In the event of workmen's representative ceasing to be a member under sub-rule (3) of rule 52 or ceasing to be employed in the establishment or in the event of his ceasing to represent the trade or vocation he was representing, or resignation or death, his successor shall be elected in accordance with the provisions of this Part from the same category, group, section, shop or department to which the member vacating the seat belonged.]

R. 54. Power to co-opt.—

The Committee shall have the right to co-opt in a consultative capacity persons employed in the establishment having particular or special knowledge of a matter under discussion. Such co-opted member shall not be entitled to vote and shall be present at meetings only for the period during which the particular question is before the Committee.

R. 55. Meetings.—

The Committee may meet as often as necessary but not less often than once in three months (a quarter).

The Committee shall at its first meeting regulate its own procedure.

R. 56. Facilities for meeting, etc.—

The employer shall provide accommodation for holding meetings of the Committee. He shall also provide all necessary

facilities to the Committee and to the members thereof for carrying out the work of the Committee. The Committee shall ordinarily meet during working hours of the establishment concerned on any working day and the representative of the workmen shall be deemed to be on duty while attending the meeting.

The Secretary of the Committee may with the prior concurrence of the Chairman, put up notice regarding the work of the Committee on the notice board of the establishment.]

[41]**[R. 56A. Submission of returns.—**

The employer shall submit half yearly returns as in Form G 1 in triplicate to the [42][Assistant Labour Commissioner (Central)] concerned not later than the 20th day of the month following the half-year.]

R. 57. Dissolution of Works Committee.—

The Central Government, or where the power under section 3 has been delegated to any officer or authority under section 39, such officer or authority may, after making such inquiry as it or he may deem fit, dissolve any Works Committee at any time, by an order in writing, if he or it is satisfied that the Committee has not been constituted in accordance with these rules or that not less than two-thirds of the number of representatives of the workmen have without any reasonable justification failed to attend three consecutive meetings of the Committee or that the Committee has, for any other reason, ceased to function:

Provided that where a Works Committee is dissolved under this rule the employer may, and if so required by the Central Government or, as the case may be, by such officer or authority, shall take steps to re-constitute the Committee in accordance with these rules.

PART VIII MISCELLANEOUS

R. 58. Memorandum of settlement.—

A settlement arrived at in the course of conciliation proceedings or otherwise, shall be in Form H.

The settlement shall be signed by—

(a) in the case of an employer, by the employer himself, or by his authorised agent, or when the employer is an incorporated company or other body corporate, by the agent, manager or other principal officer of the corporation;

43[(b) in the case of the workmen, by any officer of a trade union of the workmen or by five representatives of the workmen duly authorised in this behalf at meeting of the workmen held for the purpose;]

44[(c) in the case of the workman in an industrial dispute under section 2A of the Act, by the workman concerned.]

[45][*Explanation*.—In this rule "officer" means any of the following officers, namely:—

(a) the President;

(b) the Vice-President;

(c) the Secretary (including the General Secretary);

(d) a Joint Secretary;

(e) any other officer of the trade union authorised in this behalf by the President and Secretary of Union.]

Where a settlement is arrived at in the course of conciliation proceeding the Conciliation Officer shall send a report thereof to the Central Government together with a copy of the memorandum of settlement signed by the parties to the dispute.

Where a settlement is arrived at between an employer and his workmen otherwise than in the course of conciliation proceeding before a Board or a Conciliation Officer, the parties to the settlement shall jointly send a copy thereof to the Central Government, the Chief Labour Commissioner (Central) New Delhi, and the Regional Labour Commissioner (Central) and to the [46][Assistant Labour Commissioner (Central)] concerned.

R. 59. Complaints regarding change of conditions of service, etc.—

Every complaint under section 33A of the Act shall be presented in triplicate in Form I and shall be accompanied by as many copies of the complaint as there are opposite parties to the complaint.

Every complaint under sub-rule (1) shall be verified at the foot by the workmen making it or by some other person proved to the satisfaction of the Labour Court, Tribunal or National Tribunal to be acquainted with the facts of the case.

The person verifying shall specify, by references to the numbered paragraphs of the complaint, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

R. 60. Application under section 33.—

An employer intending to obtain the express permission in writing of the Conciliation Officer, Board, Labour Court, Tribunal or National Tribunal, as the case may be, under sub-section (1) or sub-section (3) of section 33 shall present an application in Form J in triplicate to such Conciliation Officer, Board, Labour Court, Tribunal or National Tribunal and shall file along with the application as many copies thereof as there are opposite parties.

An employer seeking the approval of the Conciliation Officer, Board, Labour Court, Tribunal or National Tribunal, as the case may be, of any action taken by him under clause (a) or clause (b) of sub-section (2) of section 33 shall present an application in Form K in triplicate to such Conciliation Officer, Board, Labour Court, Tribunal or National Tribunal and shall file along with the application as many copies thereof as there are opposite parties.

Every application under sub-rule (1) or sub-rule (2) shall be verified at the foot by the employer making it or by some other person proved to the satisfaction of the Conciliation Officer, Board, Labour Court, Tribunal or National Tribunal to be acquainted with the facts of the case.

The person verifying shall specify by reference to the numbered paragraphs of the application, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

R. 61. Protected workmen.—

Every registered trade union connected with an industrial establishment, to which the Act applies, shall communicate to the employer before the [47][30th April] every year, the names and addresses of such of the officers of the union who are employed in that establishment and who, in the opinion of the union should be recognised as “protected workmen”. Any change in the incumbency of any such officer shall be communicated to the employer by the union within fifteen days of such change.

The employer shall, subject to section 33, sub-section (4), recognise such workmen to be “protected workmen” for the purposes of sub-section (3) of the said section and communicate to the union, in writing, within fifteen days of the receipt of the names and addresses under sub-rule (1), the list of workmen recognised as protected workmen [48][for the period of twelve months from the date of such communication].

Where the total number of names received by the employer under subrule (1) exceeds the maximum number of protected workmen, admissible for the establishment, under section 33, sub-section (4), the employer shall recognise as protected workmen only such maximum number of workmen:

Provided that where there is more than one registered trade union in the establishment, the maximum number shall be so distributed by the employer among the unions that the numbers of recognised protected workmen in individual unions bear

roughly the same proportion to one another as the membership figures of the unions. The employer shall in that case intimate in writing to the President or the Secretary of the union the number of protected workmen allotted to it:

Provided further that where the number of protected workmen allotted to a union under this sub-rule falls short of the number of officers of the union seeking protection, the union shall be entitled to select the officers to be recognised as protected workmen. Such selection shall be made by the union and communicated to the employer within five days of the receipt of the employer's letter.

When a dispute arises between an employer and any registered trade union in any matter connected with the recognition of 'protected workmen' under this rule, the dispute shall be referred to the [49][any Regional Labour Commissioner (Central) or] [50][Assistant Labour Commissioner (Central)] concerned, whose decision thereon shall be final.

[51]**[R. 62. Application for recovery of dues.—**

Where any money is due from an employer to a workman or a group of workmen under a settlement or an award or under the provisions of Chapter VA, [52][Chapter VB], the workman or the group of workmen, as the case may be, may apply in Form K 1 for the recovery of the money due:

Provided that in the case of a person authorised in writing by the workman, or in the case of the death of the workman the assignee or heir of the deceased workman, the application shall be made in Form K 2.

Where any workman or a group of workmen is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money, the workman or the group of workmen, as the case may be, may apply to the specified Labour Court in Form K 3 for the determination of the amount due or, as the case may be, the amount at which such benefit should be computed:]

[53][*Provided* that in the case of the death of a workman, application shall be made in Form K 4 by the assignee or heir of the deceased workman].

R. 63. Appointment of Commissioner.—

Where it is necessary to appoint a Commissioner under sub-section (3) of section 33C of the Act, the Labour Court may appoint a person with experience in the particular industry, trade or business involved in the industrial dispute or a person with experience as a judge of civil court, or as a stipendiary magistrate or as a Registrar or Secretary of a Labour Court, or Tribunal constituted under any Provincial Act or State Act or of a Labour Court, Tribunal or National Tribunal constituted under the Act or of the Labour Appellate Tribunal constituted under the Industrial Disputes (Appellate Tribunal) Act, 1950.

R. 64. Fees for the Commissioner, etc.—

The Labour Court shall, after consultation with the parties, estimate the probable duration of the enquiry and fix the amount of the Commissioner's fees and other incidental expenses and direct the payment thereof into the nearest treasury, within a specified time, by such party or parties and in such proportion as it may consider fit. The Commission shall not issue until satisfactory evidence of the deposit into the treasury of the sum fixed is filed before the Labour Court:

Provided that the Labour Court may from time to time direct that any further sum or sums be deposited into the treasury within such time and by such parties as it may consider fit:

Provided further that the Labour Court may in its discretion, extend the time for depositing the sum into the treasury.

The Labour Court may, at any time, for reasons to be recorded in writing, vary the amount of the Commissioner's fees in consultation with the parties.

The Labour Court may direct that the fees shall be disbursed to the Commissioner in such installments and on such date as it may consider fit.

The undisbursed balance, if any, of the sum deposited shall be refunded to the party or parties who deposited the sum in the same proportion as that in which it was deposited.

R. 65. Time for submission of report.—

Every order for the issue of a Commission shall appoint a date, allowing sufficient time, for the Commissioner to submit his report.

If for any reason the Commissioner anticipates that the date fixed for the submission of his report is likely to be exceeded he shall apply, before the expiry of the said date, for extension of time setting forth grounds thereof and the Labour Court shall take such grounds into consideration in passing orders on the application:

Provided that the Labour Court may grant extension of time notwithstanding that no application for such extension has been received from the Commissioner within the prescribed time limit.

R. 66. Local investigation.—

In any industrial dispute in which the Labour Court deems a local investigation to be requisite or proper for the purpose of computing the money value of a benefit, the Labour Court may issue a commission to a person referred to in rule 63 directing him to make such investigation and to report thereon to it.

R. 67. Commissioner's report.—

The Commissioner after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence together with his report in writing signed by him to the Labour Court.

The report of the Commissioner and the evidence taken by him (but not evidence without the report) shall be evidence in the industrial dispute and shall form part of the record of the proceedings in the industrial dispute; but the Labour Court or, with the permission of Labour Court any of the parties to the industrial dispute may examine the Commissioner personally before the Labour Court regarding any of the matters referred to him or mentioned in his report or as to his report, or, as to the manner in which he had made the investigation.

Where the Labour Court is for any reason dissatisfied with the proceedings of the Commissioner it may direct such further enquiry to be made as it shall think fit.

R. 68. Powers of Commissioner.—

Any Commissioner appointed under these rules may unless otherwise directed by the order of appointment—

(a) examine the parties themselves and any witnesses whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(b) call for and examine documents and other things relevant to the subject of enquiry;

(c) at any reasonable time enter upon or into any premises mentioned in the order.

R. 69. Summoning of witnesses, etc.—

The provisions of the Code of Civil Procedure, 1908 (5 of 1908) relating to the summoning, attendance, examination of witnesses and penalties to be imposed upon witnesses, shall apply to persons required to give evidence or to produce documents before the Commissioner under these rules.

Every person who is summoned and appears as a witness before the Commissioner shall be entitled to payment by the Labour Court out of the sum deposited under rule 64, of an allowance for expenses incurred by him in accordance with the scale for the time being in force for payment of such allowance to witnesses appearing in the Civil Courts.

R. 70. Representation of parties before the Commissioner.—

The parties to the Industrial Dispute shall appear before the Commissioner, either in person or by any other person who is competent to represent them in the proceedings before the Labour Court.

[54]**[R. 70A. Preservation of records by the National Industrial Tribunals, Industrial Tribunals or Labour Courts.—**

The records of the National Industrial Tribunals, Industrial Tribunals or Labour Courts specified in Column 1 of the Table below shall be preserved, for the periods specified in the corresponding entry in column 2 thereof after the proceedings are finally disposed of by such National Tribunals, Industrial Tribunals, Labour Courts.

TABLE

Records	**Number of years for which the records shall be preserved**
(i) Orders and Judgments of National Industrial Tribunals, Industrial Tribunals or Labour Courts.	10 years
(ii) Exhibited documents in the above mentioned Tribunals or Courts.	10 years
(iii) Other papers.	7 years

Notwithstanding anything contained in sub-rule (1) the records of the National Industrial Tribunals, Industrial Tribunals or Labour Courts, connected with writ petitions, if any, filed in the High Courts or Supreme Court, or connected with appeals by special leave, if any, filed in the Supreme Court shall be preserved at least till the final disposal of such writ petitions or appeal by special leave.]

R. 71. Notice of strike.—

The notice of strike to be given by workmen in public utility service shall be in Form L.

On receipt of a notice of a strike under sub-rule (1), the employer shall forthwith intimate the fact to the Conciliation Officer having jurisdiction in the matter.

R. 72. Notice of lock-out.—

The notice of lock-out to be given by an employer carrying on a public utility service shall be in Form M. [55][The notice shall be displayed conspicuously by the employer on a notice board at the main entrance to the establishment and in the Manager's Office:

Provided that where a registered trade union exists, a copy of the notice shall also be served on the Secretary of the Union.]

R. 73. Report of lock-out or strike.—

The notice of lock-out or strike in a public utility service to be submitted by the employer under sub-section (3) of section 22, shall be in Form N.

R. 74. Report of notice of strike or lock-out.—

The report of notice of a strike or lock-out to be submitted by the employer under sub-section (6) of section 22, shall be sent by registered post or given personally to the [56][Assistant Labour Commissioner (Central)] appointed for local area concerned, with copy by registered post to—

The Administrative Department of the Government of India concerned,

The Regional Labour Commissioner (Central) for the Zone,

Chief Labour Commissioner (Central),

Ministry of Labour of the Government of India,

Labour Department of the State Government concerned, and

The District Magistrate concerned.

R. 75. Register of settlements.—

The [57][Conciliation Officer] shall file all settlements effected under this Act in respect of disputes in the area within his jurisdiction in a register maintained for the purpose as in Form O.

[58][R. 75A. Notice of lay-off.—

If any workmen employed in an industrial establishment as defined in the explanation below section 25A not being an industrial establishment referred to in sub-section (1) of that section is laid-off, then, the employer concerned shall give notices of commencement and termination of such lay-off in Forms O-1 and O-2 respectively within seven days of such commencement or termination, as the case may be.

Such notices shall be given by an employer in every case irrespective of whether, in his opinion, the workman laid off is or is not entitled to compensation under section 25C .]

[59][R. 75B. Application for permission for lay-off under section 25M.—

Application for permission to lay-off any workman under sub-section (1), or for permission to continue a lay-off under [60][sub-section (3)] of section 25M shall be made in Form O-3 and delivered to the authority specified under sub-section (1) either personally or by registered post acknowledgment due and where the application is sent by registered post the date on which the same is delivered to the said authority shall be deemed to be the date on which the application is made, for the purposes of [61][sub-section (5)] of the said section.

The application for permission shall be made in triplicate and copies of such application shall be served by the employer on the workmen concerned and a proof to that effect shall also be submitted by the employer along with the application.]

The employer concerned shall furnish to the authority to whom the application for permission has been made such further information as the authority considers necessary for arriving at a decision on the application, as and when called for by such authority, so as to enable the authority to communicate the permission or refusal to grant permission within the period specified in [63][sub-section (5)] of section 25M.

Where the permission to lay-off has been granted by the said authority, the employer concerned shall give to the Regional Labour Commissioner (Central) concerned, a notice of commencement and termination of such lay-off in Forms O-1 and O-2 respectively and where permission to continue a lay-off has been granted by the said authority, the employer shall give to the Regional Labour Commissioner (Central) concerned, a notice of commencement of such lay-off in Form O-1, in case such a notice has not already been given under sub-rule (1) of rule 75A, and a notice of termination of such lay-off in Form O-2.

The notice of commencement and termination of lay-off referred to in subrule (4) shall be given within the period specified in sub-rule (1) of rule 75A.]

[64][R. 76. Notice of retrenchment.—

If any employer desires to retrench any workman employed in his industrial establishment who has been in continuous service for not less than one year under him (hereinafter referred to as 'workman' in this rule and in rules 77 and 78), he shall give notice of such retrenchment as in Form P to the Central Government, the Regional Labour Commissioner (Central) and Assistant Labour Commissioner (Central) and the Employment Exchange concerned and such notice shall be served on that Government, the Regional Labour Commissioner (Central), the Assistant Labour Commissioner (Central), and the Employment Exchange concerned by registered post in the following manner:—

(a) where notice is given to the workman, notice of retrenchment shall be sent within three days from the date on which notice is given to the workman;

(b) where no notice is given to the workman and he is paid one month's wages in lieu thereof, notice of retrenchment shall be sent within three days from the date on which such wages are paid; and

(c) where retrenchment is carried out under an agreement which specifies a date for the termination of service, notice of retrenchment shall be sent so as to reach the Central Government, the Regional Labour Commissioner (Central), the Assistant Labour Commissioner (Central), and the Employment Exchange concerned, at least one month before such date:

Provided that if the date of termination of service agreed upon is within 30 days of the agreement, the notice of retrenchment shall be sent to the Central Government, the Regional Labour Commissioner (Central), the Assistant Commissioner (Central), and the Employment Exchange concerned, within 3 days of the agreement.]

[65]**[R. 76A. Notice of, and application for permission for, retrenchment.—**

Notice [66][or, as the case may be, the application under] sub-section (1) of section 25N for retrenchment shall be served in Form PA and served on the Central Government or such authority as may be specified by the Government under the said clause either personally or by registered post acknowledgment due and where the notice is served by registered post, the date on which the same is delivered to the Central Government or the authority shall be deemed to be date of service of the notice for the purposes of [67][sub-section (4)] of the said section.

[68][***]

The notice or, as the case may be, the application, shall be made in triplicate and copies of such notice or, as the case may be, the application, shall be served by the employer on the workmen concerned and a proof to that effect Shall also be submitted by the employer along with the notice or, as the case may be, the application.

The employer concerned shall furnish to the Central Government or the authority to whom the notice for retrenchment has been given or the application for permission for retrenchment has been made, under subsection (1) of section 25N, such further information as the Central Government or, as the case may be, the authority considers necessary for arriving at a decision on the notice or, as the case may be, the application, as and when called for by such authority so as to enable the Central Government or the authority to communicate its permission, or refusal to grant permission within the period specified in sub-section (4) of section 25N .]

[72]**[R. 76B.] Notice of closure.—**

If an employer intends to close down an undertaking he shall give notice of such closure in Form Q to the Central Government, the Regional Labour Commissioner (Central), the Assistant Labour Commissioner (Central), and the Employment Exchange concerned, by registered post.]

[73]**[R. 76C. Notice of, and application for permission for, closure.—**

Notice under sub-section (1) of section 25-O of intended closure shall be given in Form QA and served on the Central Government either personally or by registered post acknowledgment due.]

[74][A copy of such application shall be served simultaneously by registered post on the President or Secretary of registered trade

union(s) functioning in the establishment and a notice in this regard shall also be displayed conspicuously by the employer on a notice board at the main entrance to 1 Sub-rule the establishment for the information of all the concerned workmen at the same time when applications are served on the Central Government.]

The notice, or, as the case may be, the application shall be made intriplicate.

The employer concerned shall furnish to the Central Government to whom the notice of intended closure has been given or the application for permission to close down has been made such further information as that Government considers necessary, for arriving at a decision on the notice, or, as the case may be, the application, and calls for from such employer.]

R. 77. Maintenance of seniority list of workmen.—

The employer shall prepare a list of all workmen in the particular category from which retrenchment is contemplated arranged according to the seniority of their service in that category and cause a copy thereof to be pasted on a notice board in a conspicuous place in the premises of the industrial establishment at least seven days before the actual date of retrenchment.

R. 78. Re-employment of retrenched workmen.—

At least ten days before the date on which vacancies are to be filled, the employer shall arrange for the display on a notice board in a conspicuous place in the premises of the industrial establishment details of those vacancies and shall also give intimation of those vacancies by registered post to every one of all the retrenched workmen eligible to be considered thereof, to the address given by him at the time of retrenchment or at any time thereafter:

Provided that where the number of such vacancies is less than the number of retrenched workmen, it shall be sufficient if intimation is given by the employer individually to the senior-most retrenched workmen in the list referred to in rule 77 the number of such senior-most workmen being double the number of such vacancies:

Provided further that where the vacancy is of a duration of less than one month there shall be no obligation on the employer to send intimation of such vacancy to individual retrenched workmen:

[77][*Provided* also that if a retrenched workman, without sufficient cause being shown in writing to the employer, does not offer himself for re-employment on the date or dates specified in the intimation sent to him by the employer under this sub-rule, the employer may not intimate to him the vacancies that may be filled on any subsequent occasion.]

Immediately after complying with the provisions of sub-rule (1), the employer shall also inform the trade unions connected with the industrial establishment, of the number of vacancies to be filled and names of the retrenched workmen to whom intimation has been sent under that sub-rule:

Provided that the provisions of this sub-rule need not be complied with by the employer in any case where intimation is sent to every one of the workmen mentioned in the list prepared under rule 77.

R. 79. Penalties.—

Any breach of these rules shall be punishable with fine not exceeding fifty rupees.

R. 80. Repeal.—

The Industrial Disputes (Central) Rules, 1947, are hereby repealed:

Provided that any order made or action taken under the rules so repealed shall be deemed to have been made or taken under the corresponding provisions of these rules.

SCHEDULE

[Forms]

[78][FORM A

(*See* rule 3)

FORM OF APPLICATION FOR THE REFERENCE OF AN INDUSTRIAL DISPUTE TO A BOARD OF CONCILIATION/COURT OF ENQUIRY/LABOUR COURT/ TRIBUNAL/NATIONAL TRIBUNAL UNDER SECTION 10(2) of the INDUSTRIAL DISPUTES ACT, 1947

Whereas an industrial dispute **is apprehended/exists between..... and.....and it is expedient that the matters specified in the enclosed statement which are **connected with the dispute /relevant to the dispute should be referred for **enquiry/adjudication by a Board of conciliation/a court of Enquiry/a Labour Court/a Tribunal/a National Tribunal for investigation and settlement, an application is hereby made under sub-section (2) of section 10 of the Industrial Disputes Act, 1947, that the **said matters/said dispute should be referred to **a Board of conciliation/a court of Enquiry/a Labour Court/a Tribunal/a National Tribunal.

This application is made by the undersigned who have/has been duly authorised to do so by virtue of a resoluation (copy enclosed) adopted by a majority of the members present at a meeting of..... the held on the..... 20……

A statement giving the particulars required under rule 3 of the Industrial Disputes (Central) Rules, 1957, is attached. Dated the.....

Signature of employer ** ..... or Agent .....

or manager ..... or principal officer of the Corporation.....

Signature of the President of the trade union **..... Secretary of the trade union.....Or **Signature of five representatives duly authorised (vide resolution enclosed) .....

[79][or "Signature of the workman..... Or **Signature of the workman in the same establishment duly authorised (vide authorization enclosed).....]

To

The Secretary to the Government of India, Ministry of Labour.

Statement required under rule 3 of the Industrial Disputes (Central) Rules, 1957, to accompany the form of application prescribed under sub-section (2) of section 10 of the Industrial Disputes Act, 1947:

(a) Parties to the dispute including the name and address of the establishment or undertaking involved;

(b) Specific matters in dispute;

(c) Total number of workmen employed in the undertaking affected;

(d) Estimated number of workmen affected or likely to be affected by the dispute;

(e) Efforts made by the parties themselves to adjust the dispute.

[80][Copy to—

(i) The [81][Assistant Labour Commissioner (Central)].....[here enter office address of the Assistant Labour Commissioner (Central) in the local area concerned];

(ii) The Regional Labour Commissioner (Central);

(iii) The Chief Labour Commissioner (Central), New Delhi.]

** Delete whichever is not applicable.

FORM B

(See rule 6)

Whereas an industrial dispute has arisen/is apprehended between..... and.....and it is expedient to refer the said dispute under section 10 of the Industrial Disputes Act, 1947, to a Board of Conciliation for the purpose of investigating the same and for promoting a settlement thereof, you are hereby required to intimate to the undersigned not later than the ..... the name(s) and address (es) of one (two) person(s) whom you wish to recommend for appointment as your representative(s) on the said Board.

If you fail to make the recommendation by the date specified above, the Central Government will select and appoint such person(s) as it thinks fit to represent you.

Secretary to the Government of India,

Ministry of Labour.

[82][FORM C

(*See* rule 7)

AGREEMENT

[UNDER SECTION 10A of the INDUSTRIAL DISPUTES ACT, 1947]

Name of the Parties:

……..……..……

Representing employers:

……

Representing workmen/workman:

……

It is hereby agreed between the parties to refer the following dispute to the arbitration of

..... [here specify the name(s) and address(es) of the arbitrator(s)].

(i) Specific matters in disputes;

(ii) Details of the parties to the dispute including the name and address of the establishment or undertaking involved;

(iii) Name of the workman in case he himself is involved in the dispute or the name of the Union, if any, representing the workmen or workman in question;

(iv) Total number of workmen employed in the undertaking affected;

(v) Estimated number of workmen affected or likely to be affected by the dispute.

*We further agree that the majority decisions of the arbitrators) be binding on us/ in case the arbitrators are equally divided in their opinion, that they shall appoint another person as umpire whose award shall be binding on us.

The arbitrator(s) shall make his (their) award within a period of..... [83][(here specify the period agreed upon by the parties) from the date of publication of this agreement in the Official Gazette by the appropriate Government] or

within such further time as is extended by mutual agreement between us in writing. In case the award is not made within the period aforementioned, the reference to arbitration shall stand automatically cancelled and we shall be free to negotiate for fresh arbitration.

Signature of the parties Representing employer

Witnesses: **Workman/Rep resenting workman/workmen

(1) …….

(2) …….

Copy to:

(i) [84][The Assistant Labour Commissioner (Central)], (here enter office address of the [85][Assistant Labour Commissioner (Central)] in local area concerned);

(ii) The Regional Labour Commissioner (Central).....

(iii) The Chief Labour Commissioner (Central), New Delhi;

(iv) The Secretary to the Government of India, Ministry of Labour, Employment and Rehabilitation (Department of Labour and Employment), New Delhi.

*****Where applicable

******Delete whichever is not applicable.

FORM D

(*See* rule 17)

SUMMONS

Whereas an industrial dispute between ..... and ..... has been referred to this Board of Conciliation for investigation and settlement. Court of Enquiry for investigation/Labour Court/Tribunal/National Tribunal for adjudication, under section 10 of the Industrial Disputes Act, 1947, you are hereby summoned to appear before the Board/Court/Labour Court/Tribunal/National Tribunal in person on the ..... day of ..... at ..... o'clock in the ..... noon to answer all material questions relating to the said dispute and you are directed to produce on that day all the books, papers and other documents and things in your possession or under control in any way relating to the matter under investigation by this Board/Court/Labour Court/Tribunal/National Tribunal.

Date .....

Chairman / Secretary,

Presiding Officer/Secretary

[86][FORM E

(See rule 34)

NOTICE OF CHANGE OF SERVICE CONDITION PROPOSED BY AN EMPLOYER

Name of employer

.....……

Address.....

Dated the.....day of.....20.....

In accordance with section 9A of the Industrial Disputes Act, 1947, I/we hereby give notice to all concerned that it is my/our intention to effect the change/changes specified in the annexure, with effect from.,.....in the conditions of service applicable to workmen in respect of the matters specified in the Fourth Schedule to the said Act.

Signature.....

Designation.....

ANNEXURE

(Here specify the change/changes, intended to be effected)

Copy forwarded to:

(1) The Secretary of registered trade union, if any;

(2) [87][Assistant Labour Commissioner (Central)]..... Here enter office address of the [88][Assistant Labour Commissioner (Central)] in the local area concerned];

(3) Regional Labour Commissioner (Central)..... Zone;

(4) Chief Labour Commissioner (Central), New Delhi.]

FORM F

(*See* rule 36)

Before (Here mention the authority concerned)

In the matter of:

Reference No.....of .....

..... workmen

Versus

Employer

I/we hereby authorise Shri/Sarvashree..... to represent me/us in the above matter.

Dated this.....day of.....20.....

Signature of person(s) nominating the representative(s)

Address Accepted.

Signature of representative(s).

Address.

FORM G

(See rule 47)

FORM OF NOMINATION PAPER

Name of Industrial Establishment	Group/Section/Shop/Department

I nominate ……. (here enter the name of the workmen's representative eligible for election) as a candidate for election to the Works Committee. He is eligible as a voter in the constituency for which he is nominated.

Signature of proposer. Date.....

I agree to the proposed nomination.

Signature of candidate Date.....

Attested by: (1)

(To be signed by any two voters belonging to the electoral constituency.)

[89][FORM G1

(*See* rule 56A)

PROGRESS REPORT ON CONSTITUTION AND FUNCTIONING OF WORKS COMMITTEE FOR THE HALF YEAR ENDINGTHE 30TH JUNE*/ 31ST DECEMBER

1. Name and address of the establishment……...……
2. Name of the employer……...……..
3.
   (a) Number of workmen employed……...……..
   (b) Name of Unions, if any……...…….
   (c) Affiliation of the Union(s) to the Central Organisations of workers……..……
4. If the Works Committee has been functioning—
   (a) Date of its constitution……..…….
   (b) Number of workmen's representatives (elected members)……..……..
   (c) Number of employer's representatives (nominated members)…….……
   (d) Number of meetings held during the half-year (with dates)…….……
5. If the Works Committee had not been functioning, -the difficulties encountered in its constitution/functioning.
6. General remarks, if any.

Date.....

Place..... Signature of employer or his representatives.

* Strike out the portion not applicable.

FORM H

(See rule 58)

FORM FOR MEMORANDUM OF SETTLEMENT

Names of Parties: ……..

Representing employer(s) :…….

Representing workmen:…….

Terms of settlement: ……. ……

Short Recital of the Case…….……

Signature of the parties.....

Witnesses:

(1) .....

(2) .....

Signature of ——— Conciliation Officer. / Board of Conciliation.

Copy to:

(1) [90][Assistant Labour Commissioner(Central)].....

[*Here enter the office address of the Assistant Labour Commissioner (Central) in the local area concerned*]

(2) Regional Labour Commissioner (Central) .....

(3) Chief Labour Commissioner (Central), New Delhi.....

(4) The Secretary to the Government of India, Ministry of Labour, New Delhi.

In case of settlements effected by——— Conciliation Officer / Board of Conciliation

***** In case where settlements are arrived at between the employer and his workmen otherwise than in the course of conciliation proceeding.

FORM I

(*See* rule 59)

COMPLAINTS REGARDING CHANGE OF CONDITIONS OF SERVICE

Labour Court.....

Before the ——— Tribunal / National Tribunal ..... complaint under section 33A

of the Industrial Disputes Act, 1947.

In the matter of :..... Reference No.....

A..... Complainant(s).

Versus

B..... Opposite Party(ies).

Address:

The petitioner(s) begs/beg to complain that the Opposite Party(ies) has/have been guilty of a contravention of the provisions of section 33 of the Industrial Disputes Act, 1947 (14 of 1947), as shown below:

(Here set out briefly the particulars showing the manner in which the alleged contravention has taken place and the grounds on which the order or act of the Management is challenged.)

The complainant(s) accordingly prays/pray that the

Labour Court
Tribunal
National Tribunal

may be pleased to decide the complaint set out above and pass such order or orders thereon as it may deem fit and proper.

The number of copies of .the complaint and its annexures required under rule 59 of the Industrial Dispute (Central) Rules, 1957, are submitted herewith.

Dated this.....day of.....20.....Signature of the Complainant(s)

Verification

I do solemnly declare that what is stated in paragraph..... above is true to my knowledge and that what is stated in paragraphs..... above is stated upon information received and believed by me to be true. This verification is signed by me at..... on .....day of.....20.....

Signature or Thumb impression of the person verifying

FORM J

[*See* rule 60 (1)]

BEFORE (HERE MENTION THE [91][ASSISTANT LABOUR COMMISSIONER (CENTRAL)] BOARD, LABOUR COURT, TRIBUNAL OR NATIONAL TRIBUNAL.)

Sub-section (1)

Application for permission under ———————— of section 33 of the Industrial Disputes Act, 1947 (14 of 1947). Sub-section (3)

In the matter of:..... Reference No.....

A.....Applicant

Address: .....

Versus

B..... Opposite Party(ies)

Address(es) :.....

The above-mentioned applicant begs to state as follows:—

[Here mention the action specified in clause (a) or clause (b) of sub-section (1) grounds on which the permission is sought for.]

The applicant, therefore, prays that express permission may kindly be granted to him to take the following action namely:

[Here mention the action specified in clause (a) or clause (b) of sub-section (1) …… sub-section (3) of section 33 .]

Signature of the applicant,

Dated this.....day of.....20.....

(Space for Verification)

Date (on which the verification was signed) .....

Place (at which the verification was signed) .....(Signature of person verifying).

FORM K

[*See* rule 60(2)]

DISCHARGE, DISMISSAL, ETC. PENDING PROCEEDINGS

Before (Here Mention the Conciliation Officer, Board, Labour Court, Tribunal or National Tribunal).

Application under sub-section (2) of section 33 of the Industrial Disputes Act, 1947 (14 of 1947)

In the matter of :..... Reference No.....

A.....…

Applicant.

Address:.....…

Versus

B.....

Opposite Party(ies).

Address: .....…

The above-mentioned applicant begs to state as follows;—

(Here set out the relevant facts and circumstances of the case.)

*The workmen/workman discharged/dismissed under clause (b) of sub-section (2) of section 33 has/have been paid wages for one month.

The applicant prays that the Conciliation Officer/Board/Labour Court/Tribunal/ National Tribunal may be pleased to approve of the action taken namely:

[Here mention the action taken under clause (a) or clause (b) of sub-section (2) of section 33 .]

Signature of the applicant.

Space for verification

Dated this.....day of.....20.....

Date (on which the verification was signed) .....

Place (at which the verification was signed)..... (Signature of the person verifying).

* Delete, if not applicable.

[92][FORM K 1

[*See* rule 62(1)]

APPLICATION UNDER SUB-SECTION (1) OF SECTION 33C OF THE INDUSTRIAL DISPUTES ACT, 1947

To

(1) The Secretary to the Government of India, Ministry of Labour and Employment, New Delhi.

(2) The Regional Labour Commissioner (Central)..... (here insert the name of the region).

Sir,

I/We have to state that 1 am/we are entitled to receive from M/s..... a sum of Rs. ..... on account of ..... under the provisions of [93][Chapter VA/ Chapter VB] of the Industrial Disputes Act, 1947/in terms of the award dated the..... given by..... /in terms of the settlement dated the ..... arrived at between the said M/s ..... and their workmen through..... the duly elected representatives.

I/We further state that I/we served the management with a demand notice by registered post on ..... for the said amount which the management has neither paid nor offered to pay to me/us even though a fortnight has since elapsed. The details of the amount have been mentioned in the statement hereto annexed.

I/We request that the said sum may kindly be recovered for the management under sub-section (1) of section 33C of the Industrial Disputes Act, 1947, and paid to me/us as early as possible.

	Signature of the applicant(s) Address(es)
	1.
Station:	2.
Date:	3.
	4.

ANNEXURE

(Here indicate the details of the amount(s) claimed.)]

[94][FORM K 2

[*See* rule 62(1)]

APPLICATION BY A PERSON AUTHORISED BY A WORKMAN OR BY THE ASSIGNEE OR HEIR OF A DECEASED WORKMAN UNDER SUB-SECTION (1) OF SECTION 33C of the INDUSTRIAL DISPUTES ACT, 1947

To

(1) The Secretary to the Government of India, Ministry of Labour and Employment, New Delhi.

(2) The Regional Labour Commissioner (Central).....(here insert the name of the region).

Sir,

I *Shri/Shrimati/Kumari.....have to state that *Shri/Shrimati Kumari..... *is/was entitled to receive from M/s..... a sum of Rs. ..... on account of..... under the provisions of [95][Chapter VA/Chapter VB] of the Industrial Disputes Act, 1947/in terms of the award dated the..... given by ...../in terms of the settlement, dated the.....arrived at between the said M/s..... and their workmen through..... the duly elected representatives.

I further state that I served the management with a demand notice by registered post on.....for the said amount which the management has neither paid nor offered to pay to me even though a fortnight has since elapsed. The details of the amount have been mentioned in the statement hereto annexed.

I request that the said sum may kindly be recovered from the management under sub-section (1) of section 33C of the Industrial Disputes Act, 1947, and paid to me as early as possible.

*I have been duly authorised in writing by.....(here insert the name of the workman) to make this application and to receive the payment of the aforesaid amount due to him.

*I am the assignee/heir of the deceased workman and am entitled to receive the payment of the aforesaid amount due to him.

Station..... Signature of the applicant.....

Date..... Address.....

ANNEXURE

(Here indicate the Retails of the amount claimed.)

*****Strike out the portions inapplicable.

[96][FORM K 3

[*See* rule 62(2)]

APPLICATION UNDER SUB-SECTION (2) OF SECTION 33C of the INDUSTRIAL DISPUTES ACT, 1947

Before the Central Government Labour Court at. ..... between.....and.....….

(1) Name of the applicant(s)

(2) Name of the employer

The petitioner (s).....…….a workman of…….....M/s. .....of.....The petitioner(s) undersigned, workmen of..... is/are entitled to receive from the said M/s. ..... the money /benefits mentioned in the statement hereto annexed.

It is prayed that the court be pleased to determine the amount /amounts due to the petitioner (s).

Signature or Thumb Impression (s) of the applicant(s)	Address (es)
1.	
2.	
3.	
4.	

Station:

Date:

ANNEXURE

(Here set out the details of the money due or the benefits accrued together with the case for their admissibility.)]

[97][FORM K 4

[*See* rule 62(2)]

APPLICATION BY A PERSON WHO IS AN ASSIGNEE OR HEIR OF A DECEASED WORKMAN UNDER SUB-SECTION (2) OF SECTION 33C of the INDUSTRIAL DISPUTES ACT, 1947 (14 OF 1947)

Before the Central Government Labour Court at .....

Between

(*i*) Name of the applicant/applicants

(*ii*) Name of the employer

I am/We are the assignee(s) of the deceased workman and am/are entitled to make an application on his behalf.

Shri..... former workman of M/s ..... of.....is entitled to receive from the said M/s..... the money/benefits mentioned in the statement hereto annexed;

It is prayed that the court be pleased to determine the amount/amounts due to the deceased workman.

Name and Address of workman.....

Signature or thumb impression of the applicant(s).....……

Address of the applicant(s).....

State:

Date:

ANNEXURE

Herein set out the details of the money due or the benefits accrued together with the case for their admissibility).]

FORM L

(See rule 71)

FORM OF NOTICE OF STRIKE TO BE GIVEN BY [1][UNION/WORKMEN] IN PUBLIC UTILITY SERVICE

NAME OF UNION

[Names of five elected representatives of workmen.]

Dated the.....day of.....20.....

To

(The name of the employer).

Dear Sir/Sirs,

In accordance with the provisions contained in sub-section (1) of section 22 of the Industrial Disputes Act, 1947…….hereby give you notice that ……on.....20..... for the reasons explained we propose to go on strike in the annexure.

Yours faithfully.

Secretary of the Union

[2][Five representatives of the workmen duly elected at a meeting held on ..... (date), vide resolution attached.]

ANNEXURE

Statement of the Case.

Copy to;

(1) [3][Assistant Labour Commissioner (Central)]……

(Here enter office address of the Assistant Labour Commissioner (Central) in the local area concerned.)

(2) Regional Labour Commissioner (Central).....Zone.

(3) Chief Labour Commissioner (Central), New Delhi.

[4][FORM M

(See rule 72)

FORM OF NOTICE OF LOCK-OUT TO BE GIVEN BY AN EMPLOYER CARRYING ON A PUBLIC UTILITY SERVICE

Name of employer.....…..

Address.....……..

Dated the.....day of.....20.....

In accordance with the provisions of sub-section (2) of section 22 of the Industrial Disputes Act, 1947, I/we hereby give notice to all concerned that it is my/our intention to effect a lock-out, in.,.....department(s), section(s) of my/our establishment with effect from.....for the reasons explained in the annexure.

Signature…….

Designation…….

ANNEXURE

Statement of Reasons

Copy forwarded to:

(1) The Secretary of the Registered Union, if any,

(2) [5][Assistant Labour Commissioner (Central)].....

[Here enter office address of the Assistant Labour Commissioner (Central) in the local area concerned.]

(3) Regional Labour Commissioner (Central).....Zone.

(4) Chief Labour Commissioner (Central), New Delhi,]

FORM N

[*See* rule 73]

FORM OF REPORT OF STRIKE OR LOCK-OUT IN A PUBLIC UTILITY SERVICE

Information to be supplied in this form immediately on the occurrence of a strike or lock-out in a public utility service to the [6][Assistant Labour Commissioner (Central)] for the local area concerned

Name of undertaking	Station and district	Normal working strength	Number of workers involved		Strike or lock- out	Date of commencement of strike or lock-out	Cause	Was notice of strike or lockout given; if so on what date and for what period	Is there any permanent agency or agreement in the undertaking for the settlement of disputes between the employer and workmen? If any exist, particulars thereof	Any other information
			Directly	Indirectly						
1	2	3	4	5	6	7	8	9	10	11

Notes : Column (3). Give the average number of workmen employed during the month previous to the day on which the strike or lock-out occurred. While reckoning the average, omit the days on which the attendance was not normal for reasons other than individual reasons of particular workmen. Thus days on which strike or lock-out occurs or communal holiday is enjoyed by a large section of workers should be omitted.

Column (4). If say, 200 workers in a factory strike work and in consequence the whole factory employing 1,000 workers has to be closed then, 200 should be shown under "directly" and the remaining under "indirectly". If the strike of 200 workers does not affect the working of the other departments of the factory, the number of workers involved would only be 200, which figure should appear under 'directly' and column 'indirectly' would be blank.

Column (8). Give the main causes of the dispute as well as the immediate cause that led to the strike or lock-out.

FORM O

(See rule 75)

Register—PART 1

Serial No.	Industry	Parties to the settlement	Date of settlement	Remarks*

* Whether the settlement was effected at the intervention of the conciliation machinery, or by mutual negotiations between the parties, may be indicated here.

PART II

Should contain one copy each of the settlements in the serial order indicated in Part I

[7][FORM O-1

(*See* rule 75-A)

To,

The Regional Labour Commissioner (Central),..... *(here specify the region concerned.)*

Sir,

Under rule 75A of the Industrial Disputes (Central) Rules, 1957, I/we hereby inform that I/we have laid of.....out of† a total of.....workmen employed in the establishment with effect from‡ .....for the reasons explained in the Annexure.

2. Such of the workmen concerned as are entitled to compensation under section 25C of the Industrial Disputes Act, 1947, will be paid compensation due to them.

Yours faithfully,

**

Copy forwarded to [8][Assistant Labour Commissioner (Central)]…….

[Here specify the address of the Assistant Labour Commissioner (Central) of the local area concerned.]

ANNEXURE

Statement of Reasons

† Here insert the number of workmen.

‡ Here insert the date.

** Here insert the position which the person who signs the letter holds with the employer issuing the letter.

[9][FORM O-2

(*See* rule 75A)

To

The Regional Labour Commissioner (Central),.....…… *(here specify the region concerned.)*

Sir,

As required by rule 75A of the Industrial Disputes (Central) Rules, 1957 and in continuation of my/our notice dated.....in Form O1 I/we hereby inform you that the layoff in my/our establishment has ended on†.....

Yours faithfully,

‡

Copy to the [10][Assistant Labour Commissioner (Central)].....……..

[Here specify the address of the Assistant Labour Commissioner (Central) of the local area concerned.

† Here insert the date.

‡Here insert the position with the person who signs the letter holds with the employer issuing the letter.]

[11][Form O-3

(To be submitted in triplicate [12][***])

[*See* rule 75B (1)]

FORM OF APPLICATION FOR PERMISSION TO LAY-OFF, TO CONTINUE THE LAY-OFF OF WORKMEN IN INDUSTRIAL ESTABLISHMENTS TO WHICH PROVISIONS OF CHAPTER VB OF THE INDUSTRIAL DISPUTES ACT, 1947 (14 OF 1947) APPLY

To

.....

.....

.....

[The authority specified under sub-section (1) of section 25M]

Sir,

Under *sub-section (1)/sub-section [13][(3)] of section 25M of the Industrial Disputes Act, 1947 (14 of 1947) read with sub-rule (1) of rule 75B of the Industrial Disputes (Central) Rules, 1957, I/we hereby apply for *permission to the lay-off/permission to continue the lay- off.....workmen of a total of.....workmen employed in my/our establishment with effect from.....for the reasons set out in the Annexure.

Permission is solicited *for the lay-off/to continue the lay-off the said workmen.

Such of the workmen permitted to be laid-off will be paid such compensation, if any, to which they are entitled under sub-section [14][(10)] of section 25M, read with section 25C, of the Industrial Disputes Act, 1947 (14 of 1947).

Yours faithfully,

(Signature)

* Strike out whatever is inapplicable.

ANNEXURE

(Please give replies against each item)

Item No.

1. Name of the undertaking with complete postal address, including telegraphic address and telephone number.

2. Status of undertaking—

(*i*)Whether Central public sector/State public sector/ foreign majority company joint sector, etc.

(*ii*)If belongs to large industrial house, please indicate the controlling group; and if a foreign majority company, indicate the extent of foreign holdings.

(*iii*)Whether the undertaking is licensed/registered and if so, name of licensing/ registration authority and licence/ registration certificate numbers.

3. (*a*) *Names and addresses of the affected workmen proposed to be laid-off/ names and addresses of the workmen laid-off before the commencement of the Industrial Disputes (Amendment) Act, 1976 (32 of 1976) and the dates from which each of them has been laid-off.

(*b*)The nature of the duties of the workmen referred to in sub-item

(a), the units/sections/ shops where they are or were working and the wages drawn by them.

4. Items of manufacture and scheduled industry/industries under which they fall.

5. Details relating to installed capacity, licensed capacity and utilised capacity.

6. (i) Annual production, item wise for pre-ceding three years-

(ii) Production figures, month-wise, for the preceding twelve months,

7. Work in progress—item-wise and valuewise.

8. Any arrangement regarding off-loading or sub-contracting of products or any

components thereof.

9. Position of the order book-item-wise and value-wise for a period of six months, and one year next following, and for the period after the expiry of the said one year.

10. Number of working days in a week with the number of shifts per day and the strength of workmen per each shift.

11. Balance sheets, profit and loss accounts and audit reports for the last three years.

12. Financial position of the company.

13. Names of the inter-connected companies or companies under the same management.

14. (*i*) The total number of workmen (category-wise), and the number of employees other than workmen as defined under the Industrial Disputes Act, 1947 (14 of 947), employed in the undertaking,

(*ii*)Percentage of wages of workmen to the total cost of production.

15. Administrative, general and selling cost in absolute terms per year in the last three years and percentage thereof to the total cost.

16. Details of lay-offs resorted to in the last three years (other than the lay-off for which permission is sought), including the periods of such lay-offs, the number of workmen involved in each such lay-off and the the Industrial Disputes (Central) Rules, 1957 reasons therefore.

17. Anticipated savings due to the *proposed lay off/lay-off for the continuance of which permission is sought.

18. Any proposal for effecting savings on account of reduction in—

(i) managerial remuneration,

(ii) sales promotion cost, and

(iii) general administration expenses.

19. Position of stocks on last day of each of the months in the preceding twelve months.

20. Annual sales figures for the last three years and month-wise sales figures for the preceding twelve months both item-wise and value-wise.

21. Reasons for the ‘proposed lay-off/lay-off for the continuance of which permission is

sought.

22. Any specific attempts made so far to avoid the *proposed lay-off/lay-off for the continuance of which permission is sought.

23. Any other relevant factors with details thereof.]

* Strike out whatever is inapplicable.

FORM P

(*See* rule 76)

FORM OF NOTICE OF RETRENCHMENT TO BE GIVEN BY AN EMPLOYER UNDER CLAUSE (C) OF SECTION 25F of INDUSTRIAL DISPUTES ACT, 1947

Name of employer.....

Address.....

Dated ..... day of.....20.....

To,

The Secretary to the Government of India,

Ministry of Labour, New Delhi

Sir,

Under clause (c) of section 25F of the Industrial Disputes Act, 1947 (14 of 1947), I/ we hereby inform you that I/we have decided to retrench*..... workmen with effect from**..... for the reasons explained in the Annexure.

2. †The workmen concerned were given on the..... 20.....one month's notice in writing as required under clause (a) of section 25F of the Act. Retrenchment is being effected in pursuance of an agreement, a copy of which is enclosed. The workmen were given on the** ..... 20 ..... one months pay in lieu of notice as required under clause (a) of section 25F of that Act.

3. The total number of workmen employed in the industrial establishment is***..... and the total number of those who will be affected by the retrenchment is given below:

Category and designation of workmen to be retrenched	Number of workmen	
	Employed	To be retrenched
(1)	(2)	(3)

4. I/We hereby declare that the workman/workmen concerned has/have been/will be paid compensation due to them under section 25F of the Act on **...../the expiry of the notice period.

Yours faithfully,

†

ANNEXURE

Statement of Reasons

Copy to :

[15][Assistant Labour Commissioner (Central)].....

[Here enter office address of the[16]*[Assistant Labour Commissioner (Central)] in local area concerned,]*

(2) Regional Labour Commissioner (Central).

[17][(3) Employment Officer, Employment Exchange.....….

(Enter the full address of the Employment Exchange concerned.)]

* Here insert the number of workmen.

**Here insert the date.

†Delete the portion which is not applicable.

*** Here insert the total number of workmen employed in the industrial establishment.

[18][FORM PA

(To be made in triplicate [19][***])

[*See* rule 76A(1)]

FORM OF NOTICE FOR PERMISSION FOR RETRENCHMENT OF WORKMEN TO BE GIVEN BY AN EMPLOYER UNDER CLAUSE [20][(b)] OF SUB-SECTION (I) OF SECTION 25N of the INDUSTRIAL DISPUTES ACT, 1947 (14 OF 1947)

Date.....

To

.....

.....

.....

[The Central Government /authority* specified under clause (c) of sub-section (1) of section 25N].

Sir,

Under [21][clause (c)] of sub-section (1) of section 25N of the Industrial Disputes Act, 1947 (14 of 1947), I/we hereby inform you that *I/we propose to retrench.....workmen [being workmen to whom sub-section (1) of section 25N applies] with effect from.....for the reasons set out in the Annexure.

2. The workmen *concerned have been given notice in writing as required under clause (a) of sub-section (1) of section 25N /have not been given notice since the retrenchment is under an agreement (copy of which is enclosed) as provided in the proviso to the said clause.

3. The total number of workmen employed in the industrial establishment is.....and the total number of those who will be affected by the proposed retrenchment is as given below:

Category and designation of workmen to be retrenched	Number of workmen	
	Employed	To be retrenched
(1)	(2)	(3)

4. Permission is solicited for the proposed retrenchment under clause (c) of sub-section (1) of section 25N.

5. I/We hereby declare that the workmen permitted to be retrenched will be paid compensation due to them under clause (b) of sub-section (1) of section 25N of the Act.

Yours faithfully,

(Signature)

***** Strike out whatever is inapplicable.

ANNEXURE

(Please give replies against each item)

Item No.

1. Name of the undertaking with complete postal address, including telegraphic addresses and telephone number.

2. Status of undertaking—

(i) Whether Central public sector /State public sector/foreign majority company/joint sector, etc,

(ii) If belongs to large industrial house, please indicate the controlling group; and if a foreign majority company, indicate the extent of foreign holdings,

(iii) Whether the undertaking is licensed/registered and if so, name of licensing/registration authority and licence registration certificate numbers.

3. Names and addresses of the workmen proposed to be retrenched and the nature of the duties, the units /sections/shops where they are working and the wages drawn by them.

4. Items of manufacture and scheduled industry/industries under which they fall.

5. Details relating to installed capacity licensed capacity and the utilised capacity.

6. (i) Annual production, item-wise for preceding three years.

   (ii)Production figures month-wise for preceding twelve months.

7. Work in progress—item-wise and value-wise.

8. Any arrangement regarding off-loading or sub-contracting of products or any components thereof.

9. Position of the order book—item-wise and value-wise for a period of six months and one year next following, and for the period after the expiry of the said one year.

10. Number of working days in a week with number of shifts per day and strength of workmen per each shift.

11. Balance sheet, profit and loss account and audit reports for the last three years.

12. Financial position of the company.

13. Names of the inter-connected companies or companies under the same management.

14. (i) The total number of workmen (category-wise), and the number of employees other than workmen as defined in the Industrial Disputes Act, 1947 (14 of 1947), employed in the undertaking.

    (ii)Percentage of wages of workmen to the total cost of production,

15. Administrative, general and selling cost in absolute terms per year for the last three years and percentage thereof to the total costs.

16. Details of retrenchment resorted to in the last three years, including dates of retrenchment, the number of workmen involved in each case, and the reasons therefor.

17. Has any of the retrenched workmen been given re-employment and if so, when? Give details.

18. Are seniority lists maintained in respect of the categories of workmen proposed to be retrenched and if so, the details and the position of the workmen affected indicating their length of service including broken periods of service?

19. Anticipated savings due to the proposed retrenchment.

20. Any proposal for effecting savings on account of reduction in—

(i) managerial remuneration,

(ii) sales promotion cost, and

(iii) general administration expenses.

21. Position of stocks on the last day of each of the month in the preceding twelve months.

22. Annual sales figures for the last three years and month-wise sales figures—for the preceding twelve months both item-wise and value-wise.

23. Reasons for the proposed retrenchment.

24. Any specific attempt made so far to avoid the proposed retrenchment.

25. Any other relevant factors with details thereof.]

FORM PB[22][***]

[23][FORM Q

(See rule 76B)

FORM OF NOTICE OF CLOSURE TO BE GIVEN BY AN EMPLOYER UNDER SECTION 25 FFA OF THE

Name of employer..... Address.....

Dated the.....…… day of....…….20.....……

To

The Secretary to the Government of India, ...

Department of Labour and Employment, ...….

New Delhi.

Sir,

Under section 25FFA of the Industrial Disputes Act, 1947 (14 of 1947), I/we* hereby inform you that I/we have decided to close down,..... (name ofthe undertaking) with effect from.....for the reason's explained in the annexure. The number of workmen whose services would be terminated on account of the closure of the undertaking is..... (number of workmen).

Yours faithfully,

*(Here insert the position which the person who signs this letter holds with the employer issuing this letter.)

ANNEXURE

Statement of reasons

Copy to:

(1) The Regional Labour Commissioner (Central)……* ……

(2) The Assistant Labour Commissioner (Central) ……*……

(3) The Employment Exchange……*……...

* Here enter the office address of the Regional Labour Commissioner (Central)/ Assistant Labour Commissioner (Central) and the Employment Exchange in the local area concerned.

[24][FORM QA

(To be submitted in triplicate)

[*See* Rule 76C(1)]

FORM OF NOTICE FOR PERMISSION OF CLOSURE TO BE GIVEN BY AN EMPLOYER UNDER SUBSECTION (1) OF SECTION 25-O of the INDUSTRIAL DISPUTES ACT, 1947 (14 OF 1947)

Date.....

To,

The Secretary to the Government of India,

Ministry of Labour,

New Delhi.

Sir,

Under section 25C of the Industrial Disputes Act, 1947 (14 of 1947), I/we hereby inform you that I/we propose to close down the undertaking specified below of (name of the industrial establishment).

(*Give details of the undertaking*)

.....with effect from.....for the reasons explained in the Annexure.

2. The number of workmen whose services will be terminated on account of the closure of the undertaking is.....(number of workmen).

3. Permission is solicited for the proposed closure.

[25][4. I/we hereby declare that in the event of approval for the closure being granted, every workman in the undertaking to whom sub-section (8) of the said section 25-O applies shall be paid compensation as specified in that section.]

Yours faithfully,

(Signature)

ANNEXURE

(Please give replies against each item)

Item No.	
1.	Name of the industrial establishment with complete postal address, including

telegraphic addresses and telephone number.

2. Status of undertaking:—

(i) Whether Central public sector/State public sector/foreign majority company/ joint sector, etc.

(ii)If belongs to large industrial house, please indicate the controlling group; and if a foreign majority company, indicate the extent of foreign holdings,

(iii)Whether the undertaking is licensed/ registered and if so, name of licensing/ registration authority and licence/ registration certificate numbers.

3. The total number and categories of workmen affected by the proposed closure, along with the addresses of the workmen and the details of wages drawn by them.

4. Items of manufacture and scheduled industry/industries under which they fall.

5. Details relating to licensed capacity, installed capacity and the utilised capacity.

6. (i)Annual production item-wise for preceding three years,

(ii)Production figures month-wise for the preceding twelve months.

7. Work in progress—item-wise and value-wise.

8. Any arrangement regarding off-loading or sub-contracting of products or any component thereof.

9. Details of persons or the organisation to whom the job/jobs is/are being entrusted relationship/interest of the persons/organisations with the director/directors or the officer/officers of the company.

10. Position of the order book—item-wise and value-wise for a period of six months and one year next following, and for the period after the expiry of the said one year.

11. Number of working days in week with the number of shifts per day and the strength of workmen per each shift.

12. Balance-sheet and profit and loss account and audit reports for the last three years.

13. Financial position of the company.

14. (i)Names of inter-connected company or companies under the same management.

(ii)Details about intercorporate investment and changes during the last one year,

(iii)Interest of any of the directors/officers of the undertaking producing same or similar type of product.

15. Percentage of wages of workmen to the total cost of production.

16. Administrative, general and selling cost in absolute terms per year for the last three years and percentage thereof to the total cost.

17. Inventory position—item-wise and value-wise for the preceding twelve months (Inventories to be shown in respect of finished products, components and raw materials to be shown separately item-wise and value-wise).

18. Selling arrangement for the last three years and any change in the selling arrangement in preceding twelve months.

19. Full details of the interests of the directors and officers of the company in the organisations/persons involved in selling products of the undertaking.

20. Buying arrangements for raw materials and components.

21. Interests of the directors and officers with the organisations/persons involved in buying raw materials and components for the undertaking.

22. Annual sales figures for the three years and month-wise sales figures for the preceding twelve months both item-wise and value-wise.

23. Reasons for the proposed closure.

24. Any specific attempts made so far to avoid the closure.

25. Any other relevant factors with details thereof.]

[26][FORM QB * * * *]

1 *Vide* S.R.O. 770, dated 10-3-1957, published in the Gazette of India, Extra., dated 10-3-1957, Pt. II, Section 3, pp. 1137, 1159.

2 Proviso omitted by G.S.R. 795, dated 5-6-1972.

3 Subs by G.S.R. 1253, dated 3-8-1966.

4 Subs by G.S.R. 1182, dated 19-10-1959.

5 Subs by G.S.R. 811, dated 3-7-1959.

6 Ins by G.S.R. 1959, dated 30-5-1968.

7 Subs by G.S.R. 398, dated 21-3-1959.

8 Subs by G.S.R. 1253 (E), dated 3-8-1966.

9 Subs by G.S.R. 398, dated 21-3-1959.

10 Ins by G.S.R. 1059, dated 30-5-1968.

11 Ins by G.S.R. 488, dated 16-3-1965.

14 Subs by G.S.R. 857, dated 22-6-1961.

15 Ins by G.S.R. 1059, dated 30-5-1968.

16 Subs by G.S.R. 1253, dated 3-8-1966.

17 Subs by G.S.R. 932, dated 18-8-1984.

18 Ins by G.S.R. 141, dated 31-12-1957.

19 Subs by G.S.R. 1151, dated 11-10-1974.

20 Now see the Code of Criminal Procedure 1973 (2 of 1974).

22 Subs by G.S.R. 1151, dated 11-10-1974.

23 Ins by G.S.R. 402, dated 31-3-1960.

24 Added by G.S.R. 402, dated 31-3-1960.

25 Rule 35 omitted by G.S.R. 402, dated 31-3-1960.

26 Subs by G.S.R. 1253, dated 3-8-1966.

27 Subs by G.S.R. 1253, dated 3-8-1966.

28 Subs by G.S.R. 1253, dated 3-8-1966.

29 Added by G.S.R. 1078, dated 4-8-1962.

30 Omitted by G.S.R. 1078, dated 4-8-1962.

31 Subs by G.S.R. 1078, dated 4-8-1962.

32 Added by G.S.R. 1078, dated 4-8-1962.

33 Added by G.S.R. 1078, dated 4-8-1962.

35 Ins by G.S.R. 289, dated 2-3-1982 (wef 13-3-1982).

38 Subs by G.S.R. 1151, dated 11-10-1974.

41 Added by G.S.R. 1078, dated 4-8-1962.

42 Subs by G.S.R. 1253, dated 3-8-1966.

43 Subs by G.S.R. 284, dated 31-3-1959.

44 Ins by G.S.R. 908, dated 2-6-1967.

45 Ins by G.S.R. 908, dated 2-6-1967.

46 Subs by G.S.R. 1253, dated 3-8-1966.

47 Subs by G.S.R. 1283, dated 28-5-1969.

48 Ins by G.S.R. 1283, dated 28-5-1969.

49 Ins by G.S.R. 289, dated 2-3-1982 (wef 13-3-1982).

50 Subs by G.S.R.1253, dated 3-8-1966.

51 Subs by G.S.R. 488, dated 16-3-1965.

52 Ins by G.S.R. 1070, dated 28-7-1977.

53 Ins by G.S.R. 1070, dated 28-7-1977.

54 Ins by G.S.R. 931, dated 15-7-1975 (w.e.f. 26-7-1975).

55 Ins by G.S.R. 1151, dated 8-10-1959.

56 Subs by G.S.R. 1253, dated 3-8-1966.

57 Subs by G.S.R. 1253, dated 3-8-1966.

58 Ins by G.S.R. 229, dated 22-2-1960.

59 Ins by G.S.R. 111(E), dated 5-3-1976.

60 Subs by S.O. 2485, dated 20-5-1985.

61 Subs by S.O. 2485, dated 20-5-1985.

63 Subs by S.O. 2485, dated 20-5-1985.

64 Subs by G.S.R. 410(E), dated 13-9-1972.

65 Ins by G.S.R. 111(E), dated 5-3-1976.

66 Subs by S.O. 2485, dated 20-5-1985.

67 Subs by S.O. 2485, dated 20-5-1985.

68 Sub-rule (2) omitted by S.O. 2485, dated 20-5-1985.

72 Renumbered as 76B by G.S.R. 111(E), dated 5-3-1976.

73 Ins by G.S.R. 111(E), dated 5-3-1976.

74 Ins by S.O. 2485, dated 20-5-1985.

77 Ins by G.S.R. 40(E), dated 31-12-1958.

78 Subs by G.S.R. 302, dated 23-4-1958.

79 Ins by G.S.R. 1059, dated 30-5-1968.

80 Ins by G.S.R. 811, dated 3-7-1959.

81 Subs by G.S.R. 1253, dated 3-8-1966.

82 Subs by G.S.R. 1059, dated 30-5-1968.

83 Ins by G.S.R. 1151, dated 11-10-1974.

84 Subs by G.S.R. 1253, dated 3-8-1966.

85 Subs by G.S.R. 1253, dated 3-8-1966.

86 Subs by G.S.R. 402, dated 31-3-1960.

87 Subs by G.S.R. 1253, dated 3-8-1966.

88 Subs by G.S.R. 1253, dated 3-8-1966.

89 Ins by G.S.R. 1078, dated 4-8-1962.

90 Subs by G.S.R. 1253, dated 3-8-1966.

91 Subs by G.S.R. 1253, dated 3-8-1966.

92 Subs by G.S.R. 488, dated 16-3-1965.

93 Subs by G.S.R. 1070, dated 28-7-1977.

94 Subs by G.S.R. 488, dated 16-3-1965.

95 Subs by G.S.R. 1070, dated 28-7-1977.

96 Subs by G.S.R. 488, dated 16-3-1965.

97 Ins by G.S.R. 1070, dated 28-7-1977.

1 Subs by G.S.R. 488, dated 16-3-1965.

2 Subs by G.S.R 1151, dated 8-10-1959.

4 Subs by G.S.R 1151, dated 81-10-1959.

5 Subs by G.S.R. 1253, dated 3-8-1966.

6 Subs by G.S.R. 1253, dated 3-8-1966.

7 Ins by G.S.R. 299, dated 22-2-1960.

8 Subs by G.S.R. 1253, dated 3-8-1966.

9 Ins by G.S.R. 111 (E), dated 5-3-1976.

10 Subs by G.S.R. 1253, dated 3-8-1966.

11 Ins by G.S.R. 111(E), dated 5-3-1976.

12 Omitted by G.S R. 289, dated 2-3-1982 (wef 13-3-1982).

13 Subs by S.O. 2485, dated 20-5-1985.

14 Subs by S.O. 2485, dated 20-5-1985.

15 Subs by G.S.R. 1253, dated 3-8-1966.

17 Ins by G.S.R, 410 (E), dated 13-9-1972.

18 Ins by G.S.R. 111 (E), dated 5-3-1976.

19 Omitted by G.S.R. 289, dated 2-3-1982 (wef 13-3-1982).

20 Subs by S.O. 2485, dated 20-5-1985.

21 Subs by GSR 761, dated 2-8-1985.

22 Form PB omitted by S.O. 2485, dated 20-5-1985.

23 Ins by G.S.R. 410(E), dated 13-9-1972.

24 Ins by G.S.R. 111(E), dated 5-3-1976.

25 Subs by S.O. 2485, dated 20-5-1985.

26 Form QB omitted by S.O. 2485, dated 20-5-1985.

End of Document

ANNEXURE II - The Industrial Employment (Standing Orders) Act, 1946

(Act No. 20 of 1946)

[23rd April, 1946]

An Act to require employers in industrial establishments formally to define conditions of employment under them

Whereas it is expedient to require employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them.

It is hereby enacted as follow:

S. 1. Short title, extent and application.—

(1) This act may be called the Industrial Employment (Standing Orders) Act, 1946.

(2) It extends to [1][the whole of India [2][* * *].]

3[(3) It applies to every industrial establishment wherein one hundred or more workmen are employed, or were employed on any day of the preceding twelve months:

Provided that the appropriate Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any industrial establishment employing such number of number of persons less than one hundred as may be specified in the notification.]

[4][* * * *]

5[(4) Nothing in this Act shall apply to-

(i) any industry to which the provisions of Chapter VII of the Bombay Industrial Relations Act, 1946, apply; or

(ii) any industrial establishment to which the provisions of the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 apply :

Provided that notwithstanding anything contained in the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961, the provisions of this Act shall apply to all industrial establishments under the control of the Central Government .]

S. 2. Interpretation.—

In this Act, unless there is anything repugnant in the subject or context,—

6[(a)"appellate authority" means an authority appointed by the appropriate Government by notification in the Official Gazette to exercise in such area as may be specified in the notification the functions of an appellate authority under this Act :

Provided that in relation to an appeal pending before an Industrial Court or other authority immediately before the commencement of the Industrial Employment (Standing Orders) Amendment Act, 1963, that Court or authority shall be deemed to be the appellate authority;]

(b) "appropriate Government" means in respect of industrial establishments under the control of the Central Government or a [7][Railway administration] or in a major Port, mine or oil field, the Central Government, and in all other in all other cases the State Government:

[8][*Provided* that where question arises as to whether any industrial establishment is under the control of the Central industrial establishment is under the control of the Central Government that Government may, either on a reference made to it by the employer or the workman or a trade union or other representative body of the workmen, or on its own motion and after giving the parties an opportunity of being heard, decide the question and such decision shall be final and binding on the parties;]

9[(c)"Certifying Officer" means a Labour Commissioner or a Regional Labour Commissioner, and includes any other officer appointed by the appropriate Government, by notification in the Official Gazette, to perform all or any of the functions of a Certifying Officer under this Act;]

(d) "employer" means the owner of an industrial establishment to which this Act for the time being applies, and includes—

(i) in a factory, any person named under [10][clause (f) of sub-section (1) of Section 7 of the Factories Act, 1948], as manager of the factory;

(ii) in any industrial establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf, or where no authority is so appointed, the head of the department;

(iii) in any other industrial establishment, any person responsible to the owner for the supervision and control of the industrial establishment;

(e) "industrial establishment" means

(i) an industrial establishment as defined in clause (ii) of Section 2 of the Payment of Wages Act, 1936, or

11[(ii) a factory as defined in clause (m) of Section 2 of the Factories Act, 1948, or]

(iii) a railway as defined in clause (4) of Section 2 of the Indian Railway Act, 1890, or

(iv) the establishment of a person who, for the purpose of fulfilling a contract with the owner of any industrial establishment, employs workmen;

(f) "prescribed' means prescribed by rules made by the appropriate Government under this Act;

(g) "standing orders" means rules relating to matters set out in the Schedule:

(h) "trade union" means a trade union for the time being registered under the Indian Trade Union Act, 1926 (16 of 1926);

12[(i) "wages" and "workman" have the meanings respectively assigned to them in clauses (rr) and (s) of Section 2 of the Industrial Disputes Act, 1947 (14 of 1947).]

S. 3. Submission of draft standing orders.—

(1) Within six months from the date on which this Act becomes applicable to an industrial establishment, the employer shall submit to the Certifying Officer five copies of the draft standing orders proposed by him for adoption in this industrial establishment.

(2) Provision shall be made in such draft for every matter set out in the Schedule which may be applicable to the industrial establishment, and where Model standing orders have been prescribed shall be, so far as is practicable, in conformity with such model.

(3) The draft standing orders submitting under this section shall be accompanied by a statement giving prescribed particulars of the workmen employed in the industrial establishment including the name of the trade union, if any, to which they belong.

(4) Subject to such conditions as may be prescribed, a group of employers in similar industrial establishments may submit a joint draft of standing orders under this section.

S. 4. Conditions for certification of standing orders.—

Standing orders shall be certifiable under this Act if—

(a) provision is made therein for every matter set out in the Schedule which is applicable to the industrial establishment, and

(b) the standing orders are otherwise in conformity with the provisions of this Act;

and it [13][shall be the function] of the Certifying Officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions of any standing orders.

S. 5. Certification of standing orders.—

(1) On receipt of the draft under Section 3, the Certifying Officer shall forward a copy thereof to the trade union, if any, of the workmen, or where there is no such trade union, if any, of the workmen or where there is no trade union, to the workmen in such manner as may be prescribed, together with a notice in the prescribed form requiring objections, if any, which the workmen may desire to make to the draft standing orders to be submitted to him within fifteen days from the receipt of the notice.

(2) After giving the employer and the trade union or such other representatives of the workmen as may be prescribed an opportunity of being heard, the Certifying Officer shall decide whether or not any modification of or addition to the draft submitted by the employer is necessary to render the draft standing orders certifiable under this Act, and shall make an order in writing accordingly.

(3) The Certifying Officer shall thereupon certify the draft standing orders, after making any modifications there in which his order under sub-section (2) may require, and shall within seven days thereafter send copies of the certified standing orders authenticated in the prescribed manner and of his order under sub-section (2) to the employer and to the trade union or other prescribed representatives of the workmen.

S. 6. Appeals.—

(1) [14][Any employer, workmen, trade union or other prescribed representatives of the workmen] aggrieved by the order of the Certifying Officer under sub-section (2) of Section 5 may, within [15][thirty days] from the date on which copies are sent under sub-section (3) of that section, appeal to the appellate authority, and the appellate authority, whose decision shall be final, shall by order in writing confirm the standing orders either in the form certified by the Certifying Officer or after amending the said standing orders by making such modifications thereof or additions there to as it thinks necessary to render the standing orders certifiable under this Act.

(2) The appellate authority shall, within seven days of its order under sub-section (1) send copies thereof to the Certifying Officer, to the employer and to the trade union or other prescribed representatives of the workmen, accompanied, unless it has confirmed without amendment the standing orders as certified by the Certifying Officer, by copies of the standing orders a certified by it and authenticated in the prescribed manner.

S. 7. Date of operation of standing orders.—

Standing orders shall, unless an appeal is preferred under Section 6, come into operation on the expiry of thirty days from the date on which authenticated copies thereof are sent under sub-section (3) of Section 5, or where an appeal as aforesaid is preferred, on the expiry of seven days from the date on which copies of the order of the appellate authority are sent under sub-section (2) of Section 6.

S. 8. Register of standing orders.—

A copy of all standing orders as finally certified under this Act shall be filed by the Certifying Officer in a register in the prescribed form maintained for the purpose, and the Certifying Officer shall furnish a copy there of to any person applying there for on payment of the prescribed fee.

S. 9. Posting of standing orders.—

The text of the standing orders as finally certified under this Act shall be prominently posted by the employer in English and in the language understood by the majority of his workmen on special boards to be maintained for the purpose at or near the entrance through which the majority of the workmen enter the industrial establishment and in all departments thereof where the workmen are employed.

S. 10. Duration and modification of standing orders.—

(1) Standing orders finally certified under this Act shall not, except on agreement between the employer and the workmen [16][or a trade union or other representative body of the workmen] be liable to modification until the expiry of six months from the date on which the standing orders or the last modifications thereof came in to operation.

17[(2) Subject to the provisions of sub-section (1), an employer or workman [18][or a trade union or other representative body of the workmen] may apply to the Certifying Officer to have the standing orders modified, and such application shall be accompanied by five copies of [19][***] the modifications proposed to be made, and where such modifications are proposed to be made by agreement between the employer and the workmen [20][or a trade union or other representative body of the workmen], a certified copy of that agreement shall be filed along with the application.]

(3) The foregoing provisions of this Act shall apply in respect of an application under sub-section (2) as they apply to the certification of the first standing orders.

21[(4) Nothing contained in sub-section (2) shall apply to an industrial establishment in respect of which the appropriate Government is the Government of the State of Gujarat or the Government of the State of Maharashtra.]

[22][S. 10-A. Payment of subsistence allowance.—

(1) Where any workman is suspended by the employer pending investigation or inquiry into complaints or charges of misconduct against him, the employer shall pay to such workman subsistence allowance—

(a) at the rate of fifty per cent of the wages which workman was entitled to immediately preceding the date of such suspension, for the first ninety days of suspension; and

(b) at the rate of seventy-five per cent of such wages for the remaining period of suspension if the delay in the completion of disciplinary proceedings against such workman is not directly attributable to the conduct of such workman.

(2) If any dispute arises regarding the subsistence allowance payable to a workman under sub-section (1), the workman or the employer concerned may refer the dispute to the Labour Court, constituted under the Industrial Disputes Act, 1947 (14 of 1947), within the local limits of whose jurisdiction the industrial establishment wherein such workman is employed is situate and the Labour Court to which the dispute is so referred shall, after giving the parties an opportunity of being heard, decide the dispute and such decision shall be final and binding on the parties.

(3) Not with standing anything contained in the foregoing provisions of this section, where provisions relating to payment of subsistence allowance under any other law for the time being in force in any State are more beneficial than the provisions of this section, the provisions of such other law shall be applicable to the payment of subsistence allowance in that State.]

S. 11. Certifying Officers and appellate authorities to have powers of Civil Court.—

23[(1)] Every Certifying Officer and appellate authority shall have all the powers of a Civil Court for the purposes of receiving evidence, administering oaths,, enforcing the attendance of witnesses, and compelling the discovery and production of documents, and shall be deemed to be a Civil Court within the meaning of [24][Sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974)].

25[(2) Clerical or arithmetical mistakes in any order passed by a Certifying officer or appellate authority, or errors arising therein from any accidental slip or omission may, at any time, be corrected by that Officer or authority or the successor in office of such officer or authority, as the case may be.]

S. 12. Oral evidence in contradiction of standing orders not admissible.—

No oral evidence having the effect of adding to or otherwise varying or contradicting standing orders finally certified under this Act shall be admitted in any Court.

[26][S. 12-A. Temporary application of model standing orders.—

(1) Notwithstanding anything contained in Sections to 12, for the period commencing on the date on which this Act becomes applicable to an industrial establishment and ending with the date on which the standing orders as finally certified under this Act come into operation under Section 7 in that establishment, the prescribed model standing orders shall be deemed to be adopted in that establishment, and the provisions of Section 9, sub-section (2) of Section 13 and Section 13-A shall apply to such model standing orders as they apply to the standing orders so certified.

(2) Nothing contained in sub-section (1) shall apply to an industrial establishment in respect of which the appropriate Government is the Government of the State of Gujarat or the Government of the State of Maharashtra.]

S. 13. Penalties and procedure.—

(1) An employer who fails to submit draft standing orders as required by Section 3 or who modifies his standing orders otherwise than in accordance with Section 10, shall be punishable with fine which may extend to five thousand rupees, and in the case of a continuing offence with a further fine which may extend to two hundred rupees for every day after the first during which the offence continues.

(2) An employer who does any act in contravention of the standing orders finally certified under this Act for his industrial establishment shall be punishable with fine which may extend to one hundred rupees, and in the case of a continuing offence with a further fine which may extend to twenty-five rupees for every day after the first during which the offence continues.

(3) No prosecution for an offence punishable under this section shall be instituted except with the previous sanction of the appropriate Government.

(4) No Court inferior to that of [27][a Metropolitan Magistrate or Judicial Magistrate of the second class] shall try any offence under this section.

[28][S. 13-A. Interpretation, etc., of standing orders.—

If any question arises as to the application or interpretation of a standing order certified under this Act, any employer or workman [29][or a trade union or other representative body of the workmen] may refer the question to any one of the Labour Courts constituted under the Industrial Disputes Act,. 1947, and specified for the disposal of such proceeding by the appropriate Government by notification in the Official Gazette, and the Labour Court to which the question is so referred shall, after giving the parties an opportunity of being heard, decide the question and such decision shall be final and binding on the parties.

S. 13-B. Act not to apply to certain industrial establishments.—

Nothing in this Act shall apply to an industrial establishment in so far as the workmen employed therein are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal)Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Service Regulations, Civilians in Defense Service (Classification, Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations than may be notified in this behalf by the appropriate Government in the Official Gazette, apply.]

S. 14. Power of exempt.—

The appropriate Government may by notification in the Official Gazette exempt, conditionally or unconditionally any industrial establishment or class of industrial establishments from all or any of the provisions of this Act.

[30][S. 14-A. Delegation of powers.—

The appropriate Government may by notification in the Official Gazette, direct that any power exercisable by it under this Act or any rules made thereunder shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also-

(a) Where the appropriate Government is the Central Government, by such officer or authority subordinate to the Central Government or by the State Government, or by such officer or authority subordinate to the State Government, as may be specified in the notification;

(b) where the appropriate Government is a State Government, by such officer or authority subordinate to the State Government, as may be specified in the notification.]

S. 15. Power to make rules.—

(1) The appropriate Government may after previous publication, by notification in the Official Gazette, make rules[31] to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe additional matters to be included in the Schedule, and the procedure to be followed in modifying standing orders certified under this Act in accordance with any such addition;

(b) set out model standing orders for the purposes of this Act;

(c) prescribe the procedure of Certifying Officers and appellate authorities;

(d) Prescribe the fee which may be charged for copies of standing orders entered in the register of standing orders;

(e) provide for any other matter which is to be or may be prescribed;

Provided that before any rules are made under clause (a) representatives of both employers and workmen shall be consulted by the appropriate Government.

32[(3) Every rule made by the Central Government under this section shall be laid as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or [33][in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid] both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.]

THE SCHEDULE

[See Sections 2 (g) and 3(2)]

MATTERS TO BE PROVIDED IN STANDING ORDERS UNDER THIS ACT

1. Classification of workmen, *e.g.*, whether permanent, temporary, apprentices, probationers, [34][*badlis*].
2. Manner of intimating to workmen periods and hours of work, holidays, pay-days and wage rates.
3. Shift working.
4. Attendance and late coming.
5. Conditions of, procedure in applying for, and the authority which may grant leave and holidays.
6. Requirement to enter premises by certain gates, an liability to search.
7. Closing and reporting of sections of the industrial establishment, temporary stoppages of work and the rights and liabilities of he employer and workmen arising there from.
8. Termination of employment, and the notice thereof to be given by employer and workmen.
9. Suspension or dismissal for misconduct, and acts or omissions which constitute misconduct.
10. Means of redress for workmen against unfair treatment or wrongful exactions by the employer or his agents or servants.
11. Any other matter which may be prescribed.

1 Subs by the A.O. 1950, for “all the Provinces of India”.

2 Omitted by Act 51 of 1970, s 2 and Sch (wef 1-9-1971).

3 Subs by Act 16 of 1961, s 2, for sub-section (3).

4 Second proviso omitted by Act 39 of 1963, s 2 (wef 23-12-1963).

5 Added by Act 39 of 1963, s 2 (wef 23-12-1963).

6 Subs by Act No. 39 of 1963, s 3 for cl (a) (wef 23-12-1963).

7 Subs by the A.O. 1950, for “Federal railway”.

8 Ins by Act 18 of 1982, s 2 (wef 17-5-1982).

9 Subs by Act 16 of 1961, s 3.

10 Subs by Act 16 of 1961, s 3.

11 Subs by Act 16 of 1961, s 3, for sub clause (ii).

12 Subs by Act 18 of 1982, s 2, for cl (i) (wef 17-5-1982).

13 Subs by Act 36 of 1956, s 32, for ‘shall not be the function” (wef 17-9-1956).

14 Subs by Act 18 of 1982, s 3, for “Any person” (wef 17-5-1982).

15 Subs by Act 16 of 1961, s 4, for “twenty-one days”.

16 Ins by Act 18 of 1982, s 4 (wef 17-5-1982).

17 Subs by Act 36 of 1956, s 32, for the original sub-section (2) (wef 17-9-956).

18 Ins by Act 18 of 1982, s 4 (wef 17-5-1982).

19 Omitted by Act 39 of 963, s 4 (wef 23-12-1963).

20 Ins by Act 18 of 1982, s 4 (wef 17-5-1982).

21 Ins by Act 39 of 1963, s 4 (wef 23-12-1963).

22 Ins by Act 18 of 1982, s 5 (wef 17-5-1982).

23 The original s 11 re-numbered as sub-section (1) by Act 39 of 1963, s 5 (wef 23-12-1963).

24 Subs by Act 18 of 1982, s 6, for “ sections 480 and 482 of the Code of Criminal Procedure, 1898 (5 of 1898)” (wef 17-5-1982).

25 Added by Act 39 of 1963, s 5 (wef 23-12-1963).

26 Ins by Act 39 of 1963, s 6 (wef 23-12-1963).

27 Sub by Act 18 of 1982, s 7, for “a Presidency Magistrate or Magistrate of the second class” (wef 17-5-1982).

28 Ins by Act 36 of 1956, s 32 (wef 10-3-1957).

29 Ins by Act 18 of 1982, s 8 (wef 17-5-1982).

30 Subs by Act 39 of 1963, s 7, for s 14-A (wef 23-12-1963).

31 See the Industrial Employment (Standing Orders) Central Rules, 1946.

32 Ins by Act 16 of 1961, s 6.

33 Sub by Act 18 of 1982, s 9, for certain words (wef 17-5-1982).

34 Subs by G.S.R. 655(E), dated 10-10-2007, for “*badli* s or fixed term employment” (wef 10-10-2007).

End of Document

ANNEXURE III - The Industrial Employment (Standing Orders) Central Rules, 1946[1]

In exercise of the powers conferred by Section 15, read with clause (b) of Section 2 of the Industrial employment (Standing Orders) Act, 1946 (XX of 1946), the Central Government is pleased to make the following rules, the same having been previously published as required by sub-section (1) of the said Section 15, namely:

R. 1.

These rules may be called the Industrial Employment (Standing Orders) Central Rules, 1946,

They extend to all Union territories, and shall also apply in any State (other than a Union territory) to industrial establishments under the control of the Central Government or a Railway administration or in a major port, mine or oilfield].

R. 2.

In these rules, unless there is anything repugnant in the subject or context,—

(a) 'Act' means the Industrial Employment (standing Orders) Act, 1946 (XX of 1946);

(b) 'Form' means a form set out in Schedule II appended to these rules.

[3]**[R. 2-A.**

In the Schedule to the Act, after Item 10, the following additional matters shall be inserted, namely:—

"R. 10-A. Additional matters to be provided in Standing Orders relating to industrial establishments in coal mines—

(1) Medical aid in case of accident;

(2) Railway travel facilities;

(3) Method of filling vacancies;

(4) Transfers;

(5) Liability of manager of the establishment or mine;

(6) Service certificate;

(7) Exhibition and supply of standing orders.

10-B. Additional matters to be provided in the standing orders relating to all industrial establishment,—

(1) Service Record—matters relating to service card, token tickets, certification of service, change of residential address of workers and record of age;

(2) Confirmation;

(3) Age of retirement;

(4) Transfer;

(5) Medical aid in case of accidents;

(6) Medical examination;

(7) Secrecy;

(8) Exclusive service."

[4]**[R. 3.**

Save as other wise provided in sub-rule (2), the Model Standing Orders for the purposes of the Act shall be those set out in Schedule I appended to these rules.

The Model Standing Orders for the purposes of the Act in respect of industrial establishment in coal mines shall be those set out in Schedule I-A appended to these rules.]

R. 4.

An application for certification of standing orders shall be made in Form I.

R. 5.

The prescribed particulars of workmen for purposes of sub-section (3) of Section 3 of the Act shall be:—

total number employed;

number of permanent workmen;

number of temporary workmen;

number of casual Workmen,]

number of *badlis* or substitutes,

* * *]

number of probationers,

number of apprentices,

name of the trade union, or trade unions, if any, to which the workmen belong,

remarks.

R. 6.

As soon as may be after he receives an application under Rule 4 in respect of an industrial establishment, the Certifying Officer shall-

(a) Where there is a trade union of the workmen, forward a copy of the draft standing orders to the trade union together with a notice in Form II;

(b) where there is no such trade union, call a meeting of the workmen to elect three representatives, to whom he shall, upon their election, forward a copy of the draft standing orders together with a notice in Form II.

R. 7.

Standing orders certified in pursuance of sub-section (3) of Section 5 or sub-section (2) of Section 6 of the Act shall be authenticated by the signature and seal of office of the Certifying Officer or the appellate authority as the case may be, and shall be forwarded by such officer or authority within a week of authentication by registered letter post to the employer and to the trade union, or, as the case may be, the representatives of the workmen elected in pursuance of Rule. 6.

[7]**[R. 7-A.**

Any person desiring to prefer an appeal in pursuance of sub-section (1) of Section 6 of the Act shall draw up a memorandum of appeal setting out the grounds of appeal and forward it in quintuplicate to the appellate authority accompanied by a certified copy of the standing orders, amendments or modifications, as the case may be. [8][The memorandum of appeal shall be in [9][Form IV-A] set out in Schedule II to these rules.]

The appellate authority shall, after giving the appellant an opportunity of being heard, confirm the standing orders, amendments or modifications as certified by the Certifying Officer unless it considers that there are reasons for giving the other parties to the proceedings a hearing before a final decision is made in the appeal.

Where the appellate authority does not confirm the standing orders, amendments or modifications it shall fix a date for the hearing or the appeal and direct notice thereof to be given—

(a) where the appeal is filed by the employer or a workman, to trade unions of the workmen of the industrial establishments, and where there are no such trade unions to the representatives of workmen elected under clause (b) of Rule 6, or as the case may be, to the employer;

(b) where the appeal is filed by a trade union, to the employer and all other trade unions of the workmen of the industrial establishment;

(c) where the appeal is filed by the representatives of the workmen, to the employer and any other workmen whom the appellate authority joins as a party to the appeal.

The appellant shall furnish each of the respondents with a copy of the memorandum of appeal.

The appellate authority may at any stage call for any evidence it considers necessary for the disposal of the appeal.

On the date fixed under sub-rule [(3) for the hearing of the appeal, the appellate authority shall take such evidence as it may have called for or consider to be relevant.]

R. 8.

The register required to be maintained by Section 8 of the Act shall be in Form III and shall be properly bound, and the Certifying Officer shall furnish a copy of standing orders approved for an industrial establishment to any person applying therefor on payment of a fee [10][calculated at the following rates per copy—

(i) for the first two hundred words or less, seventy-five paise;

(ii) for every additional one hundred words or fraction thereof, thirty-seven paise:

Provided that, where the said standing orders exceeds five pages, the approximate number of words per page shall be taken as the basis for calculating the total number of words to the nearest hundred, for the purpose of assessing the copying fee.]

SCHEDULE I [11][MODEL STANDING ORDERS IN RESPECT OF INDUSTRIAL ESTABLISHMENTS NOT BEING INDUSTRIAL ESTABLISHMENTS IN COAL MINES]

1. These orders shall come into force on.....

2. Classification of workmen.—

(a) Workmen shall be classified as—

(1) permanent,

(2) Probationers,

(3) *badlis*,

12[(3A) * * *]

(4) temporary,

(5) casual,

(6) apprentices.

(b) A "permanent workman" is a workman who has been engaged on a permanent basis and includes any person who has satisfactorily completed a probationary period of three months in the same or another occupation in the industrial establishment, including breaks due to sickness, accident, leave, lock-out, strike (not being an illegal strike) or involuntary closure of the establishment.

(c) A "probationer" is a workman who is provisionally employed to fill a permanent vacancy in a post and has not completed three months' service therein. If a permanent employee is employed as a probationer in a new post he may, at any time during the probationary period of three months, be reverted to his old permanent post.

(d) A "badli" is a workman who is appointed in the post of a permanent workman or probationer who is temporarily absent.

(e) A "temporary workman" is a workman who has been engaged for work which is of an essentially temporary nature likely to be finished within a limited period.

(f) A "casual workman" is a workman whose employment is of a casual nature.

(g) An "apprentice" is a learner who is paid an allowance during the period of his training.

[13][(h) * * *]

3. Tickets.—

(1) Every workman shall be given a permanent ticket unless he is a probationer, badli, temporary worker or apprentice.

(2) Every permanent workman shall be provided with a departmental ticket showing his number, and shall, on being required to do so, show it to any person authorized by the manager to inspect it.

(3) Every badli shall be provided with the badli card on which shall be entered the days on which he has worked in the establishment, and which shall be surrendered if he obtains permanent employment.

(4) Every temporary workman shall be provided with a 'temporary' ticket which he shall surrender on his discharge.

(5) Every casual worker shall be provided with a "casual" card, on which shall be entered the days on which he has worked in the establishment.

(6) Every apprentice shall be provided with an 'apprentice' card, which shall be surrendered if he obtains permanent employment.

4. Publication of working time.—

The periods and hours of work for all classes of workers in each shift shall be exhibited in English and in the principal languages of workman employed in the establishment on notice-boards maintained at or near the main entrance of the establishment and at the time-keeper's office, if any.

5. Publication of holidays and pay-days.—

Notices specifying (a) the days observed by the establishment as holidays, and (b) pay-days shall be pasted on the said notice-boards.

6. Publication of wage rates.—

Notices' specifying the rates of wages payable to all classes of workmen and for all classes of work shall be displayed on the said notice-boards.

[14][**7. Shift working.—**

More than one shift may be worked in a department or departments or any section of a department of the establishment at the discretion of the employer. If more than one shift is worked, the workmen shall be liable to be transferred from one shift to another. No shift working shall be discontinued without two months' notice being given in writing to the workmen prior to such discontinuance, provided that no such notice shall be necessary if the closing of the shift is under agreement with the workmen affected. If as a result of the discontinuance of the shift working, any workmen are to be retrenched, such retrenchment shall be effected, in accordance with the provisions of the Industrial Disputes Act, 1947 (14 of 1947), and the rules made thereunder. If shift working is restarted, the workmen shall be given notice and re-employed in accordance with the provisions of the said Act and the said rules.]

[15][**7-A. Notice of changes in shift working.—**

Any notice of discontinuance or of restarting of a shift working required by Standing Order 7 shall be in the [16][Form IV-A] and shall be served in the following manner, namely :

The notice shall be displayed conspicuously by the employer on a notice-board at the main entrance to the establishment [17][*****]:—

Provided that where any registered trade union of workmen exists, a copy of the notice shall also be served by registered post on the Secretary of such union.]

8. Attendance and late coming.—

All workmen shall be at work at the time fixed and notified under Paragraph 4. Workmen attending late will be liable to the deductions provided for in the Payment of Wages Act, 1936.

Note.—All workmen shall have to do the work in establishment at the time fixed and notified under Para 4. There is a provision for deduction in the payment if some one becomes late according to the Payment of Wages Act. 1936.

9. Leave.—

(1) Holidays with pay will be allowed as provided for in [18][Chapter VIII of the Factories Act, 1948], and other holidays in accordance with law, contract, custom and usage.

(2) A workman who desires to obtain leave of absence shall apply to the [19][employer or any other officer of the industrial establishment specified in this behalf by the employer], who shall issue orders on the application within a week of its submission or two days prior to the commencement of the leave applied for, whichever is earlier, provided that if the leave applied for is to commence on the date of the application or within three days thereof, the order shall be given on the same day. If the leave asked for is granted a leave pass shall be issued to the worker. If the leave is refused or postponed, the fact of such refusal or post postponement and the reasons there for shall be recorded in writing in a register to be maintained for the purpose, and if the worker so desires, a copy of the entry in the register shall be supplied to him. If the workman after proceeding on leave desires an extension thereof he shall apply to the [20][employer or the officer specified in this behalf by the employer] who shall send a written reply either granting or refusing extension of leave to the workman if his address is available and if such reply is likely to reach him before the expiry of the leave originally granted to him.

(3) If the workman remains absent beyond the period of leave originally granted or subsequently extended, he shall lose his lien on his appointment unless he (a) returns within 8 days of the expiry of the leave and (b) explains to the satisfaction of the [21][employer or the officer specified in this behalf by the employer], his inability to return before the expiry of his leave. In case the workman loses his lien on his appointment, he shall been titled to be kept on the badly list.

10. Casual leave.—

A workman may be granted casual leave of absence with or without pay not exceeding 10 days in the aggregate in a calendar year. Such leave shall not be for more than three days at a time except in case of sickness. Such leave is intended to meet special circumstances which cannot be foreseen. Ordinarily, the previous permission of the head of the department in the establishment shall be obtained before such leave is taken, but when this is not possible, the head of the department shall, as soon as may be practicable, be informed in writing of the absence from and of the probable duration of such absence.

11. Payment of wages.—

(1) Any wages, due to the workmen but not paid on the usual pay day on account of their being unclaimed, shall be paid by the employer on an unclaimed wage pay day in each week, which shall be notified on the notice-boards as aforesaid.

(2) All workmen will be paid wages on a working day before the expiry of the seventh or the tenth day after the last day of the wage period in respect of which the wages are payable, according as the total number of workmen employed in the establishment does not or does exceed one thousand.

12. Stoppage of work.—

(1) The employer may, at any time, in the event of fire, catastrophe, breakdown of machinery or stoppage of power-supply, epidemics, civil commotion or other cause beyond his control, stop any section or sections of the establishment, wholly or partially for any period or periods without notice.

(2) In the event of such stoppage during working hours, the workmen affected shall be notified by notices put upon the notice-board in the department concerned, [22][and at the office of the employer and at the time-keeper's office, if any], as soon as practicable, when work will be resumed and whether they are to remain or leave their place of work. The workmen shall not ordinarily be required to remain for more than two hours after the commencement of the stoppage. If the period of detention does not exceed one hour the workmen so detained shall not be paid for the period of detention. If the period of detention exceeds one hour, the workmen so detained shall be entitled to receive wages for the whole of the time during which they are detained as a result of the stoppage. In the case of piece-rate workers, the average daily earning for the previous month shall be taken to be the daily wage. No other compensation will be admissible in case of such stoppage. Whenever particable, reasonable notice shall be given of resumption of normal work.

(3) In case where workmen are laid off for short periods on account of failure of plant or a temporary curtailment of production, the period of unemployment shall be treated as compulsory leave either with or without pay, as the case may be. When, however, workmen have to be laid off for an indefinitely long period, their services may be terminated after giving them due notice or pay in lieu thereof.

(4) The employer may in the event of a strike affecting either wholly or partially any section or department of the establishment close down either wholly or partially such section or department and any other section or department affected by such closing down. The fact of such closure shall be notified by notices put on the notice-board in the section or department concerned and in the time-keeper's office, if any, as soon as practicable. The workmen concerned shall also be notified by a general notice, prior to resumption of work, as to when work will be resumed.

13. Termination of employment.—

(1) For terminating employment of a permanent workmen, notice in writing shall be given either by the employer or the workmen - one month's notice in the case of monthly-rated workmen and two weeks' notice in the case of other workmen: one month's or two week's pay, as the case may be, may be paid in lieu of notice.

23[(2) No temporary workman whether monthly-rated, weekly-rated or piece-rated, and no probationer or badli shall be entitled to any notice or pay in lieu thereof, if his services are terminated.

Provided that no temporary workman shall be terminated by way of punishment unless he has been given an opportunity of explaining the charges of misconduct, alleged against him in the manner prescribed in Paragraph 14].

(3) Where the employment of any workmen is terminated, the wages earned by him and other dues, if any, shall be paid before the expiry of the second working day from the day on which his employment is terminated.

14. Disciplinary action for misconduct.—

(1) A workman may be fined up to two per cent of his wages in a month for the following acts and omissions, namely:

.....

.....

Note.—Specify the acts and omissions which the employer may notify with the previous approval of the Government or of the prescribed authority in pursuance of section 8 of the Payment of Wages Act, 1936.

(2) A workman may be suspended for a period not exceeding four days at a time, or dismissed without notice or any compensation in lieu of notice, if he is found to be guilty of misconduct: —

(3) The following acts and omissions shall be treated as misconduct.

(a) wilful in subordination or disobedience, whether alone or in combination with others, to any lawful and reasonable order of a superior;

(b) theft, fraud or dishonesty in connection with the employer's business or property;

(c) willful damage to or loss of employer's goods or property;

(d) taking or giving bribes or any illegal gratification;

(e) habitual absence without leave or absence without leave for more than 10 days;

(f) habitual late attendance;

(g) habitual breach of any law applicable to the establishment;

(h) riotous or disorderly behaviors during working hours at the establishment or any act subversive of discipline;

(i) habitual negligence or neglect of work;

(j) frequent repetition of any act or omission for which a fine may be imposed to a maximum of 2 per cent of the wages in a month;

(k) striking work or inciting others to strike work in contravention of the provision of any law, or rule having the force of law;

24[(l) Sexual harassment which includes such unwelcome sexual determined behaviour (whether directly or by implication) as—

(i) physical contact and advances; or

(ii) a demand or request for sexual favours; or

(iii) sexually coloured remarks; or

(iv) showing pornography; or

(v) any other unwelcome physical verbal or non-verbal conduct of sexual nature.]

[25][*Provided* that where there is a complaint of sexual harassment within the meaning of clause (I) of sub-paragraph (3), the Companies Committee constituted under sub-paragraph (3B) in each establishment for inquiring into such complaints, shall, notwithstanding anything contained in paragraph 15, be deemed to be the inquiring authority appointed by the employer for the purpose of these rules.

(3A) The Complaints Committee shall hold the inquiry, unless separate procedure has been prescribed for the Complaints Committee for holding such inquiry into the complaints of sexual harassment, as far as practicable, in accordance with the procedure laid down in these rules;

(3B) The Complaints Committee shall consist of—

(a) a Chairperson who shall be a woman;

(b) two members representing Non-Government Organisation (NGO) or any other body which is familiar with the issue of sexual harassment of nominees of the National or State Human Rights Commission or the National or State Commission for Women familiar with the issue of sexual harassment;

to, be nominated by the employer:

Provided that one of the two members of the Complaints Committee shall be a woman.

(3C) The Complaints Committee shall make and submit every year an annual report, to the appropriate Government, of the complaints and action taken.

(3D) The employers or their agents shall report, to the appropriate Government, on the compliance of the guidelines issued by the Central Government in pursuance of the directions of the Supreme Court in Writ Petition (Criminal) Nos. 666-670 of 1992 (*Vishaka v. State of Rajasthan*) including on the reports of the Complaints Committee].

26[(4)

(a) Where a disciplinary proceeding against a workman is contemplated or is pending or where criminal proceedings against him in respect of any offence are under investigation or trial and the employer is satisfied that it is necessary or desirable to place the workman under suspension, he may, by order in writing suspend him with effect from such date as may be specified in the order. A statement setting out in detail the reasons for such suspension shall be supplied to the workman within a week from the date of suspension.

27[(b) A workman who is placed under suspension shall be paid subsistence allowance in accordance with the provisions of section 10-A of the Act.]

28[(ba) In the enquiry, the workman shall be entitled to appear in person or to be represented by an office-bearer of a trade union of which he is a member.

(bb) The proceedings of the enquiry shall be recorded in Hindi or in English or the language of the State where the industrial establishment is located, whichever is preferred by the workman.

(bc) The proceedings of the inquiry shall be completed within a period of three months:

Provided that the period of three months may, for reasons to be recorded in writing, be extended by such further period as may be deemed necessary by the inquiry officer.]

(c) If on the conclusion of the enquiry or, as the case may be, of the criminal proceedings, the workman has been found guilty of the charges framed against him and it is considered, after giving the workman concerned a reasonable opportunity of making representation on the penalty proposed, that an order of dismissal or suspension or fine or stoppage of annual increment or reduction in rank would meet the ends of justice, the employer shall pass an order accordingly:

Provided that when an order of dismissal is passed under this clause, the workman shall be deemed to have been absent from duty during the period of suspension and shall not be entitled to any remuneration for such period, and the subsistence allowance already paid to him shall not be recovered:

Provided further that where the period between the date on which the workman was suspended from duty pending the inquiry or investigation or trial and the date on which an order or suspension was passed under this clause exceeds four days, the workman shall be deemed to have been suspended only for four days or for such shorter period as is specified in the said order of suspension and for the remaining period he shall be entitled to the same wages as he would have received if he had not been placed under suspension, after deducting the subsistence allowance paid to him for such period:

Provided also that where an order imposing fine or stoppage of annual increment or reduction in rank is passed under this clause, the workman shall be deemed to have been on duty during the period of suspension and shall be entitled to the same wages as he would have received if he had not been placed under suspension, after deducting the subsistence allowance paid to him for such period:

Provided also that in the case of a workman to whom the provisions of clause (2) of Article 311 of the Constitution apply, the provisions of that article shall be complied with.

(d) If on the conclusion of the inquiry, or as the case may be, or the criminal proceedings, the workman has been found to be not guilty of any of the charges framed against him, he shall be deemed to have been on duty during the period of suspension and shall be entitled to the same wages as he would have received if he had not been placed under suspension after deducting the subsistence allowance paid to him for such period.

(e) The payment of subsistence allowance under this standing order shall be subject to the workman concerned not taking up any employment during the period of suspension.]

29[(5)] In awarding punishment under this standing order, the [30][authority imposing the punishment]shall take into account any gravity of the misconduct, the previous record, if any, of the workman and any other extenuating or aggravating circumstances, that may exist. A copy of the order passed by the [31][authority imposing the punishment] shall be supplied to the workman concerned.

32[(6)

(a) A workman aggrieved by an order imposing punishment may within twenty-one days from the date of receipt of the order, appeal to the appellate authority.

(b) The employer shall, for the purposes of Clause (a) specify the appellate authority.

(c) The appellate authority, after giving an opportunity to the workman of being heard shall pass order as he thinks proper on the appeal within fifteen days of its receipt and communicate the same to the workman in writing.]

15. Complaints.—
All complaints arising out of employment including those relating to unfair treatment or wrongful exaction on the part of the employer or his agent, shall be submitted to the manager or other person specified in this behalf with the right of appeal to the employer.

16. Certificate on termination of service.—
Every permanent workman shall be entitled to a service certificate at the time of his dismissal, discharge or retirement from service.

Note.—There is a provision under this Act for issuing a service certificate at the time of dismissal, discharge or retirement and every person is entitled to take such certificate.

17. Liability of[33][employer].—
The [34][employer] of the establishment shall personally be held responsible for the proper and faithful observance of the standing orders.

[35][**17-A.**

(1) Any person desiring to prefer an appeal in pursuance of sub-section(1) of Section 6 of the Act shall draw up a memorandum of appeal setting out the ground of appeal and forward it in quintuplicate to the appellate authority accompanied by a Certified copy of the standing orders, amendments or modifications, as the case may be.

(2) The appellate authority shall, after giving the appellant an opportunity of being heard, confirm the standing orders, amendments or modifications as certified by the certifying officer unless it considers that there are reasons for giving the other parties to the proceedings a hearing before a final decision is made in the appeal.

(3) Where the appellate authority does not confirm the standing orders, amendments or modifications it shall fix a date for the hearing of the appeal and direct notice thereof to be given—

(a) where the appeal is filed by the employer or a workman, to trade unions of the workmen of the industrial establishments, and where there are no such trade unions to the representatives of workman elected under Cl. (b) of rule 6, or as the case may be, to the employer;

(b) where the appeal is filed by a trade union to the employer and all other trade unions of the workmen of the industrial establishment;

(c) where the appeal is filed by the representatives of the workmen, to the employer and any other workman whom the appellate authority joins as a property to the appeal.

(4) The appellant shall furnish each of the respondents with a copy of the memorandum of appeal.

(5) The appellate authority may at any stage call for any evidence it considers necessary for the disposal of the appeal.

(6) On the date fixed, under sub-rule (3) for the hearing of the appeal, the appellate authority shall take such evidence as it may have called for or consider to be relevant].

18. Exhibition of standing orders.—
A copy of these orders in English and in Hindi shall be pasted at [36][* * *] and on a notice-board maintained at or near the main entrance to the establishment and shall be kept in a legible condition.

[Forms]

[37][FORM * * *]

[38][SCHEDULE I - A]

MODEL STANDING ORDERS FOR INDUSTRIAL ESTABLISHMENT IN COAL MINES

1. These orders shall come into force on.....

2. Definition.—

In these orders, unless the context otherwise requires—

(a) 'attendance' means presence of the workman concerned at the place or places where by the terms of his employment he is required to report for work and getting his attendance marked;

(b) The expression 'employer' and 'workman' shall have the meanings assigned to them in Section 2(d) and (i) respectively of the Industrial Employment (Standing Orders) Act, 1946;

(c) 'Manager' means the manager of the mine and includes an acting manager for the time being appointed in accordance with the provisions of the Mines Act, 1952;

(d) words importing masculine gender shall be taken to include females;

(e) words in the singular shall include the plural and vice versa.

3. Classification of workmen.—

(a) "Workmen" shall be classified as—

(i) permanent;

(ii) Probationers;

(iii) *badlis* or substitute;

39[(iiia) * * *]

(iv) temporary;

(v) apprentices; and

(vi) casual.

(b) A "permanent workman" is one who is appointed for an unlimited period or who has satisfactorily put in three months' continuous service in a permanent post as a probationer;

(c) A "probationer" is one who is provisionally employed to fill a vacancy in a permanent post and has not completed three months' service in that post unless the probationary period is extended. If a permanent workmen is employed as a probationer in a new post he may, at any time, during the probationary period not exceeding three months, be reverted to his old permanent post unless the probationary period is extended.

(d) A 'badli' or substitute is one who is appointed in the post of a permanent workman or a probationer who is temporarily absent: but he would cease to be a 'Badli" on completion of a continuous period of service of one year (190 attendances in the case of below ground workman and 240 attendances in the case of any other workman) in the same post or other post or posts in the same category or earlier if the post is vacated by the permanent workman or probationer. A "badli" working in place of a probationer would be deemed to be permanent after completion of the probationary period.

(e) A "temporary" workman is a workman who has been engaged for work which is of an essentially temporary nature likely to be finished within a limited period. The period within which it is likely to be finished should also be specified but it may be extended from time to time, if necessary.

(f) An "apprentice" is a learner who is either paid an allowance or not paid any allowance during the period of his training, which shall inter alia be specified in his term of contract.

(g) A "casual" workman is a workman who has been engaged for work which is of an essentially casual nature.

40[(h) * * *]

4. Every workman shall be given a ticket appropriate to his classification at the time of his appointment and shall, on being required to do so, show it to the person authorized by the employer in that behalf. The said ticket shall carry the signature or thumb-impression of the workman concerned. If the workman looses his ticket, the Manager shall provide him with another ticket on a payment of 25 paise.

5. Display of notices.—

(a) The period and hours of work for all classes of workmen in each shift shall be exhibited in English and the language understood by the majority of workmen employed in the establishment on notice-boards maintained at or near the main entrance of the establishment and at the time-keeper's office, if any.

(b) Notices, specifying (a) the days observed by the establishment as holidays and (b) pay days shall be posted on the said Notice-boards,

(c) notices specifying the rates of wages and scales of allowances payable to all classes of workmen and for all classes of work shall be displayed on the said notice-boards.

6. Payment of wages.—

(a) Wages shall be paid direct to the individual workmen on any working day between the hours 6.00 a.m. and 6.00 p.m. at the office of the mine. The manager or any other responsible person authorized by him shall witness and attest the payments and note the date of payment in the wage register. Payment of wages to a contractor's workman shall be made at a place to be specified by the manager and it shall be witnessed by a nominee of the employer deputed for this purpose in writing.

(b) Any wages due to a workman but not paid on the usual pay day on account of their being unclaimed shall be paid by the employer on such unclaimed wage pay day in each week as may be notified to the workmen. If the workman so desires, the unpaid wages and other dues payable to him shall be remitted to his address by money order after deducting there from the money order commission charges. All claims for the unpaid wages shall be presented to the employer within a period of twelve months from the date on which the wages become due.

(c) Overtime shall be worked and wages thereof paid in accordance with the provisions of the Mines Act, 1952, as amended by the Mines (Amendment) Act, 1959, and as may be prescribed from time to time. For work on weekly rest day, the workman shall be paid as laid down in any agreement or award or as the case may be, as per usage or custom.

7. Shift working.—

More than one shift may be worked in a department or departments of any section of a department of the establishment at the discretion of the employer. If more than one shift is worked a workman shall be liable to be transferred from one shift to another. No shift working shall be discontinued without two months' notice being given in writing to the workmen prior to such discontinuance: provided that no such notice shall be necessary if the closing of the shift is under an agreement with the workman affected. If as a result of the discontinuance of shift working, any workmen are to be retrenched, such retrenchment shall be effected in accordance with the provisions of the Industrial Disputes Act, 1947 (14 of 1947), and the rules made there under. If shift working is restarted, the workmen shall be given notice and re-employed in accordance with the provisions of the said Act and the said rules.

8. Attendance.—

All workmen shall be at work at the mine at the time fixed and notified to them.

9. Absence from place of work.—

Any workman, who after going underground or after coming to his work in the department in which he is employed, is found absent from his proper place of work during working hours without permission from the appropriate authority or without any sufficient reason shall be liable to be treated as absent for the period of his absence.

10. Festival holidays and leave.—

(a) There shall be seven paid festival holidays or as laid down in an agreement or an award in force. Out of these seven days, the Republic Day, Independence Day and Mahatma Gandhi's Birthday shall be allowed without option and the rest of the days shall be fixed by agreement or local custom. Whenever a workman has to work on any of these holidays, he shall, at his option be entitled to either thrice the wages for the day or twice the wages for the day on which he work and in addition to avail himself of a substituted holiday with wages on any other day or as laid down in an agreement or an award in force.

(b)

(i) The workmen shall be entitled to leave with wages in accordance with the provisions contained in Chapter VII of Mines Act, 1952.

(ii) Normally a workman will not be refused the leave applied for by him. But the employer may refuse, revoke or curtail the leave applied for by workman, if the exigencies of work so demand. Wages in lieu

of leave shall be paid to a workman, where he has been refused the leave asked for and in cases where he cannot accumulate the leave any further. If a workman is refused leave in a particular year in the interest of work, it would be open to him next year either to avail of leave on two occasions with the usual railway concession or in case he avails of leave only on one occasion thel railway fare for the unveiled trip would be paid to him in the shape of National Savings/National Defense Certificates.

(c) Quarantine leave shall be granted to a workman, who is prevented from attending to his duty because of his coming into contact, through no fault of his own, with a person suffering from a contagious disease. The leave shall be granted for such period as is covered by a certificate from the medical officer of the mine. Payment for the period of quarantine leave shall be at the rate of 50 percent of the wages (basic plus dearness allowance) payable to a workman. Quarantine leave cannot be claimed, if a workman has refused to accept during the previous three months prophylactic treatment for the disease in question.

(d) A workman who desires to obtain leave of absence shall apply to the manager not less than fifteen days before the commencement of the leave, except where leave is required in unforeseen circumstances, and the manager shall issue orders on the application within a week of its submission of two days prior to the commencement of the leave applied for, whichever is earlier : provided that if the leave applied for is to commence on the date of the application within three days thereof, orders shall be given on the same day. If the leave asked for is granted, a leave-pass shall be given to the workman. If the leave is refused or postponed, the fact of such refusal or postponement and the reasons therefore shall be recorded in writing in a register to be maintained for the purpose, and if the worker so desires a copy of the entry in the register shall be supplied to him. If the workman after proceeding on leave desires an extension thereof, he shall apply to the manager, who shall send a written reply either granting or refusing extension of leave to the workman. Sanction/refusal of leave should be communicated to the workman in writing invariably.

(e) If a workman remains absent beyond the period of leave originally granted or subsequently extended, he shall lose lien on his appointment unless he-

(a) returns within ten days of expiry of his leave; and

(b) explains to the satisfaction of the manager his inability to return on the expiry of his leave.

In case, the workman loses, as aforesaid, his lien on his appointment, he shall be entitled to be kept on the "badli list".

(f) A workman may be granted casual leave of absence with pay not exceeding five days in the aggregate in a calendar year. Such leave shall not be for more than three days at a time except in case of sickness. Such leave is intended to meet special circumstances which cannot be foreseen. Ordinarily the previous permission of the head of the department in the establishment, shall be obtained before such leave is taken, but where this is not possible, the head of the department shall, as soon as may be practicable, be informed in writing of such absence and of the probable duration thereof.

(g) Notwithstanding anything mentioned above, any workman who overstays his sanctioned leave or remains absent without reasonable cause will render himself liable for disciplinary action.

[41][**11. Medical aid in case of accidents.—*** * *]

12. Railway travel facilities.—

(a) When a workman proceeds on leave and is qualified for free railway fare, the employer shall give him the cost equivalent of his ticket (including bus fare) and for boat to his home.

(b) Every workman who has completed a period of twelve months' continuous service, would qualify for railway fare or bus fare or both for going home on leave and returning to the mine on the expiry of the leave. The twelve months' service shall be deemed to have been completed if, during the twelve months preceding the date on which he applies for leave, he has worked for not less than two hundred and forty days.

(c) If on the expiry of the leave, a workman returns he shall than receive a cash payment equivalent to the return fare. If on his return the mine is unable to have him back, he shall be paid return fare at once.

(d) If the journey home is by bus or partly by bus and partly by train, the cost of journey shall be adjusted accordingly.

(e) The workman shall be entitled to railway fare by mail or express train, wherever under the Railway Rules tickets are available for such travel.

(f) The class by witch a workman is entitled to travel shall be :

(i)	if his basic wage is Rs. 165 or less per month	III Class.
(ii)	if his basic wage is above Rs.165 and up to Rs. 265 per month	II Class.
(iii)	if his basic wage is above Rs. 265 per moth	I Class.

13. Termination of services.—

(a) For terminating the services of permanent workman having less than one year of continuous service, notice of one month in writing with reasons or wages in lieu thereof shall be given by the employer:

Provided that no such notice shall be required to be given when the services of the workman are terminated on account of misconduct established in accordance with the Standing Orders.

42[(b) Subject to the provisions of the Industrial Disputes Act, 1947 (14 of 1947) no notice of termination of employment shall be necessary in the case of temporary and Badli workmen:

Provided that a temporary workman, who has completed three months continuous service, shall be given two weeks' notice of the intention to terminate his employment if such termination is not in accordance with the terms of the contract of his employment:

Provided further that when the services of a temporary workman, who has not completed three month's continuous service, are terminated before the completion of the term of employment given to him, he shall be informed of the reasons in writing and when the services of a *badli* workman are terminated before the return to work of the permanent incumbent or the expiry of his (*badli's*) term of employment, he shall be informed of the reasons for such termination in writing].

(c) No workman shall leave the service of an employer unless notice in writing is given at the scale indicated below-

(i) For monthly paid workmenone month.

(ii) For weekly paid workmentwo weeks:

Provided that it will be for employer to relax this condition and the workman may pay cash in lieu of such notice.

(d) For purposes of Standing Orders 13 (a), (b) and (c) the terms 'service' and 'wages' shall have the same meaning as assigned to them in Section 25 (B) (1) and 2 (rr) respectively of the Industrial Disputes Act, 1947.

14. Stoppage of work and re-opening.—

(a) Subject to the provisions of Chapter V-A of the Industrial Disputes Act, 1947, the employer may, at any time, in the event of underground trouble, fire, catastrophe, breakdown of machinery, stoppage of power supply, epidemic, civil commotion or any other cause beyond the control of the employer, stop any section or sections of the mine wholly or partly for any period or periods.

(b) In the event of such stoppage during working hours, the workmen affected shall be notified by notice put up on the notice-board in the departments concerned and of the office as soon as practicable as to when work will be resumed and whether they are to remain or leave their place of work. The workmen will not

ordinarily be required to remain for more than two hours after the commencement of the stoppage. Whenever workmen are laid off on account of failure of plant or a temporary curtailment of production or other causes they shall be paid compensation in accordance with the provisions of the Industrial Disputes, Act, 1947. Where no such compensation is admissible, they shall be granted leave with or without wages as the case may be, at the option of the workman concerned, leave with wages being granted to the extent of any leave due to them. When workmen are to be laid off for an indefinitely long period, their services may be terminated subject to the provisions of the Industrial Disputes Act, 1947. If normal work is resumed two weeks' notice thereof shall be given by the pasting of notices at or near the mine office and the workmen discharged either by the employer shall if they present themselves for work, have preference for re-employment.

(c) The employer may in the event of a strike affecting either wholly or partially any section of the mine close down either wholly or partially such section of the mine and any other section affected by such closure. The fact of such closure shall be notified by notices put up on notice-board in the manager's office. Prior to resumption of work, the workmen concerned will be notified by a general notice indicating as to when work will be resumed. A copy of such notice shall be sent to the registered trade union or unions functioning in the establishment.

15. Method of filling vacancies.—

In the matter of filling up of permanent vacancies, badli and temporary workmen and probationers would be given preference in order of their seniority.

[43][**16. Transfers.—** * * *]

[44][**17. Disciplinary action for misconduct.—**

(i) A workman may be suspended by the employer pending investigation or departmental enquiry and shall be paid subsistence allowance in accordance with the provisions of section 10-A of the Act. The employer shall normally complete the enquiry within 10 days. The payment of subsistence allowance shall be subject to the workman not taking any employment elsewhere during the period of suspension].

The following shall denote misconduct:

(a) Theft, fraud, or dishonesty in connection with the employer's business or property.

(b) Taking or giving of bribes or an illegal gratification whatsoever in connection with the employer's business or his own interests.

(c) Willful insubordination or disobedience, whether alone or in conjunction with another or others, or of any lawful or reasonable order of a superior. The order of the superior should normally be in writing.

(d) Habitual late attendance and habitual absence without leave or without sufficient cause.

(e) Drunkenness, fighting or riotous, disorderly or indecent behaviors while on duty at the place of work.

(f) Habitual neglect of work.

(g) Habitual indiscipline.

(h) Smoking underground within the area in places where it is prohibited.

(i) Causing willful damage to work in progress or to property of the employer.

(j) Sleeping on duty.

(k) Malingering or showing down work.

(l) Acceptance of gifts from subordinate employees.

(m) Conviction in any Court of Law for any criminal offence involving moral turpitude.

(n) Continuous absence without permission and without satisfactory cause for more than ten days.

(o) Giving false information regarding one's name, age, father's name, qualification or previous service at the time of the employment.

(p) Leaving work without permission or sufficient reason.

(q) Any breach of the Mines Act, 1952, or any other Act or any rules, regulations or bye-laws there under, or of any Standing Orders.

(r) Threatening, abusing or assaulting any superior or co-worker.

(s) Habitual money-lending.

(t) Preaching of or inciting to violence.

(u) Abetment of or attempt at abetment of any of the above acts of misconduct.

(v) Going on illegal strike either singly or with other workers with out giving 14 day's previous notice.

(w) Disclosing to any unauthorized person of any confidential information in regard to the working or process of the establishment which may come into the possession of the workman in the course of his work.

(x) Refusal to accepted any charge-sheet or order or notice communicated in writing.

(y) Failure or refusal to wear or use any protective equipment given by the employers.

45[(z) sexual harassment which includes such un-welcome sexual determined behaviour (whether directly or by implication) as—

(i) physical contact and advances; or

(ii) a demand or request for sexual favours; or

(iii) sexually coloured remarks; or

(iv) showing pornography; or

(v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature:]

[46][*Provided* that where there is a complaint of sexual harassment within the meaning of clause (z) of sub-paragraph (i), the Complaints Committee constituted under sub-paragraph (i-B) in each establishment for inquiring into such complaints, shall notwithstanding anything contained in paragraph 18, be deemed to be the inquiring authority appointed by the employer for the purpose of these rules.

(i-A) The Complaints Committee shall hold the inquiry, unless separate procedure has been prescribed for the Complaints Committee for holding such inquiry into the complaints of sexual harassment, as far as practicable, in accordance with the procedure laid down in these rules.

(i-B) The Complaints Committee shall consist of—

(a) A Chairperson who shall be a woman;

(b) Two members representing Non-Governmental Organisation (NGO) or any other body which is familiar with the issue of sexual harassment or nominees of the National of State Human Rights Commission or the National or State Commission for Women familiar with the issue of sexual harassment

to be nominated by the employer:

Provided that one of the members of the Complaints Committee shall be woman.

(i-C) The Complaints Committee shall make and submit every year an annual report, to the appropriate Government, of the complaints and action taken.

(i-D) The employers or their agents shall report, to the appropriate Government, on the compliance of the guidelines issued by the Central Government in pursuance of the directions of the Supreme Court in Writ Petition (Criminal) Nos. 666-670 of 1992 [*Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 [LNIND 1997 SC 1081] : 1997 SCC (Cri) 932 [LNIND 1997 SC 1081]] including on the reports of the Complaint Committee].

(ii) No order of punishment under Standing Order No. 17 (i) shall be made unless the workman concerned is informed in writing of the alleged misconduct and is given an opportunity to explain the allegations made against him. A departmental enquiry shall be instituted before dealing with the charges. During the period of enquiry, the workman concerned may be suspended. The workman may take the assistance of a co-worker to help him in the enquiry, if he so desires. The records of the departmental enquiry shall be kept in writing. The approval of the owner, agent or the Chief Mining Engineer of the employer or a person holding similar position shall be obtained before imposing the punishment of dismissal. At the end of the enquiry proceedings shall be given to the workman concerned on the conclusion of the enquiry, on request by the workman.

(iii) If a workman is not found guilty of the charges framed against him, he shall be deemed to be on duty during the full period of his suspension and he shall be entitled to receive the same wages as he would have received if he had not been suspended.

(iv) In awarding punishment under this Standing Order, the authority awarding punishment shall take into account the gravity of the misconduct, the previous record, if any, of the workman and any other extenuating or aggravating circumstances that may exist. A copy of the order passed by the authority awarding punishment shall be supplied to the workman concerned.

18. Time-limit for making complaints, appeals, etc.—

All complaints arising out of employment including those relating to unfair treatment or wrongful exaction on the part of the employer or his servant shall be submitted within 7 days of such cause of complaint to the manager of the mine, with the right of appeal to the employer. Any appeal to the employer shall be made within 3 days of the decision of the manager. The employer shall normally give his decision within three days of the receipt of the appeal.

19. Liability of manager of the mine.—

The manager of the mine shall personally be held responsible for the proper enforcement of these standing orders provided that where a manager is overruled by its his superior the latter shall be held responsible for the decision taken.

20. Service certificate.—

Every workman who was employed continuously for a period of more than three months shall be entitled to a service certificate at the time of his leaving the service of employer.

21. Entry and exit.—

All workmen shall enter and leave the premises of the establishment thought authorized gates and shall be liable for search while going in or coming out of the premises. In case of women workmen search will only be made by women.

22. Exhibition and supply of Standing Orders.—

A copy of these orders in English and in the regional languages of the local area in which the mine is situated shall be posted at the manager's office and in such other places of the mine as the employer may decide and it shall be kept in a legible condition. A copy of the standing orders shall be supplied to a workman on application, on payment of a reasonable price. A trade union in the establishment will, however, be entitled to the free supply of a copy of the standing orders, provided the union is one which is recognized by the employer].

[47][SCHEDULE I-B

MODEL STANDING ORDERS ON ADDITIONAL ITEMS APPLICABLE TO ALL INDUSTRIES

(1) SERVICE RECORD

Matters relating to service card, token tickets, certification of service, change of residential address of workers and record of age.

(i) *Service Card.*—Every industrial establishment shall maintain a service card in respect of each workman in the form appended to these orders, wherein particulars of that workman shall be recorded with the knowledge of that workman and duly attested by an officer authorised in this behalf together with date.

(ii) *Certification of service.*—

(a) Every workman shall be entitled to a service certificate, pacifying the nature of work (designation) and the period of employment (indicating the days, months, years), at the time of discharge, termination, retirement or resignation from service;

(b) The existing entries in para 16 of Schedule I and para 20 of Schedule I-A shall be omitted

(iii) *Residential address of workman.*—A workman shall notify the employer immediately on engagement the details of his residential address and thereafter promptly communicate to his employer any change of his residential address. In case the workman has not communicated to his employer the change in his residential address, his last known address shall be treated by the employer as his residential address for sending any communication.

(iv) *Record of age.*—

(a) Every workman shall indicate his exact date of birth to the employer or the officer authorised by him in this behalf, at the time of entering service of the establishment. The employer of the officer authorised by him in this behalf may before the date of birth of a workman is entered in his, service card, require him to supply:—

(i) his matriculation or school leaving certificate granted by the Board of Secondary Education or similar educational authority; or

(ii) a certified copy of his date of birth as recorded in the registers of a municipality, local authority or Panchayat or Registrar of Births;

(iii) in the absence of either of the aforesaid two categories of certificate, the employer or the officer authorised by him in this behalf may require the workman to supply, a certificate from a Government Medical Officer not below the rank of an Assistant Surgeon indicating the probable age of the workman provided the cost of obtaining such certificate is borne by the employer;

(iv) where it is not practicable to obtain a certificate from a Government Medical Officer, an affidavit sworn, either by the workman or his parents, or by a near relative, who is in a position to know about the workman's actual or approximate date of birth, before a first Class Magistrate or Oath Commissioner, as evidence in support of the date of birth given by him.

(b) The date of birth of a workman, once entered in the service card of the establishment shall be the sole evidence of his age in relation to all matters pertaining to his service including fixation of the date of his retirement from the service of the establishment. All formalities regarding recording of the date of birth shall be finalised within three months of the appointment of a workman.

(c) Cases where date of birth of any workman had already been decided on the date these rules come into force shall not be reopened under these provisions.

***Note.*—**Where exact date of birth is not available and the year of birth is only established then the 1st July of the said year shall be taken as the date of birth.

(2) CONFIRMATION

The employer shall in accordance with the terms and conditions stipulated in the letter of appointment, confirm the eligible workman and issue a letter of confirmation to him. Whenever a workman is confirmed, an entry with regard to the confirmation shall also be made in his service card within a period of thirty days from the date of such confirmation.

(3) AGE OF RETIREMENT

The age of retirement or superannuation of a workman shall be as may be agreed upon between the

employer and the workman under an agreement or as specified in a settlement or award which is binding on both the workman and the employer. Where there is no such agreed age, retirement or superannuation shall be on completion of [48][58] years of age by the workman.

(4) TRANSFER

A workman may be transferred according to exigencies of work from one shop or department to another or from one station to another or from one establishment to another under the same employer:

Provided that the wages, grade, continuity of service and other conditions of service of the workman are not adversely affected by such transfer:.

Provided further that a workman is transferred from one job to another, which he is capable of doing, and provided also that where the transfer involves moving from one State to another such transfer shall take place, either with the consent of the workman or where there is a specific provision to that effect in the letter of appointment, and provided also that (i) reasonable notice is given to such workman, and (ii) reasonable joining time is allowed in case of transfers from one station to another. The workman concerned shall be paid traveling allowance including the transport charges, and fifty per cent thereof to meet incidental charges.

(5) MEDICAL AID IN CASE OF ACCIDENTS

[49][Where a workman meets with an accident in the course of] or arising out of his employment, the employer shall, at the employer's expense, make satisfactory arrangements for immediate and necessary medical aid to the injured workman and shall arrange for his further treatment, if considered necessary by the doctor attending on him. Wherever the workman is entitled for treatment and benefits under the Employee's State Insurance Act, 1948 or the Workman's Compensation Act, 1923, the employer shall arrange for the treatment and compensation [50][accordingly.]

(6) MEDICAL EXAMINATION

Wherever the recruitment rules specify medical examination of a workman on, his first appointment, the employer, shall, at the employer's expense make arrangements for the medical examination by a registered medical practitioner.

(7) SECRECY

No workman shall take any papers, books, drawings, photographs, instruments, apparatus, documents or any other property of an industrial establishment out of the work premises except with the written permission of his immediate superior, nor shall he in any way pass or cause to be passed or disclose or cause to be disclosed any information or matter concerning the manufacturing process, trade secrets and confidential documents of the establishment to any unautthorised person, company or corporation without the written permission of the employer.

(8) EXCLUSIVE SERVICE

A workman shall not at any time work against the interest of the industrial establishment in which he is employed and shall not take any employment in addition to his job in the establishment, which may adversely affect the interest of his employer.]

SCHEDULE II

[Forms]

FORM I

[Industrial Employment (Standing Orders) Act, 1946 - Section 3]

Dated.....20….

To

The Certifying Officer,[51]

(Area)

(Place)

Sir,

Under the provisions of Section 3 of the Industrial Employment (Standing Order) Act, 1946, I enclose five copies of the draft Standing Orders proposed by me for adoption in .....

(Name)

.....

(Place) (Postal address)

an industrial establishment owned/controlled by me, with the request that these orders may be certified under the term of the Act. I also enclose a statement giving the particulars prescribed in Rule 5 of the Industrial Employment (Standing Orders) Central Rules, 1946.

I am, etc.

…….

(Signature)

Employer/Manager

FORM II

[Notice under Section 5 of the Industrial Employment (Standing Orders) Act, 1946.]

Office of the Certifying Officer for.....area/place….....

Dated the.....20…...

……..

I.....Certifying Officer.....area, forward herewith a copy of the draft Standing Orders proposed by the employer for adoption in the .....industrial establishment and submitted to me for certification under the Industrial Employment (Standing Orders) Act. 1946. Any objection which the workmen may desire to make to the draft Standing Orders should be submitted to me within fifteen days from the receipt of this notice.

……

(Certifying Officer)

Seal

To

The Secretary

_____Union

		Name
Representative elected under Rule 6	{	Occupation
		Industrial establishment

FORM III

[Industrial Employment (Standing Orders) Act, 1946- Section 8]

Register-Part I

INDUSTRIAL ESTABLISHMENT

Sl. No.	Date of the dispatch of the copy of standing orders authenticated under Section 5 for the first time	Date of filling appeal	Date and nature of decision	Amendment make on appeal, if any	Date of the dispatch of the copy of the standing orders as settled on appeal	Any notice subsequently given or received of any amendment	Result

Part II

(Should contain the authenticated copy of the Standing Orders)

[52][FORM IV

[See Rule 7-A (1)]

(To be furnished in respect of each clause appealed against, separately)

(1) Draft of the Standing Orders under appeal as submitted by the employers.

(2) Objection made/modification suggested, if any, to the Draft Standing Order under appeal, by the Trade Union/Representatives of workmen.

(3) Standing Order under appeal, as certified by the Certifying Officers.

(4) Grounds of appeal by the employers/trade union/workmen's representatives.]

[53][FROM IV-A

(See Standing Order 7-A of Schedule -I)

Notice of discontinuance/restarting of a shift working to be given by the /an employer.

Name of employer.....

Address.....

Date the .....day of .....20.....

In accordance with Standing Order No.....of the Standing Orders certified and approved in respect of my/our industrial establishment, I/we hereby give notice to all concerned that it is my/our intention to discontinue/restart the shift working specified in the Annexure with effect from.....

Signature.....

Designation.....

ANNEXURE

(Here specify the particulars of change in the shift working proposed to be effected).

Copy forwarded to:—

(1) The Secretary of registered trade union, if any.

(2) The Assistant Labour Commissioner (Central)/Labour Employment Officer (Here enter officer address of the Assistant Labour Commissioner (Central)/Labour Employment Officer in the local area concerned.)

(3) The Regional Labour Commissioner (Central) Zone.

(4) The Chief Labour Commissioner (Central), New Delhi.]

[54][FORM V

(See Standing Order I, Schedule I-B)

SERVICE CARD

Name of Estt./Factory/Ticket /Token No.

1. Register Serial No.
2. Name
3. Specimen Signature/Thumb Impression.
4. Father's or Husband's name
5. Sex
6. Religion
7. Date of Birth
8. Place of Birth
9. Date of Joining
10. Details of Medical certificate at the time of joining
11. Educational and other qualifications
12. Can Read
13. Can Write
14. Can Speak
15. Height
16. Identification Marks
17. Category of Workman
18. Department
19. Details of family members
20. Permanent Address
21. Local Address
22. Quarter No.
23. Life Insurance Policy No.
24. Provident Fund Account No.
25. Nominee for Gratuity
26. Nominee for pension, if any
27. Employees State Insurance No.
28. Training courses attended (details)
29. (Eligibility for higher jobs)
30. Proficiency tests passed.
31. Employment History

Department	Token No.	Designation	Scale of Pay	Joined	Left(Reason)
1	2	3	4	5	6

32. Absence Periods.

Form	To	Reason	Medical reports regarding

	suitability for continued employment

(i) Sick Leave

(ii) Earned Leave

(iii) Any other Leave

33. Maternity Benefit

34. Workmen's Compensation

Details of accidents:

35. Details of Disciplinary Action

36. Promotions

(i) Details

(ii) Awards

(iii) Issue of Certificate of commendation

37. Date of superannuation

38. Any other matter.]

1 Notification No. L.R. 11 (37), dated 18-12-1946.

3 Subs by G.S.R. 30(E), dated 17-1-1983.

4 Subs by G.S.R. 732, dated 12-5-1971.

7 Ins by C.S.R 1166, dated 28-6-1963.

8 Ins by G.S.R. 732, dated 12-5-1971.

9 Subs by G.S.R. 910, dated 10-8-1984.

10 Subs by G.S.R. 1573, dated 10-10-1967.

11 Subs by G.S.R. No. 732, dated 12-5-1971.

12 Item (3A) omitted by G.S.R. 655(E), dated 10-10-2007 (wef 10-10-2007). Prior to its omission, item 3-A read as under:—"(3A) fixed term employment".

13 Sub-paragraph (h) omitted by G.S.R. 655(E), dated 10-10-2007 (wef 10-10-2007).

14 Subs by G.S.R. 557, dated 30-4-1959.

15 Added by G.S.R. 655, dated 3-6-1960.

16 Subs by G.S.R. 910, dated 10-8-1984.

17 Omitted by G.S.R. 824, dated 20-6-1975.

18 Subs by G.S.R. 732, dated 12-5-1971.

19 Subs by G.S.R. 824, dated 20-6-1975.

20 Subs by G.S.R. 824, dated 20-6-1975.

21 Subs by G.S.R. 824, dated 20-6-1975.

22 Subs by G.S.R. 824, dated 20-6-1975.

23 Subs by G.S.R. 655(E), dated 10-10-2007 (wef 10-10-2007).

24 Ins by G.S.R. 386, dated 5-11-1999 (wef 20-11-1999).

25 Ins by G.S.R. 25(E), dated 19-1-2006 (wef 19-1-2006).

26 Subs by G.S.R. 1128, dated 18-7-1967.

27 Subs by G.S.R. 910, dated 10-8-1984.

28 Ins by G.S.R. 824, dated 20-6-1975.

29 Re-numbered by G.S.R 1128, dated 18-7-1967.

30 Subs by G.S.R. 824, dated 30-6-1975.

31 Subs by G.S.R. 824, dated 20-6-1975.

32 Subs by G.S.R. 824, dated 20-6-1975.

33 Subs by G.S.R. 824, dated 20-6-1975.

34 Subs by G.S.R. 824, dated 20-6-1975.

35 Ins by G.S.R. 1166, dated 28-6-1963.

36 Certain words omitted by G.S.R. 824, dated 20-6-1975.

37 Form omitted by G.S.R. 910, dated 10-8-1984.

38 Ins by G.S.R. 732, dated 12-5-1971.

39 Item (iii-a) omitted by G.S.R. 655(E), dated 10-10-2007 (wef 10-10-2007).

40 Sub-paragraph (h) omitted by G.S.R. 655(E), dated 10-10-2007 (wef 10-10-2007).

41 Omitted by G.S.R. 910, dated 10-8-1984.

42 Subs by G.S.R. 655(E), dated 10-10-2007 (wef 10-10-2007).

43 Omitted by G.S.R. 910, dated 10-8-1984.

44 Subs by G.S.R. 910, dated 10-8-1984.

45 Ins by G.S.R. 386, dated 5-11-1999 (wef 20-11-1999).

46 Ins by G.S.R. 25(E), dated 19-1-2006 (wef 19-1-2006).

47 Ins by G.S.R. 30 (E), dated 17-1-1983.

48 Subs by G.S.R. 1040, dated 12-9-1984.

49 *Vide* Corrigenda G.S.R. 739, dated 18-6-1984.

50 *Vide* Corrigenda G.S.R. 739, dated 18-6-1984.

51 *Vide* Notification No. L.R. 11(98), dated 25-7-1953.

52 Ins by G.S.R. 732, dated 12-5-1971.

53 Ins by G.S.R. 910, dated 10-8-1984.

54 Ins by G.S.R. 30(E), dated 17-1-1983.

End of Document

ANNEXURE IV - The Trade Unions Act, 1926

(16 of 1926)

[25th March, 1926]

STATEMENT OF OBJECTS AND REASONS

This Bill has been prepared in response to the following Resolution which was adopted by the Legislative Assembly on 1st March, 1921:

"This Assembly recommends to the Governor-General in Council that he should take steps to introduce, as soon as practicable, in the Indian Legislature, such legislation as may be necessary for the registration of trade unions and for the protection of trade unions."

The question was examined in detail by the Government of India and local Governments were consulted; full opportunity was given for the expression of views by associations of employers and employed, and by the public generally. In the light of opinions received a draft Bill was prepared and published in September, 1924. The Government of India, after considering the criticisms received on that Bill, see no ground for modifying the general principles underlying the Bill, and, except for minor alterations, the present Bill is a reproduction of the Bill previously published.

The general scheme of the Bill may be briefly explained. A trade Union making the necessary application will, on compliance with certain stated conditions designed to ensure that the union is a *bona fide* trade union, and that adequate safeguards are provided for the rights of its members, be entitled to registration. The union and its members will thereupon receive protection in certain cases in respect of both civil and criminal liability. No restriction is placed upon the objects which a registered trade union may pursue, but the expenditure of its funds must be limited to specified trade union purposes. The legal position of trade unions which do not register will be unaffected by the Bill.

An Act to provide for the registration of Trade Unions and in certain respects to define the law relating to registered Trade Unions[1]*[***].*

WHEREAS it is expedient to provide for the registration of Trade Unions and in certain respects to define the law relating to registered Trade Unions [2][***].

It is hereby enacted as follows:—

CHAPTER I PRELIMINARY

S. 1. Short title, extent and commencement.—

(1) This Act may be called the [3][***] Trade Unions Act, 1926.

[4][(2)]It extends to the whole of India [5][***].]

(3) It shall come into force on such date[6] as the Central Government may, by notification in the Official Gazette, appoint.

S. 2. Definitions.—

In this Act[7][“the appropriate Government” means, in relation to Trade Unions whose objects are not confined to one State, the Central Government, and in relation to other Trade Unions, the State Government, and], unless there is anything repugnant in the subject or context,—

(a) “executive’’ means the body, by whatever name called, to which the management of the affairs of a Trade Union is entrusted;

(b) [8][“office-bearer”], in the case of a Trade Union, includes any member of the executive thereof, but does not include an auditor;

(c) “prescribed” means prescribed by regulations made under this Act;

(d) “registered office” means that office of a Trade Union which is registered under this Act as the head office thereof;

(e) “registered Trade Union” means a Trade Union registered under this Act;

9[(f) “Registrar” means—

(i) a Registrar of Trade Unions appointed by the appropriate Government under section 3, and includes any Additional or Deputy Registrar of Trade Unions, and

(ii) in relation to any Trade Union, the Registrar appointed for the State in which the head or registered office, as the case may be, of the Trade Union is situated;]

(g) “trade dispute” means any dispute between employers and workmen or between workmen and workmen, or between employers and employers which is connected with the employment or non-employment, or the terms of employment or the conditions of labour, of any person, and “workmen” means all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises; and

(h) “Trade Union” means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions:

Provided that this Act shall not affect—

(i) any agreement between partners as to their own business;

(ii) any agreement between an employer and those employed by him as to such employment; or

(iii) any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade or handicraft.

CHAPTER II REGISTRATION OF TRADE UNIONS

S. 3. Appointment of Registrars.—

10[(1)] [11][The appropriate Government] shall appoint a person to be the Registrar of Trade Unions for [12][each State].

13[(2) The appropriate Government may appoint as many Additional and Deputy Registrars of Trade Unions as it thinks fit for the purpose of exercising and discharging, under the superintendence and direction of the Registrar, such powers and functions of the Registrar under this Act as it may, by order, specify and define the local limits within which any such Additional or Deputy Registrar shall exercise and discharge the powers and functions so specified.

(3) Subject to the provisions of any order under sub-section (2), where an Additional or Deputy Registrar exercises and discharges the powers and functions of a Registrar in an area within which the registered office of a Trade

Union is situated, the Additional or Deputy Registrar shall be deemed to be the Registrar in relation to the Trade Union for the purposes of this Act.]

S. 4. Mode of registration.—

14[(1)] Any seven or more members of a Trade Union may, by subscribing their names to the rules of the Trade Union and by otherwise complying with the provisions of this Act with respect to registration, apply for registration of the Trade Union under this Act:

[15][*Provided* that no Trade Union of workmen shall be registered unless at least ten per cent. or one hundred of the workmen, whichever is less, engaged or employed in the establishment or industry with which it is connected are the members of such Trade Union on the date of making of application for registration:

Provided further that no Trade Union of workmen shall be registered unless it has on the date of making application not less than seven persons as its members, who are workmen engaged or employed in the establishment or industry with which it is connected.]

16[(2) Where an application has been made under sub-section (1) for the registration of a Trade Union, such application shall not be deemed to have become invalid merely by reason of the fact that, at any time after the date of the application, but before the registration of the Trade Union, some of the applicants, but not exceeding half of the total number of persons who made the application, have ceased to be members of the Trade Union or have given notice in writing to the Registrar dissociating themselves from the application.]

S. 5. Application for registration.—

(1) Every application for registration of a Trade Union shall be made to the Registrar, and shall be accompanied by a copy of the rules of the Trade Union and a statement of the following particulars, namely:—

(a) the names, occupations and addresses of the members making the application;

17[(aa) in the case of a Trade Union of workmen, the names, occupations and addresses of the place of work of the members of the Trade Union making the application;]

(b) the name of the Trade Union and the address of its head office; and

(c) the titles, names, ages, addresses and occupations of the [18][office-bearers] of the Trade Union.

(2) Where a Trade Union has been in existence for more than one year before the making of an application for its registration, there shall be delivered to the Registrar, together with the application, a general statement of the assets and liabilities of the Trade Union prepared in such form and containing such particulars as may be prescribed.

S. 6. Provisions to be contained in the rules of a Trade Union.—

A Trade Union shall not be entitled to registration under this Act, unless the executive thereof is constituted in accordance with the provisions of this Act, and the rules thereof provide for the following matters, namely:—

(a) the name of the Trade Union;

(b) the whole of the objects for which the Trade Union has been established;

(c) the whole of the purposes for which the general funds of the Trade Union shall be applicable, all of which purposes shall be purposes to which such funds are lawfully applicable under this Act;

(d) the maintenance of a list of the members of the Trade Union and adequate facilities for the inspection thereof by the [19][office-bearers] and members of Trade Union;

(e) the admission of ordinary members who shall be persons actually engaged or employed in an industry with which the Trade Union is connected, and also the admission of the number of honorary or temporary members as [20][office-bearers] required under section 22 to form the executive of the Trade Union;

21[**(ee)** the payment of a minimum subscription by members of the Trade Union which shall not be less than—

(i) one rupee per annum for rural workers;

(ii) three rupees per annum for workers in other unorganised sectors; and

(iii) twelve rupees per annum for workers in any other case;]

(f) the conditions under which any member shall be entitled to any benefit assured by the rules and under which any fine or forfeiture may be imposed on the members;

(g) the manner in which the rules shall be amended, varied or rescinded;

(h) the manner in which the members of the executive and the other [22][office-bearers] of the Trade Union shall be [23][elected] and removed;

24[**(hh)** the duration of period being not more than three years, for which the members of the executive and other office-bearers of the Trade Union shall be elected;]

(i) the safe custody of the funds of the Trade Union, an annual audit, in such manner as may be prescribed, of the accounts thereof, and adequate facilities for the inspection of the account books by the [25][office-bearers] and members of the Trade Union; and

(j) the manner in which the Trade Union may be dissolved.

S. 7. Power to call for further particulars and to require alteration of name.—

(1) The Registrar may call for further information for the purpose of satisfying himself that any application complies with the provisions of section 5, or that the Trade Union is entitled to registration under section 6, and may refuse to register the Trade Union until such information is supplied.

(2) If the name under which a Trade Union is proposed to be registered is identical with that by which any other existing Trade Union has been registered or, in the opinion of the Registrar, so nearly resembles such name as to be likely to deceive the public or the members of either Trade Union, the Registrar shall require the persons applying for registration to alter the name of the Trade Union stated in the application, and shall refuse to register the Union until such alteration has been made.

S. 8. Registration.—

The Registrar, on being satisfied that the Trade Union has complied with all the requirements of this Act in regard to registration, shall register the Trade Union by entering in a register, to be maintained in such form as may be prescribed, the particulars relating to the Trade Union contained in the statement accompanying the application for registration.

S. 9. Certificate of registration.—

The Registrar, on registering a Trade Union under section 8, shall issue a certificate of registration in the prescribed form which shall be conclusive evidence that the Trade Union has been duly registered under this Act.

[26][S. 9A. Minimum requirement about membership of a Trade Union.—

A registered Trade Union of workmen shall at all times continue to have not less than ten per cent. or one hundred of the workmen, whichever is less, subject to a minimum of seven, engaged or employed in an establishment or industry with which it is connected, as its members.]

S. 10. Cancellation of registration.—

A certificate of registration of a Trade Union may be withdrawn or cancelled by the Registrar—

(a) on the application of the Trade Union to be verified in such manner as may be prescribed;

(b) if the Registrar is satisfied that the certificate has been obtained by fraud or mistake, or that the Trade Union has ceased to exist or has wilfully and after notice from the Registrar contravened any provision of this Act or allowed any rule to continue in force which is inconsistent with any such provision, or has rescinded any rule providing for any matter provision for which is required by section 6 ;

27[(c) if the Registrar is satisfied that a registered Trade Union of workmen ceases to have the requisite number of members:]

Provided that not less than two months' previous notice in writing specifying the ground on which it is proposed to withdraw or cancel the certificate shall be given by the Registrar to the Trade Union before the certificate is withdrawn or cancelled otherwise than on the application of the Trade Union.

[28][S. 11. Appeal.—

(1) Any person aggrieved by any refusal of the Registrar to register a Trade Union or by the withdrawal or cancellation of a certificate of registration may, within such period as may be prescribed, appeal—

(a) where the head office of the Trade Union is situated within the limits of a Presidency town [29][***] to the High Court, or

30[(aa) where the head office is situated in an area, falling within the jurisdiction of a Labour Court or an Industrial Tribunal, to that Court or Tribunal, as the case may be;]

(b) where the head office is situated in any area, to such Court, not inferior to the Court of an additional or assistant Judge of a principal Civil Court of original jurisdiction, as the [31][appropriate Government] may appoint in this behalf for that area.

(2) The appellate Court may dismiss the appeal, or pass an order directing the Registrar to register the Union and to issue a certificate of registration under the provisions of section 9 or setting aside the order or withdrawal or cancellation of the certificate, as the case may be, and the Registrar shall comply with such order.

(3) For the purpose of an appeal under sub-section (1) an appellate Court shall, so far as may be, follow the same procedure and have the same powers as it follows and has when trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), and may direct by whom the whole or any part of the costs of the appeal shall be paid, and such costs shall be recovered as if they had been awarded in a suit under the said Code.

(4) In the event of the dismissal of an appeal by any Court appointed under clause (b) of sub-section (1) the person aggrieved shall have a right of appeal to the High Court, and the High Court shall, for the purpose of such appeal, have all the powers of an appellate Court under sub-sections (2) and (3), and the provisions of those sub-sections shall apply accordingly.]

S. 12. Registered office.—

All communications and notices to a registered Trade Union may be addressed to its registered office. Notice of any change in the address of the head office shall be given within fourteen days of such change to the Registrar in writing, and the changed address shall be recorded in the register referred to in section 8.

S. 13. Incorporation of registered Trade Unions.—

Every registered Trade Union shall be a body corporate by the name under which it is registered, and shall have perpetual succession and a common seal with power to acquire and hold both movable and immovable property and to contract, and shall by the said name sue and be sued.

S. 14. Certain Acts not to apply to registered Trade Unions.—

The following Acts, namely:—

(a) The Societies Registration Act, 1860 (21 of 1860);

(b) The Co-operative Societies Act, 1912 (2 of 1912);

32[(c) The Companies Act, 1956 (1 of 1956)[33]],

shall not apply to any registered Trade Union, and the registration of any such Trade Union under any such Act shall be void.

CHAPTER III RIGHTS AND LIABILITIES OF REGISTERED TRADE UNIONS

S. 15. Objects on which general funds may be spent.—

The general funds of a registered Trade Union shall not be spent on any other objects than the following, namely:—

(a) the payment of salaries, allowances and expenses to [34][office-bearers] of the Trade Union;

(b) the payment of expenses for the administration of the Trade Union, including audit of the accounts of the general funds of the Trade Union;

(c) the prosecution or defence of any legal proceeding to which the Trade Union or any member thereof is a party, when such prosecution or defence is undertaken for the purpose of securing or protecting any rights of the Trade Union as such or any rights arising out of the relations of any member with his employer or with a person whom the member employs;

(d) the conduct of trade disputes on behalf of the Trade Union or any member thereof;

(e) the compensation of members for loss arising out of trade disputes;

(f) allowances to members or their dependants on account of death, old age, sickness, accidents or unemployment of such members;

(g) the issue of, or the undertaking of liability under, policies of assurance on the lives of members, or under policies insuring members against sickness, accident or unemployment;

(h) the provision of educational, social or religious benefits for members (including the payment of the expenses of funeral or religious ceremonies for deceased members) or for the dependants of members;

(i) the upkeep of a periodical published mainly for the purpose of discussing questions affecting employers or workmen as such;

(j) the payment, in furtherance of any of the objects on which the general funds of the Trade Union may be spent, of contributions to any cause intended to benefit workmen in general, provided that the expenditure in respect of such contributions in any financial year shall not at any time during that year be in excess of one-fourth of the combined total of the gross income which has up to that time accrued to the general funds of the Trade Union during that year and of the balance at the credit of those funds at the commencement of that year; and

(k) subject to any conditions contained in the notification, any other object notified by the [35][appropriate Government] in the Official Gazette.

S. 16. Constitution of a separate fund for political purposes.—

(1) A registered Trade Union may constitute a separate fund, from contributions separately levied for or made to that fund, from which payments may be made, for the promotion of the civic and political interests of its members, in furtherance of any of the objects specified in sub-section (2).

(2) The objects referred to in sub-section (1) are—

(a) the payment of any expenses incurred, either directly or indirectly, by a candidate or prospective candidate for election as a member of any legislative body constituted under [36][***] [37][the Constitution] or of any local authority, before, during, or after the election in connection with his candidature or election; or

(b) the holding of any meeting or the distribution of any literature or documents in support of any such candidate or prospective candidate; or

(c) the maintenance of any person who is a member of any legislative body constituted under [38][***] [39][the Constitution] or for any local authority; or

(d) the registration of electors or the selection of a candidate for any legislative body constituted under [40][***] [41][the Constitution] or for any local authority; or

(e) the holding of political meetings of any kind, or the distribution of political literature or political documents of any kind.

42[(2A) In its application to the State of Jammu and Kashmir, references in sub-section (2) to any legislative body constituted under the Constitution shall be construed as including references to the Legislature of that State.]

(3) No member shall be compelled to contribute to the fund constituted under sub-section (1); and a member who does not contribute to the said fund shall not be excluded from any benefits of the Trade Union, or placed in any respect either directly or indirectly under any disability or at any disadvantage as compared with other members of the Trade Union (except in relation to the control or management of the said fund) by reason of his not contributing to the said fund; and contribution to the said fund shall not be made a condition for admission to the Trade Union.

S. 17. Criminal conspiracy in trade disputes.—

No [43][office-bearer] or member of a registered Trade Union shall be liable to punishment under sub-section (2) of section 120B of the Indian Penal Code (45 of 1860), in respect of any agreement made between the members for the purpose of furthering any such object of the Trade Union as is specified in section 15, unless the agreement is an agreement to commit an offence.

S. 18. Immunity from civil suit in certain cases.—

(1) No suit or other legal proceeding shall be maintainable in any Civil Court against any registered Trade Union or any [44][office-bearer] or member thereof in respect of any act done in contemplation or furtherance of a trade

dispute to which a member of the Trade Union is a party on the ground only that such act induces some other person to break a contract of employment, or that it is in interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills.

(2) A registered Trade Union shall not be liable in any suit or other legal proceeding in any Civil Court in respect of any tortious act done in contemplation or furtherance of a trade dispute by an agent of the Trade Union if it is proved that such person acted without the knowledge of, or contrary to express instructions given by, the executive of the Trade Union.

S. 19. Enforceability of agreements.—

Notwithstanding anything contained in any other law for the time being in force, an agreement between the members of a registered Trade Union shall not be void or voidable merely by reason of the fact that any of the objects of the agreement are in restraint of trade:

Provided that nothing in this section shall enable any Civil Court to entertain any legal proceeding instituted for the express purpose of enforcing or recovering damages for the breach of any agreement concerning the conditions on which any members of a Trade Union shall or shall not sell their goods, transact business, work, employ or be employed.

S. 20. Right to inspect books of Trade Union.—

The account books of a registered Trade Union and the list of members thereof shall be open to inspection by an [45][office-bearer] or member of the Trade Union at such times as may be provided for in the rules of the Trade Union.

S. 21. Rights of minors to membership of Trade Unions.—

Any person who has attained the age of fifteen years may be a member of a registered Trade Union subject to any rules of the Trade Union to the contrary, and may, subject as aforesaid, enjoy all the rights of a member and execute all instruments and give all acquittances necessary to be executed or given under the rules:

[46][***]

[47][S. 21A. Disqualifications of office-bearers of Trade Unions.—

(1) A person shall be disqualified for being chosen as, and for being, a member of the executive or any other office-bearer of a registered Trade Union if—

(i) he has not attained the age of eighteen years;

(ii) he has been convicted by a Court in India of any offence involving moral turpitude and sentenced to imprisonment, unless a period of five years has elapsed since his release.

(2) Any member of the executive or other office-bearer of a registered Trade Union who, before the commencement of the Indian Trade Unions (Amendment) Act, 1964, has been convicted of any offence involving moral turpitude and sentenced to imprisonment, shall on the date of such commencement cease to be such member or office-bearer unless a period of five years has elapsed since his release before that date.]

48[(3) In its application to the State of Jammu and Kashmir, reference in subsection (2) to the commencement of the Indian Trade Unions (Amendment) Act, 1964 (38 of 1964), shall be construed as reference to the commencement of this Act in the said State.]

[49][S. 22. Proportion of office-bearers to be connected with the industry.—

(1) Not less than one-half of the total number of the office-bearers of every registered Trade Union in an unrecognised sector shall be persons actually engaged or employed in an industry with which the Trade Union is connected:

Provided that the appropriate Government may, by special or general order, declare that the provisions of this section shall not apply to any Trade Union or class of Trade Unions specified in the order.

Explanation.—For the purposes of this section, "unorganised sector" means any sector which the appropriate Government may, by notification in the Official Gazette, specify.

(2) Save as otherwise provided in sub-section (1), all office-bearers of a registered Trade Union, except not more than one-third of the total number of the office-bearers or five, whichever is less, shall be persons acutally engaged or employed in the establishment or industry with which the Trade Union is connected.

Explanation.—For the purposes of this sub-section, an employee who has retired or has been retrenched shall not be construed as outsider for the purpose of holding an office in a Trade Union.

(3) No member of the Council of Ministers or a person holding an office of profit (not being an engagement or employment in an establishment or industry with which the Trade Union is connected), in the Union or a State, shall be a member of the executive or other office-bearer of a registered Trade Union.]

S. 23. Change of name.—

Any registered Trade Union may, with the consent of not less than two-thirds of the total number of its members and subject to the provisions of section 25, change its name.

S. 24. Amalgamation of Trade Unions.—

Any two or more registered Trade Unions may become amalgamated together as one Trade Union with or without dissolution or division of the funds of such Trade Unions or either or any of them, provided that the votes of at least one-half of the members of each or every such Trade Union entitled to vote are recorded, and that at least sixty per cent. of the votes recorded are in favour of the proposal.

S. 25. Notice of change of name or amalgamation.—

(1) Notice in writing of every change of name and of every amalgamation signed, in the case of a change of name, by the Secretary and by seven members of the Trade Union changing its name, and in the case of an amalgamation, by the Secretary and by seven members of each and every Trade Union which is a party thereto, shall be sent to the Registrar and where the head office of the amalgamated Trade Union is situated in a different State, to the Registrar of such State.

(2) If the proposed name is identical with that by which any other existing Trade Union has been registered or, in the opinion of the Registrar, so nearly resembles such name as to be likely to deceive the public or the members of either Trade Union, the Registrar shall refuse to register the change of name.

(3) Save as provided in sub-section (2), the Registrar shall, if he is satisfied that the provisions of this Act in respect of change of name have been complied with, register the change of name in the register referred to in section 8, and the change of name shall have effect from the date of such registration.

(4) The Registrar of the State in which the head office of the amalgamated Trade Union is situated shall, if he is satisfied that the provisions of this Act in respect of amalgamation have been complied with and that the Trade Union formed thereby is entitled to registration under section 6, register the Trade Union in the manner provided in section 8, and the amalgamation shall have effect from the date of such registration.

S. 26. Effects of change of name and of amalgamation.—

(1) The change in the name of a registered Trade Union shall not affect any rights or obligations of the Trade Union or render defective any legal proceeding by or against the Trade Union, and any legal proceeding which might have been continued or commenced by or against it by its former name may be continued or commenced by or against it by its new name.

(2) An amalgamation of two or more registered Trade Unions shall not prejudice any right of any of such Trade Unions or any right of a creditor of any of them.

S. 27. Dissolution.—

(1) When a registered Trade Union is dissolved, notice of the dissolution signed by seven members and by the Secretary of the Trade Union shall, within fourteen days of the dissolution be sent to the Registrar, and shall be registered by him if he is satisfied that the dissolution has been effected in accordance with the rules of the Trade Union, and the dissolution shall have effect from the date of such registration.

(2) Where the dissolution of a registered Trade Union has been registered and the rules of the Trade Union do not provide for the distribution of funds of the Trade Union on dissolution, the Registrar shall divide the funds amongst the members in such manner as may be prescribed.

S. 28. Returns.—

(1) There shall be sent annually to the Registrar, on or before such date as may be prescribed, a general statement, audited in the prescribed manner, of all receipts and expenditure of every registered Trade Union during the year ending on the 31st day of [50][December] next preceding such prescribed date, and of the assets and liabilities of the Trade Union existing on such 31st day of [51][December]. The statement shall be prepared in such form and shall comprise such particulars as may be prescribed.

(2) Together with the general statement there shall be sent to the Registrar a statement showing changes of [52][office-bearers] made by the Trade Union during the year to which the general statement refers, together also with a copy of the rules of the Trade Union corrected up to the date of the despatch thereof to the Registrar.

(3) A copy of every alteration made in the rules of a registered Trade Union shall be sent to the Registrar within fifteen days of the making of the alteration.

53[(4) For the purpose of examining the documents referred to in sub-sections (1), (2) and (3), the Registrar, or any officer authorised by him, by general or special order, may at all reasonable times inspect the certificate of registration, account books, registers, and other documents, relating to a Trade Union, at its registered office or may require their production at such place as he may specify in this behalf, but no such place shall be at a distance of more than ten miles from the registered office of a Trade Union.]

CHAPTER IV REGULATIONS

S. 29. Power to make regulations.—

(1) [54][***] The [55][appropriate Government] may make regulations for the purpose of carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters namely:—

(a) the manner in which Trade Unions and the rules of Trade Unions shall be registered and the fees payable on registration;

(b) the transfer of registration in the case of any registered Trade Union which has changed its head office from one State to another;

(c) the manner in which, and the qualifications by whom, the accounts of registered Trade Unions or of any class of such Unions shall be audited;

(d) the conditions subject to which inspection of documents kept by Registrars shall be allowed and the fees which shall be chargeable in respect of such inspections; and

(e) any matter which is to be or may be prescribed.

56[(3) Every notification made by the Central Government under sub-section (1) of section 22, and every regulation made by it under sub-section (1), shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or regulation, or both Houses agree that the notification or regulation should not be made, the notification or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification or regulation.

(4) Every notification made by the State Government under sub-section (1) of section 22 and every regulation made by it under sub-section (1) shall be laid, as soon as may be after it is made, before the State Legislature.]

S. 30. Publication of regulations.—

(1) The power to make regulations conferred by section 29 is subject to the condition of the regulations being made after previous publication.

(2) The date to be specified in accordance with clause (3) of section 23 of the General Clauses Act, 1897 (10 of 1897), as that after which a draft of regulations proposed to be made will be taken into consideration shall not be less than three months from the date on which the draft of the proposed regulations was published for general information.

(3) Regulations as made shall be published in the Official Gazette, and on such publication shall have effect as if enacted in this Act.

CHAPTER V PENALTIES AND PROCEDURE

S. 31. Failure to submit returns.—

(1) If default is made on the part of any registered Trade Union in giving any notice or sending any statement or other document as required by or under any provision of this Act, every [57][office-bearer] or other person bound by the rules of the Trade Union to give or send the same, or, if there is no such [58][office-bearer] or person, every member of the executive of the Trade Union, shall be punishable with fine which may extend to five rupees and, in the case of a continuing default, with an additional fine which may extend to five rupees for each week after the first during which the default continues:

Provided that the aggregate fine shall not exceed fifty rupees.

(2) Any person who wilfully makes, or causes to be made, any false entry in, or any omission from, the general statement required by section 28 or in or from any copy of rules or of alterations of rules sent to the Registrar under that section, shall be punishable with fine which may extend to five hundred rupees.

S. 32. Supplying false information regarding Trade Unions.—

Any person who, with intent to deceive, gives to any member of a registered Trade Union or to any person intending or applying to become a member of such Trade Union any document purporting to be a copy of the rules of the Trade Union or of any alterations to the same which he knows, or has reason to believe, is not a correct copy of such rules or alterations as are for the time being in force, or any person who, with the like intent, gives a copy of any rules of an unregistered Trade Union to any person on the pretence that such rules are the rules of a registered Trade Union, shall be punishable with fine which may extend to two hundred rupees.

S. 33. Cognizance of offences.—

(1) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act.

(2) No Court shall take cognizance of any offence under this Act, unless complaint thereof has been made by, or with the previous sanction of, the Registrar or, in the case of an offence under section 32, by the person to whom the copy was given, within six months of the date on which the offence is alleged to have been committed.

1 The words “in the Provinces of India” omitted by Act 42 of 1960, s 2 (wef 21-9-1960).

2 The words “in the Provinces of India” omitted by Act 42 of 1960, s 2 (wef 21-9-1960).

3 The word “Indian” omitted by Act 38 of 1964, s 3 (wef 1-4-1965).

4 Subs by the A.O. 1950, for sub-section (2).

5 The words “except the State of Jammu and Kashmir” omitted by Act 51 of 1970, s 2 and Sch. (wef 1-9-1971).

6 Came into force on 1-6-1927.

7 Ins by the A.O. 1937.

8 Subs by Act 38 of 1964, s 2, for “officer” (wef 1-4-1965).

9 Subs by Act 42 of 1960, s 3, for clause (f) (wef 21-9-1960).

10 S 3 re-numbered as sub-section (1) thereof by Act 42 of 1960, s 4 (wef 21-9-1960).

11 Subs by the A. O. 1937, for “Each Local Government”.

12 Subs by the A.O. 1937, for “the Province”.

13 Ins by Act 42 of 1960, s 4 (wef 21-9-1960).

14 S 4 re-numbered as sub-section (1) thereof by Act 42 of 1960, s 5 (wef 21-9-1960).

15 Ins by Act 31 of 2001, s 2 (wef 9-1-2002).

16 Ins by Act 42 of 1960, s 5 (wef 21-9-1960).

17 Ins by Act 31 of 2001, s 3 (wef 9-1-2002).

18 Subs by Act 38 of 1964, s 2, for “officers” (wef 1-4-1965).

19 Subs by Act 38 of 1964, s 2, for “officers” (wef 1-4-1965).

20 Subs by Act 38 of 1964, s 2, for “officers” (wef 1-4-1965).

21 Clause (ee) subs by Act 31 of 2001, s 4 (wef 9-1-2002).

22 Subs by Act 38 of 1964, s 2, for “officers” (wef 1-4-1965).

23 Subs by Act 31 of 2001, s 4 for “appointed” (wef 9-1-2002).

24 Ins by Act 31 of 2001, s 4 (wef 9-1-2002).

25 Subs by Act 38 of 1964, s 2, for “officers” (wef 1-4-1965).

26 Ins by Act 31 of 2001, s 5 (wef 9-1-2002).

27 Ins by Act 31 of 2001, s 6 (wef 9-1-2002).

28 Subs by Act 15 of 1928, s 2, for s 11.

29 The words “or of Rangoon” omitted by the A.O. 1937.

30 Ins by Act 31 of 2001, s 7 (wef 9-1-2002).

31 Subs by the A.O. 1937, for “Local Government”.

32 Subs by Act 42 of 1960, s 7, for clause (e) (wef 21-9-1960).

33 Now see the Companies Act 2013 (18 of 2013).

34 Subs by Act 38 of 1964, s 2, for “officers” (wef 1-4-1965).

35 Subs by the A.O. 1937, for “Governor-General in Council”.

36 The words and figures “the Government of India Act, or the Government of India Act, 1935, or” omitted by Act 42 of 1960, s 8 (wef 21-9-1960).

37 Ins by the A.O. 1950.

38 The words and figures “the Government of India Act, or the Government of India Act, 1935, or” omitted by Act 42 of 1960, s 8 (wef 21-9-1960).

39 Ins by the A.O. 1950.

40 The words and figures “the Government of India Act, or the Government of India Act, 1935, or” omitted by Act 42 of 1960, s 8 (wef 21-9-1960).

41 Ins by the A.O. 1950.

42 Ins by Act 51 of 1970, s 2 and Sch. (wef 1-9-1971).

43 Subs by Act 38 of 1964, s 2, for “officer” (wef 1-4-1965).

44 Subs by Act 38 of 1964, s 2, for “officer” (wef 1-4-1965).

45 Subs by Act 38 of 1964, s 2, for “officer” (wef 1-4-1965).

46 Proviso omitted by Act 38 of 1964, s 4 (wef 1-4-1965).

47 Ins by Act 38 of 1964, s 5 (wef 1-4-1965).

48 Ins by Act 51 of 1970, s 2 and Sch. (wef 1-9-1971).

49 Subs by Act 31 of 2001, s 8, for s 22 (wef 9-1-2002).

50 Subs by Act 38 of 1964, s 6, for “March” (wef 1-4-1965).

51 Subs by Act 38 of 1964, s 6, for “March” (wef 1-4-1965).

52 Subs by Act 38 of 1964, s 2, for “officer” (wef 1-4-1965).

53 Ins by Act 42 of 1960, s 9 (wef 21-9-1960).

54 The words “Subject to the control of the Governor-General in Council” omitted by the A.O. 1937.

55 Subs by the A.O. 1937, for “Local Government”.

56 Ins by Act 31 of 2001, s 9 (wef 9-1-2002).

57 Subs by Act 38 of 1964, s 2, for “officer” (wef 1-4-1965).

58 Subs by Act 38 of 1964, s 2, for “officer” (wef 1-4-1965).

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ANNEXURE V - The Central Trade Union Regulations, 1938[1]

In exercise of the powers conferred by section 29 of the Indian Trade Unions Act, 1926 (16 of 1926), and by the said section of the said Act as in force in Berar, the Central Government is pleased, in relation to Trade Unions whose objects are not confined to one[2][State], to make the following regulations, the same having been previously published as required by sub-section (1) of section 30 of the said Act, namely:—

Reg. 1. Title and application.—

(1) These regulations may be called the Central Trade Union Regulations, 1938.

(2) The regulations apply to Trade Unions whose objects are not confined to one [3][State].

Reg. 2. Definitions.—

In these regulations—

(a) "the Act" means the Indian Trade Unions Act, 1926.

(b) "Form" means a form appended to these regulations.

(c) "section" means a section of the Act.

Reg. 3. Application for registration.—

Every application for registration of a Trade Union shall be made in Form A.

Reg. 4. Register of Trade Unions.—

The Register of Trade Unions referred to in section 8 shall be maintained in Form B.

Reg. 5. Certificate of registration.—

(1) The Certificate of Registration issued by the Registrar under section 9 shall be in Form C.

(2) When the Registrar registers a change of name under section 25, sub-section (3), he shall certify under his signature at the foot of the certificate on its presentation to him by the Secretary that the new name has been registered.

Reg. 6. Cancellation of registration.—

The Registrar on receiving an application for the cancellation of registration shall, before granting the application, satisfy himself that the withdrawal or cancellation of registration was approved by a general meeting of the Trade Union, or if it was not so approved, that it has the approval of the majority of the members of the Trade Union. For this purpose, he may call for such further particulars as he may deem necessary and may examine any officer of the Union.

Reg. 7. Unions registered with [4][State] Registrars.—

If the application is made by a Trade Union which has previously been registered by the Registrar of any [5][State] the union shall submit with its application a copy of the certificate of registration granted to it and copies of the entries relating to it in the Register of Trade Unions for the [6][State].

Reg. 8. Fees.—

The fee payable for the registration of a Trade Union shall be Rs. 5.

Reg. 9. Amendment of rules.—

(1) On receiving a copy of an application made in the rules of a Trade Union under section 28(3), the Registrar, unless he has reason to believe that the alteration has not been made in the manner provided by the rules of the Trade Union, shall register the alteration in a register to be maintained for this purpose and shall notify the fact that he has done so to the Secretary of the Trade Union.

(2) The fee payable for registration of alteration of rules shall be Re.1 for each set of alterations made simultaneously.

Reg. 10. Appeals.—

Any appeal made under section 11(1) of the Act must be filed within sixty days of the date on which the Registrar passed the order against which the appeal is made.

Reg. 11. Funds of a dissolved Trade Union.—

Where it is necessary for the Registrar, under section 27(2) to distribute the funds of a Trade Union which has been dissolved, he shall divide the funds in proportion to the amounts contributed by the members by way of subscription during this membership.

Reg. 12. Return.—

The annual return to be furnished under section 28 shall be submitted to the Registrar by the 31st day of July in each year and shall be in Form D.

Reg. 13. Auditors.—

(1) Save as provided in sub-clauses (2), (3), (4) and (5) of this regulation, the annual audit of the account of any registered Trade Union shall be conducted by an auditor authorized to audit the accounts of companies under section 144(1) of the Indian Companies Act, 1913 or under section 3(2) of the Indian Companies (Amendment) Act, 1930.

(2) Where the membership of Trade Union did not at any time during the financial year exceed 2,500, the annual audit of the accounts may be conducted—

(a) by any examiner of local fund accounts; or

(b) by any local fund auditor appointed by the [7][State] Government; or

(c) by the person, who, having held an appointment under Government in any audit or accounts departments, is in receipt of a pension of not less than Rs. 200 per mensem.

(3) Where the membership of a Trade Union did not at any time during the financial year exceed 750, the annual audit of the accounts may be conducted—

(a) by any two persons holding office as magistrates or judges or as members of any municipal council, district board, or legislative body; or

(b) by any person, who, having held an appointment under Government in any audit or accounts department, is in receipt of a pension from Government of not less than Rs. 75 a month, or

(c) by any auditor appointed to conduct the audit of any co-operative societies by Government or by the Registrar of Co-operative Societies or by any [8][State] co-operative organization recognized by Government for this purpose.

(4) Where the membership of a Trade Union did not at any time during the financial year exceed 250, the annual audit of the accounts may be conducted by any two members of the Union.

(5) Where the Trade Union is a federation of unions, and the number of unions affiliated to it at any time during the financial year did not exceed 50, 51 or 5, respectively, the audit of the accounts of the federation may be conducted as if it had not at any time during the year had a membership of more than 2,500, 750 or 250, respectively.

Reg. 14. Exception.—

Notwithstanding anything contained in regulation 13, no person, who, at any time during the year, was entrusted with any part

of the funds or securities belonging to the Trade Union shall be eligible to audit the accounts of that Union.

Reg. 15. Audit.—

The auditor or auditors appointed in accordance with the regulations shall be given access to all the books of the Trade Union and shall verify the annual return with the accounts and vouchers relating thereto and shall thereafter sign the auditor's declaration appended to Form D, indicating separately on that form under his signature or their signatures a statement showing in what respect he or they find the return to be incorrect, unvouched or not in accordance with the Act. The particulars given in this statement shall indicate—

(a) every payment which appears to be unauthorized by the rules of the Trade Union or contrary to the provisions of the Act,

(b) the amount of any deficiency or loss which appears to have been incurred by the negligence or misconduct of any person,

(c) the amount of any sum which ought to have been but is not brought to account by any person.

Reg. 16. Audit of political funds.—

The audit of the political funds of a registered Trade Union shall be carried out alongwith the audit of the general account of the Trade Union and by the same auditor or auditors.

Reg. 17. Inspection.—

(1) The register of Trade Unions maintained in accordance with regulation 4 shall be open to inspection by any person on payment of a fee of annas eight.

(2) Any documents in the possession of the Registrar received from a registered Trade Union may be inspected by any member of that Union on payment of a fee of annas eight for each document inspected.

(3) Documents shall be open to inspection every day on which the office of the Registrar is open and within such hours as may be fixed for this purpose by the Registrar.

(4) The Registrar may supply a Certified copy of any such document to a registered Trade Union or a member thereof on payment of annas twelve for the first two hundred words (or less) and annas six for every additional hundred words or fractional part thereof.

[Forms]

FORM A APPLICATION FOR REGISTRATION OF TRADE UNION

Date the..... day of..... 20.....

1. We hereby apply for the registration of a Trade Union under the name of.....
2. The address of the head office of the Union is.....
3. The Union came into existence on the.....day of..... 20....
4. The Union is a Union of employers/workers engaged in the industry (or profession).
5. The particulars required by section 5(1)(c) of the Indian Trade Unions Act, 1926, are given in Schedule I.
6. The particulars given in Schedule II show the provisions made in the rules for the matters detailed in section 6 of the Indian Trade Unions Act, 1926.
7. (To be struck out in the case of unions which have not been in existence for one year before the date of application). The particulars required by section 5(2) of the Indian Trade Unions Act, 1926, are given in Schedule[9] III.
8. We have been duly authorized to make this application.

	Signature	*Occupation*	*Address*	*Signed*
1				
2				
3				
4				
5				
6				
7				

To the Registrar of Central Trade Unions, Delhi.

SCHEDULE I—LIST OF OFFICERS

Title	*Name*	*Age*	*Address*	*Occupation*

Note.—Enter in this Schedule the names of all members of the executive of the Union showing in column 1 the names of any posts held by them (*e.g.*, President, Secretary, Treasurer, etc.) in addition to their offices as members of the executive.

SCHEDULE II—REFERENCE TO RULES

The numbers of the rules-making provision for the several matters detailed in column 1 are given in column 2 below:

Matter	*Number of rules*
1	*2*
Name of union	
The whole of the objects for which the union has been established.	
The whole of the purposes for which the general funds of the union shall be applicable.	
The maintenance of a list of members.	
The facilities provided for the inspection of the list of members by officers and members.	
The admission of ordinary members.	
The admission of honorary or temporary members.	
The conditions under which members are entitled to benefit assured by the rules.	
The conditions under which fines or forfeitures can be imposed or varied.	
The manner in which the rule shall be amended, varied or rescinded.	

The manner in which the members of the executive and the other officers of the union shall be appointed and removed.

The safe custody of the funds.

The annual audit of the accounts.

The facilities for the inspection of the account books by officers and members.

The manner in which the union may be dissolved

SCHEDULE III—STATEMENT OF LIABILITIES AND ASSETS ON THE .....DAY OF.....20.....

(This need not be filled in if the Union came into existence less than one year before the date of application for registration.)

Liabilities	*Rs. P.*	*Assets*	*Rs. P.*
Amount of General fund		Cash— ..	
Amount of political fund		In hands of Treasurer ..	
Loans ... from Other liabilities (to be specified)		In hands of Secretary ..	
		In hands of— ..	
		In the Bank ..	
		In the Bank ..	
		Securities as per list below ..	
		Unpaid subscription due ..	
		Loans to—	
		Immovable property ..	
		Goods and furniture ..	
		Other assets (to be Specified)	
Total Liabilities		Total Assets	

List of Securities

Particulars	*Nominal*	*Market value*	*In hands of*
1.			
2.			
3.			
4.			
5.			
6.			
7.			

FORM B REGISTER OF TRADE UNIONS

Serial No.							*Officers*
Name of Union Address of head Office Date of Registration.							
	Year of entering in office	Name	Age of entry	Address	Occupation	Year of relinquishing office	Other office held in addition to membership of executive with date
Number of applications from List of members applying for registration							
1. 2. 3. 4. 5. 6. 7.							

FORM C CERTIFICATE OF REGISTRATION OF TRADE UNION

No.

It is hereby certified that the……has been registered under the Indian Trade Unions Act, 1926, this…….day of …….20……

Seal

Registrar of Central Trade Unions

FORM D ANNUAL RETURN PRESCRIBED UNDER SECTION 28 OF THE INDIAN TRADE UNIONS ACT, 1926

FOR THE YEAR ENDING ON 31ST MARCH, 20….

Name of Union.

Registered Head Office.

Number of Certificate of registration.

Return to be made by federations of Trade Union	Number of unions affiliated at the beginning of year.
This return need not be made by federations of trade Unions.	Number of unions joining during the year.
	Number of unions disaffiliated at the end of year.
	Number of members on books at the beginning of year.
	Number of members admitted during the year (add) together.

Number of members who left during the year (deduct).

Total number of members on books at the end of the year.

Males

Females

Number of members contributing to political fund.

A copy of the rules of the Trade Union, corrected up to the date of dispatch of this return, is appended.

Dated the…… Secretary

Statement of liabilities and assets on the……..day of…….20……

Liabilities	*Rs. P.*	*Assets*	*Rs. P.*
Amount of General fund		Cash— ..	
Amount of political fund		In hands of Treasurer ..	
Loans … from debts due to		In hands of Secretary ..	
Other liabilities (to be specified)		In hands of— ..	
		In the Bank ..	
		In the Bank ..	
		Securities as per list below ..	
		Unpaid subscription due ..	
		Loans to—	
		Immovable property ..	
		Goods and furniture ..	
		Other assets (to be specified)	
Total Liabilities		Total Assets	

List of securities

Particulars	Nominal value	Market-value at date on which accounts have been made up	In hands of

Treasurer

General Fund Account

Income	*Rs. P.*	*Expenditure*	*Rs. P.*
Balance at beginning of year		Salaries, allowances and expenses of officers	
Contributions from members as per member		Salaries, allowances and expenses of establishment ..	
Donations		Auditor's fee ..	
Sale of periodicals, rules, etc.		Legal expenses ..	
Interest on investments		Expenses in conducting trade disputes	
Income from miscellaneous sources (to be specified)			

Total..		Compensation paid to members for loss arising out of trade disputes Funeral, old-age, sickness, unemployment benefits, etc. Educational, social and religious benefits Cost of publishing periodical .. Rents, rates and taxes .. Stationery, printing and postage .. Expenses incurred under section 15(j) of the Indian Trade Unions Act, 1926 (to be specified) Other expenses (to be specified) Balance at the end of year.. Total..	

Treasurer

Political Fund Account

	Rs. P.		*Rs. P.*
Balance at beginning of year Contributions from members as per member Total..		Payments made on objects specified in section 16(b) of the Indian Trade Unions Act, 1926 (to be specified) Expenses of managements (to be specified) .. Balance at the end of year Total ..	

Treasurer

Auditor's Declaration

The undersigned, having had access to all the books and accounts to the Trade Union and having examined the foregoing Statements and verified the same as found to be correct, duly vouched and in accordance with the law, subject to the remarks, if any, appended hereto.

Auditor.

The following changes of officers have been made during the year—

Officers Relinquishing Office

Name	*Office*	*Date of relinquishing*
		\

Officers Appointed

Name	*Age*	*Office*	*Address*	*Occupation*	*Date of Appointment*

Secretary.

———

1 Notification No. L-1785, dated 16-6-1938.

2 Subs by the A.O. 1950 for “Province”.

3 Subs by the A.O. 1950 for “Province”.

4 Subs by the A.O. 1950 for ‘‘Provincial’’.

5 Subs by the A.O. 1950 for ‘‘Province’’.

6 Subs by the A.O. 1950 for ‘‘Province’’.

7 Subs by the A.O. 1950 for ‘‘Provincial’’.

8 Subs by the A.O. 1950 for ‘‘Provincial’’.

9 State here whether the authority was given by a resolution of a general meeting of the Union, if not, in what other way it was given.

End of Document

ANNEXURE VI - Report of the National Commission on Labour, 1969[1]

(*Relevant Extracts*)

NOTE FROM THE EDITOR:

As the enlightened readers will notice, the First National Commission on Labour in the post-Independent India was constituted vide the Government of India Resolution No. 36/14/66-I&E, dated the 24th December, 1966, under the Chairmanship of the celebrated Hon'ble Mr. Justice PB Gajendragadkar, former Chief Justice of India, who himself was an acknowledged authority on labour law and industrial jurisprudence. The terms of reference were exhaustive covering almost every conceivable aspect of the subject 'labour' in all its multifarious hues and shades. The Final Report (1969) was a product of an outstanding research, spanning nearly three years, and consists of 33 Chapters, 13 Annexures and 10 Appendices. This massive Report can be rightly described as a 'classic' in every sense of the term. Out of the several Annexures to the Report, the following seven, which are particularly relevant to, and have a direct bearing on, the Industrial Relations Legislation, have been identified for inclusion here to facilitate ready reference:

Annexure III:	Code of Discipline in Industry
Annexure IV:	Rights of Recognised Unions under the Code of Discipline
Annexure VI:	Model Grievance Procedure
Annexure VII:	Functions of Works Committees
Annexure IX:	Recommendations of the 15th Session of the ILC regarding Need-based Minimum Wage
Annexure X:	Definition of Minimum, Fair & Living Wages as given by the Fair Wages Committee Report, 1948
Annexure XI:	Rationalisation—The recommendation of the 15th session of Indian Labour Conference

ANNEXURE III CODE OF DISCIPLINE IN INDUSTRY

I. To Maintain Discipline in Industry

(Both in public and private sectors)

There has to be (i) a just recognition by employers and workers of the rights and responsibilities of either party, as defined by the laws and agreements (including bipartite and tripartite agreements, arrived at all levels from time to time) and (ii) a proper and willing discharge by either party of its obligations consequent on such recognition.

The Central and State Governments, on their part will arrange to examine and set right any shortcomings in the machinery they constitute for the administration of labour laws to ensure better discipline in industry.

II. Management and Union(s) Agree

(i) that no Unilateral action should be taken in connection with any industrial matter and that disputes should be settled at appropriate level,

(ii) that the existing machinery for settlement of disputes should be utilised with the utmost expedition,

(iii) that there should be no strike or lock-out without notice,

(iv) that affirming their faith in democratic principles, they bind themselves to settle all future differences, disputes and grievances by mutual negotiation, conciliation and voluntary arbitration,

(v) that neither party will have recourse to (a) coercion, (b) intimidation, (c) victimisation or (d) go-slow,

(vi) that they will avoid (a) litigation, (b) sit down and stay in strikes and (c) lock outs,

(vii) that they will promote constructive co-operation between their representatives at all levels and as between workers themselves and abide by the spirit of agreements mutually entered into,

(viii) that they will establish upon a mutually agreed basis, a grievance procedure which will ensure a speedy and full investigation leading to settlement,

(ix) that they will abide by various stages in the grievance procedure and take no arbitrary action which would bypass this procedure, and

(x) that they will educate the management personnel and workers regarding their obligations to each other.

III. Management Agree

(i) not to increase work-loads unless agreed upon or settled otherwise;

(ii) not to support or encourage any unfair labour practice such as (a) interference with the right of employees to enrol or continue as union members, (b) discrimination, restraint or coercion against any employee because of recognised activity of trade unions and (c) victimisation of any employee and abuse of authority in any form;

(iii) to take prompt action for (a) settlement of grievances and (b) implementation of settlements, awards decisions and orders;

(iv) to display in conspicuous places in the undertaking the provisions of this Code in local language(s);

(v) to distinguish between actions justifying immediate discharge and those where discharge must be preceded by a warning, reprimand, suspension or some other form of disciplinary action and to arrange that all such disciplinary action should be subject to an appeal through normal grievance procedure;

(vi) to take appropriate disciplinary action against its officers and members in cases where enquiries reveal that they were responsible for precipitate action by workers leading to indiscipline; and

(vii) to recognise the union in accordance with the criteria *(ANNEXURE A* below) evolved at the 16th session of the Indian Labour Conference held in May, 1958.

IV. Union[s] Agree

(i) not to engage in any form of physical duress;

(ii) not to permit demonstrations which are not peaceful and not to permit rowdyism in demonstration;

(iii) that their members will not engage or cause other employees to engage in any union activity during working hours, unless as provided for by law, agreement or practice;

(iv) to discourage unfair labour practices such as (a) negligence of duty, (b) careless operation, (c) damage to property, (d) interference with or disturbance to normal work and (e) insubordination;

(v) to take prompt action to implement awards, agreements, settlements and decisions;

(vi) to display in conspicuous places in the union offices, the provisions of this Code in the local languages); and

(vii) to express disapproval and to take appropriate action against office-bearers and members for indulging in action against the spirit of this Code.

Annexure A

Criteria for recognition of Unions

1. Where there is more than one union, a union claiming recognition should have been functioning for at least one year after registration. Where there is only one union, this condition would not apply.
2. The membership of the union should cover at least 15% of the workers in the establishment concerned. Membership would be counted only of those who had paid their subscriptions for at least three months during the period of six months immediately preceding the reckoning.
3. A union may claim to be recognised as a representative union for an Industry in a local area if it has a membership of at least 25% of the workers of that industry in that area.
4. When a union has been recognised, there should be no change in its position for a period of two years.
5. Where there are several unions in an industry or establishment, the one with the largest membership should be recognised.
6. A representative union for an industry in an area should have the right to represent the workers in all the establishments in the industry, but if a union of workers in a particular establishment has a membership of 50 per cent or more of the workers of that establishment it should have the right to deal with matters of purely local interest, such as, for instance, the handling of grievances pertaining to its own members. All other workers who are not members of that union might cither operate through the representative Union for the industry or seek redress directly.
7. In the case of trade union federations which are not affiliated to any of the four central organisations of labour the question of recognition would have to be dealt with separately.
8. Only unions which observed the Code of Discipline would be entitled to recognition.

ANNEXURE IV RIGHTS OF RECOGNISED UNIONS UNDER THE CODE OF DISCIPLINE

The question of rights (of unions recognised under the Code of Discipline vis-a-vis unrecognised unions was discussed at the 20th Session of the Indian Labour Conference (August, 1962). While a decision on the rights of unrecognised unions was deferred for future consideration, it was agreed that unions granted recognition under the Code of Discipline should enjoy the following rights:—

(i) to raise issue and enter into collective agreements with employers on general questions concerning the terms of employment and conditions of service of workers in an establishment or, in the case of a Representative; Union, in an industry in a local area;

(ii) to collect membership fees/subscriptions payable by members to the union within the premises of the undertaking;

(iii) to put or cause to put up a notice board on the premises of the undertaking in which its members are employed and affix or cause to be affixed thereon notices relating to meetings, statements of accounts of its income and expenditure and other announcements which are not abusive, indecent or inflammatory, or subversive of discipline or otherwise contrary to the Code;

(iv) for the purpose of prevention or settlement of an industrial dispute:—

  (a) to hold discussions with the employees who are members of the union at a suitable place or places within the premises of office/factory/establishment as mutually agreed upon;

  (b) to meet and discuss with an employer or any person appointed by him for the purpose, the grievances of its members employed in the undertaking;

  (c) to inspect, by prior arrangement, in an undertaking, any place where any member of the union is employed;

(v) to nominate its representatives on the Grievance Committee constituted under the Grievance Procedure in an establishment;

(vi) to nominate its representatives on Joint Management Councils; and

(vii) to nominate its representatives on non-statutory bi-partite committees, e.g. production committees, welfare, committees, canteen committees, house allotment committees, etc., set up by managements.

The rights referred to above would be without prejudice to the privileges being enjoyed by the recognised unions; at present either by agreement or by usage.

ANNEXURE VI MODEL GRIEVANCE PROCEDURE

A. Grievance Machinery

A Grievance Machinery will be required to be set up in each undertaking to administer the Grievance Procedure. The minimum requirements of such a machinery would be as follows, except where an established procedure is already working to the mutual satisfaction of either party. Even in the latter case, every effort shall be made to bring the procedure in conformity with the Guiding Principles *(ANNEXURE B*).

For the purpose of constituting a fresh Grievance Machinery, workers in each department (and where a department is too small, in a group of departments) and each shift, shall elect, from amongst themselves and for a period of not less than one year at a time, departmental representatives and forward the list of persons so elected to the management. Where the unions in the undertaking are in a position to submit an agreed list of names, recourse to election may not be necessary. Similar is the case where works committees are functioning satisfactorily, since the works committee member of a particular constituency shall act as the departmental representative. Correspondingly, the management shall designate the persons for each department who shall be approached at the first stage and the departmental heads for handling grievances at the second stage. Two or three of the departmental representatives of workers and two or three departmental heads nominated by the management shall constitute the Grievance Committee, the composition of which is indicated in *ANNEXURE C.* In the case of appeals against discharges or dismissals, the management shall designate the authority to whom appeals could be made.

B. Grievance Procedure

While adaptations have to be made to meet special circumstances such as those obtaining in the Defence undertakings, Railways, Plantations and also small undertakings employing few workmen the procedure normally envisaged in the handling of grievances should be as follows:

(1) An aggrieved employee shall first present his grievance verbally in person to the officer designated by the management for this purpose. An answer shall be given within 48 hours of the presentation of complaint.

(2) If the worker is not satisfied with the decision of this officer or fails to receive an answer within the stipulated period, he shall, either in person or accompanied by his departmental representative, present his grievances to the Head of the Department designated by the management for the purpose of handling grievances. (For this purpose, a fixed time shall be specified during which on any working day, an aggrieved worker could meet the departmental head for presentation of grievances). The Departmental head shall give his answer within 3 days of the presentation of grievance. If action cannot be taken within that period, the reason for delay should be recorded.

(3) If the decision of the Departmental Head is unsatisfactory, the aggrieved worker may request the forwarding of his grievance to the "Grievance Committee" which shall make its recommendations to the Manager within 7 days of the worker's request. If the recommendations cannot be made within this time limit, the reason for such delay should be recorded. Unanimous recommendations of the Grievance Committee shall be implemented by the management. In the event of a difference of opinion, among the members of the Grievance Committee, the views of the members along with the relevant papers shall be placed before the Manager for final decision. In either case, the final decision of the management shall be communicated to the workmen concerned by the personnel officer within 3 days from the receipt of the Grievance Committee's recommendations.

(4) Should the decision from the Management be not forthcoming within the stipulated period or should it be unsatisfactory, the worker shall have the right to appeal to Management for a revision. In making this appeal, the worker, if he so desires, shall have the right to take a union official along with him to facilitate discussions with Management. Management shall communicate their decision within a week of the workman's revision petition.

(5) If no agreement is still possible, the union and the management may refer the grievance to voluntary arbitration within a week of the receipt by the worker of Management's decision.

(6) Where a worker has taken up a Grievance for redressal under this procedure, the formal Conciliation Machinery shall not intervene till all steps in the procedure are exhausted. A Grievance shall be presumed to assume the form of a dispute only when the final decision of the top management in respect of the Grievance is not acceptable to the worker.

(7) If a grievance arises out of an order given by management, the said order shall be complied with before the workman concerned invokes the procedure laid down for redressal of grievance. If, however, there is a time lag between the

issue of order and its compliance, the grievance procedure may immediately be invoked but the order nevertheless must be complied within the due date, even if all the steps in the grievance procedure have not been exhausted. It may however be advisable for the management to await the findings of Grievance procedure machinery.

(8) Workers' representatives on the Grievance Committee shall have the right of access to any document connected with the inquiry maintained in the department and which may be necessary to understand the merit or otherwise of the workers' grievances. The management's representatives shall have the right, however, to refuse to show any document or give any information which they consider to be of a confidential nature. Such confidential document(s) shall not be used against the workmen in the course of the grievance proceedings.

(9) There shall be a time-limit within which an appeal shall be taken from one step to the other. For this purpose, the aggrieved worker shall, within 72 hours of the receipt of the decision at one stage (or if no decision is received, on the expiry of the stipulated period), file his appeal with the authority at the next higher stage should he feel inclined to appeal.

(10) In calculating the various time intervals under the above clause, holidays shall not be reckoned.

(11) Management shall provide the necessary clerical and other assistance for the smooth functioning of the grievance machinery.

(12) If it is necessary for any worker to leave the department during working hours on call from the Labour/Personnel Officer or any other officer of the established grievance machinery, previous permission of his superior shall necessarily be obtained. Subject to this condition, the worker shall not suffer any loss in wages for the work-time lost in this manner.

(13) If, however, there be any complaint against any individual member of the staff, who is nominated by the management to handle grievance at the lowest level, the workman may take up his grievance at the next higher stage, *i.e.*, at the level of Departmental Head.

(14) In the case of any grievance arising out of discharge or dismissal of a workman, the above-mentioned procedure shall not apply. Instead, a discharged or dismissed workman shall have the right to appeal either to the dismissing authority or to a senior authority who shall be specified by the management, within a week from the date of dismissal or discharge. At the time the appeal is heard, the workman may, if he so desires, be accompanied by either an official of the recognised union or a fellow worker, as the case may be.

Annexure B

Guiding Principles/or a grievance procedure

Existing labour legislation does not provide for a well-defined and adequate procedure for redressal of day-to-day grievances in industrial units. Clause 15 of the Model Standing Orders in Schedule I of the Industrial Employment (Standing Orders) Central Rules 1946 specifies that 'All complaints arising out of employment including those relating to unfair treatment or wrongful exaction on the part of the employer or his agent, shall be submitted to the manager or the other person specified in this behalf with the right to appeal to the employers'. In some industrial units, however, detailed grievance procedure has been worked out by mutual agreement. In the absence of a satisfactory grievance procedure, day-to-day grievances are allowed to pile up with the result that the accumulated discontent culminates sometime or the other in cases of indiscipline, strikes, etc. In what follows, therefore, an attempt has been made to draw up Guiding Principles for a Grievance Procedure. It is realised that it may not be possible to apply all these principles in respect of each and every industrial unit. However, all units should endeavour to conform, as much as possible, to these principles.

Complaints affecting one or more individual workers in respect of their wage payments, over-time, leave, transfer, promotion, seniority, work assignment, and discharges would constitute[2] grievances. Where the points at dispute are of general applicability or of considerable magnitude, they will fall outside the scope of this procedure.

A grievance procedure should take note of the following principles:

(1) Conformity with existing legislation

A Grievance Procedure forms part of the integrated scheme intended to promote satisfactory relations between employers and workers. This procedure should be designed to supplement the existing statutory provisions and it may, where practicable, make use of such machinery as is already provided by legislation. The Grievance Machinery can be availed of on the receipt by the worker of the order causing a grievance. The operation of the order, however, need not be held up till the grievance

machinery is completely exhausted. Wherever possible, attempts should be made to complete the grievance procedure between the time the order is passed and when it is acted upon.

(2) Need to make the machinery simple and expeditious

(a) As far as possible, grievances should be settled at the lowest level.

(b) No matter should ordinarily be taken up at more than two levels, i.e., normally there should be only one appeal.

(c) Different types of grievances may be referred to appropriate authorities.

(d) A grievance must be redressed as expeditiously as possible and towards this end, the employer, in consultation with the workers, should decide upon the time limit required for settling a grievance.

(3) Designation of authorities

The workmen must know the authorities to be approached and it should, therefore, be incumbent on the management to designate the authorities to be contacted at various levels.

It may be useful to classify grievances as those arising from personal relationship and others arising out of conditions of employment. In the former case, a grievance should be taken up, in the first instance, with the authority in the line management immediately above the officers against whom the complaint is made. Thereafter, the matter may go to the Grievance Committee comprising representatives of management and workers. The size and composition of the Committee shall be decided at the unit level *(ANNEXURE C* below). Other grievances should be taken up, in the first instance, with the authority designated by the management.

Thereafter, a reference may be made to the Grievance Committee. Where the matter goes to the Grievance Committee in the first instance, an appeal shall lie with the top management.

Annexure C

Constitution of grievance committee

(1) In the case where the Union is recognised

Two representatives of management plus a union representative and the union departmental representative of the department in which the workmen concerned work.

(2) ln the case where the union is not recognised or there is no union but there is a works committee

Two representatives of management plus the representatives of the department of the workman concerned on the works committee plus either the Secretary or Vice-President of the Works Committee (this is in the case the Secretary of the works committee is also the workman's departmental representative).

It is suggested that in the case of the management, their representatives should be the departmental head plus the official who dealt with the matter at the first stage, or the personnel officer should act as an adviser. The size of the 'Grievance Committee' should be limited to a maximum of four to six; otherwise it becomes unwieldy.

ANNEXURE VII FUNCTIONS OF WORKS COMMITTEES

Conclusions of the Tripartite Committee on Works Committees

(Seventeenth Session—I.L.C Decision 1959)

It was agreed that it was not practicable to draw up an exhaustive list of the functions of Works Committees. There should be some flexibility of approach for the system to work properly. Illustrative lists of items which the Works Committee should normally deal with and those which it should not normally deal with were drawn up and approved. It was agreed that the demarcation would not be rigid and the approved lists were flexible.

I. Illustrative list of items which Works Committees will normally deal with

1. Conditions of work such as ventilation, lighting, temperature and sanitation including latrines and urinals.
2. Amenities such as drinking water, canteens, dining rooms, creches, rest rooms, medical and health services.
3. Safety and accident prevention, occupational diseases and protective equipment.
4. Adjustment of festival and national holidays.
5. Administration of welfare and fine funds.
6. Educational and recreational activities, such as libraries, reading rooms, cinema shows, sports, games, picnic parties, community welfare and celebrations.
7. Promotion of thrift and savings.
8. Implementation and review of decisions arrived at meetings of Works Committees.

II. List of items which the Works Committees will not normally deal with

1. Wages and allowances.
2. Bonus and profit sharing schemes.
3. Rationalisation and matters connected with the fixation of workload.
4. Matters connected with the fixation of standard labour force.
5. Programmes of planning and development.
6. Matters connected with retrenchment and lay-off.
7. Victimisation for trade union activities.
8. Provident Fund, gratuity schemes and other retiring benefits.
9. Quantum of leave and national and festival holidays.
10. Incentive schemes.
11. Housing and transport services.

ANNEXURE IX RECOMMENDATIONS OF THE 15TH SESSION OF THE INDIAN LABOUR CONFERENCE REGARDING NEED BASED MINIMUM WAGE

It was agreed that the minimum wage was 'need-based' and should ensure the minimum human needs of the industrial worker, irrespective of any other consideration. To calculate the minimum wage, the Committee accepted the following norms and recommended that they should guide all wage fixing authorities, including minimum wage committees, wage boards, adjudicators, etc. :—

(i) in calculating the minimum wage, the standard working-class family should be taken to consist of 3 consumption units for one earner; the earnings of women, children and adolescents should be disregarded;

(ii) minimum food requirements should be calculated on the basis of a net intake of 2,700 calories, as recommended by Dr. Aykroyd, for an average Indian adult of moderate activity;

(iii) clothing requirements should be estimated at a per capita consumption of 18 yards per annum which would give for the average worker's family of four, a total of 72 yards;

(iv) in respect of housing the norm should be the minimum rent charged by Government in any area for houses provided under the Subsidised Industrial Housing Scheme for low-income groups; and

(v) fuel, lighting and other 'miscellaneous' items of expenditure should constitute 20 per cent of the total minimum wage.

While agreeing to these guidelines for fixation of the minimum wage for industrial workers throughout the country, the Committee recognised the existence of instances where difficulties might be experienced in implementing these recommendations. Wherever the minimum wage fixed went below the recommendations, it would be incumbent on the authorities concerned to justify the circumstances which prevented them from

adherence to the norms laid down.

ANNEXURE X DEFINITION OF MINIMUM, FAIR & LIVING WAGES AS GIVEN BY THE FAIR WAGES COMMITTEE REPORT, 1948

(a) Minimum Wage: We consider that a minimum wage must provide not merely for the bare sustenance of life but for the preservation of the efficiency of the worker. For this purpose the minimum wage must also provide for some measure of education, medical requirements and amenities.

(b) Living Wage: "..... the living wage should enable the male earner to provide for himself and his family not merely the bare essentials of food, clothing and shelter but a measure of frugal comfort including education for his children, protection against ill-health, requirements of essential social needs and a measure of insurance against the more important misfortunes including old age."

(c) Fair Wage: While the lower limit of the fair wage must obviously be the minimum wage, the upper limit is equally set by what may broadly be called the capacity of industry to pay. This will depend not only on the present economic position of the industry but on its future prospects. Between these two limits the actual wages will depend on a consideration of the following factors and in the light of the comments given below:

(i) the productivity of labour;

(ii) the prevailing rates of wages in the same or similar occupations in the same or neighbouring localities;

(iii) the level of the national income and its distribution; and the place of the industry in the economy of the country.

ANNEXURE XI RATIONALISATION—THE RECOMMENDATION OF THE FIFTEENTH SESSION OF THE INDIAN LABOUR CONFERENCE

The recommendations of the Conference Committee on the subject as adopted by the Conference are as follows:—
The Second Five Year Plan stressed the need for promoting increased productivity for the general benefit of the community, the enterprise and the workers. In this context, rationalisation, that is better utilisation of men, machines and management in industrial undertakings, has assumed great importance. The Committee discussed the content of rationalisation and the procedure to be followed by establishments which proposed to introduce schemes involving higher productivity. It was emphasised and agreed that Government might make arrangements to ensure that measures of rationalisation which did not serve real economic interest in the existing conditions of the country might be avoided. This and what follows would be applicable even in the case of units which have already taken initial steps to introduce rationalisation but have not completed the process. The Committee agreed on the basis provided for this purpose in paragraphs 28 and 29 in the Chapter on Labour Policy and Programmes in the Second Five Year Plan and emphasised particularly that:—

(i) there should be no retrenchment or loss of earnings of the existing employees *i.e.* the full complement required for the operations before rationalisation should be maintained except for cases of natural separation or wastage. Workers could, however, be provided with suitable alternative jobs in the same establishment or under the same employer, subject to agreement between the employer and his workers;

(ii) there should be an equitable sharing of benefits of rationalisation as between the community, the employer and the worker; and

(iii) there should be a proper assessment of work-load made by an expert or experts mutually agreed upon and also suitable improvement in the working conditions.

Subject to the above conditions, the following broad procedure was suggested to smoothen the progress of rationalisation. The union or unions in an undertaking and the employer could enter into a working arrangement on the following lines:—

(i) the company may seek to make such changes in machinery, lay-out and organisation as it deems necessary for efficient operation of machinery and rational use of labour and material without prejudice to the provisions of any law for the time being in force and subject to the provisions of the working arrangement;

(ii) before any such changes is effected, the company shall give reasonable notice, ranging from three weeks to three months, to the union(s) of its intention to effect the change. The notice shall be in a form mutually agreed upon and shall contain full information regarding the nature of the proposed change, approximate date of such change, proposed duties for workers concerned and their job assignment and the expected earnings. Where, however, an appropriate

procedure for notice of change exists under the current legislation, the same should be observed in preference to the above;

(iii) the employer shall also furnish information regarding the change and the reduction in the number of jobs and also the effect of the change on the number of jobs in other departments affected by the same change;

(iv) the employer and employees shall meet and discuss the proposal as soon as possible after the notice has been given under para (ii) above. The employer shall furnish all information necessary for a complete understanding of the proposed change and shall explain the contemplated change to the union(s);

(v) the union(s) shall, within a week after the discussion with the employer, present its views or proposals to the employer. If there is agreement between the parties, the employer may introduce the change on the due date in accordance with the agreement;

(vi) the union(s) shall be given adequate opportunity to study the new change so as to enable it to gauge the workloads and the earnings of the employees engaged in the new operation; and

(vii) if there are differences between the parties on any matter covered by this working arrangement, the matters in dispute shall be referred for arbitration or adjudication.

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1 Government of India, Ministry of Labour and Employment and Rehabilitation.

2 In the case of Defence undertakings, however, a special provision may have to be made.

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