Bombay High Court Walchandnagar Industries ... vs Dattusingh Lalsing Pardeshi And ... on 20 October, 2005 Equivalent citations: 2005 (6) BomCR 733, (2005) 107 BOMLR 942, (2006) IILLJ 834 Bom Author: S Mhase Bench: S Mhase, D Bhosale JUDGMENT S.B. Mhase, J. Page 946 1. Both these Letter Patent Appeals are directed against the judgment and orders passed by the learend Single Judge of this court on 19th April 2002 in Writ Petitons Nos. 4730 of 1994 and 4734 of 1994. Page 947 2. Initially, 9 workmen who were employed with the appellant had filed ULP Complaint before the Member, Industrial Court at Kolhapur. However, all those complaints were dismissed by the Member, Industrial Court by a common judgment dated 22.7.1994. Out of these 9 workmen, 5 workmen have approached this court by filing the above referred two writ petitions. The ULP Complaint No. 112 of 1988 was filed by the respondent in Letters Patent Appeal 213 of 2002. After the dismissal of the said complaint, the respondent in Letters Patent Appeal 213 of 2002 filed writ Petition No. 4730 of 1994. Since the said writ petition was allowed by the learned Single Judge by order dated 19th April 2002, the appellant has preferred Letters Patent Appeal No. 213 of 2002. Thus, it will be clear that the respondent in Letters Patent Appeal. No. 213 of 2002 is the Complainant in ULP Complaint No. 112 of 1988, and the Petitioner in Writ Petition No. 4730 of 1994. ULP Complaint No. 123 of 1988 was filed by one Vijay Jagnnath Pawar. The respondent Nos. 4 & 5 to the Letters Patent Appeal No. 212 of 2002 are the legal representatives of the said Vijay Jagannath Pawar. Respondent Nos. 4 & 5 are continuting the litigation of the said ULP Complaint as the legal heir of said Vijay Pawar. ULP Complaint No. 132 of 1988 was filed by the respondent No. 1, in Letters Patent Appeal No. 212 of 2002. ULP Complaint No. 185 of 1988 was filed by the respondent No. 2, in Letters Patent Appeal No. 212 of 2002. ULP Complaint No. 189 of 1988 was filed by the respondent No. 3 in Letters Patent Appeal No. 212 of 2002. After the dismissal of all these complaints, the respondent Nos. 1 to 5, as stated above, have jointly preferred Writ Petition No. 4734 of 1994 against the comon order passed by the Member, Industrial Court, referred to above, from which the present Letter Patent Appeals arise. While disposing of the writ petition No. 4734 of 1994, the learned Single Judge of this Court, after disposing of the Writ Petition No. 4730 of 1994, has obseved that "for the reasons recorded in Writ Petition No. 4730 of 1994, Writ Petition No. 4734 of 1994 may be disposed of in terms of the orders which are stated separately." Thus it will be evident that both these Letters Patent Appeals arise from the common judgment, and therefore, we have decided to dispose of these Letters Patent Appeals by this common judgment. 3. At the outset, we point out that the appellant-Cooper Kamgar Sangh is a recognised union under the Industrial Disputes Act, 1947 and the MRTU & PULP Act, 1971. The respondent in Letters Patent Appeal No. 213 of 2002, namely, Ibrahim Hanif Mulani was/is not a Member of the recognised union. However, the respondent Nos. 1 to 3 in Letters Patent Appeal No. 212 of 2002 and the deceased Vijay were/are the Members of the recognised union in the said Industry being the Cooper Kamgar Sangh. 4. ULP complaints were filed by the respondent under Item-5

of Schedule-IV and Items-1 & 4 of Schedule-II of the MRTU & PULP Act, since the services of the respondents were terminated with effect from 5.2.1988 after the close of the working hours, in view of the settlement under Section 2(p) of the Industrial Disputes Act, 1947 arrived at between the appellant-management and the recognised Union dated 2.2.1988. The said settlement was the subject matter of challenge before this court. As a result of the said settlement, out of total 810 employees services of 492 employees Page 948 were brought to an end and services of the 318 employees were retained on certain conditions. Out of 492 employees, only 9 employees had challenged the said act of termination of the services by filing the ULP complaints, as stated above. Out of 9 employees four employees and the legal representatives of one employee preferred above referred two writ petitions, as explained above. Those 4 employees and legal represntatives of the deceased employee are the respondents before this court. Suffice it to state at this stage that the rest of the employees have accepted the settlement dated 2.2.1988 and thereby the action of termination of their services, because of settlement dated 2.2.1988. 5. The respondents have invoked items 1 & 4 of Schedule II and Item-5 of Schedule IV of the MRTU & PULP Act, 1971. So far as the order of the Industrial Court is cocnerned, the Industrial Court has held that the unfair labour practices under items-1 & 4 of Schedule-II have not been proved, much less the Industrial Court has found that there are no adequate pleadings constituting the said unfair labour pratice. Item-5 of Schedule-IV is about the show of favourtism or partiality to one set of workers, regardless of merit. However, on this count also the Industrial Court found that the respondents -Complainant have failed to prove unfair labour pratice because, no set of workers was pointed out to whom favourtism has been shown and/or partiality has been done by the employer. However, while allowing the writ petition, the learned Single Judge of this Court has held that the appellants have committed unfair labour pratice under item 4(c) of Schedule-II, since the settlement entered into on 2.2.1998 with the recognised union has, in fact, changed the seniority rating of the respondent - employees, because the juniors to the respondents have been retained in the service while the respondents have been retrenched. The learned Single Judge has observed that this was done with a view to discourage the membership of the recognsied union. However, the learned Single Judge has also found that there was no unfair labour pratices committed by the appellant under item-1 of Schedule II and also under item-4(a), (b) and (d) to (f) of the MRTP & PULP Act, 1971. 6. So far as Schedule-IV of the said Act is concerned, the learned Single Judge has found that the appellant has violated the provisions of Section 25-N, & 25-G of the Industrial Disputes Act and so also the mandatory provisions of Rule 81 of the Industrial Disputes (Bombay) Rules, 1957. The Single Judge has found that the management does not have the right to terminate the services of the workmen on the basis of settlement who are not the members of the said union. With reference to Section 20(2)(b) of the MRTU & PULP Act, the learned Single Judge found that the settlement dated 2.2.1988 relating to the termination of these employees by retaining their juniors cannot be held to be valid and the clause relating to the termination of the respondents'

services must be severed from the rest of the settlement. Thus, the learned Single Judge having found that there was no compliance of Sections 25-N & 25-G of the Industrial Disputes Act, has ultimately found that that part of the settlement which deals with the termination of the services of the respondents is not valid and severed that part from the rest of the settlement. Page 949 7. Thus, it will be noticed that even though the settlement has been partly held to be valid to the extent of retaining the services of 318 employees and yet that part of the said settlement dealing with the termination of services of the 492 employees, including the respondents has been held to be not valid. However, the learned Single Judge has not recorded any finding on the issue of unfair labour pratice under which item it falls. Since the said unfair labour pratice falls under item 1 of Schedule-IV. This is necessary to be mentioned at this stage because there was no complaint under item 1 of Schedule IV before the Member, Industrial Court. However, since the findings as recorded by the learned Single Judge have ultimately culminated in allowing the ULP complaints giving benefit of the reinstatement and/or monetary benefits till the date of superannuation or retirement, it has become necessary for us to scrutinise the said reasoning and the findings of the learned Single Judge. The learned Single Judge has also recorded a finding that the appellant has indulged into unfair labour pratice under item-5 of Schedule-IV of the MRTU & PULP Act by retaining 318 workmen as against 492 they being terminated regardless of merit. Thus, the learned Single Judge has held violation of Section 25-N, 25-G of the Industrial Disptues Act, 1947 and Rule-81 of the Industrial Disputes (Bombay) Rules and unfair labour pratice under item-5 of Schedule-IV and item 4-C of Schedule-II of the MRTU & PULP Act, 1971. 8. The other relevant facts are as under. The Appellant - Walchandnagar Industries Limited, Engineering and Foundry Division, Satara Road is the employer at present. Originally, the appellant's factory was owned by Cooper Engineering Limited, which had divisions at Satara Road & Chinchwad. In the year 1964, there was an award by the Industrial Tribunal, Bombay regarding bifurcation of the accounts of the Satara Road and the Chinchwad units. In this industry, Cooper Kamgar Sangh and Engineering Mazdoor Sangh are two trade unions, separately registered. Cooper Kamgar Sangh is registered in the year 1965 and was a recognised union since prior to 1971. It was also recognised under the MRTU & PULP Act, 1971. However, Cooper Kamgar Sangh was representing the workers of the appellant factory since beginning and it was a recognised union under the Act. The appellant and the said Cooper Kamgar Sangh had settlements in respect of the Lay-off and Retrenchment on 21st January 1971. The said Cooper Engineering Limited was merged with the appellant - Walchandnagar Industries Limited on 26th February 1981 under the order of the High Court of Bombay passed in Company Petition No. 178/79 and since then appellants are employers. There was a settlement dated 2.2.1988 in between the appellant and the Cooper Kamgar Sangh which was executed after the deliberation between the parties. The said settlement dated 2nd February 1988 is a subject matter of the present challenge. As a result of the said settlement, the services of the Respondent -employees were

brought to an end with effect from 5.2.1988 alongwith the 492 employees and the employment of the 318 employees was retained on certain conditions. Out of the total 492 employees as stated above, only 9 employees have challenged the said settlement, as stated in the earlier paragraphs. Out of them, only present respondents have continued the litigation. The rest of the employees have accepted the said settlement. Out of 492 employees whose services have been brought to an Page 950 end, 479 employees were/are the members of the Recognised Union, namely, Cooper Kamgar Sangh and only 13, employees were/are belonging to the category of non-members of the recognised union. Out of those 13 non members of the recognised union, only one employee the respondent in Letters Patent Appeal No. 213 of 2002, namely, Mr. Mulani, has challenged the said settlement. It is further to be noted that out of 318 employees who were retained in service, 303 employees are the members of the recognised union and 15 employees were not the members of the recognised union. Thus, it will be seen, on the facts that out of the total 810 employed persons, 782 were the members of the recognised union and only 28 persons were not the members of the recognised union. Out of these, only one person, who is not the member of the recognised union, has challenged the settlement. The Respondents in Letters Patent Appeal No. 212 of 2002 were/are the members of the recognised union. It is further to be noted that this settlement dated 2.2.1988 though signed in between the representatives of the employer, on one hand and the representatives of the workmen on the other hand, namely, the appellant and Office bearers of the Cooper Kamgar Sangh respectively, is an outcome not only of discussions and deliberations arrived at between the employer and the recognised union, but is an outcome of deliberations and sanction brought about with the active participation of the members of the recognised union. On reading the Preamble Part, it will be evident that though the Office bearers of the recognised union had deliberation with the employer and have arrived at the terms of the settlement, the Office bearers of the said union have not themselves accepted and signed the settlement immediately. Since the effect of the said settlement was to bring to an end the services of 492 employees and also freezing the benefits of 318 employees, the recognised union thought it fit to place the said settlement before the General Body of the Union. And, accordingly the General Body Meeting was held on 22nd January 1988. In the said General body Meeting of the the recognised union, naturally all the members of the said union were expected to participate and this settlement along with annexures-I & II were placed for the approval of the General Body Meeting. Annexure-I was containing the list of the workmen whose services were retained by the appellant - employer on certain conditions as showed in Column No. 2.1 to 2.9, etc. The Annexure-II contained the list of 492 workmen whose services were to be brought to an end by the said settlement. Thus, it was evident that the said settlement along with the list of the employees to be retained and the employees whose services were to be brought to an end had been placed before the General Body on 22nd January 1988. The said General Body Meeting had approved the said settlement and accordingly by a letter dated 23rd January 1988 (bearing No. 880/25/01,) the

recognised union informed the management of the appellant about the approval of the said settlement. Thereafter on 2nd February 1988 the said settlement was signed by the representatives of the employer and the recognised union. 9. It is further to be noted that, it appears from the settlement that this was executed between the parties, to avoid an inevitable closure. Part-I of the said agreement shows the facts, circumstances and the cause or causes for effecting the said settlement. It is revealed that in the past Engine and Foundry Division of the appellant (Erstwhile Cooper Engineering Limited located at Satara) Page 951 had employed around 3,000 employees and it came into grip of sever recession for its products such as agricultural pump sets, power looms, etc since 1970-1971. Since the industry suffered recession, in consultation with the recognised union, the measures were initiated which included 5-day working in a week, stoppage of incentives scheme, 45 days of lay-off and 60 working days leave of absence for the 600 workmen. The workmen scarifcied one day's wages in a working week. However, there was no improvement. Therefore, there were further negotiations with the recognised union and there was a scheme under which 200 employees resigned and 400 workmen were retrenched. Simultaneously, the employer made efforts to secure a jobbing orders for castings for foundry and jobbing machining which included BARC job work. However its main business remained slack and faced grave financial problems. Therefore, in order to meet the extra-ordinary situation, the erstwhile Cooper Kamgar Limited approached the Industrial Reconstruction Corporation of India in October 1972 and a reconstruction loan was sanctioned during the financial year 1972-73. During the year 1973-74, Engine & Foundry Division received two major business orders for about 5000 pumps from Bangladesh and 1536 power-looms from Marathwada Development Corporation. In order to fulfil these orders 600 employees, who had earlier resigned and retrenched were re-employed. These orders were complied by the end of 1974. However, usual domestic business did not revive, thereby necessitating for the search of new business opportunities and simultaneous measures for cost reduction, including man power rationalisation, were found necessary. Therefore, efforts were made, and in 1974, 4 cylinder automotive diesel engine was developed for OEM application and to facilitate its production and to execute automotive jobbing castings, modernisation of the Light Foundry was done. But, the demand for 4 cylinder Diesel Engine picked up only from 1977-78. As a planned scheme for revival of the EFD the erstwhile Cooper Engineering Limited was merged with Walchandnagar Industries Limited with effect from April 1978. The appellant had placed the funds amounting to Rs. 14 crores for the purpose of capital expenditure, working Capital so also to cover up the continuous losses. In order to secure the sustained market during the same period 3 cylinder engine and 4 cylinder higher H.P. diesel engine were developed. So also efforts were made to manufacture medium duty shapers and fabrication work for sugar/cement machinery. The demand for multi cylinder diesel engine for want of sustained business considerably reduced in Mid-1983. Therefore, plans were drawn for manufacture of Sophisticated 1200 CC light weight, fuel efficient diesel engine for passenger cars and a collaboration agreement was signed with

M/s. Technoliccence, U.K. for manufacture of light weight, advanced 4 cylinder diesel engine of M/s. Fratelli Negri Maschhine Diesel Sud SRL (Italy) design, in 1983-84. However, the said plan could not work out since the development and commercialisation involved import of certain critical items and while the same were in process of being sorted out, the appellant faced severe liquidity problems arising out of the delayed purchases, business recession and making it difficult to proceed with manufacture of the proposed fuel efficient, light weight FNM diesel engine and therefore the project was sold to M/s. Premier Automobiles Limited, Bombay. The machine and tool division at Chinchwad was also sold to Premier Automobiles. During this period, the Page 952 management of the EFD and Union were in continuous dialogue and the efforts were made for exploring newer business opportunities, as stated above, and also for the cost reduction including the manpower rationalisation, in the year 1976, 1979, 1983 and 1986, in the form of Voluntary Retirement Scheme being introduced and reduction of man power strength was achieved. Since the efforts made for securing the adequate business had not materialised to the desired results, the EFD was forced to declare 5 days working week effective from December 1986. There was reduction of business, continuous cash loss and consequent liquidity problem and, therefore, various payments of the suppliers, employees could not be made promptly in 1987. From August 1987 payment of electricity bills could not be made. With the result, effective from 17th December 1987, MSEB discontinued the supply of power. In the meantime, from 1st December 1987 only 3 days working per week was introduced as a consequence of depleted order book. With the discontinuation of power supply the operation of the EFD virtually came to a grindling halt. It is further to be mentioned that during this period, the management of the EFD has been negotiating with the Cooper Kamgar Sangh, the recognised union, on several bilateral issues of workmen and there were settlements entered into between the employer and employees on 16.1.1974, 3.2.1980 and 9.2.1986. Thus, from the above causes it will be clear that the activity of the EFD of the appellant at Satara Road had virtually come to stand still. Therefore, to avoid closure, the settlement dated 2.2.1988 was executed. 10. By this settlement, it was made aware on the either side that this is an effort to avoid closure and that it is an ultimate effort to save the EFD from otherwise inevitable closure. This settlement makes a provision for 318 employees who were retained and 492 employees whose services were brought: to an end. It was agreed that the production activity in respect of castings, proof machining and jobbing machining would be continued on an understanding that the minimum production of 125 MT of net good castings and production of value added of Rs. 2 lacks of jobbing machining would be achieved per month. For achieving the said production level, the number of workmen (including clerical/technical workmen) to be retained were 318. The categories of workmen as well as individual workmen to be retained for the above production level were determined by the management of EFD and categories and names of such workmen were as per Annexure-1 to the Settlement. The wages, salaries and the benefits including the allowances (HRA, conveyance allowance) of the retained workmen were re-adjusted to 85%

of the wages and salary of the month of January 1988 at the level of production of 125 tonnes of net good castings and jobbing machining of value added of Rs. 2 lacks per month; Dearness Allowance would stand frozen at the level which was payable in the month of January 1988, for a period of 18 months, at the end of which parties would review the situation. The re-adjusted salaries, as stated earlier and wages would be subject to upward change only with increase in production, as shown in the chart incorporated in the said settlement. It was further agreed that till the production of machine jobbing increase, as per the chart stated in the settlement, the basic wages and Dearness Allowance etc would remain same as before. No payment towards any production incentive except shown in the chart would be paid. Page 953 11. So far as the bringing to an end the relationship of the employer and employee of 492 workmen was concerned, their names were reflecting in Annexure-II and it was agreed that these workmen would be paid final dues as under: a) Gratuity as per the Payment of Gratuity Act. b) Benefit/Compensation - as shown in the table below. TABLE (A) 15 days salary for every completed year of service. (B) Additional lumpsum payment: Service years completed Lumpsum amt payable 1 to 4 yrs.(including Rs. 6,000/- less than 5 complete years) 5 to 12 years. Rs. 7,000/- 13 to 18 years. Rs. 8,000/- 19 to 24 years. Rs. 6,000/- 25 years and above. Rs. 4,000/-

(C) Balance of wages/salary and other allowances, including incentive, till the date of this Settlement.

(D) Arrears of adhoc rise effective from 1-10-1987 under Settlement datd 9.2.1986.

(E) Earned/Privilege leave salary.

(F) LTA for 1988, wherever applicable.

For the purpose of calculation of benefit/compensation monthly salary/wages would mean average of basic wages + DA for the month of November 1987, December 1987 and January 1988. To arrive at day's salary, for the purpose of benefit/compensation, the monthly salary as computed above would be divided by 30 days.

12. The payment to these workmen whose services were to come to an end by this settlement would be made as follows:

i) Balance of wages would be paid as stated in Clause 2.10 (C) by 8th February 1988.

ii) Remaining final dues would be made in three batches of workmen starting from 15th February 1988. All payments would be completed before 29th February 1988.

The workmen whose services were brought to an end would be eligible to receive presentation articles on the same basis as indicated in the previous Voluntary Retirement Scheme dated 7.4.1986. The management had further undertaken the responsibility to make an arrangement through trained social workers for extending assistance, counselling for rehabilitation, or search for alternate occupation or give advice for investment of terminal funds for those workmen whose services come to an end. In the event of production exceeding the level as shown in the chart of the settlement/agreement, if it becomes necessary to employ additional number of workmen Page 954 in the future, preference would be given to those whose services were brought to an end in this settlement or those who had retired under the Voluntary Retirement Scheme in the past. Selection would be at the discretion of the management. 13. Thus, the above referred settlement shows as to what are the causes for executing the said settlement, the historical background since 1970 onwards; as to how the business of the EFD had dwindled down from time to time and how the diversified efforts made for the survival of the EFD of the appellant had ultimately failed, and that in December 1987 as a result of the disconnection of the electric supply and reduction of three working days in a week, the appellant's EFD at Satara Road had come to a standstill and that in order to avoid a closure, the said settlement was entered into. This also shows how the employer and the Union were on negotiating terms with each other and various settlements were effected between them on 16.1.1974, 3.2.1980 and 9.2.1986 as a result of which the schemes for resignation, VRS and retrenchment were implemented. This also shows that employees/workmen of the appellant were aware of the downfall and dwindling down of the business and industry. They were equally aware of the fact that something was necessary to be done for the survival of the industry and the industry would not survive with such large force of employees employed. The industry had reached to a stage that it was not only having shortage of funds to make payment of suppliers and employees, but even it had no funds to make payment of electricity bills so as to continue foundry unit. Therefore, under these facts and circumstances, keeping in mind that the closure should be avoided, the factory shall survive and that those whose services are to be brought to an end shall get a proper legal dues and something in addition to that, such a settlement was arrived at by the Union and the employer. The whole attempt appears to be to have a mutual existence of the employer, manufacturing activity and the employees also. Therefore, for the survival of the industry, it was agreed that the workers who are retained in the employment would equally have to sacrifice their pay and DA, which would be re-adjusted to 85% of the wages and salary for the month of January 1988 at the production level. The workers retained in service were put to a strict performance in order to achieve full wage, as shown in the chart at Point No. 2.6 of the Settlement. The retained workmen had allowed to freeze their DA for a period of 18 months at the level of January 1988. They had equally given up the Staff Bus facility, Facility of Rice Plate in the Canteen and, instead, accepted snacks and tea only. The other social activities, such as Sports and Social Club, were accepted to be carried out on "No profit and No Loss Basis". As against that, it was further agreed that the services of 492 employees

would be brought to an end after making them the payment of the gratuity as per the Payment of Gratuity Act, and the compensation as provided in Clause 2(10), which has been referred to above. The said benefit/compensation provides for 15 days salary for each completed year and plus additional lumpsum as detailed above along with the balance of wages, salaries and other allowances, arrears of adhoc rise effective from 1.10.1987 as per settlement dated 9.2.1986, the earned and privilege leave salary and LTA wherever applicable. Thus, the total agreement if taken into its totality and entirety it shows that this agreement has been arrived at Page 955 by the appellant and the Cooper Kamgar Sangh as a final effort for the survival of the industry. If such an agreement had not been arrived at, the only consequence as has been accepted, and was known to all the workmen and the office bearers of the Union was the closure of the appellant's unit at Satara, thereby resulting into an unemployment of all the workers. Therefore, as analysed earlier, the Union though negotiated agreement had not signed it immediately. It appears that the negotiations were complete in the last quarter of 1987. However, the union had not immediately signed the settlement and conveyed to the employer that the Union would place this agreement before the General Body Meeting of the recognised union and accordingly the General Body Meeting was held on 22nd January 1988 wherein the settlement was approved and it was accordingly conveyed on 23.1.1988 to the appellant. Thereafter settlement was singed on 2.2.1988. It was brought into force from 5.2.1988. Intimation of this settlement, as required under Rule 62 of the Bombay Industrial Disputes Rules, 1957 and under the Industrial Disputes Act was given to the Government of Maharashtra, the Commissioner of Labour, Bombay, Dy. Commissioner of Labour (Administration) Bombay, Additional Commissioner of Labour, Pune and Assistance Commissioner of Labour, Satara by letter dated 3rd February 1988 (5th February 1988). On 4th February 1988 the appellant had put up a notice that notwithstanding the terms of the settlement the workmen who wants to collect their legal dues, should immediately contact the office during the working hours on 5.2.1988, ie., on the date on which the services of 492 employees were to come to an end. 14. In these above referred facts and circumstances, the above referred ULP complaints were filed by the respondents respectively as stated above. The Industrial Court has dismissed those complains. However, the learned Single Judge of this Court has found that there is an unfair labour practice under item-4(c) of Scheudle-II and item-5 of Schedule IV. So also there is violation of Sections 25-N and 25-G of the Industrial Disputes Act, and has, therefore granted re-instatement and/or backwages till the date of superannuation or retirement. SUBMISSIONS: Both the counsel orally argued the matter and have submitted the detailed notes of arguments along with case law upon which they respectively rely in support of their contentions. These submissions are as follows: 15. Learned Counsel appearing on behalf of the appellant, Shri. A.V. Bukhari has raised several grounds of challenge. He has submitted that the challenge made in the complaint to the settlement is on the basis of the non-compliance of Rule-80 & Rule-81 of the Industrial Disputes (Bombay) Rules of 1957 and Section 25-G of the Industrial Disputes Act, 1947 and there is no grievance made in respect of

the non compliance of Section 25-F(a), 25-F(b) or Section 25-N of the Industrial Disputes Act, 1947. Learned Counsel further pointed out that there is grievance only in respect of non-compliance of Section 25-G. He has submitted that there are no particulars of unfair labour practice under item 1 & 4 of Schedule II of the MRTU & PULP Act. He has submitted that Engineering Mazdoor Sangh, which is Page 956 other Union in the Industry is in existence since long and even though Mr. Mulani happens to be the member of the said Union he has not disclosed as to how he has been discharged on account of the his Union activities. He has taken us through items-1 & 4 of Schedule II, and submitted that there are no pleadings in order to constitute unfair labour practice under those items. 16. Learned Counsel has further submitted that the learned Single Judge erred in invoking violation of Section 25-N of the Industrial Disputes Act, 1947. He has submitted that basically the Chapter VB of the Industrial Disputes Act, 1947 cannot be invoked in the facts and circumstances of the present case. According to the learned Counsel, Section 25-N is incorporated in Chapter V-B which is in respect of the special provisions relating to Lay-Off, Retrenchment and Closure in certain Establishment. He pointed out that the said Chapter applies to the establishment to which Section 25-K applies. He brought to our notice that in ULP complaints initially filed, there were no pleadings pointing out how the appellant is covered by Section 25-K and in turn by Section 25-N of the said Act. He has submitted that there are no initial pleadings made in the complaint, thereby there was no opportunity to the appellant to meet out the said challenge. He has submitted that the application of Section 25-K involves not simplicitor the question of law but also a question of fact. It is necessary for the Complainant - respondents herein to point out that in the establishment of the appellant there are not less than 100 workmen who were employed on an average per working day for the preceding 12 months. In the absence of the pleadings and evidence to that effect, it is an error on the part of the learned single Judge to invoke the provisions of Section 25-N and to hold that the appellant has violated the said provisions. He has submitted that merely looking to the fact that 492 employees' services have been brought to an end by the said settlement, it cannot be said that the Industry was governed under Chapter-VB of the Industrial Disputes Act, 1947. Learned Counsel has further submitted that the provisions of Section 25-G were not applicable in the facts and circumstances of the present case, because the services of the respondents have been terminated in view of the settlement arrived at between the recognised union and the employer and also submitted that Section 25-G permits a deviation from the general rule of "last come first go" if there is an agreement to the contrary between the parties. Therefore, He has submitted that since the services have been brought to an end in view of the settlement between the parties which is contrary to the rule of last come first go, there is no violation of Section 25-G. Learned Counsel has further demonstrated and pointed out, taking us through the service record of the respondents in relation to their claim that the Juniors being kept in service by the employer, that they were not juniors to the respondents. Learned Counsel has further taken us through Section 2(p) and Section 18(1) as amended by the Bombay Amendment of the

Industrial Disputes Act, 1947 and Section 20(2b) of the MRTU & PULP Act and submitted that the said settlement arrived at between the recognised union and the employer is binding on all the employees irrespective of the fact whether they are members of the said recognised union or not. In respect of the said submission, he relied upon several judgments which will be dealt with in the later part of the judgment. The Page 957 ultimate submission was that the settlement in question is fair, bonafide and legal one, and submitted that as it has been brought up for the survival of the employees, employer and industry, it is just and proper. Learned Counsel Shri. A.V. Bukhari submitted that the said settlement, which has been found to be bonafide, just and proper in a given circumstances cannot be challenged by an individual employee. Learned Counsel has further submitted that this settlement has been accepted by all the employees of the appellant except the respondents who have approached to this court. He has submitted that out of 492 employees whose services have been brought to an end, only 4 employees-respondents have challenged the said settlement and that out of the 318 employees who were retained have suffered under the said settlement in terms of less salary, freezing of DA, have not challenged the said settlement. Therefore, he has submitted that since the settlement is with the recognised union and has been accepted by most of the employees, it is not open for the respondents to challenge the said settlement. He has submitted that the said settlement is binding on the respondents in Letters Patent Appeal No. 212 of 2002, since they happen to be the members of the recognised union. Learned Counsel has further submitted that the respondent in Letters Patent Appeal No. 213 of 2002, though not member of the recognised union is equally bound by the said settlement since the said settlement has been effected by the appellant employer with the recognised union. Learned Counsel has further submitted that the said settlement was binding in view of the provisions of Section 18(1) of the Industrial Disputes Act, 1947 as unamended by Bombay amendment. Learned Counsel has further submitted that it is equally binding on the respondent employees even if the amended proviso to Section 18(1) of the Industrial Disputes Act, 1947 brought by Bombay Amendment is considered. He has submitted that Clause (b) of Section 20(2) is also not a bar for the recognised union to enter into such a settlement. Learned Counsel pointed out that the finding of the learned Single Judge that the settlement is not valid to the extent it brings to an end the services of 492 employees is not correct and justified and submitted that the said settlement cannot be read piecemeal or in such a split up manner. He has submitted that it is a settled position that the settlement has to be accepted in toto or has to be rejected. He has submitted that thereby the learned Single Judge has committed an error in rejecting the settlement in partial to the extent of bringing to an end the services of the respondents. 17. Learned Counsel has further submitted that there are no pleadings in respect of item-5 of Schedule-IV, pointing out that there was failure on the part of the respondents to point out as to which set of the workers has been favoured by the appellant regardless of the merit. He harped upon the point that basic pleadings to that effect are not reflected in the complaint itself. He has submitted that it is an error on the part of the learned Single Judge to

hold that 318 employees have been favoured regardless of the merit as against 492 employees whose services have been brought to an end. He has submitted that such was not the case made out by the respondents in the complaint. He has submitted that these observations and findings of the learned Single Judge are beyond the scope of the complaint. Page 958 18. Learned Counsel for the appellant Shri. A.V. Bukhari has further submitted that both the courts below have rightly concluded that there was no unfair labour practice under items - 1 & 4(a), 4(b), 4(d)& 4(f) of Schedule-II. He has, however, submitted that the findings of the learned Single Judge that there is an unfair labour practice under item 4(c) of Schedule-II is an erroneous one. He has submitted that item 4(c) of Schudule-II is to the effect changing seniority rating of employees because of union activities. He has submitted that the said another unrecognised union was/is in existence since long and is working in the said industry. Learned Counsel has further pointed out and submitted that out of the 492 employees whose services have been brought to an end by this settlement, there were 479 employees who were members of the recognised union whose services have been brought to an end by the said settlement. As against this there were only 13 employees who were not the members of the recognised union and out of them only the respondent in Letters Patent Appeal No. 213 of 2002 was the only member of the other the unrecognised union making grievance in respect of the change of seniority rating because of the Union activities. Learned Counsel Shri. A.V. Bukhari submitted that there is no evidence brought on record to show as to which union activity of the concerned respondent has been taken into consideration so as to record a finding of unfair labour practice under item 4(2) of Schedule-II. He has submitted that the learned Single Judge has committed a gross error in recording such a finding. 19. Learned Counsel tried to submit that the services which are brought to an end by the said settlement does not amount to retrenchment. He has submitted that it is the recognised union and the employer who have come together by way of the settlement to bring to an end the services of 492 employees so as to have a survival of the appellant's EFD at Satara. He has submitted that causes for the agreement have not been disputed by the respondents and therefore agreement has been entered into for valid and just reasons. He has submitted that the act of bringing to an end the services of the respondent is an act of separation of the employees with an agreement with the recognised union. Since it is a mutual act between the employer and the recognised union, it cannot be called retrenchment. He insisted to submit that it is an act of separation. 20. Alternatively, he submitted that even if it is considered to be a retrenchment, then on 4.2.1988, a notice was displayed on the Notice Board to the effect that notwithstanding the terms of the settlement if the employees want to collect their legal dues, they should contact the office immediately. Therefore, he has submitted that as per law, offer to each of the employees was made notwithstanding the settlement between the parties, however, none of the respondents reported to the office during working hours on 5.2.1988 to collect the legal dues. He has submitted that in accordance with law, it is only binding on the appellant to issue notice or make payment of wages in lieu of notice and offer compensation, as provided under Section 25-F(a) &

(b). Once that offer is validly made and if the respondents fail to collect their said legal dues, the appellant cannot be blamed. Thus, He has submitted that even assuming for a moment that there is retrenchment, it is for a valid reasons and made in accordance with Section 25-F. Page 959 He has further submitted that the provisions of Rule 80 are not mandatory one and Rule-81 has been complied with. He has submitted that the total list of the employees was furnished to the recognised union along with the draft settlement as annexure-I & Annexure-II which shows several particulars which were required to be given under Rule-81. He has submitted that the settlement was under discussion since the last quarter of 1987 and the recognised union placed it before the General Body Meeting on 22nd January 1988 along with Annexures, thereby the list of employees along with ticket numbers was given thereby making known to workmen/employees their seniority. Thereby, he submitted that there was substantial compliance of Rule-81. Learned Counsel Shri. A.V. Bukhari has relied upon several cases, which will be dealt with in the later part of the judgment. He ultimately submitted that these Letters Patent Appeals may be allowed. 21. Learned Counsel Shri. S.M.Dharap, who appears for the respondent, submitted that though there is no pleading in respect of the application of Sections 25-K and 25-N in the complaint, yet the learned Single Judge was right in applying the said provisions. He has submitted that the strict rules of pleadings are not applicable in a proceedings under the Industrial Law since the illiterate workers are involved. He has submitted that the facts and circumstances of the case themselves show that there were 810 workers working with the appellant which fact has been dealt with by the said settlement, and therefore, Chapter - VB was applicable. He has submitted that here the facts in the proceedings themselves show that the material which will attract the provisions of Section 25-K and 25-N exist on record. Therefore, the learned Single Judge was right in applying the said provisions and decide the matter. 22. He has submitted that by the settlement dated 2.2.1988 out of the 810 workmen the services of the 492 workmen have been brought to an end and therefore it is a retrenchment and as such a retrenchment cannot be effected unless the permission of the State Government as required under Section 25-N of the Industrial Disputes Act has been obtained. Thus, he maintained that after the settlement the appellant should have made an application to the State Government to get a permission to retrench the workmen. He submitted that the Section 25-N contemplates three months notice and/or three months wages in lieu of the notice. He submitted that since this is not done, there is violation of Section 25-N. Coming to the settlement, he submitted that the learned Single Judge was justified in holding that the part of the settlement which maintains the services of the 318 workmen is valid. However, the part of the said settlement by which the services of the 492 workmen have been brought to an end is unjust and illegal one, since the provisions of Section 25-N and alternatively Section 25-F(a) & (b) are not followed. He submitted that the said settlement is not a settlement in the eyes of law to the extent of the retrenchment carried out by it. He tried to persuade us that the said settlement is against the provisions of Section 23 of the Contract Act. He also submitted that the said settlement has not been effected for

bonafide purpose and there are no just causes for the purpose of entering into the said settlement. By the said settlement, the services of the workmen who are members of the unrecognised union have Page 960 been selectively brought to an end. Therefore, Shri. Dharap, learned Counsel for the respondent submitted that the learned Single Judge was justified in holding that there is an unfair labour practice under item 4(c) of Schedule-II of the MRTU & PULP Act. He emphasised that the said settlement has been arrived at otherwise than in conciliation proceeding. He emphasised that there was no occasion for entering into such settlement. According to him, there can be settlement in conciliation proceeding or otherwise than non conciliation proceeding. However, for both the types of settlements there must exist an industrial dispute between the parties which can be settled by the parties as a result of such settlement. He submitted that there was no demand by the workmen and equally no change notice was issued under Section 9(A) and thereby there was no dispute or an issue involved between the parties for arriving at such a settlement. Since according to him, prior to entering into such a settlement, there was no industrial dispute pertaining to the industrial matter, the said settlement is not a settlement in the eyes of law. Therefore, he submitted that the complainants' services have been brought to an end without following the procedure of law. 23. Learned Counsel further submitted that by the said settlement as the services of the 492 workmen have been brought to an end, without express or implied consent of the respondents, the said settlement is not binding as against the present respondents. He submitted that the right to employment is an individual right of the respondent complainants, and the recognised union cannot contract out the terms of their service and more specifically in respect of the retrenchment and brining to an end their services. He submitted that proviso to Section 18(1) of the Industrial Disputes Act and Section 20(2)(b) of the MRTU & PULP Act carves out an embargo on the rights of the recognised union to negotiate in respect of the order of dismissal, discharge, removal, retrenchment and suspension of the workman. Relying upon these provisions, learned Counsel Shri. Dharap submitted that since that part of the settlement as a result of which the services of the respondents - complainants have been brought to an end amounts to discharge or removal or retrenchment and termination of the services, the said settlement is not a settlement as against the respondent complainant. The fact that the most of the workmen have accepted the said settlement will not affect the right of the respondents to challenge the said settlement. He submitted that, thus, the settlement is not bonafide, just and is bad in law as against the respondent -complainants. 24. Alternatively, the learned Counsel submitted that even if it is found that Sections 25-K and 25-N, i.e., Chapter V-B is not applicable, still there is violation of Section 25-F(a) and (b). He submitted that notice and/or notice pay in lieu of notice as desired under Section 25-F(a) have not been offered or paid to the workmen - respondents. He further submitted that the compensation as per the provisions of Section 25-F(b) has not been paid. He pointed out that the scheme provided by the said settlement does not make a provisions in respect of the payment in lieu of notice. Relying on the Clause 2.2 he submitted that whatever the amounts to be paid were to be

determined as per Clause 2.10, namely, the benefits and compensation which include 15 days salary for every completed year and additional lumpsum additional amount, was not being paid at the time of the retrenchment. On the contrary, he submitted Page 961 that the balance wages as per Clause 2.(10) were to be paid on 8th February 1988 and the remaining final dues were to be paid in 3 batches of workmen starting on 15th February 1988. All payments were desired to be completed by 29th February 1988. He submitted that there is non compliance of Section 25-F. Therefore, the action of the appellant amounts to an unfair labour practice under the MRTU & PULP Act. 25. He submitted that there is non compliance of Rules -80 & 81 of the Industrial Disputes (Bombay) Rules, 1957. He submitted that even though Rule 80 is directive in nature, however, there can not be an empty formality. Relying upon Rule 81, he submitted that it is obligatory for the appellant to prepare a list of all workmen in the particular category from which retrenchment is contemplated to be arranged according to the seniority of thier service in that category and cause a copy thereof to be posted on a notice board in conspicuous place in the presmises of the industrial establishment at least seven days before the actual date of retrenchment. He submitted that such a notice was not posted and, therefore, there is non compliance of the mandatory provision. 26. He submitted that there is violation of Section 25-G of the Industrial Disputes Act since according to him so far as the respondent in LPA No. 213 of 2002 is concerned the services of Shri. Shikalgar, who had joined the employment on 17.4.1973 is still continued in the service, and thus by retaining the juniors in the service the respondent has not followed the rule of "last come first go" as provided in Section 25-G and the retrenchment has been effected. Therefore, he submitted that the said act on the part of the employer is an unfair labour practice. Thus, the learned Counsel for the respondent tried to maintain that the act of the termination of the services of the respondent is retrenchment which violates Sections 25-N and alternatively provisions of Sections 25-F(a) & (b). According to him this act of the employer is also contrary to Rule-80 and 81 of the Industrial Disputes (Bombay) Rules. He empathetically submitted that the submission of the learned Counsel for the appellant that the act of bringing to an end the services of the 492 workmen is a retrenchment and is not a proper and legal to call it a separation. He submitted that the such concept of separation as advocated by the learned Counsel for the appellant is unknown to the Industrial law. 27. He ultimately submitted relying upon the definition of Section 2(oo) of the Industrial Disputes Act that all those acts of the termination of services by the employer excluding those which have been provided in the said section, effected for whatsoever reason, is a retrenchment and thus submitted that the termination of 492 workmen including respondent is not separation but is a retrenchment. 28. Having mentioned the submissions of the rival parties, we propose to consider the arguments about the settlement, its validity and binding force of such a settlement. While considering this aspect, we also scrutinise as to whether the settlement is just, proper and bonafide one, keeping in view the provisions of Section 18(1) of the Industrial Disputes Act along with amendment in the said section by insertion of proviso to Section 18(1). Page 962 The word

" settlement" has been defined in Section 2(p) of the Industrial Disputes Act, 1947 as follows: “settlement” means a settlement arrived at in the course of conciliation proceeding and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to an officer authorised in this behalf by the appropriate Government and the conciliation officer. 29. The analysis of the above-mentioned definition would show that there are two categories of settlement; First the settlement arrived at in the course of conciliation proceedings, i.e, which is arrived at with the assistance and the concurrence of the conciliation officer who is duty bound to frame and write a settlement and to do everything he can do to introduce the parties to come to an amicable settlement of the dispute and; secondly, a written agreement between the employer and the workmen arrived at otherwise than in the course of the conciliation proceeding. The settlement arrived at otherwise than in conciliation proceeding can be possible after the failure of the initial conciliation and/or at the initial stage or prior to the commencement of the conciliation proceeding, either when the industrial dispute is apprehended and/or has started. 30. Section 18 of the Industrial Disputes Act, 1947 deals with the binding effect of the settlement and award. Section 18 the Industrial Disputes Act, 1947 is as follows: “18. Persons settlements and awards are binding:- (1) A settlement arrived at by agreement between the employer and workman otherwise than in the course of conciliation proceeding shall be binding on the parties to the agreement. Provided that, where there is a recognised union for any undertaking under any law for the time being in force than such agreement (not being an agreement in respect of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee) shall be arrived at between the employer and the recognised union only; and such agreement shall be binding on all persons referred to in Clause (c) and Clause (d) of Sub-section (3) of this section. (2) provisions of Sub-section (3), an arbitration award which has become enforceable shall be binding on the parties to the agreement who referred the dispute to arbitartion. (3) in the course of conciliation proceedings under this Act or an arbitration award in a case where a notification has been issued under Sub-section (3A) of Section 10A or an arbitration award in case where there is a recognised union for any undertaking under any law for the time being in force or an award of a Labour Court, Tribunal or National Tribunal which has become enforceable shall be binding on (a) all parties to the industrial dispute; (b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board, arbitrator, Labour Court, Tribunal Page 963 or National Tribunal, as the case may be, records the opinion that they were so summoned without proper cause; (c) where a party referred to in Clause (a) or Clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates; (d) where a party referred to in Clause (a) or Clause (b) is composed of workmen, all persons who are employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in

that establishment or part." 31. This section has been analysed by this court in 2002 (II) CLR 457, in the matter of Hill Son & Dinshaw Ltd v. P.G. Pednekar and Ors., as follows: "7. A bare perusal of the above quoted section would show that whereas a settlement arrived at by agreement between the employer and the workmen otherwise than in the course of conciliation proceeding is binding only on the parties to the agreement, a settlement arrived in the course of conciliation proceeding under the Act is binding not only on the parties to the settlement but also on other persons specified in Clauses (b), (c) & (d) of Sub-section (3) of Section 18 of the Act. Therefore, if the settlement arrived at between the employer and the workmen, otherwise than in the course of conciliation proceedings, with which we are concerned in this case, it shall be binding on the parties to settlement. The phrase"parties to the settlement" includes both employer and an individual employee or the union representing the employees. If the settlement is between the employer and workman, it would be binding on that particular employee and the employer; if it is between a recognised union of the employees and the employer, it will bind all the members of the union and the employer. That it would be binding on all the members of the union is a necessary corollary of collective bargaining in the absence of allegation of malafides or fraud. Merely because an individual employee or some of the employees do not agree to the terms of the settlement entered into between a recognised union and the employer, he/they cannot be permitted to contend that it is not binding on him/them. . . ." 8. The aims and objects of the provisions of the Act include industrial peace which is essential to the industrial development and economy of the nation. Great emphasis is, therefore, laid on the settlements as they set at rest all the disputes and controversies between the employer and the employees." In the case of Herbertsons Limited v. The workmen of Herbertsons Limited and Ors., the Supreme Court considered the effect of the settlement arrived at by the recognised union of majority workers." ". . . Since the recognised and registered union had entered into a voluntary settlement, this court thought it fit if the same were found to be just and fair, that would be allowed to be binding on all the workman even if a very smaller number of workers were not members of the Majority union." Page 964 "When a recognised union negotiates with an employer, the workers as individuals do not come into picture, it is not necessary that each individual worker should know the implications of the settlement since a a recognised union, which is expected to protect the legitimate interests of labour enters into a settlement in the best interests of labour. This would be the normal rule. There may be exceptional cases where there may be allegations of malafides, fraud or even corruption or other inducements. But in the absence of such allegations a settlement in the course of collective bargaining is entitled to due weight and consideration." In connection with justness and fairness of the settlement, it was observed; "that this has to be considered in the light of the conditions that were in force at the time of the settlement. When, therefore, the negotiations take place which have to be encouraged, particularly between labour and employer in the interest of industrial peace and well-being, there is always give and take. The settlement has to be taken as a package deal and when labour has gained in the matter

of wages and if there is some reduction in the matter of dearness allowance so far as the award is concerned, it cannot be said that settlement as a whole is unfair and unjust." It is further observed that: "It is not possible to scan the settlement in bits and pieces and held some parts good and acceptable and others bad. Unless it can be demonstrated that the objectionable portion is such that it completely outweighs all the other advantages gained the court will be slow to hold a settlement as unfair and unjust. The settlement has to be accepted or rejected as a whole." 32. In the matter of New Standard Engg. Company Limited v. M.L. Abhyankar reported in 1978(1) LLJ page 486 SC, in paragraph 7 the Hon'ble Supreme Court has observed as under: "settlement of labour disputes by direct negotiation or settlement through collective bargaining is always to be preferred for, as is obvious, it is the best guarantee of industrial peace which is the aim of all legislations for the settlement of labour disputes. In order to bring about such a settlement more easily, and to make it more workable and effective, it is no longer necessary, under the law, that the settlement should be confined to that arrived at in the course of conciliation proceeding, but now includes, by virtue of the definition in Section 2(p) of the Act, a written agreement between the employer and the workmen arrived at otherwise than in the course of a conciliation proceeding where such agreement has been signed by the parties in the prescribed manner and a copy thereof has been sent to the authorised officers. Rule 58(2) of the Industrial Disputes (Central) Rules, 1957, prescribes the manner of signing the settlement and it is not in dispute before us that this requirement has been complied with. The other relevant provision is that contained in Section 18(1) of the Act which specifically states that a settlement arrived at by agreement between the employer and the workmen otherwise than in the course of conciliation proceedings shall be binding on the parties to the agreement. In fact it has clearly been held by this Court in Sirsilk Ltd. and Anr. v. Govt. of Andra Pradesh and Anr. (1963-II LLJ 647) Page 965 that as soon as an agreement is signed in the prescribed manner and a copy of it is sent to the officers concerned, it becomes binding on the parties and comes into operation on the date it is signed or on the date mentioned in it for its coming into operation." After scanning the factual material, in paragraph 12, the Apex Court has observed that: "... As has been stated, the settlement was made with the Bhartiya Kamgar Sena (respondent No. 3) which represented a very large majority of the workmen of the company. It is a significant fact that the bona fides of that Union have not been challenged before us. There is, therefore, no reason why the Tribunal's finding that the settlement is just and fair should not be accepted." 33. In 1981 (II) LLJ SC 429 in the matter Tata Engg. & Locomotive Co., Ltd v. Workmen, the Apex Court has considered two questions, viz., (1) What are the criteria to call a settlement fair and just; and (2) where coercion and fraud is alleged, on whom does onus lie to prove the same. Answering the questions, the Court observed in paragraph 8 and 10 as follows: "... The onus to prove a falsity of the assertion in the case of any particular workman thus rested heavily on the Telco Union but it made no attempt to discharge the same. It has been urged on its behalf that the very fact that 400 workmen had challenged the settlement claiming to

be members of the Telco Union showed that the declaration made earlier was not correct. Now it is true that out of a total 635 workmen, 564 signed the declaration and later on 400 challenged the settlement. The only reasonable inference to be drawn from that circumstance would, however, be that at least 329 workers changed sides in between the 18th of February 1970 and the 14th of April 1970. It cannot be further interpreted to mean, in the absence of any other evidence on the point, that the declaration, when made, was false." "If the settlement had been arrived at by a vast majority of the concerned workers with their eyes open and was also accepted by them in its totality, it must be presumed to be just and fair and not liable to be ignored while deciding the reference merely because a small number of workers (in this case 71, i.e., 11.18 per cent) were not parties to it or refused to accept it, or because the Tribunal was of the opinion that the workers deserved marginally higher emoluments than they themselves thought they did. A settlement cannot be weighed in any golden scales and the question whether it is just and fair has to be answered on the basis of principles different from those which come into play when an industrial dispute is under adjudication." 34. In the matter of Shaw Wallace & Co. v. 1st Industrial Tribunal, West Bengal reported in 1986 LAB. IC 2030 CAL. the learned Single Judge of the High Court of Calcutta, afther following the Apex Court judgments, observed that: "A settlement between the employer and the workmen represented by their the recognised union should not be interfered with easily even though it may operate with a little bit of harshness to a section of the employees as there must be some amount of give and take in collective bargaining for Page 966 industrial peace and harmony. Law courts therefore, have a bounden obligation to maintain the settlement. It would be most improper to ignore the agreement and insert something totally different." 35. In 1997 (I) LLJ 308 SC, in the matter of The KCP Ltd v. Presiding Officer, the Apex Court considered the concept of the settlement entered into between the employer and the Union representing the employees. In that case, the settlement arrived at by the Union with the Company was not in the course of the conciliation proceeding as in the present case. The facts were that the issue of dismissal of 29 workmen by way of punishment was pending for adjudication and during such pendency the recognised union entered into a settlement with the management regarding these 29 dismissed persons as well, and it was agreed that the option would be given to them either to accept re-instatement without backwages or lumpsum amount of Rs. 75,000/- with other monetary benefits may be accepted by the concerned workman. 17 workman accepted and remaining 12 challenged the said settlement and pressed for adjudication being continued by the Labour Court, contending before the Apex Court that settlement regarding their interest entered into by the recognised union during the pendency of the adjudication of the industrial dispute is illegal and was not binding on them. It was also submitted that they were not parties to the settlement entered into between the Company and the union. The Apex Court held that the settlement by direct negotiation between the employer and the Union was valid and the union had represented 29 dismissed employees. The Apex Court observed as follows : "It has to be kept in view that under the scheme

of labour legislation like the Act in the present case, collective bargaining and the principle of industrial democracy permeate the relations between the management on the one hand and the union which resorts to collective bargaining on behalf of its members -workmen with the management on the other. Such a collective bargaining which may result in just and fair settlement would always be beneficial to the management as well as to the body of workmen and society at large as there would be industrial peace and tranquillity pursuant to such settlement and which would avoid unnecessary social strife and tribulation on the one hand and promote industrial and commercial development on the other hand. Keeping in view the aforesaid salient features of the Act the settlement which is sought to be impugned has to be scanned and scrutinised. Settlement of labour disputes by direct negotiation and collective bargaining is always to be preferred for it is the best guarantee of industrial peace which is the aim of all legislations for settlement of labour disputes. In order to bring about such a settlement more easily and to make it more workable and effective it may not be always possible or necessary that such a settlement is arrived at in the course of conciliation proceedings which may be the first step towards resolving the industrial dispute which may be lingering between the employers and their workmen represented by their unions but even if at that stage such settlement does not take place and the industrial dispute gets referred for adjudication, even pending such disputes, the parties can arrive at amicable settlement which may be binding on the parties to the settlement unlike settlement arrived at during conciliation proceedings which may Page 967 be binding not only on the parties to the settlement but even to the entire labour force working in the concerned organisation even though they may not be members of the union which might have entered into settlement during conciliation proceedings." 36. Therefore, if we consider Section 18(1) without the proviso, the position of settlement is as per the above referred observations which shows that the settlement otherwise than in conciliation proceedings is binding between the parties and when such a settlement is between the union which has a majority of workers and/or with the recognised union, the said settlement is binding not only on the members of the said union or the recognised union, but also on those employees who are not the members of the said union. Such settlement is to be accepted for industrial peace and stability of economy and courts shall be slow in inteferring with such settlement. Such settlement shall not be interfered with unless it is proved that the settlement is unjust, malafide or suffers from want of bonafides on the part of the union and/or the settlement is illegal. 37. Now, so far as the position of the Industrial Disputes Act, 1947 in State of Maharashtra is concerned, in Section 18 following proviso has been added in Sub-section (1). "Provided that, where there is a recognised union for any undertaking under any law for the time being in force than such agreement (not being an agreement in respect of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee) shall be arrived at between the employer and the recognised union only; and such agreement shall be binding on all persons referred to in Clause (c) and Clause (d) of Sub-section (3) of this section." 38. We have to scrutinise, on the basis of this proviso, the arguments advanced by the learned

Counsel for the respondent, Shri. S.M. Dharap, that the recognised union is allowed to negotiate in respect of all the industrial matters except the matters pertaining to the dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee. Thereby, he has submitted that part of the settlement by which the recognised union has agreed to bring to an end the services of the 492 employees was contrary to this proviso and, therefore, it is not a settlement in the eyes of law. 39. Learned Counsel Shri. A.V. Bukhari submitted that the such is not the meaning of the said proviso. He has submitted that the position of law as available from the various judgments of the Apex Court have not been changed as a result of the introduction of the said proviso. He has submitted that by that proviso the exclusive right has been created in favour of the recognised union to negotiate and to enter into an agreement except the agreement in respect of dismissal, discharge, removal, retrenchment, termination of service, or suspension of an employee. In other words, he has submitted that in respect of the subjects of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee, there can be an agreement with the recognised union, or un-recognised union or an individual employee or a group of employees. He has submitted that there is no bar to the recognised union to negotiate and to arrive at a settlement on these subjects. Page 968 40. We have considered the rival submissions and perused Section 18 of the Industrial Disputes Act. On plain reading of Section 18(1) it is revealed that the agreement between the workman and the employer entered into otherwise than in conciliation proceeding is binding on the parties to the agreement. Therefore, such agreement can be between (a) the employer and the workman, or (b) the employer and the group of workmen, or (c) the employer and the un-recognised union, or (d) the employer and the recognised union. However, as a result of this, the multiple and multifarious agreements are likely to come into existence in respect of the same subject(s). Therefore, to overcome this difficulty, the proviso has been added and by the proviso the exclusive right has been given in favour of the recognised union to negotiate and enter into settlement/agreement, except an agreement in respect of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee. This does not mean that the recognised union cannot enter into an agreement in respect of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee. However, it only means that on these subjects, not only the recognised union can negotiate and enter into a settlement but also the individual workman or a group of workmen or an un-recognised union can also negotiate and enter into a settlement. 41. In this connection, we also desire to consider the provisions of Section 20(2)(b) of the MRTU & PULP Act, which is as follows: "(2) Where there is a recognised union for any undertaking, (a)... (b) no employee shall be allowed to appear or act or be allowed to be represented in any proceedings under the Central Act (not being a proceeding in which the legality or propriety of an order of dismissal, discharge, removal, retrenchment, termination of service, or suspension of an employee is under consideration), except through the the recognised union; and the decision arrived at, or order made, in such proceeding shall be binding on all the employees in

such undertaking;" 42. Learned Counsel Shri. S.M. Dharap has also made a reference to this provision and has submitted that the recognised union is not given a right to represent in the matters of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee. We are not in agreement with such a submission. By this proviso the exclusive right has been conferred upon the recognised union to appear, to act and to represent in any proceeding under the Act, except in the matters regarding the legality or proprietary of an order of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee. This on clear construction means that on a subject of a legality and propriety of an order of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee, the concerned employee may agitate and act upon himself or an unrecognised union can also act and appear in such matters. Thus, the correct interpretation of proviso to Section 18(1) of the Industrial Disputes Act, 1947 and Section 20(2)(b) of the MRTU & PULP Act is one and the same, namely, the exclusive right has been created in favour of the recognised union in respect of all industrial matters except the matter pertaining to the dismissal, Page 969 discharge, removal, retrenchment, termination of service or suspension of an employee, and that in respect of matters of dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee the recognised union can act, negotiate and enter into a settlement so also an un-recognised union can act, negotiate and enter into a settlement. It will be equally permissible for the individual or a group of individuals to act on their behalf and negotiate and enter into a settlement with the employer. What we find that by Section 20(2)(b) of the MRTU & PULP Act and proviso to Section 18(1) of the Industrial Disputes Act, 1947, there is no embargo or bar or prohibition created by the legislature as against the recognised union, that the said union shall not deal with the subjects of the dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee. Since there is no bar as against the recognised union, settlement entered into by the recognised union in respect of the subjects of the dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee is/will be valid one and will not be hit by the proviso to Section 18(1) of the Industrial Disputes Act, 1947 and Section 20(2)(b) of the MRTU & PULP Act. 43. We render support to this interpretation from the judgment reported in the matter of Hill Son & Dinshaw Ltd. v. P.G. Pednekar and Ors. reported in 2002 II CLR 457 (Bom). The argument in this respect which was tried to be submitted, relying upon Section 18(1) of the Industrial Disputes Act, 1947, in paragraph 13 of the said judgment is considered and answered as follows : "Ms. Gopal relying upon the words"not being an agreement in respect of dismissal, discharge, removal, retrenchment, termination of service, or suspension of an employee" contended that union has no right to enter into settlement in respect of these categories. The argument is required to be stated only to be rejected. In the first place the settlement is not in respect of any of these categories but is pertains to the right to re-employment in terms of Section 25-G of the Act. Moreover there is nothing in the language of proviso that the settlement in respect of the above matters will not bind the members

of the union." 44. In view of the above analysis, we would like to mention the argument of the learned Counsel Shri. S.M. Dharap based on the case reported in the matter of Delhi Transport Corporation v. DTC Mazdoor Congress and Ors. to the effect: "... the right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. the employment is not a bounty for them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them." We have no dispute with this proposition, but we find that all this discussion has been carried out by the Apex Court while considering the constitutional Page 970 validity of Clause 9(b) of the Delhi Road Transport Authority (Conditions of Appointment and Services) Regulations, 1952, and thus the Apex Court has held that the unfettered right to terminate the services cannot be given to the employer and in the light of the above referred facts the observations have been made by the Hon'ble Supreme Court. The facts involved in the DTC case referred to above are quite different and ratio in the said judgment is not applicable to the facts and circumstances of the present case. In the present matter, the services of the 492 workmen have been brought to an end by negotiations with the recognised union which negotiations were carried out on the basis of the collective bargaining. The whole settlement was a package for the survival of the industry. Thus, we hold that the submission made by the learned Counsel for the respondent that the power to negotiate in respect of the dismissal, discharge, removal, retrenchment and suspension of the workman cannot be abdicated in favour of the recognised union is hereby rejected. 45. This will show that the said submission which is now raised, that union has no right to enter into settlement in respect of the dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee has been rejected by this court. Therefore, coming to the facts of the present case, that the causes for entering into a settlement, as enumerated in above paragraphs of the judgment, have not been challenged by the respondents in the complaints. There are no allegations made that the settlement in question is malafide, unfair, unjust or fraudulent one. Even otherwise, we find that looking to the causes for entering into such a settlement, the settlement is for the just causes, because by this settlement the inevitable closure of the industrial establishment has been avoided. 46. It will be further seen that out of the total 810 employees 782 were the members of the recognised union and only 318 employees were retained on certain conditions, which we have stated in the earlier part of the judgment and the services of 492 employees were brought to an end. Out of these 492 employees, only 13 persons are not the members of the recognised union whose services were brought to an end and out those 13 persons only one person, namely, the respondent in Letters Patent Appeal No. 213 of 2002 has challenged the said settlement to the extent of termination of his services. Out of the members of the said recognised union, only 4 persons, namely, respondents in Letters Patent Appeal No. 212 of 2002 have challenged the said settlement. Thus, it will be noticed that all

the employees, whether members or non-members of the recognised union, have accepted and acted upon the said settlement. It is further to be noted that by this settlement the persons whose services have been brought to an end, were being paid the compensation/benefits as stated in Clause 2.10 of the settlement. It will be revealed that they were paid gratuity, balance of wages /salary and other allowances, arrears of adhoc rise effective from 1.10.1987 under settlement dated 9.2.1986, earned/privilege leave salary, LTA for 1988. Apart from that, 15 days salary for every year of completed service and lumpsum payment as stated below has been paid to them. Page 971 TABLE (A) 15 days salary for every completed year of service. (B) Additional lumpsum payment: Service years completed Lumpsum amt payable 1 to 4 yrs.(including Rs. 6,000/- less than 5 complete years) 5 to 12 years. Rs. 7,000/- 13 to 18 years. Rs. 8,000/- 19 to 24 years. Rs. 6,000/- 25 years and above. Rs. 4,000/-

47. It has transpired when the matter was being conducted, since there was some talk of settlement, that the last drawn salary of Mr. Mulani who is respondent in Letters Patent Appeal No. 213 of 2002 was Rs. 1246/-, that of Mr. B.R. Pardeshi was Rs. 1500/-, Mr. V.B. Jadhav Rs. 1308/-, Mr. V.J. Pawar was Rs. 1174/- Mr. S.R. Mantri was Rs. 1498/-. These figures will show that, had the appellant - employer effected a retrenchment in stead of entering into a settlement, since the valid reasons for retrenchment were in existence, the appellant would have made payment as per Section 25-F(a) and 25-F(b) of the Industrial Disputes Act, 1947, i.e., one month's pay in lieu of notice and the compensation equivalent to 15 days average pay for every year of completed service or any part of it in excess of 6 months which would have been less than the amount payable under the settlement. By this agreement, Section 25-F(a) & (b) of the ID Act stands complied with by Clause 2.10(b)(A) of the settlement which provides for compensation of 15 days' salary for every completed year of service. As a result of Section 25-F(a), employer is under obligation to pay one month's salary in lieu of notice, that means each of the respondents would have got monthly salary as stated above. However, if we look to the chart of the lumpsum payment it will be noticed that the minimum lumpsum payment provided in the above referred chart is Rs 4,000/-, and the lesser the service more the lumpsum amount is the scheme. However, looked it at from any angle the lumpsum payment which has been provided in the settlement is double the salary or more than that. Thereby it will be noticed that the lumpsum payment provided under the settlement is more than the amount which is payable under Section 25-F(a). As a result of this, it will be revealed that the recognised union has negotiated in respect of the every amount of the compensation which should be paid by the employer under Section 25-F(a) & (b) of the ID Act and has also negotiated and settled a lumpsum payment more than the monthly payment which is payable under Section 25-F(a). This will show that the payments and benefits and the compensation which the employee received is more beneficial and advantageous than the payment provided under Section 25-

(F)(a) & (b), if the retrenchment is carried out. What is to be looked into is that, only concession has been given to the employer to make such payment by 8th of February 1988 and in any circumstances in between 15th to 29th of February 1988. That means, extended time for payment has been given to the employer, but no monetary loss has been caused to the employees. Thus, looking to Page 972 this agreement from the point of view of the employees whose services have been broguth to an end, it will be revealed that the settlement was more advantageous. Therefore, out of the 492 employees whose services have been brought to an end, none of them have made a grievance about the said settlement except the respondents in these two Letters Patent Appeals. What we find is that, that settlement is just and fair and it does not suffer from any malafide, and the settlement as a whole has to be accepted and it was an error on the part of the learned Single Judge to split up this settlement into two parts and to hold that that part of the settlement by which the services of 492 employees have been brought to an end is invalid one. In fact, as per the aboveferred apex court judgment, the learned Single Judge was under the obligation to accept or reject the settlement evaluating it as a whole. Since the said settlement has been accepted by the majority of the workmen, we also hold, relying upon the various judgments of the Apex Court referred to above, that the said settlement is valid, just, proper and binding on all the employees including the present respondents. It is specifically mentioned that the respondents in Letters Patent Appeal No. 212 of 2002, being the members of the recognised union and since the recognised union has signed the said settlement, after having approved it by the general body of the union, the said settlement is not only binding as against the respondent in Letters Patent Appeal No. 212 of 2002 being signed by union in a representative capacity but it is also binding as against them since they happened to be a party to the said settlement as a result of decision of the general body. The said settlement is equally binding as against the respondents in Letters Patent Appeal No. 213 of 2002, even though he is not a member of the said recognised union, since the said settlement has been entered into by the recognised union and has been accepted by the majority of the employees as demonstrated above.

48. Learned Counsel for the appellant, Mr. Bukhari was all the while submitting that the act of putting to an end the services of the respondent including 492 employees is an act of separation and not a retrenchment. According to him, the services are being brought to an end by negotiation and settlement entered into with the recognised union which have power to enter into such a settlement and therefore, it shall be called as a separation. The learned Counsel Shri. S.M. Dharap submitted that even though there is a settlement, as a result of the said settlement, the services of the 492 employees including the respondents have been terminated and therefore, it is a retrenchment. The whole effort of the learned Counsel Shri. S.M. Dharap is to say that it is a retrenchment, because his attempt is to point out non compliance of Sections 25-F & 25-G of the ID Act and

Rule-81 of the Industrial Disputes (Bombay) Rules 1957. What we find is that as per the above referred Apex Court judgments, the agreement settlement cannot be read into bits and pieces and it has to be read as a whole and has to be accepted or rejected as a whole. Therefore, we will be looking into this settlement as a whole. What we find is that by this settlement out of the 810 employees, the services of the 318 employees have been retained under certain stringent conditions, viz., reduction in wages and freezing of dearness allowance, coupled with their services being linked Page 973 up with the production level. While in respect of the 492 employees the services have been brought to an end on payment of the amounts as stated in settlement Clause 2.10, which has already been dealt with thoroughly in the above parts of the judgment. Therefore, we desire to treat this settlement as one package. Therefore, according to us, this settlement entered into between the employer and the recognised union is connnected with the employment and non employment of the persons. Thus, we avoid to enter into the controversy to call the part of settlement as a separation as submitted by Mr. A.V. Bukhari. Learned Counsel Mr. S.M. Dharap relied upon 1990 (II) CLR 1 in the matter of Punjab Land Development & Reclamation Corporation Ltd., Chandigarh v. Presiding Officer, Labour Court and submitted that the present act of the employer is a retrenchment. He invited our attention to paragrph 27, wherein the definition of the "retrenchment" has been analysed. It is observed that: "Analysing the de(sic) 'retrenchment' in Section 2(oo) the Court found in it the following four essential requirements: (a) termination of the service of a workman; (b) by the employer; (c) for any reason whatsoever; and (d) otherwise than as a punishment inflicted by way of disciplinary action." The Apex court after having discussed the provisions and case-law, in paragraph 82 has observed as follows: "Applying the above reasonings; principles and precedents, to the definition in Section 2(oo) of the Act, we hold that"retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever except those expressly excluded in the section."

49. Thus, on plain reading it is clear that the emphasis of Mr. S.M. Dharap is on the point that, if there is termination of services of the employees for whatsoever reason, except those expressly excluded in the section, then it shall be treated as 'retrenchment'. We are afraid to accept this submission in the facts of the present case. In the present matter it is the employer and the recognised union sitting together have taken a decision to retain the employment of the certain employees and to bring to an end the employment of the certain employees as a package for the survival of the industry and to avoid inevitable closure. The recognised union has also signed the settlement after getting the approval of the general body of the recognised union which had the membership of 782 employees out of the 810 employees in the industry. Therefore, practically it amounts to a settlement between the employer and the individual employee. Thus, on a theory of representation through recognised union and on the basis

of the individual agreement this action of bringing to an end the services of the 492 employees has been carried out. Thus, each of the employee was/is, therefore, party to the settlement in respect of the termination of his services with the employer, as contemplated under Section 18(1) of the Industrial Disputes Act, 1947. Thus, the dismissal, discharge, removal, retrenchment, termination of service or suspension of an employee was/is not at the instance of the employer unilaterally in the managerial right of the employer. One of the essentials, namely, the act by employer as analysed in in the matter of Punjab Land Development & Reclamation Corporation Ltd., Chandigarh v. Presiding Officer, Labour Court 1990 (II) CLR 1 Page 974 referred to above is wanting or missing. Therefore, it is not a retrenchment. Since we are holding that it is not a retrenchment we record our finding that the provisions of Section 25-N and Rule-81 are not applicable and we also record our finding that the provisions of Sections 25-F & 25-G are not applicable. In the result, there is no breach of the provision of Section 25-N and/or 25-F and 25-G and so also Rule-80 & Rule-81 of the Industrial Disputes (Bombay) Rules 1957.

50. We have already held that the provisions of Section 25-N of the Industrial Disputes Act, 1947 pertaining to retrenchment are not applicable to the appellant since the respondents were removed because of the settlement as discussed above. We also consider that the application of said section cannot be considered in the present matter for the following reasons. Considering the question of application of Section 25-N, the learned Single Judge has held that there is violation of the said section which is one of the ground to conclude that there is unfair labour practice on the part of the appellant - employer and the settlement is not in accordance with law. It is an admitted position across the bar and even from the written submissions of the respondents that the pleading of the violation of Section 25-N was not taken in complaint before the Industrial Court. The same was taken before the learned Single in the Writ Petition. Taking advantage of this admission and even independently the learned Counsel for the appellant Mr. Bukhari has relied upon the following cases:

(A) 1997 (76) FLR 771 in the matter of Ashok Kumar Misra v. L.H. Sugar Factory Ltd., Pilibhit;

(B) 1979 (II) LLJ (SC) 194 in the matter of Shankar Chakravarti v. Britannia Biscuit Company; and (C) 2003 (IV) SC 619 in the matter of Pramod Jha and Ors. v. State of Bihar and Ors.

51. In 1979 (II) LLJ (SC) 194 the observations of the court in respect of the pleadings are in paragraph 31, which are to the following effect: “If such be the duties and functions of the Industrial Tribunal or the Labour Court, any party appearing before it must make a claim or demure the claim of the other side and when there is a burden upon it to prove or establish the fact so as to invite a decision in its favour, it has to lead evidence. The

quasi-judicial tribunal is not required to advise the party either about its rights or what it should do or omit to do. Obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be who would fail if no evidence is led. It must seek an opportunity to lead evidence and lead evidence. A contention to substantiate which evidence is necessary has to be pleaded. If there is no pleading raising a contention there is no question of substantiating such a non-existing contention by evidence. It is well settled that allegation which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained it would tantamount to granting an unfair advantage to the first mentioned party. We are not unmindful of the fact that pleadings before such bodies Page 975 have not to be read strictly, but it is equally true that the pleadings must be such as to give sufficient notice to the other party of the case it is called upon to meet. This view expressed in Tin Printers 9 (P) Ltd v. Industrial Tribunal [1967-II LLJ 667 page 680] commands to us. The rules of fair play demand where a party seeks to establish a contention which if proved would be sufficient to deny relief to the opposite side, such a contention has to be specifically pleaded and then proved. But if there is no pleading there is no question of proving something which is not pleaded. This is very elementary."

52. In 1997 (76) FLR 771, the Division Bench of the Allahabad High Court, after scrutinising the provisions of Sections 25-K & 25-N has held that, "Although the ap (sic) paragraph-6 of the writ petition has stated that more than one hundred workmen are employed in the sugar factory; but he has not stated that more than one hundred workmen were employed on an average per working day for the preceding twelve months. In the counter-affidavit filed by the sugar factory, the applicability of Section 25-N to the appellant's case has been disputed and denied. Therefore, the provisions of Chapter V-B including Section 25-N cannot be applied to the case of the appellant on the basis of the pleadings of the parties. Sri. K.P. Agarwal, learned Counsel for the appellant has submitted that judicial notice can be taken of the fact that the factory is not an undertaking of seasonal character and must be having more than one hundred workmen employed on an average per working day. This submission cannot be accepted, because these are the questions of facts, which have to be pleaded and proved. Unless the conditions precedent laid down for applying Chapter V-B are satisfied, the appellant cannot take the advantage of Section 25-N. The appellant has failed to plead and prove the existence of conditions precedent. The sugar factory has disputed and denied the applicability of Section 25-N to the appellant's case. In view of the want of adequate pleadings and serious factual dispute it is not possible to decide the controversy on merit under Article 226 of the Constitution."

53. In , in paragraph 17 the Hon'ble Apex Court has observed that: "... a last effort was made by the learned Senior Counsel for the appellants urging for relief being allowed on the ground of non-compliance with the provisions

of Section 25-N of the Act. Section 25-N is placed in Chapter V-B of the Act which according to Section 25-K has an application only to industrial establishment in which not less than 100 workmen were employed on an average per working day for the preceding 12 months. The plea was not raised before the High Court. It is not even taken in the special leave petitions. It was sought to be taken only at the time of hearing. The plea need not detain us any longer. The infirmity in retrenchment by reference to Section 25-N cannot be ventured to be found out without laying factual foundation attracting applicability of the provision. It is basically a question of fact. In the absence of requisite pleadings having been raised and documents having been brought on record, we are not persuaded to entertain the plea." Page 976

54. Thus, reading above cases it is well established that Section 25-N of the Industrial Disputes Act being included in Chapter-VB of the Act which will apply only to industrial establishments which were covered under Section 25-K. Section 25-K lays down criteria when Chapter-VB and inter-alia Section 25-N will apply in cases of retrenchment. The said provisions lay down that this Chapter shall apply only to the industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day for the preceding twelve months.
55. Therefore, before it can be held that said Chapter applies, it is necessary to establish how many were the total number of working days in the said establishment in the preceding 12 months. It is further necessary to find out factually that as to how many workmen were employed on each working day and thereafter multiply the total number of workmen by the number of working days and thus arrive at average by dividing strength of workmen by the total number of working days. The quotient shall show average of 100 or more. Thus, the application of Section 25-K is a mixed question of law and fact.
56. Therefore, before on an average 100 workmen employed per working day in preceding 12 months is arrived at, all this factual evidence is necessary. This is necessary in view of the fact that there is a dispute in respect of the application of the said section. This requires, therefore, as stated earlier, the pleadings initially by a party who wants to rely upon the provisions of Section 25-K read with Section 25-N. In the present facts and circumstances of the case, it appears that the learned Single Judge has taken into consideration the only strength of the employees appearing in the settlement, namely, that the Settlement pertains to 810 employees and out of them, 492 were retrenched, and, therefore the appellant is governed by Chapter V-B of the Act. The learned Single Judge has ignored the fact that there are no pleadings in the ULP complaints before the Member, Industrial Court in respect of the application of this Chapter, and more specifically Section 25-N and thereby there was no opportunity to demonstrate the non-applicability of Chapter V-B of the Industrial Disputes Act.

Had the such pleading being made, it would have been possible for the appellant to deny the same and further on the basis of the facts and records of the industrial establishment it would have been possible for the appellant to demonstrate that there were not one hundred average workmen employed in the industrial establishment during the preceding 12 months period. The learned Counsel for the respondent referred to the clause of settlement and the preamble and submitted that the factual material which is required for the application of Section 25-K & 25-N is available on record and tried to justify the application of Section 25-A. However, we are not in agreement with the learned Counsel for the respondent.

57. This argument deserves to be rejected on two counts. Firstly, such material cannot be looked into by us because, the Apex Court in the matter of Shankar Chakravarti v. Britannia Biscuit Company 1979 (II) LLJ (SC) 194, referred to above, have observed that: "A contention to substantiate which evidence is necessary has to be pleaded. If there is no pleading raising a contention there is no question of Page 977 substantiating such a non existing contention by evidence. It is well settled that allegation, which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained it would tantamount to granting an unfair advantage to the first mentioned party." Secondly, according to us, the material available from the settlement does not show actual working days in the last preceding 12 months and total number of workmen working with the appellant since working days in each week were reduced from time to time and workmen were laid off from time to time. Thus, we record our finding that the findings of the learned Single Judge that the appellant has committed breach of Section 25-N of the Industrial Disputes Act, 1947 is not sustainable in law and we accordingly set it aside.

58. The learned Single Judge has observed, referring to Section 25-G of the ID Act that the employer has not recorded reasons for retrenchment and there is no agreement with the concerned workman and, therefore, there is violation of Section 25-G. We are not in agreement with the learned Single Judge, in view of our above referred discussion, which we have carried out in respect of Section 18(1) & 2(oo) of the Industrial Disputes Act, 1947. The said settlement is binding as against the members of the recognised union and also against the non-members as laid down in the judgments of the Apex Court. It is further pertinent to note in this context that the said settlement was not a secrete document. It was already negotiated since the last quarter of 1987 and by letter dated 20th January 1988, it was forwarded to the union to place it before the general body. The recognised union placed the same before the general body on 22nd January 1988 and the general body has approved the terms of settlement. It is to be noted that the Annexure-II to the settlement was the list of the 492 workmen in which the names of the employees including the respondents was placed before the general body meeting and after the approval of the general body, settlement has been signed by the recognised union. Thus, we find,

since there is an agreement contrary to the provision of Section 25-G in existence, there is no violation of Section 25-G. Therefore, the finding of the learned Single Judge that there was no individual contract with the respondent-employees is not proper and we set aside the said finding recorded by the learned Single Judge. We also set aside the findings of the learned Single Judge that the appellant has committed breach of Section 25-G of the Industrial Disputes Act, 1947.

59. Apart from that we further desire to find out as to whether really the rule of last come first go has been flouted by the employer. On going through the judgment of the learned Single Judge, it is revealed that the learned Single Judge has only scrutinised the case of Mr. Mulani who is the respondent in Letters Patent Appeal No. 213 of 2002. The learned Single Judge has not scrutinised the cases of the respondents in Letters Patent Appeal No. 212 of 2002 to find out whether the rule of last come first go has been violated in their case. The case made out by Mr. Mulani in complaint is that one Gani Hasan Shikalgar whose name is appearing at serial No. 67 in Annexure-II to the settlement who has been retained was/is junior to him. In this respect it is Page 978 brought on record of this court that the Ticket Number of Shri. Shikalgar is 2099 and the Ticket Number of Shri. Mulani is 2281. These ticket numbers are assigned as per the joining date of the person with the appellant and they are in serial. The ticket numbers of the respondent Mulani and that of Mr. Shikalgar is an admitted position as reflected from the Annexure-I & Annexure-II to the said settlement. This shows that Mr. Shikalgar was in fact senior to Mr. Mulani and therefore his ticket number is much earlier to that of the ticket number of Mr. Mulani. Therefore, we record our finding that in fact there is no violation of the last come first go rule so far as the respondent is concerned. In respect of the rest of the employees there is no separate analysis carried out either by the Industrial Court or the learned Single Judge. Therefore, we do not propose to enter into that area. We also record our finding that infact there is no violation of Section 25-G.

60. We have already analysed that the termination of the services of the 492 workmen, including the respondents in the present appeals, is not a retrenchment and thereby the Rule-81 of the Industrial Disputes (Bombay) Rules, 1957 is not applicable in the facts and circumstances of the present case. We have equally analysed that Section 25-G of the ID Act, 1947 is not applicable, since there was a contract to otherwise than to follow the rule of last come first go. We have also recorded a finding, on facts, in respect of the respondent in Letters Patent Appeal No. 213 of 2002 that there is no change in seniority rating. All these circumstances elaborated above, show that Rule-81 is not applicable to the present case. Rule-81 contemplates publication of the seniority list as categorywise when the retrenchment is to be effected. But since there is no retrenchment it was not necessary for the appellant to publish the seniority list. It was equally not necessary to publish the said seniority list since the removal of the workmen including the respondents was effected because of the settle-

ment dated 2.2.1988 which provided a system of removal otherwise than the rule as provided in Section 25-G. Therefore, we find that the expectation of the respondent and equally the finding of the learned Single Judge in respect of the requirement of the publication of the seniority list as provided under Rule-81 was an empty formality in the facts and circumstances of the present case. We record our finding that even if such a list is not published, there is no violation of the provisions, and thus there is no unfair labour practice.

61. As we have analysed in the above paragraphs that in fact there is no change in the seniority rating, however, we desire to deal with the question of unfair labour practice under item 4(c) of Schedule-II of the MRTU & PULP Act, 1971, since the learned Single Judge has held that the appellant has indulged into unfair labour practice under the said item. Item 4(c) of Schedule-II is as follows: "4. To encourage or discourage membership in any union by discriminating against any employee, that is to say: ...

(c) changing seniority rati(sic) employees because of union activities;" It is seen that the basic ingredient for this unfair labour practice is change in seniority rating. But, since we have already recorded a finding that there Page 979 is no change in the seniority rating and no violation of Section 25-G, we do not find that the finding of the learned Single Judge on that count is sustainable in law. However, assuming for a moment that there is a change in the seniority rating, the other ingredients of the said unfair labour practice is that the said seniority rating should have been changed on account of the union activities, and the discrimination is to encourage or discourage the membership of any union. Both these essential requirements are absent. It will be revealed from the settlement dated 2.2.1988, that: the services of the large number of members of the recognised union have been brought to an end as against that only one employee who is not a member of the recognised union is making the grievance in the present complaint. Therefore, it cannot be held that the change in seniority rating was because of the union activities, and it was with a view to encourage or discourage the membership of any union. From the earlier discussion it will be revealed that out of the 810 employees, the 782 were the members of the recognised union and out of the 782 member-employees, the services of 479 member-employees have been brought to an end, and, if these figures are taken into consideration it cannot be inferred that the change in seniority rating, as considered by the learned Single Judge, was to encourage or discourage the membership of any union. As we have discussed above, that this change in seniority rating, if at all, has taken place, it is not at the instance of the employer but it is the result of the settlement dated 2.2.1988. And, it was not an unilateral act on the part of the employer so as to hold that the employer has indulged into an unfair labour practice. Thus, we record a finding that the finding given by the learned Single Judge that there is an unfair labour practice under item 4(c) of Schedule-II of the MRTU & PULP Act,

1971 is not sustainable.

62. The learned Single Judge has recorded a finding that the appellant has committed an unfair labour practice under item -5 of Schedule-IV of the MRTU & PULP Act, 1971. Item-5 of Schedule-IV is as follows: "To show favouritism or partiality to one set of workers, regardless of merits." The learned Single has considered that on the basis of the settlement, the services of the 318 workmen have been retained and the services of the 492 employees have been brought to an end and this was done, according to the learned Single Judge, regardless of the merits. This finding is not sustainable in law; because there will not be a question of favouritism or partiality on the part of the employer - appellant since it was not an unilateral or isolated act on the part of the employer. The employer, as discussed in the other part of this judgment, had negotiations with the recognised union and thereafter had brought to an end the services of the 492 employees. As we have analysed the retention of the 318 workmen and bringing to an end the services of the 492 employees is one package deal given in the settlement and as analysed elsewhere in the judgment, the majority of the workmen whose services have been brought to an end are the members of the recognised union and since the act has been done with the concurrence of the recognised union, it cannot be said that the appellant has shown favouritism or partiality regardless of merits. The said finding given by the learned Single Judge also deserves to be set aside. Page 980
63. Assuming for a moment that the act of brining to an end the services of 492 employees including the respondents, amounts to a retrenchment, we desire to scrutinise whether there is violation of Section 25-F of the ID Act at the hands of the appellants. Section 25-F(a) & 25-F(b) of the ID Act are mandatory and there is no dispute between the either side that these 25-F(a) & 25-F(b) are mandatory and Section 25-F(c) is a directory one. There is a catina of judgments on this point. We desire to refer to case in the matter of Pramod Jha v. State of Bihar, wherein the Apex Court has observed as follows: "The underlying object of Section 25-F is two fold. Firstly, a retrenched employee must have one month's time available at his disposal to search for alternate employment, and so, either he should be given one month's notice of the proposed termination or he should be paid wages for the notice period. Secondly, the workman must be paid retrenchment compensation at the time of retrenchment, or before, so that once having been retrenched there should be no need for him to go to his employer demanding retrenchment compensation and the compensation so paid is not only a reward earned for his previous services rendered to the employer but is also a sustenance to the worker for the period which may be spent in searching for another employment. Section 25-F nowhere speaks about the retrenchment compensation being paid or tendered to the worker along with one month's notice, on the the contrary Clause (b) expressly provides for the payment of compensation being made at

the time of retrenchment and by implication it would be permissible to pay the same before retrenchment. Payment or tender of compensation after the time when the retrenchment has taken effect would vitiate the retrenchment and non compliance with the mandatory provision which has beneficial purpose and a public policy behind it would result in nullifying the retrenchment.

64. Compliance with Clauses (a) & (b) of Section 25-F strictly as per the requirement of the provision is mandatory. However, compliance with Clause (c) is directory and a substantial compliance would be enough."

65. In the present matter we have already analysed as to how the payment of compensation is to be made under Clause 25-F(b) has been provided for in the settlement in Clause 2.10 of the settlement. We have also shown how the payment more than as contemplated under Clause (a) of Section 25-F has been provided for in Clause 2.10(B) by way of lumpsum payment in the said settlement.

66. The settlement states that the above payments were to be made on 8.2.1988 and till 29.2.1988. Thus, payment as per the settlement is not being made at the time of removal, but latter on. Taking recourse to this, learned Counsel for the respondent Shri. S. M. Dharap submitted that since payment as per Section 25-F(a) & (b) is not made at the time of retrenchment, the said act of retrenchment is violative of Section 25-F. However, what we find, from the record, that the appellant employer and the recognised union have entered into an agreement on 2.2.1988. Intimation to be sent to the Secretary to the Government of Maharashtra was prepared on 3.2.1988 and has been dispatched on 5.2.1988. Thus, the compliance of Rule-62 of the Industrial Disputes (Bombay) Rules, 1957 Page 981 has been carried out. This satisfies the compliance of Section 25-F(c) of the Industrial Disputes Act, 1947. It appears that the appellants were aware that the time of payment as stated in the settlement is no in accordance with Section 25-F and the employees may object to it at a later stage and the appellant may come into difficulty. Therefore, to overcome such a likely difficulty, the appellant published a notice on notice board on 4.2.1988 and informed the respondents including all employees that notwithstanding the settlement, those employees who desire to have legal payment in their favour, they shall approach the office for the same during the office hours on 5.2.1988. Thus, the total payment has been tendered. This amount to a notice of retrenchment coupled with the payment in lieu of notice as desired under Section 25-F(a). Learned Counsel Mr. Bukhari also pointed out the standing order applicable to the appellant - employer. The Standing Order which deals with the procedure for mass termination of the services of workman is laid down in Order- 21(6), which is as follows : “An order of termination of service shall be in writing and shall be signed by the Manager or any other officer duly authorised to do so and a copy thereof shall be supplied to the workman concerned. In cases of general retrenchment, closing down of departments, or termination of service as a result of a strike no such

order will be given to individual workman."

67. Thus, what we find that the general notice published on 4.2.1988 was in compliance with the standing order 21(6), by which total payment as contemplated under Section 25-F(a) & 25-F(b) was offered. Once such offer is made, it is for the concerned employees to collect the said amount. We find that the conduct and the acts done by the present appellant on 4.2.1988 in publishing the said notice on Notice Board offering all the payments as provided in Clause 25-F(a) & 25-F(b) were notwithstanding the terms of the settlement, i.e., dates provided therein. Therefore, we record our findings that assuming for a moment that the act of the termination of the services of the 492 employees including the respondents is a retrenchment, it is a valid retrenchment in compliance of Section 25-F(a) & 25-F(b) of the ID Act.

68. Learned Counsel Shri. S.M. Dharap also submitted that unless there is an industrial dispute, there cannot be a settlement between the employer and the recognised union. He has submitted that the dispute can be initiated under Section 9-A of the Industrial Disputes Act, 1947 by the employer and/or by issuance of a demand notice by the employees of the recognised union and in that eventuality the settlement between the parties is possible. Thus, Shri. S.M. Dharap tried to persuade us that unless there is an industrial dispute existing, there cannot be a settlement between the employer and the recognised union of the employees under Section 18. We are not in agreement with learned Counsel. If the employer is transparent and continuously in negotiations with the employees or the recognised union, and, both are aware of the problems of the industry, in that eventuality without having a head on collision, by initiation of an industrial dispute, both of them, in apprehension of the industrial dispute, can settle the dispute on the principles of collective Page 982 bargaining in order to maintain the peace and harmony between the parties and sustainable economic growth in the industry. The definition of the settlement does not contemplate that the settlement can take place only after the industrial dispute has arisen. It can take place while the industrial dispute is in conciliation proceedings, the settlement is equally possible and even after the failure of the conciliation proceeding. We find that where the employer and employee relationships are good and sound it is equally possible before initiation of the industrial dispute as desired under the Rule. Such a settlement, on the contrary we will have to welcome for the industrial peace and good relations and development of the industry. Therefore, the submission of the learned Counsel is hereby rejected.

69. The submission of the learned Counsel Shri. A.V. Bukhari that the reliefs claimed in the complaints were under item -1 of schedule IV. However, there was no complaint under the said item, and complaint was under items 1 & 4 of Schedule -II and item-5 of Schedule-IV and thus the Industrial Court had no power to grant the relief of re-instatement and backwages needs to be mentioned only for rejection in this judgment the because of observations of the Division Bench of this Court in the mat-

ter of R.P. Sawant v. Bajaj Auto Limited, 2001 II CLR 982, wherein the court has observed that: "Section 7 of the 1971 Act provides that it shall be the duty of the Labour Court established under the Act to decide Complaints relating to unfair labour practices relating to unfair labour practices prescribed in item-1 of Schedule-IV and to try offences punishable under the Act. The duties of the Industrial Court enumerated in Section 5 of the 1971 Act do not include the duty to decide the Complaint relating to unfair labour pratice under item - 1 of Schedule IV. Section 32 of the 1971 Act entitled"Power of Court to decide all connected matters" reads as under: "Notwithstanding anything contained in this Act, the Court shall have the power to decide all matters arising out of any application or complaint referred to it for the decision under any of the provisions of this Act." A conjoint reading of Sections 5, 7 & 32 of the 1971 Act would make it clear that, though, for the purpose of exercising initial jurisdiction into a substantive Complaint, the jurisdictions have been compartmentalized inasmuch as the Labour Court has no jurisdiction to entertain Complaints other than Complaints falling under item-1 of Schedule - IV of the 1971 Act and conversely, the Industrial Court has been given powers to entertain Complaints in all other matters. It does not mean that the Industrial Court, while exercising jurisdiction within the sphere legtimately assigned to it, cannot pass an order which is required to be done in the interest of justice. It cannot be forgotten that Section 32 starts with a non-obstante clause "Notwithstnading anything contained in this Act" and provides that the Court trying the matter shall have the power to decide all matters arising out of any Application or Complaint referred to it for the decision under any of the provisions of this Act."

70. Therefore, the legal position is well settled that it is/was within the jurisdiction of the Industrial Court to adjudicate upon the entire issue in respect of the alleged complaint and grant a relief. Therefore, the submission Page 983 of the learned Counsel Shri. A.V. Bukhari that the reliefs under item-1 of Schedule-IV of the 1971 Act have been wrongly granted by the learned Single Judge is hereby rejected. The submission of the learned Counsel that the initial complaint is in respect of item -1 of Schedule-II of the 1971 Act before the Industrial Court is also equally rejected since the complaint, as was filed before the Industrial Court was under item-5 of Schedule-IV and items- 1 & 2 of Schedule II of the 1971 Act.
71. In the result, both the Letters Patent Appeals are allowed. The judgment and order dated 19th April 2002 passed by the learned Single Judge of this Court in Writ Petition Nos. 4730 of 1994 and 4734 of 1994 are hereby set aside. The original complaints filed by the respondents are also hereby dismissed.