L. Robert D'Souza vs The Executive Engineer Southern ... on 16 February, 1982

Equivalent citations: 1982 AIR 854, 1982 SCR (3) 251, AIR 1982 SUPREME COURT 854, 1982 (1) SCC 616, 1982 LAB. I. C. 811, (1982) 3 SCR 251 (SC), 1982 (1) SCC 645, (1982) KER LJ 164, (1982) 44 FACLR 250, 1982 UJ(SC) 344, 1982 UJ (SC) 844, 44 FACLR 250, 1982 SCC (L&S) 124, (1982) 1 SCWR 268, (1982) 1 LABLJ 330, (1982) 60 FJR 144, (1982) GUJ LH 327, (1982) 1 LAB LN 257, (1982) 2 SCJ 29, (1982) 1 SERVLR 864, (1982) 1 SERVLJ 319

Author: D.A. Desai

Bench: D.A. Desai, R.B. Misra

PETITIONER:
L. ROBERT D'SOUZA

Vs.

RESPONDENT:
THE EXECUTIVE ENGINEER SOUTHERN RAILWAY & ANR.

DATE OF JUDGMENT16/02/1982

BENCH:
DESAI, D.A.
BENCH:
DESAI, D.A.
MISRA, R.B. (J)

CITATION:
1982 AIR 854 1982 SCR (3) 251
1982 SCC (1) 645 1982 SCALE (1)466
CITATOR INFO :
R 1983 SC 500 (2)
E 1983 SC1320 (11)
E&D 1990 SC1808 (5)

ACT:
Industrial Disputes Act, 1947, sections 2(oo) and 25F, scope of-"Termination of service for any reason whatsoever" in the definition "retrenchment" clarified.
Construction of Section 9A-Casual labour, termination of services of-Railway Establishment Code, Rules 2501 and 2505, explained.

HEADNOTE:

The appellant joined service as a gangman in Southern Railway on July 1, 1948. In course of his service he was transferred to various places. While he was working as a Lascar at Ernakulam, he was transferred, some time in March 1970 by way of punishment for his Union activities in the capacity of General Secretary of the Southern Railway Construction Workers Union, Ernakulam, to Podannur in Tamil Nadu. However, his transfer was cancelled and he joined duty on 20-2-1971 at Ernakulam. The Ministry of Labour, Government of India, by its letter dated April 23, 1974 directed treatment of his entire period of absence from 8th March, 1970 to 19th February, 1971 as duty. Later, the appellant approached the Labour Court for recovering some of his dues which remained pending for a long time. As the appellant and those similarly situated were likely to reach the age of superannuation and by the unfair labour practice, namely, treating them only as 'daily rated labour', of the Railway Administration, they were likely to be denied the full retirement benefits, appellant and several others filed a writ petition in the High Court of Kerala, praying for a direction that they should be treated at least as temporary railway servant with attendant benefits. During the pendency of the matter, in connection with the demand for all the benefits granted by the Central Pay Commission being extended to the category of employees to which the appellant belonged the appellant undertook a fast, but broke the same on September 28, 1974 at the intervention of the Assistant Labour Commissioner. Taking advantage of the appellant's absence, the respondents terminated his service with retrospective effect, i.e., from 18-9-1974 on the ground of unauthorised absence. A learned single Judge having dismissed the same, the matter was taken in appeal before the Division Bench. In the appeal, it was contended that the termination of service of the appellant in the circumstances would constitute retrenchment within the meaning of section 25F of the Industrial Disputes Act, 1947 and, therefore, the order of termination was invalid. The matter was referred to the Full Bench which held that there was no retrenchment and dismissed the appeal. Hence, the appeal by special leave.

Allowing the appeal, the Court

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HELD: 1. The expression "termination of service for any reason whatsoever" in the definition "retrenchment" in section 2(oo) of the Industrial Disputes Act, 1947 covers every kind of termination of service except those not expressly included in section 25F or not expressly provided for by other provisions of the Act such as sections 25FF and 25FFF. The excepted categories are (i) termination by way of punishment inflicted pursuant to disciplinary action; (ii) voluntary retirement of the workman; (iii) retirement of the

workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; (iv) or termination of the services on the ground of continued ill-health. Once the case does not fall in any of the excepted categories, the termination of service even if it be according to automatic discharge from service under agreement would nonetheless be retrenchment within the meaning of expression in section 2(oo) of the Act. It must as a corollary follow that if the name of the workman is struck off the roll, that itself would constitute retrenchment. [259 B-C, 206 H, 261 A-B]

Delhi Cloth & General Mills Ltd. v. Shambhu Nath Mukherji, [1978] 1 SCR 591, followed.

State Bank of India v. N. Sundera Money, [1976] 3 S.C.R. 160; Hindustan Steel Ltd. v. Presiding Officer, Labour Court, [1977] 1 S.C.R. 586; Santosh Gupta v, State Bank of Patiala, [1980] 2 S.C.R. 884 at 892; Mohan Lal v. Bharat Electronics Ltd., [1981] 3 S.C.C. 225, referred to.

1:2. There is neither apparent nor real conflict between the decision of the constitution bench in Hariprasad Shivshanker Shukla v. A.D. Divikar, [1957] S.C.R. 121 and the later five decisions commencing from Sundera Money and ending with Mohanlal's case. Re-examining a contention over again so as to cover the familiar ground would, apart from giving a gobye to the doctrine of stare decisis, would be a sheer waste of time and mere lengthening of the judgment. [260 C-D]

Surendra Kumar Verma & Ors. v. Central Government Industrial-cum-Labour Court, New Delhi & Anr., [1981] 4 S.C.C. 443, View of Pathak, J. held inapplicable.]

2:1. Notice contemplated by clause (a) of section 25F would not be dispensed with, in view of the provision contained in proviso (b) of section 9A, which is an independent provision having no co-relation with section 25F. [264 B]

2:2. Section 9A imposes an obligation on the employer, who promises to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule to give notice as therein provided and the employer is precluded from effecting the change without giving to the workman likely to be effected by such change, notice in the prescribed manner of the nature of the change proposed to be effected, and the change cannot be effected within 21 days of the giving of such notice. In order to attract section 9A the change proposed must be in the conditions of service applicable to
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the workman in respect of any matters specified in the Fourth Schedule. If the proposed change falls in any of the matters specified in the Fourth Schedule the change can be effected after giving notice in the prescribed manner and waiting for 21 days after giving such notice. In order to

attract section 9A the employer must be desirous of effecting a change in conditions of service in respect of any matter specified in Fourth Schedule. If the change proposed does not cover any matter in Fourth Schedule section 9A is not attracted and no notice is necessary. [262 E-G]

Workmen of Sur Iron & Steel Co. (P) Ltd. v. Sur Iron & Steel Company (P) Ltd., [1971] LLJ 570; Tata Iron & Steel Company Ltd. v. Workmen, [1973] 1 SCR 594; Assam Match Co. Ltd. v. Bijoy Lal Sen, [1974] 1 SCR 116, referred to.

2:3. Retrenchment to be valid must comply with three conditions set out in section 25F. They are, (a) subject to the proviso to clause (a) one month's notice in writing specifying the reasons for retrenchment or wages in lieu of notice: (b) compensation to be paid according to the measure provided in the clause, the payment to be simultaneous with the retrenchment; and (c) the notice in the prescribed manner to be served on the appropriate Government. It was obligatory upon the employer, who wants to retrench the workmen to give notice as contemplated by clause (a) of section 25. [262 C-E]

2:4. A careful reading of sections 9A and 25F makes it clear that when a workman is retrenched, no change in his conditions of service is effected. No item in Fourth Schedule which sets out the conditions of service covers the case of retrenchment. In fact retrenchment is specifically covered by item 10 of the Third Schedule. If retrenchment which connotes termination of service, cannot constitute change in conditions of service in respect of any item mentioned in Fourth Schedule section 9A would not be attracted. If section 9A is not attracted, the question of seeking exemption from it in the case falling under the proviso would hardly arise. Therefore, neither section 9A nor the proviso is attracted in this case. That apart, none of the other pre-conditions to a valid retrenchment have been complied with, because the very letter of termination of service shows that services were deemed to have been terminated from a back date which clearly indicates no notice being given, no compensation being paid and no notice being given to the prescribed authority. Therefore, termination of service, being retrenchment, for failure to comply with section 25F, would be void ab initio. [263 D-E, H, 264 A, C-D]

3:1. The test provided is that for the purpose of determining the eligibility of casual labour to be treated as temporary, the criterion should be the period of continuous work put in by each individual labour on the same type of work and not the period put in collectively by any particular gang or group of labourers. It is thus abundantly clear that if a person belonging to the category of casual labour employed in construction work other than work-charged projects renders six months' continuous service without a break, by the operation of statutory rule the person would

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be treated  as temporary railway servant after the expiry of
six months  of continuous  employment. It is equally true of
even seasonal labour. Once the person acquired the status of
temporary
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railway servant  by operation  of law, the conditions of his
service would  be governed  as set out in Chapter XXIII. The
service of  a temporary railway servant may be termined only
as provided in Rule 2301. [266 H, 267 A-B, E]
     3:2. The  underlying intendment of the Rule 2501(b) (i)
JUDGMENT:
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has rendered six months' continuous service would be placed in the category of temporary railway servant unless he is employed on work-charged project. Rule 2501(b) (i) clearly provides that even where staff is paid from contingencies, they would acquire the status of temporary railway servants after expiry of six months of continuous employment. [271 E- H] In the instant case: (i) the appellant acquired the status of temporary railway servant long before the termination of his service and, therefore, his service could not have been terminated under Rule 2505; (ii) he never worked on projects but on a construction Unit. Construction Unit is a regular Unit and cannot be equated to Project. Every construction work does not imply Project. Project is correlated to planned projects in which the workman is treated as work-charged. Persons belonging to casual labour category cannot be transferred but the appellant was transferred on innumerable occasions; (iii) as a result of the appellant and others filing a writ petition, three co- appellants were informed that they were treated as on regular employments and ceased to belong to the category of casual labour. But for impugned termination orders the appellant also would have been treated as temporary and therefore, the appellant received discriminatory treatment offending Article 14 & 16 of the Constitution; and (iv) section 25F of the Industrial Disputes Act provides that no workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until the conditions set out in Act are satisfied. The appellant would be a workman within the meaning of that expression in section 2(s) of the Act. He has rendered continuous service for a period over twenty years. Therefore, the first condition of section 25F that appellant is a workman who has rendered service for not less than one year under the Railway administration, an employer carrying on an industry, is satisfied. His service is terminated which for the reasons herein before given would constitute retrenchment. It is immaterial that he is a daily rated worker. He is either doing manual or technical work and his salary was less than Rs. 500 and the termination of his service does not fall in any of the excepted categories. Therefore, assuming that he was a daily rated worker, once he has rendered continuous uninterrupted service for a period of one year or more, within the meaning of section 25B of the Act and his service is terminated for any reason whatsoever and the case does not fall in any of the excepted categories, notwithstanding the fact that Rule 2505 would be attracted, it would have to be read subject to the provisions of the Act. Accordingly the termination of service in this case would constitute retrenchment and for not complying with pre-conditions to valid retrenchment the order of termination would be illegal and invalid. [271 D, 272 A, G, 275 D-G] 3:3. Absence without leave constitutes misconduct and it is not open to the employer to terminate service without notice and inquiry or at any rate without complying with the minimum principle of natural justice. Further Rule, 2302 clearly prescribes the mode, manner and methodology of terminating service of a temporary railway servant and

admittedly the procedure therein prescribed having not been carried out, the termination is void and invalid. Accordingly, the same conclusion would be reached even while accepting for the purpose of the facts of this case simultaneously rejecting it in law that the termination does not constitute retrenchment yet nonetheless it would be void and inoperative. [273 A-C] OBSERVATION: Rule 2501 which permits a man serving for 10, 20, 30 years at a stretch without break being treated as daily rated servant, is thoroughly opposed to the notions of socio-economic justice and it is high time that Railway administration brings this part of the provision of the Manual, antiquarian and antediluvian, in conformity with the Directive Principles of State Policy as enunciated in Part IV of the Constitution. It is high time that these utterly unfair provisions wholly denying socio-economic justice are properly modified and brought in conformity with the modern concept of justice and faieplay to the lowest and the lowliest in Railway administration. [273 C-D, 274 A-B] & CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1613 of 1979.

Appeal by special leave from the Judgment and Order dated the 9th January, 1979 of the Kerala High Court in O.P. No. 4401 of 1974.

K.R.R. Pillai for the Appellant.

P.A. Francis and Miss A. Subhashini for the Respondents.

The Judgment of the Court was delivered by DESAI, J. Appellant L. Robert D'Souza joined service as a gangman at Mangalapuram in Southern Railway on July 1, 1948. In course of his service he was transferred to various places. When he was last working as Lascar at Ernakulam, on October 8, 1974 the Executive Engineer (Construction), Ernakulam intimated to him that his services were deemed to have been terminated from September 18, 1974, from which date the appellant was said to have absented himself from duty. This letter has an important bearing on the issues raised in this appeal, and, therefore, relevant portion may be extracted here:

> "You have absented yourself unauthorisedly from 18.9.1974 and hence your services are deemed to have been terminated from the day you have absented yourself. Please note.
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> Since you are no longer on the rolls of this office you should vacate the quarters allotted to you immediately failing which action will be taken to evict you".

According to the appellant, up to the date of unauthorised and illegal termination of his service he had rendered continuous service for a period of 26 years yet the Railway administration wrongfully denied him the status of a temporary and or regular workman and treated him a daily rated casual labourer. This treatment according to the appellant was so unfair that it prompted persons who were victims of this unfair treatment by the Railway administration to form a Union named Southern Railway Construction Workers Union, Ernakulam, of which the appellant was the General Secretary. The Union submitted a charter of demands which presumably irritated the authorities and chagrinned by it, the appellant was transferred to Podannur in Tamil Nadu by way of punishment. As the late Shri A.K. Gopalan, who was a renowned trade union leader, espoused the

cause of the appellant, his transfer was cancelled and he was repasted and allowed to continue at Ernakulam after paying the arrears of wages and granting continuity of service for the period he did not join duty at the place of his transfer. This is quite evident from the letter of the Under Secretary, Ministry of Labour, dated April 23, 1974, which reads as under:

> "With reference to your letter dated the 28th May, 1973, on the above subject, I am directed to say that it has been reported by the Ministry of Railways that the Southern Railway Administration has been advised that as you were transferred back to Ernakulam on 19th March, 1971, you should be deemed to have been on duty for the intervening period from 8th March, 1970 to 19th February, 1971, and your wages paid accordingly".

The local superiors of the appellant were annoyed by the success of the appellant and they were on a look out for settling the score with the appellant. In the meantime the appellant approached the Labour Court for recovering some of his dues which remained pending for a long time. As the appellant and those similarly situated were likely to reach the age of superannuation and by the unfair labour practice of the Railway administration they were likely to be denied the full retirement benefits, appellant and several others filed a writ petition in the High Court of Kerala. According to the appellant, for the various reasons stated in the petition, appellant and those similarly situated could not be treated as daily rated casual labour and under the relevant rules appellant and his co-workers would at least acquire the status of temporary railway servants and their services could not be terminated in the manner in which the appellant's service was terminated and that they would be entitled to all the retiral benefits. The petition came up before a learned single judge who dismissed the same. The matter was taken in appeal before the Division Bench. In the appeal it was contended that the termination of service of the appellant in the circumstances as set out earlier would constitute retrenchment within the meaning of section 25F of the Industrial Disputes Act, 1947 ('Act' for short), and therefore, the order of termination, inter alia, is invalid. The Division Bench found the question raised before it of such importance and magnitude that it referred the same to the Full Bench.

In the meantime the appellant was actively pursuing his trade union activities. A demand was made that all the benefits granted by the Central Pay Commission be extended to the category of employees to which the appellant belonged and when these demands fell on deaf ears, it was resolved to give a strike notice. The matter was taken in conciliation which ultimately resulted in failure. The appellant approached the Central Government to make a reference under s. 10 of the Act in respect of the demands for adjudication by National Tribunal. As the Central Government was wobbling in its approach, the appellant declared his intention to go on fast unto death for redressal of the grievances suffered for decades by the lowest category of railway employees. At that stage the Assistant Labour Commissioner intervened and persuaded the appellant not to precipitate the matter. The appellant accordingly broke his fast on September 28, 1974, in the hospital where he was confined during his fast. Taking advantage of his absence during the fast immediately the order of termination of his service was served and this led to the present proceedings which have culminated in this appeal.

The appellant, inter alia, contended before the Full Bench of Kerala High Court that the termination of his service for the reasons and in the manner brought about is illegal and invalid, that it was victimisation for trade union activities; that it was unfair labour practice and that it was mala fide. It was also contended that in view of his long uninterrupted service admittedly over twenty years he was at the minimum a temporary railway servant and, therefore, his service cannot be terminated unless he was rendered surplus or by way of disciplinary measure after complying with Article 311 of the Constitution. The legal submission put in the forefront was that in the circumstances herein mentioned the termination of service constituted 'retrenchment' within the meaning of s. 25F of the Act and as the pre-condition to valid retrenchment having not been satisfied, the termination is illegal and invalid. The Full Bench answered the point referred to it against the appellant holding that there is no retrenchment as contended for, on behalf of the appellant and finally dismissed the petition. Hence this appeal by special leave.

At the outset it must at once be pointed out that the construction put by the Full Bench of the Kerala High Court on the expression 'retrenchment' in s. 2(oo) of the Act that it means only the discharge of surplus labour or staff by the employer for any reason whatsoever is no more good law and in fact the decision of the Full Bench of Kerala High Court in L. Robert D'Souza v. Executive Engineer, Southern Railway and Anr.,(1) has been specifically overruled by this Court in Santosh Gupta v. State Bank of Patiala (2) This Court has consistently held in State Bank of India v. N. Sundera Money,(3) Hindustan Steel Ltd. v. Presiding Officer, Labour Court,(4) and Delhi Cloth & General Mills Ltd. v. Shambhu Nath Mukherji,(5) that the expression 'termination of service for any reason whatsoever' now covers every kind of termination of service except those not expressly included in s. 25F or not expressly provided for by other provisions of the Act such as ss. 25FF and 25FFF. It was attempted to be urged that in view of the decision of this Court in Pipraich Sugar Mills Ltd. v. Pipraich Sugar Mills Mazdoor Union,(6) the ratio of which was re-affirmed by a Constitution Bench of this Court in Hariprasad Shivshanker Shukla v. A.D. Divikar,(7) all the later decisions run counter to the Constitution Bench and must be treated per in curium. This contention need not detain us because first in Hindustan Steel Ltd. case, then in Santosh Gupta's case (Supra) and lastly in Mohan Lal v. Bharat Electronics Ltd.,(1) it was in terms held that the decision in Sundera Money's case was not at all inconsistent with the decision of the Constitution Bench in Hariprasad Shukla's case and not only required no reconsideration but the decision in Sundera Money's case was approved in the aforementioned three cases. This position is further buttressed by the decision in Delhi Cloth and General Mills Ltd. case wherein striking off the name of a workman from the roll was held to be retrenchment. It is, therefore, the settled law that the expression 'termination of service for any reason whatsoever' in the definition of the expression 'retrenchment' in s. 2(oo) of the Act covers every kind of termination of service except those not expressly included in s. 25F or not expressly provided for by other provisions of the Act such as ss. 25FF and 25FFF. Two things thus emerge, firstly, that the decision of the Full Bench of Kerala High Court under appeal has been specifically overruled by this Court in Santosh Gupta's case (Supra) and secondly, in view of the decision in Delhi Cloth General Mills Ltd. case (Supra) striking off the name of a workman from the rolls without anything more constitutes retrenchment within the meaning of the expression 'retrenchment' in s. 2(oo). This emerging legal position alone would be sufficient for us to allow the appeal and set aside the decision of the Kerala High Court.

Sheet anchor of Mr. Francis's submission is that this Court should proceed on the construction of expression 'retrenchment' as set out in Hariprasad Shukla's case, and ignore the construction of the expression 'retrenchment' put in the decisions of this Court in Sundera Money's Hindustan Steel Ltd. case, Santosh Gupta's case, Delhi Cloth & General Mills Ltd. case as being per in curium. We are not disposed to undertake this recurring futile exercise for obvious reason that on four different occasions, in Hindustan Steel Limited case, a Division Bench of this Court consisting of Chandrachud, Goswami and Gupta, JJ. in Sundera Money's case, a Bench consisting of Chandrachud, Krishna Iyer and Gupta, JJ; in Santosh Gupta's case, a Bench consisting of Krishna Iyer and O. Chinnappa Reddy, JJ. and a Bench of two judges consisting of Gupta, J. and one of us in Mohanlal's case, have repeatedly undertaken this very detailed exercise and held that there is no inconsistency of any nature and kind nor any conflict, contradiction or repugnancy between the decision of the Constitution Bench in Hariprasad Shukla's case and aforementioned later four decisions and they stand in harmony with each other and the later decisions take note of an amendment in the relevant provisions of Industrial Disputes Act and, therefore, the construction put on the expression 'retrenchment' in the aforementioned decisions pronounced the settled view of this Court. We, therefore, consider it futile and waste of precious time of the Court to re-examine the submission of Mr. Francis negatived on four different occasions in the past. Undoubtedly, Mr. Francis pointed out that in Surendra Kumar Verma & Ors. v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi & Anr.,(1) Pathak, J. in his concurring judgment has stated that his concurrence with the majority view propounded by Reddy, J. should not be taken to imply his agreement with the interpretation of s. 2(oo) rendered in Santosh Gupta's case. It may, however, be mentioned that the majority in that case has affirmed the earlier decision. Therefore, after meticulously examining on five distinct and different occasions, it is clearly and unequivocally stated that there is neither apparent nor real conflict between the decision of the Constitution Bench in Hariprasad Shukla's case and the later five decisions commencing from Sundera Money and ending with Mohanlal's case, it would be sheer waste of time and merely adding to the length of the judgment to re-examine this contention over again, so as to cover the familiar ground.

As we are not prepared to examine the contention over again, the submission of Mr. Francis that 'retrenchment' contemplates some overt act on the part of the employer, that it inheres the principle of last come first go which again requires an overt act on the part of the employer; that when retrenched workmen and required to be re-employed, first option for re-employment has to be given to the retrenched workmen, which necessitates some overt act on the part of the employer, would be beside the point and of no relevance and significance. The reference to Rules 76, 77 and 78 of the Industrial Disputes (Central Rules). 1957, does not advance his case a step further. The definition of expression 'retrenchment' in s. 2(oo) is so clear and unambiguous that no external aids are necessary for its proper construction. Therefore, we adopt as binding the well settled position in law that if termination of service of a workman is brought about for any reason whatsoever, it would be retrenchment except if the case falls within any of the excepted categories, i.e., (i) termination by way of punishment inflicted pursuant to disciplinary action; (ii) voluntary retirement of the work-

man; (iii) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; (iv) or termination of the service on the ground of continued ill-health. Once the case does

not fall in any of the excepted categories the termination of service even if it be according to automatic discharge from service under agreement would nonetheless be retrenchment within the meaning of expression in s. 2(oo). It must as a corollary follow that if the name of the workman is struck off the roll that itself would constitute retrenchment, as held by this Court in Delhi Cloth & General Mills Ltd. case. We specifically refer to this case because the facts in the case before us are on all fours with the facts in the aforementioned cases and on parity of reasoning and judicial comity the same conclusion must follow unless something to the contrary is indicated. In that case respondent S. N. Mukherji who was recruited as a labourer came to be promoted in course of time to the post of Motion Setter. On October 1, 1964, pursuant to some re-organisation in the establishment the post of Motion Setter was abolished. The management offered employment to the respondent S. N. Mukherji on any other suitable post, which was indicated to be the post of Assistant Line Fixer (Assistant Grade I) without loss of wages. He was to be on probation. The management found him unsuitable for this post even after extending the period of probation by 9 months and therefore offered him post of Fitter on the same pay which he, as a Motion Setter, used to get. The response of S. N. Mukherji to this offer was that he should be given a further opportunity to show his efficiency in his job and if he fails to improve, he would tender his resignation voluntarily. The management did not reply to the letter with the result that the workman did not report for work at the newly offered post. On January 19, 1966, the management wrote to the workman that his name has been struck off from the rolls with effect from August 24, 1965, for continued absence without intimation. Such termination of service was held to be covered by the expression 'retrenchment' and it was struck down on the ground that the pre-condition to valid retrenchment was not complied with. It would thus appear that it is consistently held by this Court that termination of service for any reason whatsoever except the excepted categories would constitute retrenchment within the meaning of the expression in the Act. And here recall the order of termination of service of the appellant wherein it is stated that "You have absented yourself unauthorisedly from 19.8.1974 and hence your services are deemed to have been terminated from the day you have absented yourself." Is any other conclusion possible save and except the one recorded by this Court in Delhi Cloth & General Mills Ltd case that this constitutes retrenchment and for non-compliance with pre- condition, it is invalid.

Before referring to other contentions of Mr. Francis, we may dispose of one contention based upon construction of s. 9A of the Act as in our opinion, it is utterly untenable. Mr. Francis says that if valid retrenchment presages a notice contemplated by s. 25F, the same would stand dispensed with in view of the proviso (b) of s. 9A of the Act and therefore even if the termination is held to be retrenchment, the same would be valid. There are two basic fallacies in this submission. Retrenchment to be valid must comply with three conditions set out in s. 25F. They are (a) subject to the proviso to clause (a), one month's notice in writing specifying the reasons for retrenchment or wages in lieu of notice; (b) compensation to be paid according to the measure provided in the clause, the payment to be simultaneous with the retrenchment; and (c) the notice in the prescribed manner to be served on the appropriate Government. If the termination in this case otherwise constitutes retrenchment admittedly clauses (b) and (c) of s. 25F have not been complied with. That apart, the submission that in view of the provision contained in proviso (b) of s. 9A, the notice contemplated by clause (a) of s. 25F would be dispensed with, is without merits. Section 9A imposes an obligation on the employer, who proposes to effect any change in the conditions of service applicable to any

workman in respect of any matter specified in the Fourth Schedule to give notice as therein provided and the employer is precluded from effecting the change without giving to the workman likely to be affected by such change, notice in the prescribed manner of the nature of the change proposed to be effected, and the change cannot be effected within 21 days of the giving of such notice. In order to attract s. 9A the change proposed must be in the conditions of service applicable to the workman in respect of any matters specified in the Fourth Schedule. If the proposed change falls in any of the matters specified in the Fourth Schedule the change can be effected after giving notice in the prescribed manner and waiting for 21 days after giving such notice. There is a proviso to s. 9A which exempts the employer from giving the notice of change if the case falls in any of the two provisos. According to Mr. Francis the case would be covered by proviso (b). It reads as under:

> "9A. No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change-
>
> (a) x x x x
> (b) x x x x
>
> Provided that no notice shall be required for effecting any such change:
>
> (a) x x x x
>
> (b) where the workmen likely to be effected by the change are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Services Regulations, Civilians in Defence Services (Classification, Control and Appeal) Rules, or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette, apply".

It was obligatory upon the employer, who wants to retrench the workmen to give notice as contemplated by clause (a) of s. 25. When a workman is retrenched it cannot be said that change in his conditions of service is effected. The conditions of service are set out in Fourth Schedule. No item in Fourth Schedule covers the case of retrenchment. In fact, retrenchment is specifically covered by Item 10 of the Third Schedule. Now, if retrenchment which connotes termination of service, cannot constitute change in conditions of service in respect of any item mentioned in Fourth Schedule, S. 9A would not be attracted. In order to attract s. 9A the employer must be desirous of effecting a change in conditions of service in respect of any matter specified in Fourth Schedule. If the change proposed does not cover any matter in Fourth Schedule s. 9A is not attracted and no notice is necessary. See Workmen of Sur Iron & Steel Co. (P) Ltd. v. Sur Iron & Steel Company (P) Ltd., Tata Iron & Steel Company Ltd. v. Workmen and Assam Match Co. Ltd. v. Bijoy Lal Sen. Thus if s. 9A is not attracted the question of seeking exemption from it in the case falling under the proviso would hardly arise. Therefore, neither s 9A nor the proviso is attracted in this case. The basic fallacy in the submission is that notice of change contemplated by s. 9A and notice for a valid retrenchment under s. 25F are two different aspects of notice, one having no co-relation with the

other. It is, therefore, futile to urge that even if termination of the service of the petitioner constitutes retrenchment it would nevertheless be valid because the notice contemplated by s. 25F would be dispensed with in view of the provision contained in s. 9a, proviso (b). That apart, it is an indisputable position that none of the other pre-conditions to a valid retrenchment have been complied with in this case because the very letter of termination of service shows that services were deemed to have been terminated form a back date which clearly indicates no notice being given, no compensation being paid and no notice being given to the prescribed authority. Therefore, termination of service, being retrenchment, for failure of comply with s. 25F, would be viod ab initio.

Mr. Francis next contended that as the appellant belonged to the category of casual labour as defined in rule 2501 in Chapter XXV of the India Railway Establishment Manual ('Manual' for short), no notice prior to termination of his service is necessary or required by law in view of the provisions contained in Rule 2505. The submission is that in the case of casual labour the service will be deemed to have been terminated when such employee absents himself or no the close of the day.

Rule 2501 reads as under:

> "2501. Definition-
>
> (a) Casual labour refers to labour whose employment is seasonal, intermittent, sporadic or extends over short periods. Labour of this kind is normally recruited from the nearest available source. It is not liable to transfer, and the conditions applicable to permanent and temporary staff do not apply to such labour,
>
> (b) The casual labour on railway should be employed only in the following types of cases, namely:
>
> (i) Staff paid from contingencies except those retained for more than six months continuously. Such of those persons who continue to do the same work for which they were engaged or other work of the same type for more than six months without a break will be treated as temporary after the expiry of the six months of continuous employment.
>
> (ii) Labour on projects, irrespective of duration, except those transferred from other temporary or permanent employment.
>
> (iii) Seasonal labour who are sanctioned for specific works of less than six months duration. If such labour is shifted from one work to another of the same type, e.g., relaying and the total continuous period of such work at any one time is more than six months' duration, they should be treated as temporary after the expiry of six months of continuous employment. For the purpose of determining the eligibility of labour to be treated as temporary, the criterion should be the period of continuous

work put in by each individual labour on the same type of work and not the period put in collectively by any particular gang or group of labourers.

	x	x	x
Note :	(1)	x	x

(2) Once any individual acquires temporary status, after fulfilling the conditions indicated in (i) or (iii) above, he retains that status so long as he is in continuous employment on the railways. In other words, even if he is transferred by the administration to work of a different nature he does not lose his temporary status.

(3) x x x (4) Casual labour should not be deliberately discharged with a view to causing an artificial break in their service and thus prevent their attaining the temporary status.

(5) x x x Rule 2505 may as well be extracted. It reads as under:

"2505. Notice of termination of service-Except where notice is necessary under any statutory obligation, no notice is required for termination of service of the casual labour. Their services will be deemed to have terminated when they absent themselves or on the close of the day.

Note: In the case of a casual labourer who is to be treated as temporary after completion of six months' continuous service, the period of notice will be determined by the rules applicable to temporary Railway servants".

In order to satisfactorily establish that the applicant belonging to the category of casual labour whose service by deeming fiction enacted in Rule 2505 will stand terminated by the mere absence, it must be shown that the appellant was employed in any of the categories set out in clause (b) of rule 2502. What has been urged on behalf of the respondent is that the appellant was employed in construction work and, therefore, labour on projects irrespective of duration would belong to the category of casual labour. That, however, does not mean that every construction work by itself becomes a work-charged project. On the contrary sub clause (1) of clause (b) of rule 2501 would clearly show that such of those persons belonging to the category of casual labour who continued to do the same work for which they were engaged or other work of the same type for more than six months without a break will be treated as temporary after the expiry of the six months of continuous employment. Similarly, seasonal labour sanctioned for specific works for less than six months' duration would belong to the category of casual labour. However, sub clause (iii) of clause (b) of rule 2501 provides that if such seasonal labour is shifted from one work to another of the same type, as for example, 'relaying' and the total continuous period of such work at any one time is more than six months' duration, they should be treated as temporary after the expiry of six months of continuous employment. The test provided is that for the purpose of determining the eligibility of casual labour to be treated as temporary, the criterion should be the period of continuous work put in by each individual labour on the same type of work and not the period put in collectively by any particular gang or group of labourers. It is thus abundantly clear that if a person belonging to the category of

casual labour employed in construction work other than work-charged projects renders six months' continuous service without a break, by the operation of statutory rule the person would be treated as temporary railway servant after the expiry of six months of continuous employment. It is equally true of even seasonal labour. Once the person acquired the status of temporary railway servant by operation of law, the conditions of his service would be governed as set out in Chapter XXIII.

Rule 2301 in Chapter XXIII defines a temporary railway servant. It reads as under:

> "2301. Definition-A 'temporary railway servant' means a railway servant without a lien on a permanent post on a Railway or any other administration or office under the Railway Board. The term does not include 'casual labour', a 'contract' or 'part time' employee or an 'apprentice'."

The service of a temporary railway servant may be terminated as provided in Rule 2301. The benefits which a temporary railway servant enjoys are set out in the same chapter.

The question, therefore, is whether the appellant who was recruited as casual labour continued to be the same or he had acquired the status of temporary railway servant at the time of termination of his service. In the affidavit filed in the High Court the respondents contended that the appellant was employed in construction work on work-charged project. The High Court did not examine this contention on merits and, therefore, it has become obligatory upon us to probe it.

The appellant has stated that he joined as a Gangman on July 1, 1948 at Mangalapuram and he was transferred in 1953 to Pindur in Mysore State. He confessed that he does not have any record to show this employment but urged that if the pay roll of the relevant period would be produced by the Railway administration, the fact alleged would be completely borne out. We would bypass this controversial period, without recording any finding on it one way or the other. The appellant further contends that on November 15, 1954, on transfer he joined in the office of Inspector of Works at Mangalore and since then he has been in continuous employment in the construction branch of the Southern Railway till the date of his illegal termination of service on October 8, 1974. These averments are incontrovertible and have not rightly been controverted before us, in view of unimpeachable evidence produced by the appellant. The Executive Engineer, Ernakulam, where the appellant at the relevant time, i.e. September 5, 1966, was working, addressed a letter to various Executive Engineers inquiring from them whether the surplus staff on his establishment could be absorbed by any of them. The material portion of the letter reads as under:

> Ext. P-3 Executive Engineer's Office, Ernakulam Dated 5.9.1966 Subject :- Surplus staff (Casual labour staff) absorption of
>
> ---
>
> "Since the major portion of the work in this construction unit is over the list of the C.L. staff who are likely to be rendered surplus by 30.9.66 and 31.12.66 due to expiry of sanction to the post held by them, is enclosed.

Please advise whether you can absorb any of these personnel in your construction division so that they may be relieved in time if they are willing".

Enclosures:

(1) List.

List of C.L. Staff Working in Xen's Office/Ers.

Sr. No.	Name	Presently working as	Date of appointment
X	X	X	X
10.	Robert D'Souza.	Peon/Lascar.	15.11.54
X	X	X	X

This evidence furnished from the record of the respondent and not controverted by any affidavit to the contrary would establish that the appellant was in continuous service from November 15, 1954. Recall here, the fact that his service was terminated by the impugned order contained in the letter Annexure 1 dated October 8, 1974. Therefore, apart from the period in controversy from 1948 to 1964 it is unquestionably established that the appellant was in continuous uninterrupted service from November 1954 to October 1974, a period of 20 years and he was working as Peon/Lascar. Undoubtedly he has been referred to as belonging to casual labour staff but would it be fair to hold that after 20 years of continuous service, he would still continue to be a casual labour and therefore, his service could be terminable at will, and he would not be entitled to any of the benefits which a temporary or a permanent railway employee would enjoy ?

There is, however, one more aspect to which we would refer before we proceed to pronounce upon the status of the appellant. The definition of casual labour extracted by us above clearly indicates that person belonging to casual labour is not liable to transfer. The appellant has stated that he was transferred to Madras in 1957, to Tuni in Andhra Pradesh in 1958, to Rajahmundry in 1960, to Samalkhotan in 1961, to Virudhnagar in 1962 and to Manamadurai in 1965 and then to Ernakulam in August 1965. It appears that he was again transferred from Ernakulam which was seriously objected and he took up the matter with the higher authorities when he was re-transferred to Ernakulam on March 19, 1971. This appears from the letter of the Under Secretary in the Ministry of Labour addressed to the appellant in which it is stated that the Ministry of Railways was advised that the appellant be transferred back to Ernakulam, which advice has been carried out and the intervening period for which he did not report for duty, i.e. from March 6, 1970 to February 19, 1971, he would be paid the wages as if he was on duty. In the face of these incontrovertible facts could it at all be said that the appellant though transferred ad nauseum still continued to belong to the category of casual labour ?

An additional fact which buttresses this conclusion may be referred to. The appellant and several others filed petition in the High Court of Kerala from which the present appeal arises. All the petitioners before the High Court contended that each of them having rendered continuous service for decades they could not be said to be belonging to the category of casual labour and if anything all

of them had acquired status of temporary employees. The respondent filed counter-affidavit and contended that the appellant and his co-petitioners in the High Court never acquired the status of temporary railway servant and each of them belonged to the category of casual labour. During the pendency of the petition in the High Court service of the appellant was terminated but his co-petitioners continued in service. After the dismissal of the writ petition by the learned single judge appellant and three others preferred Writ Appeal No. 218 of 1973 in the same High Court. By the time the appeal came up for hearing three co-appellants of the present appellant who were appellants before the Division Bench were informed that they were treated as on regular employment and ceased to belong to the category of casual labour. Unfortunately as the service of the appellant was already terminated he was not given this benefit. This fact clearly emerges from the manner in which the Division Bench disposed of the appeal before it. The relevant observation is as under:

> "In view of the letters received from the Executive Engineer, Southern Railway, addressed to Shri K.P. Pathrosa, advocate, appearing for respondents in the writ appeal, it has become unnecessary to consider this writ appeal on merits".

With reference to the appellant it was stated as under:

> "As regards the first appellant, it is stated that he absented himself from duty and so he had been denied employment. Since then another Writ Petition O.P. No. 4401/74 has been filed by the first appellant and is now pending before this Court. The contention of the first appellant including what has been raised in this petition will be considered in O.P. 4401/74".

By the letters referred to by the Division Bench, the Executive Engineer informed the advocate appearing for Railway administration that appellants other than the present appellant were absorbed as regular railway employees and hence the appeal has become infructuous. Unfortunately for the appellant he was denied this benefit as his service was already terminated. If his service was not terminated, his case was not distinguishable from the case of his co- appellants and he would have been entitled both in law and facts to the same treatment. The approach of the Railway administration to say the least is amazing. For years they did not act according to law and confer status of temporary railway servant on the appellant and his colleagues in the High Court. When appellant espoused this cause he was thrown out but his colleagues were given the benefit richly deserved in law. This discriminatory treatment cannot help the respondent because appellant's case cannot be distinguished. If the status of temporary railway employee was already acquired before the termination of service in the manner brought about, the same would be ipso facto invalid. At this stage we would again revert to the annexure to the letter of Executive Engineer dated September 5, 1966, in which the name of the appellant appears at Serial No. 10. One of the co-petitioners of the appellant in the High Court, who got the benefit of regular employment pursuant to the writ petition was one Shri K.N. Balakrishna. His name appears at Serial No. 1 in the annexure to the letter of Executive Engineer referred to above. His date of appointment is shown to be March 24, 1954. It would thus appear at a glance that the case of the appellant could not be distinguished from the case of Shri K.N. Balakrishna and if Shri Balakrishna was accorded the status of regular employee, the

appellant could not be treated otherwise, but for a singular unfortunate event of his termination of service. He could not be singled out for such treatment, Had his service not been terminated, the Railway administration could not have denied him the status and this status he would have acquired long back. If by operation of law, to wit, Rule 2501 the appellant had acquired the status of temporary railway servant by rendering continuous uninterrupted service for more than six months, his service could not have been terminated under rule 2505. It, however, needed moral force of fast and costly court proceedings by a low daily paid workman against the Railway administration in the High Court to obtain such meagre benefit. It would thus clearly appear that even the appellant would have acquired the status of at least a temporary railway servant. But we would rather like to refer to the legal position in this behalf more accurately.

To start with, let us recall the rule 2501(b) (i) and

(iii) and note below rule 2505. The underlying internment of the provision is that a casual labourer who has rendered six months' continuous service would be place in the category of temporary railway servant unless he is employed on work- charged project.

Rule 2501(b) (i) clearly provides that even where staff is paid from contingencies, they would acquire the status of temporary railway servants after expiry of six months of continuous employment. But reliance was placed on rule 2501(b) (ii) which provides that labour on projects, irrespective of duration, except those transferred from other temporary or permanent employment would be treated as casual labour. In order to bring the case within the ambit of this provision it must be shown that for 20 years appellant was employed on projects. Every construction work does not imply project. Project is correlated to planned projects in which the workman is treated as work-charged. The letter dated September 5, 1966, is by the Executive Engineer, Ernakulam, and he refers to the staff as belonging to construction unit. It will be doing violence to language to treat the construction unit as project. Expression 'project' is very well known in a planned development. Therefore, the assertion that the appellant was working on the project is belied by two facts: (i) that contrary to the provision in Rule 2501 that persons belonging to casual labour category cannot be transferred, the appellant was transferred on innumerable occasions as evidenced by orders Ext. P-1 dated January 24, 1962, and Ext. P-2 dated August 25, 1964, and the transfer was in the office of the Executive Engineer (Construction); (ii) there is absolutely no reference to project in the letter, but the department is described as construction unit. If he became surplus on completion of project there was no necessity to absorb him. But the letter dated September 5, 1966, enquires from other executive engineers, not attached to projects, whether the surplus staff including appellant could be absorbed by them. This shows that the staff concerned had acquired a status higher than casual labour, say temporary railway servant. And again construction unit is regular unit all over the Indian Railways. It is a permanent unit and cannot be equated to project. Therefore, the averment of the Railway administration that the appellant was working on project cannot be accepted. He belonged to the construction unit. He was transferred fairly often and he worked continuously for 20 years and when he questioned the bona fides of his transfer he had to be re-transferred and paid wages for the period he did not report for duty at the place where he was transferred. Cumulative effect of these facts completely belie the suggestion that the appellant worked on project. Having rendered continuous uninterrupted service for over six months, he acquire the status of a temporary railway

servant long before the termination of his service and, therefore, his service could not have been terminated under Rule 2505.

Once it is held that by operation of statutory rule in the Manual, the appellant had acquired a status of temporary railway servant and assuming, as contended by Mr. Francis, that the termination of service in the circumstances alleged does not constitute retrenchment stricto sensu, would the termination be still valid ?

The answer is an emphatic no. On the admission of the Railway administration, service was terminated on account of absence during the period appellant was on fast. Absence without leave constitutes misconduct and it is not open to the employer to terminate service without notice and inquiry or at any rate without complying with the minimum principle of natural justice. Further, rule 2302 clearly prescribes the mode, manner and methodology of terminating service of a temporary railway servant and admittedly the procedure therein prescribed having not been carried out, the termination is void and invalid. Accordingly, the same conclusion would be reached even while accepting for the purpose of the facts of this case simultaneously rejecting it in law that the termination does not constitute retrenchment yet nonetheless it would be void and inoperative.

We would be guilty of turning a blind eye to a situation apart from being highly unethical, wholly contrary to constitutional philosophy of secio-economic justice if we fail to point out that Rule 2501 which permits a man serving for 10, 20, 30 years at a stretch without break being treated as daily rated servant, is thoroughly opposed to the notion of socioeconomic justice and it is high time that the Railway administration brings this part of the provision of the Manual, antiquarian and antediluvian, in conformity with the Directive Principles of State Policy as enunciated in Part IV of the Constitution. It may be necessary for a big employer like the railway to employ daily rated workmen but even here it is made distinctly clear that in case of casual labour, the daily wage is fixed by dividing monthly minimum wage by 26 so as to provide a paid holiday. Maybe, for seasonal employment, or for other intermittent work daily rated workmen may have to be employed. It may as well be that on projects workcharged staff may have to be employed because on the completion of the projects the staff may become surplus. That was at a time when planning and projects were foreign to the Indian economy. Today, Railways perspective plans spreading over decades. If one project is complete another has to be taken over. Railway administration has miles to go and promises to keep and this becomes clear from the fact that the appellant, a daily rated workman, continued to render continuous service for twenty years which would imply that there was work for daily rated workman everyday for twenty years at a stretch without break and yet his status did not improve and continued to be treated as daily rated casual labour whose service can be terminated at the whim and fancy of the local satraps. It is high time that these utterly unfair provisions wholly denying socioeconomic justice are properly modified and brought in conformity with the modern concept of justice and fairplay to the lowest and lowliest in Railway administration.

Now, if appellant had become at least a temporary railway servant he is entitled to many benefits set out in Rule 2303 onwards. We have no doubt in our minds that the appellant whose case was on par with Shri K.N. Balakrishna who had already been offered regular employee status, would be entitled to be placed in the same category and that too from the date much earlier to the date of termination

of his service. In this situation termination of his service not being covered by any of the excepted categories and not after notice would be retrenchment within the meaning of the expression as used in the Act and for the failure to comply with the pre condition the termination of service would be void.

Assuming we are not right in holding that the appellant had acquired the status of a temporary railway servant and that he continued to belong to the category of casual labour, would the termination of the service in the circumstances mentioned by the Railway administration constitute retrenchment under the Act ?

Section 25F of the Act provides that no workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until the conditions set out in Act are satisfied. The expression 'workman' is defined as under:

> "In this Act, unless there is anything repugnant in the subject or context:
>
> "Workman" means any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-
>
> (i) who is subject to the Army Act, 1950, or the Air Force Act, 1950 or the Navy (Discipline) Act, 1934, or
>
> (ii) who is employed in the police service or as an officer or other employee of a prison; or
>
> (iii) who is employed mainly in a managerial or administrative capacity; or
>
> (iv) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

There is no dispute that the appellant would be a workman within the meaning of the expression in s. 2(s) of the Act. Further, it is incontrovertible that he has rendered continuous service for a period over twenty years. Therefore, the first condition of s. 25F that appellant is a workman who has rendered service for not less than one year under the Railway administration, an employer carrying on an industry, and that his service is terminated which for the reason hereinbefore given would constitute retrenchment. It is immaterial that he is a daily rated worker. He is either doing manual

or technical work and his salary was less than Rs. 500/- and the termination of his service does not fall in any of the excepted categories. Therefore, assuming that he was a daily rated worker, once he has rendered continuous uninterrupted service for a period of one year or more. within the meaning of s. 25F of the Act and his service is terminated for any reason whatsoever and the case does not fall in any of the excepted categories. notwithstanding the fact that Rule 2505 would be attracted, it would have to be read subject to the provisions of the Act. Accordingly the termination of service in this case would constitute retrenchment and for not complying with pre-conditions to valid retrenchment, the order of termination would be illegal and invalid.

Accordingly, we allow this appeal, set aside the order of the High Court and declare that the termination of service of the appellant was illegal and invalid and the appellant continues to be in service and he would be entitled to full back wages and costs quantified at Rs. 2,000.

S.R. Appeal allowed.