National Engineering Industries ... vs Shri Shri Kishan Bhageria & Others on 11 November, 1987

Equivalent citations: 1988 AIR 329, 1988 SCR (1) 985, AIR 1988 SUPREME COURT 329, 1988 LAB. I. C. 384, 1987 REPORTS 652, 1987 5 JT 569, 1988 (1) SCJ 334, (1987) 4 JT 569 (SC), (1987) 1 SCJ 334, 1988 SCC (SUPP) 82, 1988 SCC (L&S) 428, (1988) 72 FJR 190, (1988) 56 FACLR 148, (1988) 1 LABLJ 363, (1988) 1 LAB LN 675, (1988) 2 SERVLJ 22, (1988) 1 CURLR 290

Author: Sabyasachi Mukharji

Bench: Sabyasachi Mukharji, G.L. Oza

PETITIONER:
NATIONAL ENGINEERING INDUSTRIES LIMITED

Vs.

RESPONDENT:
SHRI SHRI KISHAN BHAGERIA & OTHERS

DATE OF JUDGMENT11/11/1987

BENCH:
MUKHARJI, SABYASACHI (J)
BENCH:
MUKHARJI, SABYASACHI (J)
OZA, G.L. (J)

CITATION:
1988 AIR 329 1988 SCR (1) 985
1988 SCC Supl. 82 JT 1987 (4) 569
1987 SCALE (2)1301

ACT:
Industrial Disputes Act, 1947: Section 2(s)-'Workman'-who is-Internal Auditor in Company-Not doing supervisory work-only checking up on behalf of employer-No independent authority or right to take decision-Such employee held 'workman'-I. D. Act not repugnant to Rajasthan Shops and Commercial Establishments Act 1958.

Rajasthan Shops and Commercial Establishments Act, 1958: Sections 28A and 37-Whether repugnant to Industrial Disputes Act 1947-Employee's petition against dismissal-Dismissed on ground of limitation-Relief through petition under I. D. Act 1947-Whether barred.

HEADNOTE:

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The Ist respondent was working in the appellant-company as an Internal Auditor on a monthly salary of Rs.1186-60P per month. The appellant alleged that the respondent started absenting himself from 28th January, 1978 and as such was not entitled to any salary for any period beyond the said date. The respondent was thereafter placed under suspension on 30th March, 1978.

On 4th May, 1978 the respondent filed an application under section 33C(2) of the Industrial Disputes Act, 1947 claiming a total sum of Rs.4746-40p on account of salary from Ist January, 1978 to 30th April, 1978. The appellant objected on the ground that the respondent was not a 'workman'. On 9th November, 1978 there was an order dismissing the respondent from service.

On 2nd January, 1979 the respondent filed an application under section 28A of the Rajasthan Shops and Commercial Establishments Act, 1958 which was dismissed on 31st July, 1979 on the ground of limitation.

On the 2nd August, 1979 the Labour Court held that the respondent was doing clerical duties and as such was a 'workman' under the Industrial Disputes Act and he was entitled to Rs.2060-98p as salary

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from 9th March, 1978 to 30th April, 1978. There was also a reference under section 10 of the Industrial Disputes Act, 1947 on 8th August, 1960 arising out of the dismissal of the respondent. The appellant filed a writ petition challenging this order.

All the aforesaid writ petitions were disposed of by a Single Judge of the High Court on 16th March, 1982 holding that the respondent was not a 'workman'.

Division Bench of the High Court, however reversed the aforesaid judgment and held that the respondent was a 'workman'. The two writ petitions of the appellant were dismissed, while the writ petition of the respondent was allowed.

Aggrieved by the aforesaid orders the appellant appealed to this Court. On the questions: (1) whether the respondent was a 'workman' or not within the definition of section 2(s) of the Industrial Disputes Act, 1947 and (2) whether the Industrial Disputes Act, 1947 or the Rajasthan Shops and Commercial Establishments Act, 1958 would apply.

Dismissing the appeals,

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HELD: 1.(a) Whether a person was performing supervisory or managerial work is a question of fact. One must, therefore, look into the main work and that must be found out from the main duties. A supervisor has to take some kind of decision on behalf of the company. One who was reporting

merely as to the affairs of the company and making assessment for the purpose of reporting is not supervisor. [992A-B]

(b) There is no controversy in the instant case, that the respondent is not employed in any managerial or administrative capacity. Distribution of work may easily be the work of a manager or an administrator but "checking" the work so distributed or "keeping an eye" over it is certainly supervision. A manager or administrator's work may easily include supervision but that does not mean that supervision is the only function of a manager or an administrator. Where there is a power of assigning duties and distribution of work there is supervision. [990C,991A-B,991D]

Mcleod and Co. v. Sixth Industrial Tribunal West Bengal and others, A.I.R. 1958 Calcutta 273; All India Reserve Bank Employees Association v. Reserve Bank of India, [1966] 1 S.C.R. 25; Llyods Bank

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Ltd. v. Pannalal Gupta, [1961] 1 L.L.J. 18; Burmah Shell Oil Storage & Distribution Co. Of India. v. Burmah Shell Management Staff Association & Ors. [1971] 2 S.C.R. 758; The Punjab Co-operative Bank Ltd. v. R.S. Bhatia (dead) through Lrs, [1975] 4 S.C.C. 696; Maheshwari v. Delhi Administration

JUDGMENT:

Delton Cable India (P) Ltd., [1984] 2 S.C.C. 569 and Hind Construction and Engineering Company Ltd. v. Their Workmen, [1965] 1 L.L.J. 462 referred to.

(c) A checker on behalf of the management or employer is not a supervisor. [993E] In the instant case, the nature of duties performed by Respondent No. 1 were mainly reporting and checking up on behalf of the management. A reporter or a checking clerk is not a supervisor. The respondent does not appear to be doing any kind of supervisory work. He was undoubtedly checking up on behalf of the employer but he had no independent right or authority to take decision and his decision did not bind the company. The Division Bench came to the conclusion that the respondent was a 'workman' within the meaning of section 2(s) of the Industrial Disputes Act, 1947 taking into consideration the evidence recorded before the Labour Court that the respondent is a workman and not a supervisor. That conclusion on the appreciation of evidence cannot be interfered with under Article 136 of the Constitution. [993A-C]

2.(a) In order to raise the question of repugnancy two conditions must be fulfilled. The State law and the Union law must operate in the same field and one must be repugnant or inconsistent with the other. These are two cumulative conditions which are required to be fulfilled. [995E] Deep Chand v. The State of Uttar Pradesh and others, [1959] Suppl. 2 S.C.R. 8 and M/s. Hoechst Pharmaceuticals Ltd. and others v. State of Bihar and others, [1983] 4 S.C.C. 45 at page 87 referred to.

(b) In this case there is a good deal of justification to hold that these laws, the Industrial Disputes Act, 1947 and the Rajasthan Shops and Commercial Establishments Act, 1985 tread on the same field and both laws deal with the rights of a dismissed workman or employee. But these two laws are

not inconsistent or repugnant to each other. The basic test of repugnancy is that if one prevails the other cannot prevail. That is not the position in this case. [995F-G]

(c) The application under section 28A of the Rajasthan Act was dismissed not on merits but on limitation. There is a period of limitation provided under the Rajasthan Act and it may be extended for reasonable cause. But there is no period of limitation as such provided under the Industrial Disputes Act. Therefore, that will be curtailment of the rights of the workmen or employees under the Industrial Disputes Act. In that situation section 37 declares that law should not be construed to curtail any of the rights of the workmen. [996A-B]

(d) Social Welfare and labour welfare broadens from legislation to legislation in India. It will be a well settled principle of interpretation to proceed on that assumption and section 37 of the Rajasthan Act must be so construed. In no way the Rajasthan Act could be construed to curtail the rights of the workman to seek any relief or to go in for adjudication in case of the termination of the employment. [996C]

(e) There is, therefore, no conflict between the Industrial Disputes Act, 1947 and Rajasthan Shops and Commercial Establishments Act, 1985 and there is no question of repugnancy. These two Acts are supplemental to each other. [994G-H; 996D]

3. The High Court was, therefore, right in holding that Respondent No. 1 was a 'workman' and in granting relief on that basis. [996E] & CIVIL APPELLATE JURISDICTION: Civil Appeal Nos.3521-3523 of 1987.

From the Judgment and order dated 17.10. 1986 of the Rajasthan High Court in D.B. Civil Special (Writ) Appeals Nos. 27,28 of 1983 and 224 of 1982.

Dr. Shankar Ghosh, N.C. Shah and Praveen Kumar for the Appellant.

Tapas Ray, S.K. Jain, Mrs. P.Jain and S. Atreya for the Respondents.

The Judgment of the Court was delivered by SABYASACHI MUKHARJI, J. After hearing parties and after considering the relevant documents, additional as well as original, we grant leave to appeal in these matters. The appeals are disposed of by the judgment herein.

Since prior to Ist of January, 1978 the respondent No. 1 Shri Kishan Bhageria was working under the appellant- company as an Internal Auditor on a monthly salary of Rs.1186.60 per month. The appellant alleged that the respondent started absenting himself from 28.1.78 and as such was not entitled to any salary for any period beyond 28.1.78 The said respondent was thereafter placed under suspension on 30th of March, 1978. The respondent on 4th of May, 1978 filed an application under section 33C(2) of the Industrial Disputes Act, 1947 (hereinafter called 'the Act') claiming the total sum of Rs.4,746.40 on account of salary from Ist of January, 1978 to 30th of April, 1978 at the rate of Rs.11,86.60 per month. The appellant company objected. The main ground of objections was that the respondent was not a workman. On or about 9th of November, 1978 there was an order

dismissing the respondent from service. The respondent thereafter on 2nd of January, 1979 filed an application under section 28A of the Rajasthan Shops & Establishments Act, 1958 (hereinafter called 'the Rajasthan Act'). The said application was dismissed on 31st of July 1979 on the ground of limitation. The Labour Court on 2nd of August, 1979 held that the respondent was doing clerical duties and as such was a workman under the Act and he was entitled to Rs.2,060 as salary from 1.1.78 to 9.3.78. The appellant filed Writ Petition No. 765 of 1979 in the Rajasthan High Court against the order of the Labour Court allowing the said salary. The respondent also filed another writ petition being writ petition No. 1091 of 1979 for declaration that he was entitled to receive Rs.2,066.98 as salary from 9.3.78 to 30.4.78. There was thereafter a reference under section 10 of the Act on 8.8.80 arising out of the dismissal of the respondent. The appellant filed another writ petition being Writ Petition No. 1623 of 1980 challenging the order of reference. All these aforesaid writ petitions were disposed of by the learned Single Judge of the Rajasthan High Court on 16.3.82 holding that the respondent was not a workman. The other contentions urged before the leaned Single Judge were not considered by the Division Bench in the view it took later on. On 17th of October, 1986 the Division Bench reversed the judgment of the learned Single Judge and held that the respondent was a workman. Two writ petitions of the appellant were dismissed and the writ petition of the respondent was allowed. Aggrieved by the aforesaid orders the appellant has come up in these appeals before this Court.

The main question which requires consideration in these appeals is whether the respondent was a workman or not. For the determination of this question it is necessary to refer to section 2(s) of the Act which defines "workman" and states that it means any person emp-

loyed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and includes any such person who has been dismissed discharged or retrenched in connection with or as a consequence of any dispute. But sub-clause (iii) does not include any person who is employed mainly in a managerial or administrative capacity and sub-clause (iv) does not include any person who being employed in a supervisory capacity draws wages exceeding one thousand six hundred rupees per month or duties attached to the office or by reason of the powers vested in him, discharges functions mainly of a managerial nature. In view of the said definition, we are concerned here with the question whether the respondent was a workman as not being employed in any supervisory capacity. There is no controversy that the said respondent is not employed in any managerial or administrative capacity.

In this case before we deal with the facts and the relevant authorities of this Court it may be appropriate to refer to a decision of P.B. Mukharji, J. Of the Calcutta High Court as the learned Chief Justice then was in Mcleod and Co. v. Sixth Industrial Tribunal, West Bengal and others, A.I.R. 1958 Calcutta 273. There the learned Judge observed that whether a person was a workman within the definition of the Industrial Disputes Act was the very foundation of the jurisdiction of the Industrial Tribunal. The Court further observed that in order to determine the categories of service indicated by the use of different words like "supervisory", "managerial", "administrative", it was necessary not to import the notions of one into the interpretation of the other. The words such as supervisory, managerial and administrative are advisedly loose expressions with no rigid frontiers and too much

subtlety should not be used in trying to precisely define where supervision ends and management begins or administration starts. For that would be theoretical and not practical. It has to be broadly interpreted from a common sense point of view where tests will be simple both in theory and in their application. The learned Judge further observed that a supervisor need not be a manager or an administrator and a supervisor can be a workman so long as he did not exceed the monetary limitation indicated in the section and a supervisor irrespective of his salary is not a workman who has to discharge functions mainly of managerial nature by reasons of the duties attached to his office or of the powers vested in him. In that case the learned Judge further held that a person in charge of a Department could not ordinarily be a clerk even though he may not have power to take disciplinary action or even though he may have another superior officer above him. It was further observed that distribution of work may easily be the work of a manager or an administrator but "checking" the work so distributed or "keeping an eye" over it is certainly supervision. It is reiterated that a manager or administrator's work may easily include supervision but that does not mean that supervision is the only function of a manager or an administrator.

Bearing in mind the aforesaid indication, it would be necessary to discuss some decisions of this Court. In All India Reserve Bank Employees Association v. Reserve Bank of India, [1966] 1 S.C.R. 25, this Court dealing with certain types of employees observed "These employees distribute work, detect faults, report for penalty, make arrangements for filling vacancies, to mention only a few of the duties which are supervisory and not merely clerical." At page 46 of the report Hidayatullah, J. as the learned Chief Justice then was observed that the work in a Bank involved layer upon layer of checkers and checking is hardly supervision but where there is a power of assigning duties and distribution of work there is supervision, (emphasis supplied). There the Court referred to a previous decision in Llyods Bank Ltd. v. Pannalal Gupta, [1961] 1 L.L.J. 18, where the finding of the Labour Appellate Tribunal was reversed because the legal inference from proved facts was wrongly drawn and it was reiterated that before a clerk could claim a special allowance payable to a supervisor, he must prove that he supervises the work of some others who are in a sense below him. It was pointed out by Hidayatullah, J. that mere checking of the work of others is not enough because this checking was a part of accounting and not of supervision and the work done in the audit department of a bank was not supervision. (emphasis supplied).

In Burmah Shell Oil Storage & Distribution Co. Of India. v. Burmah Shell Management Staff Association & Ors., [1971] 2 S.C.R. 758, this Court observed that a workman must be held to be employed to do that work which is the main work he is required to do, even though he may be incidentally doing other types of work. Therefore, in determining which of the employees in the various categories are covered by the definition of 'workman' one has to see what is the main or substantial work which he is employed to do. In The Punjab Co-operative Bank Ltd. v. R.S. Bhatia (dead) through Lrs., [1975] 4 S.C.C. 696 it was held that the accountant was supposed to sign the salary bills of the staff even while performing the duties of a clerk. That did not make the respondent employed in a managerial or administrative capacity. The workman was, therefore, in that context rightly held as a clerk.

In P. Maheshwari v. Delhi Administration & Ors., [1983] 3 S.C.R. 949 the question whether a person was performing supervisory or managerial work was the question of fact to be decided bearing in

mind the correct principle. The principle therefore is, one must look into the main work and that must be found out from the main duties. A supervisor was one who could bind the company to take some kind of decision on behalf of the company. One who was reporting merely as to the affairs of the company and making assessment for the purpose of reporting was not a supervisor. See in this connection Black's Law Dictionary, Special Deluxe, Fifth Edition. At page 1290, "Supervisor" has been described, inter alia, as follows:

> "In a broad sense, one having authority over others, to superintend and direct.
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> The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Reference may be made to the observations of this Court in Ved Prakash Gupta v. M/s. Delton Cable India (P) Ltd., [1984] 2 S.C.C. 569. There on facts a Security Inspector was held to be a workman. At page 575 of the report this Court referred to the decision in Llyods Bank Ltd. v. Panna Lal Gupta, (supra) and also the observations of this Court in Hind Construction and Engineering Company Ltd. v. Their Workmen, [1965] 1 L.L.J. 462. In that case the nature of the duties performed by the appellant showed that the substantial part of the work of the appellant consisted of looking after the security of the factory and its property by deputing the watchmen working under him to work at the factory gate or sending them to watch-towers or around the factory or to accompany visitors to the factory and making entries in the visitors' register as regards the visitors and in the concerned registers as regards materials entering into or going out of the premises of the factory. There it was found that he had no power to appoint.

In the instant case the evidence have been summarised by the Division Bench. Reference may be made to pages 65, 73, 80, 84 to 94, 95, 96 and 97 of the Paper Book which indicate the nature of duties performed by the respondent No. 1 herein. His duties were mainly, reporting and checking up on behalf of the management. A reporter or a checking clerk is not a supervisor. The respondent herein does not appear to us doing any kind of supervisory work. He was undoubtedly checking up on behalf of the employer but he had no independent right or authority to take decision and his decision did not bind the company. In that view of the matter keeping the correct principle of law in mind the Division Bench has come to the conclusion taking into consideration the evidence recorded before the Labour Court that the respondent is a workman and not a supervisor. That conclusion arrived at in the manner indicated above cannot, in our opinion, be interfered with under Article 136 of the Constitution. It is not necessary for our present purpose to set out in extenso the evidence on record as discussed by the Division Bench. Our attention was, however, drawn by the counsel for the respondent to certain correspondence, for instance the letter at page 65 of the paper book bearing the date 14th of May, 1976 where the respondent reported that certain materials were lying in stores deptt. in absence of any decision. It was further reiterated that on inspection of the pieces that those pieces were found cracked. Similarly, our attention was drawn to several other

letters and we have perused these letters. We are of the opinion that the Division Bench was right that these letters only indicated that the report was being made of the checking done by the respondent. A checker on behalf of the management or employer is not a supervisor.

In the aforesaid view of the matter the conclusion of the Division Bench that respondent No. 1 is a workman has to be sustained. We do so accordingly.

The next question that arises in this case is whether Act would apply or the Rajasthan Act would apply. In this connection section 28A of the Rajasthan Act is material. It enjoins that no employer shall dismiss or discharge from his employment any employee who has been in such employment continuously for a period of not less than 6 months except for a reasonable cause and after giving such employee at least one month's prior notice or on paying him one month's wages in lieu of such notice. Sub-section (2) of section 28A gives every employee, so dismissed or discharged, right to make a complaint in writing in the prescribed manner to a prescribed authority within 30 days of the receipt of the order of dismissal or discharge. Sub-section (3) of section 28A provides that the prescribed authority shall cause a notice to be served on the employer relating to the said complaint, record briefly the evidence produced by the parties, hear them and make such enquiry as it might consider necessary and thereafter pass orders in writing giving reasons therefor. Section 37 of the Rajasthan Act reads as follows:

> "37. Saving of certain rights and privileges.- Nothing in this Act shall affect any rights or privileges which an employee in any establishment is entitled to on the date this Act comes into force under any other law, contract, custom or usage applicable to such establishment or any award, settlement or agreement binding on the employer and the employee in such establishment, if such rights or privileges are more favourable to him than those to which he would be entitled under this Act."

It has to be borne in mind that section 2A of the Act was amended to permit individual workman to ask for a reference in the case of individual dispute. This amendment was assented to by the President on 1st of December, 1965. The Rajasthan Act received the assent of the President on 14th of July, 1958. On 8th March, 1972 Chapter 6A including section 28A was inserted in the Rajasthan Act. Therefore the material provision of the Rajasthan Act is the subsequent law. Under Article 254(2) of the Constitution if there was any law by the State which had been reserved for the assent of the President and has received the assent of the President, the State law would prevail in that State even if there is an earlier law by the Parliament on a subject in the Concurrent List. It appears that both of these Acts tread the same field and if there was any conflict with each other, then section 28A of Rajasthan Act would apply being a later law. We find, however, that there is no conflict. The learned Single Judge of the Rajasthan High Court in Poonam Talkies, Dausa v. The Presiding Officer, Labour Court, Jaipur, (S.B. Civil Writ Petition No. 1206/85 decided on 9.6.1986) so. That decision has been upheld by the Division Bench of the Rajasthan High Court in Writ Appeal No. 231/86. The Division Bench of the High Court in the instant appeal relying on the said decision held that there was no scope for any repugnancy. It appears to us that it cannot be said that these two Acts do not tread the same field. Both these Acts deal with the rights of the workman or employee to get redressal and damages in case of dismissal or discharge, but there is no repugnancy

because there is no conflict between these two Acts, in pith and substance. There is no inconsistency between these two acts. These two Acts, in our opinion, are supplemental to each other.

In Deep Chand v. The State of Uttar Pradesh and others, [1959] Suppl. 2 S.C.R. 8, Subba Rao, J., as the learned Chief Justice then was observed that the result of the authorities indicated was as follows:

> "Nicholas in his Australian Constitution, 2nd Edition, p. 303, refers to three tests of inconsistency or repugnancy:
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> 1. There may be inconsistency in the actual terms of the competing statutes;
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> 2. Though there may be no direct conflict, a State law may be inoperative because the Commonwealth Code is intended to be a complete exhaustive code; and
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> 3. Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject matter."

Quoting the aforesaid observations, this Court in M/s. Hoechst Pharmaceuticals Ltd. and others v. State of Bihar and others, [1983] 4 S.C.C. 45 at page 87 where A.P. Sen, J. exhaustively dealt with the principles of repugnancy and observed that one of the occasions where inconsistency or repugnancy arose was when on the same subject matter, one law would be repugnant to the other. Therefore, in order to raise a question of repugnancy two conditions must be fulfilled. The State law and the Union law must operate on the same field and one must be repugnant or inconsistent with the other. These are two conditions which are required to be fulfilled. These are cumulative conditions. Therefore, these laws must tread on the same field and these must be repugnant or inconsistent with each other. In our opinion, in this case there is a good deal of justification to hold that these laws, the Industrial Disputes Act and the Rajasthan Act tread on the same field and both laws deal with the rights of dismissed workman or employee. But these two laws are not inconsistent or repugnant to each other. The basic test of repugnancy is that if one prevails the other cannot prevail. That is not the position in this case. Learned counsel on behalf of the appellant, however, contended that in this case, there had been an application as indicated above under section 28A of the Rajasthan Act and which was dismissed on ground of limitation. Sree Shankar Ghosh tried to submit that there would be inconsistency or repugnancy between the two decisions, one given on limitation and the other if any relief is given under the Act. We are unable to accept this position, because the application under Section 28A of the Rajasthan Act was dismissed not on merit but on limitation. There is a period of limitation provided under the Rajasthan Act of six months and it may be extended for reasonable cause. But there is no period of limitation provided under the Industrial Disputes Act. Therefore, that will be curtailment of the rights of the workmen or employees under the Industrial Disputes Act. In the situation section 37 declares that law should not be construed to curtail any of the rights of the workmen. As Poet Tennyson observed-

> "freedom broadens from precedent to precedent" so also it is correct to state that social welfare and labour welfare broadens from legislation to legislation in India. It

will be a well-settled principle of interpretation to proceed on that assumption and section 37 of the Rajasthan Act must be so construed. Therefore in no way the Rajasthan Act could be construed to curtail the rights of the workman to seek any relief or to go in for an adjudication in case of the termination of the employment. If that is the position in view of the provisions 6 months' time in section 28A of the Rajasthan Act has to be ignored and that cannot have any binding effect inasmuch as it curtails the rights of the workman under the Industrial Disputes Act and that Act must prevail. In the premises, there is no conflict between the two Acts and there is no question of repugnancy.

The High Court was, therefore, right in holding that the respondent was workman and in granting relief on that basis. Before we conclude we note that our attention was drawn to certain observations of this Court that interference by the High Court in these matters at the initial stage protracts adjudication and defeats justice. Reference was made to certain observations in P. Maheshwari v. Delhi Admn. & Ors., (supra). But as mentioned hereinbefore in this case, the interference was made by the High Court not at the initial stage.

In the premises, we are of the opinion that the High Court was right in the view it took. These appeals, therefore, fail and are accordingly dismissed. There will, however, be no order as to costs. The reference before the Tribunal should proceed as expeditiously as possible.

N.V.K. Appeals dismissed.