Mumbai Mazdoor Sabha And Anr. vs S.A. Patil And Ors. on 10 February, 1993

Equivalent citations: [1994(68)FLR171], (1994)IILLJ891BOM

JUDGMENT

D.R. Dhanuka, J.

1. Both writ petitions, being Writ Petition No. 321 of 1988 and Writ Petition No. 295 of 1988, have been heard together as the basic issues involved in these two writ petitions are almost identical.

These writ petitions involve consideration of the following interesting and important questions of law:

> (a) Whether the Industrial Court had no jurisdiction to consider the question of alleged invalidity of Clause 2 of the impugned settlement prohibiting the employer from retrenching its workmen without first obtaining consent of union of employees while considering complaint made under Section 28 of Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practice Act, 1971 read with Item 9 of Schedule IV to the said Act?
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> (b) Whether Clause 2 of the settlement in each case survived even after service of notice of termination of settlement and expiry of notice period as a part of contract of service or otherwise?
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> (c) Whether Clause 2 of the settlement in each case was and is opposed to Industrial Disputes Act, 1947 or opposed to public policy or constitutes restraint on right of employer to pursue his trade within the contemplation of Section 27 of Indian Contract Act?

I shall first summarise the relevant facts concerning Writ Petition No. 321 of 1988.

> (a) By this petition filed under Article 226 of Constitution of India, the petitioner Union known as Mumbai Mazdoor Sabha seeks to impugn order passed by the Industrial Court, Bombay on 30th July, 1985 and May 4th 1987 on Complaint (ULP) No. 62 of 1985 filed by the Petitioner-Union against respondent No. 2 (i.e. Employer concerned). By the said order dated July 30th the Industrial Court rejected an application made by the petitioner to the Industrial Court for amendment of the said

complaint. By order dated May, 4th 1987, the Industrial Court dismissed the said complaint.

(b) On January 2, 1981, a settlement was arrived at between the petitioner Union and respondent No. 2 during the pendency of Reference (IT) No. 155 of 1980 then pending before the Industrial Tribunal, Maharashtra, Bombay. The said settlement included matters which were foreign to the Reference being Reference (IT) No. 155 of 1980. The Industrial Court made an Award in terms of the said settlement in so far as the said settlement concerned the disputes covered by the said reference. In respect of remaining matters, the matters which were foreign to the reference, the Industrial Tribunal took the said settlement record without placing its imprimatur thereon. By Clause 2 of the said settlement, it was inter alia provided that the respondent No. 2 employer shall not effect any retrenchment or termination of service or discharge any workman except after obtaining consent of the petitioner Union. The validity of this part of Clause No. 2 is seriously in issue before this Court in this petition. By the said clause, it was further provided that in case of any workman committing gross misconduct, the employer shall be entitled to , dismiss the workman in accordance with law. By the said clause, it was further provided that there shall be no lay off of any workman by the employer except when the employer is faced with circumstances which were beyond control. The said clause was headed with the caption "Security of Job". The said clause further provided that the guarantee of job provided by the said clause shall be available to the workmen so long as majority of the workmen remained members of Mumbai Mazdoor Sabha and in case the majority of the workmen changed their allegiance and became members of any other Union, Clause 2, providing for 'Job Security" shall become inoperative from the date the majority of the workmen joined the other union. By Clause 3 of the said settlement, it was provided that the employer and the Union accepted collective bargaining as the proper method of settling disputes that may arise between the employer and the workmen during the currency of the settlement. The said settlement dealt with various subjects. By Clause 12 of the said settlement, it was provided that the said settlement shall remain binding upto December 31, 1981. By the said clause, it was further provided that both parties shall thereafter negotiate for a fresh settlement in respect of the matters covered by the said settlement. By the said clause it was further provided that in case no change was asked for in respect of any one of the terms set out in the settlement, the said settlement shall continue to remain in force and shall remain binding on the parties till such time when such term or terms were changed on the petitioner Union claiming such a change therein. If the petitioner union's case regarding operation of Clause 2 of the settlement beyond expiry of notice period of termination of settlement is to be accepted by the Court, the said Clause No. 2 can possibly operate for ever i.e., till the same is changed or replaced at the instance of the union. Thus, the exercise of important right of employer to retrench the workmen is made dependent not merely on compliance with statutory obligation but made conditional on obtaining prior consent of petitioner union i.e. in substance the workmen themselves.

(c) By Notice dated September 29, 1982, the petitioner Union terminated the said settlement. Sometime in the last week of January 1985 or near about, twelve members of the petitioner Union were sought to be retrenched by respondent No. 2. There is a serious controversy between the parties-both factual as well as legal-in respect of validity of the said retrenchment. According to the petitioner Union, the move to retrench the said workmen as well as their actual retrenchment was illegal and unjustified. The respondent No. 2 contends that the said 12 workmen were retrenched lawfully and in accordance with the provisions of Industrial Disputes Act, 1947. The dispute as to validity or legality of the above-referred action of retrenchment need not be decided in this petition as the said issue does not directly arise in this petition. In this respect, the parties shall have to be left to their respective remedies before the appropriate forum for getting the said dispute decided under the relevant legislation as deemed fit.

(d) On or about January 28, 1985, the petitioner Union filed a complaint against the 2nd respondent before the Industrial Court at Bombay numbered as Complaint (ULP) No. 62 of 1985 invoking Section 28 of the Ma-harashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (Maharashtra Act No. I of 1972) read with Item 9 of Schedule IV of the said Act. In Para 3(d) of the said complaint, the petitioner Union averred that the proposed retrenchment of concerned workmen by the 2nd respondent herein was without obtaining consent of the petitioner Union. In the same paragraph, the petitioner further averred that this action on the part of respondent No. 2 amounted to willful and flagrant breach of Settlement dated January 2, 1981. Item 9 of Schedule IV of the Maharashtra Act No. I of 1972 enjoins the Industrial Court to consider complaints of unfair labour practice on the part of the employer where failure to implement award, settlement or agreement is the ground for making the complaint. On January 28, 1985, the Industrial Court granted ad-interim injunction in the matter. On February 4, 1985, the Industrial Court vacated the ad-interim order of injunction. In the written statement filed by respondent No. 2 employer, in response to the said complaint, the respondent No. 2 contends that the said settlement dated January 2, 1981 was already terminated by issue and service of notice dated September 29, 1982 and the said clause was not operative thereafter, In para two of its written statement, the 2nd respondent contended in alternative, that in any event the said clause was opposed to provision of Industrial Law and was also immoral and opposed to public policy. In para 9 of its written statement, the 2nd respondent was required to retrench services of concerned workmen bonafide and with a view to reorganise its business and the 2nd respondent had tendered notice and legal dues of the workman at the relevant time. It is case of the petitioner Union that the workmen accepted the tender made by respondent No. 2 under protest. I express no opinion on merits of this controversy as it is not relevant for disposal of this petition and is referred to merely for completion of sequence of events.

(e) Being aggrieved by order dated February 4, 1985, passed by the Industrial Court the petitioner-Union filed Writ Petition No. 278 of 1985 in this Court. The said writ petition was dismissed in limine. Being aggrieved by the said order, the petitioner filed Letters Patent Appeal being Appeal No. 224 of 1985. By its order dated April 19, 1985, the Honourable Division Bench of this Court consisting of letion and Kanthania JJ, the Industrial Court was directed to dispose of the complaint expeditiously as more particulars set out therein. The honourable Division Bench did not interfere with the interim order dated February 4, 1985. The Honourable Division Bench directed 2nd respondent to make certain interim payment to the workmen in the meanwhile. Sometime prior to July 23, 1985, effective hearing of the said Complaint started in full swing. Large number of witnesses were examined on behalf of the petitioner Union before the Industrial Court and evidence on behalf of the petitioner Union was closed. About 9 witnesses were thus examined prior to making of application for amendment of the said complaint by the petitioner Union on July 23, 1985. On July 23, 1985, the petitioner Union made an application to the Industrial Court at Bombay for amendment of the said complaint by seeking to rely on Items 1(b), (d) and (f) in the said complaint for the first time by attempting to impugn the orders of termination/retrenchment passed by respondent No. 2 employer against twelve of their workmen. Section 7 of the Maharashtra Act No. I of 1972 in term provides that it shall be the duty of the Labour Court to decide complaints relating to unfair labour practices described in Item I of Schedule IV and to try offence punishable under the Act. Section 5(d) of Maharashtra Act No. I of 1972 provides that it shall be the duty of the Industrial Court to decide complaints relating to unfair labour practices except unfair labour practices falling under item I of Schedule IV. By order dated July 30, 1985, the Industrial Court rejected the above referred application for amendment for valid reasons. The Industrial court rejected the said application for amendment inter alia on the ground of delay as well as on the ground of possibility of conflict of jurisdiction. After the said application for the amendment of complaint was rejected by the Industrial Court as aforesaid, respondent No. 2 led evidence. The hearing of the complaint was proceeded with further in all respects. By its order dated May 4, 1987 the Industrial Court dismissed the said complaint. The Industrial Court came to the conclusion that Clause 2 of the said settlement referred to in the opening part of this judgment, was not enforceable as it was violative of Sections 27 and 23 of Indian Contract Act and merely not obtaining of consent of the petitioner Union by respondent No. 2 before effecting retrenchment could not be considered as unfair labour practice. The Industrial Court came to the conclusion that the relevant portion of said clause was violative of the principles contained in Section 27 of Indian Contract Act and was also opposed to public policy. The Industrial Court recorded various reasons in the impugned order dated May 4, 1987 for coming to its above referred conclusion. In para 14 of the said order the learned member of the Industrial Court observed that the management had a right to determine the volume of its labour force and no employer could be compelled to carry on the burden of economic dead weight by keeping surplus labour, In substance, it was held that retrenchment was inevitable in certain circumstances,

> though unfortunate. In substance, the Industrial Court took the view that the employer could not be prevented from effecting retrenchment in accordance with law merely on the ground that the employer had not obtained prior consent of the petitioner Union in this behalf. The Industrial Court reached the conclusion that a stipulation of this kind which precluded the Employer from effecting retrenchment of a workman after complying with conditions laid down in Industrial Disputes Act, 1947 without obtaining the prior consent of Union was not enforceable at law.

By Writ Petition No. 295 of 1988, the petitioner Union has impugned order dated December 22, 1987 passed by Industrial Court in Complaint (ULP) No. 1052 of 1987, I shall now summarise the facts concerning Writ Petition No. 295 of 1988. On June 6, 1986, a settlement was arrived at between Engineering Mazdoor Sabha, the writ petitioner in this petition, and the employer known as M.T.R. Pvt. Ltd. The period of the said Settlement was specified to be upto June 30, 1987. Clause 2 of the said settlement is similar to Clause 2 of the settlement in Writ Petition No. 321 of 1988, though not identical. Clause 2 of the said settlement inter alia provided that the employer shall not resort to any lay off, retrenchment or termination of service in any manner in future of any workman during currency of the settlement except after obtaining the consent of the Sabha. The latter part of the said clause is not the subject-matter of any controversy. By the later part of the said clause, it was provided that the employer shall be at liberty to terminate the service of concerned workman if the workman committed act of gross misconduct, etc. By later part of the said clause, it was further provided that in case there was shortfall in work in any one of the departments or sections, the concerned workmen must accept suitable equivalent alternative job. Clause 2 of the said settlement reads as under:

> Clause No. (2): SECURITY OF JOB:
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> "That subject to Clause (3) hereinbelow, the Company shall not resort to any lay off, retrenchment of termination of service of any manner in future of any workman/workmen during the currency of this settlement except, after obtaining consent of the Sabha. However, the Company shall be at liberty to terminate service of any permanent workman/ workmen for committing any act of gross misconduct like theft, assault, sabotage or fraud but only after taking the Sabha into confidence. However in case there is any short-fall in the work in any one of the departments or sections, the workman/workmen shall continue to accept suitable equivalent alternate job/jobs. In case any workman/workmen who does/do not accept the alternative job/jobs, the Sabha on the Company approaching it with an application to pay off such workman/workmen shall permit the Company to do so."

By Clause 3 of the said settlement, it was provided that there shall be no strike including go-slow by the workmen and there shall be no lock-out by the Company. By notice dated July 8, 1987, the 1st respondent employer informed the petitioner Union that the said settlement expired by efflux of time on June 30, 1987. By letter dated July 13, 1987, the petitioner Union informed the first respondent employer that it had noted the contents of the said notice of termination of settlement i.e., the notice dated July 8, 1987. On August 21, 1987, the petitioner Union served a specific notice

on the first respondent employer stating therein that the said settlement dated June 6, 1986 shall stand terminated on expiry of two months notice of termination. The petitioner Union itself served the said notice on respondent No. 1 as contemplated under Section 19(2) of Industrial Disputes Act, 1947 and Rule 8 of the Industrial Disputes (Bombay) Rules. It was stated in the said notice that on expiry of two months notice period from service of the date of the said notice on respondent No. 1 the petitioner shall be free to raise fresn demand. By letter dated August 31, 1987 the first respondent acknowledged the receipt of the said two months notice in respect of termination of the said settlement. On November 6, 1987, the petitioner Union filed Complaint (ULP) No. 1052 of 1987 before the Industrial Court at Bombay under Section 28 of the Ma-harashtra Act No. 1 of 1972 read with Item 6 of Schedule II and Items 9 and 10 of Schedule IV to the said Act. In para 3(b) of the Complaint, the petitioner Union stated as under:

> "The Complainant submits that the aforesaid settlement dated June 6, 1986 bans the lay off and retrenchment of service of any manner in future of any workman/workmen except with the consent of the complainant".

By the said complaint dated November 6, 1987, the Engineering Mazdoor Sabha inter alia sought an injunction restraining the employer from effecting the retrenchment of the ten workmen or any workman at all from November 6, 1987 or on any later dated except after obtaining the consent of the complainant. The said complaint is still pending. By an ad-interim order dated November 6, 1987, the Industrial Court restrained the employer from retrenching any employee unless it followed due process of law and the conditions set out in the settlement dated June 6, 1986. The respondent employer assailed the legal efficacy or validity of Clause 2 of the said settlement on various grounds. By order dated December 22, 1987, the Industrial Court modified the said order of injunction in the following words:

> "The impugned order is hereby confirmed with a modification that the conditions in the said order of obtaining permission from the Union following the steps the Company intends to take in respect of the workers is hereby set aside."

The Industrial Court recorded reasons in detail in support of its view that the condition of obtaining consent of the Union for effecting retrenchment of the workman as provided in the said settlement was opposed to public policy and was void also on the ground that the said Clause 2 offended Sections 23 and 27 of Indian Contract Act, 1872.

The learned Counsel for the petitioner Union has submitted that the Industrial Court ought to have granted the above referred application for amendment of the complaint concerning Writ Petition No. 321 of 1988. The learned Counsel for the petitioner has submitted that while considering complaint based on Item 9 of Schedule IV appended to the Maharashtra Act No. l of 1972, the Industrial Court had no jurisdiction to go behind the settlement between the parties or consider the issue as to whether the said settlement particularly clause two of the settlement in each case was valid or invalid. The learned Counsel for the petitioner has submitted that even after expiry of two months notice period terminating the settlement, the said settlements including Clause 2 thereof survived and the impugned clause was and is enforceable. The learned Counsel for the petitioner has

submitted that conceptually the "Settlement" as defined under Industrial Disputes Act, 1947 was not a mere contract but has different status as it can bind persons other than parties thereto by virtue of provisions contained in Section 18 of Industrial Disputes Act, 1947. The learned Counsel has submitted that the said clause could not be impugned with reference to the provisions contained in Indian Contract Act. The learned Counsel for the petitioner has contended that Clause 2 of each of the settlements must be read down by reading in the said implication that "the consent" to retrenchment of the concerned workman shall not be unreasonably withheld by the Union and if unreasonably withheld. Clause 2 could be ignored. The learned Counsel for the petitioner has submitted that if Clause 2 of the said settlement was interpreted in this manner, the said clause would not appear to be unreasonable or opposed to public policy. The learned Counsel for the petitioner has submitted that Clause 2 of the said settlement in each of. the two cases was in keeping with the object and spirit of the Industrial law. Counsel for the petitioner has contended that a clause of this nature was in furtherance of public interest and public policy and can never be construed as amounting to restraint of trade or opposed to public policy within contemplation of Sections 23 and 27 of Indian Contract Act.

The learned Counsel for the employers in both the writ petitions have submitted that portion of Clause 2 of each of the two settlements was void ab initio. The learned Counsel have submitted that even if Clause 2 of each settlement was not void ab initio the said clause ceased to be operative on termination of the settlement i.e. on expiry of the notice period of two months. Both the learned Counsel for the Employer have supported the reasoning and the conclusion of the Industrial Court and have submitted that the Industrial Court was not bound to enforce the said clause even if Clause 2 survived after termination of the said settlement once the Industrial Court came to the conclusion that the said clause was opposed to Industrial Law and was violative of principles and provisions contained in Section 27 of the Indian Contract Act and also opposed to public policy. Both the learned Counsel for the employer have also relied upon the provisions of law contained in Section 25-J of Industrial Disputes Act, 1947. Section 25-J of Industrial Disputes Act, 1947 has an over-riding effect subject to the proviso to Section 25-J(1) of the Act. These are principal contentions urged by learned Counsel on either side.

7. The learned Counsel on both sides have cited large number of authorities during course of their arguments. I do not propose to refer to or deal with all the authorities during the course of this judgment although I have carefully gone through each of the authorities with assistance of learned Counsel. I shall briefly refer to such of the authorities which appear to me to be most relevant for disposal of these writ petitions.

8. Before I deal with the principal contentions urged at the Bar, I shall dispose of two of the comparatively smaller contentions.

9. I shall first consider the question as to whether the impugned order passed by the Industrial Court on July 30, 1985 dismissing the application for amendment of Complaint (ULP) No. 62 of 1985 concerning Writ Petition No. 321 of 1988 suffers from any error of law apparent on face of the record. It is necessary to emphasise that in para 3 (d) of the complaint, the petitioner Union described the impugned retrenchment of the concerned workmen merely as" a proposed

retrenchment" at that stage. The hearing of the said complaint was expedited by order of the High Court passed by Lentin and Kantharia, JJ., on April 19, 1985 in Appeal No. 224 of 1985 arising from Writ Petition No. 278 of 1985. About nine witnesses were already examined before the Industrial Court on behalf of the complainant Union prior to making of the said complaint. Eventhough validity of the retrenchment was not the subject matter of the said complaint as framed at that stage, evidence was let on behalf of petitioner Union on all points whether forming subject-matter of the complaint or not. In this view of the matter, the Industrial court was justified in taking the view that if the petitioners desired to impugn the validity of retrenchment, the remedy of the workmen or the Union was to file a separate complaint instead of amending the complaint which was filed invoking Item 9 of Schedule IV appended to the Maharashtra Act No. I of 1972 only. It is sometimes argued that the Industrial Court has jurisdiction to decide not merely the complaints based on items contained in Schedules II, III and IV of the Act but also complaints falling under Item I of Schedule IV if the complaints was formulated as a composite complaint. The validity of such an argument is not free from doubt. Section 5(d) of the Maharashtra Act No. I of 1972 provides that the Industrial Court shall have jurisdiction to decide complaints relating to unfair labour practices except unfair labour practices falling in Item I of Schedule IV. Section 7 of the said Act provides that it shall be the duty of the Labour Court to decide complaints relating to unfair labour practice described in Item 1 of Schedule IV. If the Industrial Court took the view that the petitioner Union could not be permitted to amend the complaint by pleading also Item No. 1 Schedule IV to the Maharashtra Act No. I of 1972 at that stage as ground of delay as well as likelihood of conflict of jurisdiction, the Industrial Court cannot be blamed for taking such a view and rejecting application for amendment. In my judgment, the Industrial Court rightly exercised this discretion in refusing to grant amendment and no case is made out for judicial intervention of this Court so as to impugn the said order dated July 30, 1985 under Article 226 of the Constitution of India. The petitioner Union is not without a remedy. The petitioner can always file a separate complaint complaining of unlawful termination or retrenchment if it amounted to an unfair labour practice. The petitioner Union has been pursuing its Constitutional remedy under Article 226 of Constitution of India so as to impugn the said order rejecting application for amendment bona fide. Unfortunately, the petitioner has failed to convince the Court on this apsect. This Court, however, is firmly of the opinion that the petitioner-Union or the workmen concerned ought to be protected by the Writ Court so as to enable the petitioner to pursue its separate remedy in respect of dispute concerning validity of retrenchment or termination of workmen concerned on merits without being affected by plea of limitation. As a Writ Court, I direct that if the petitioner Union files a fresh complaint before the Labour Court complaining of unfair labour practice on the part of the employer invoking Item 1 of Schedule IV to the Maharashtra Act No. I of 1972 within eight weeks from today, such complaint shall be considered by the Labour Court on merits and in accordance with law and application for condonation of delay to be made by the petitioner union in this behalf shall be favourably considered by the Court before which the complaint is filed. Issue of this direction by the High Court is considered necessary to prevent failure of substantial justice.

10. The learned Counsel for the petitioner has submitted that the Industrial Court had no jurisdiction to examine the contention of the employer to the effect that Clause 2 of the settlement was void. In my judgment there is no merit in this contention. Section 32 of the Maharashtra Act No. I of 1972 provides that the Court shall have the power to decide all matters arising out of any

application or complaint referred to it for decision under any of the provisions of the Act. If the Industrial Court is persuaded to take the view that the impugned clause of the settlement or part thereof was opposed to public policy or was void, Section 25J of Industrial Disputes Act, 1947 or Section 27 of Indian Contract Act, the Industrial Court would be justified in dismissing the complaint on the ground that no unfair labour practice was committed by the employer. The Industrial Court has requisite power and Judicial discretion to examine all aspects of the matter while dealing with the complaint under Item 9 of Schedule IV to the Maharashtra Act No. I of 1972.

> "I shall now deal with the principal contentions urged at the Bar which have been debated at the hearing of these writ petitions.
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> 12. Relying on observations made by the Honourable Division Bench of our High Court in the case of B.K. Jobanputra v. B.S. Kalekar (1965-I-LLJ-543) the learned Counsel for the petitioner submitted that the provisions of Indian Contract Act could not be invoked by the employer for assailing impugned portion of Clause 2 of the settlement in each case. The learned Counsel submitted that conceptually the expression "settlement" as understood in Industrial Law could never be considered as a mere contract. The learned Counsel submitted that every 'settlement' originated in an agreement but its ultimate status under Industrial Law was akin to that of an award and not a mere contract. To my mind, the applicable principles on this aspect are authoritatively laid down in the judgment of the. Honourable Supreme Court in the case of The life Insurance Corporation of India v. D.J. Bahadur (1981-I-LLJ-1) and the ratio of the said judgment must clinch the issue. Let me first refer to the relevant statutory provisions of the Act. Section 19(2) of Industrial Disputes Act, 1947 deals with the subject matter of "period of operation of settlements and awards". Sub-section (2) of the said section provides that the settlement shall be binding on the parties for such period as is agreed upon by them. The said section further provides that if no specific period was agreed upon between the parties', the settlement shall be binding on the parties for a period of six months from the date on which the memorandum of settlement was signed by the parties to the dispute. Sub-section (6) of Section 19 of the said Act provides that notwithstanding the expiry of the period of operation under Sub-section (2), the settlement or the award shall cease to be binding on expiry of two months notice period commencing from the date on which notice in writing of an intention to terminate the settlement is given by one of the parties to the settlement to the other party or parties to the settlement. Section 18(3) of the said Act provides that a settlement arrived at in the course of conciliation proceedings under the Act etc. shall be binding not merely on all the parties to the industrial dispute but also to various other persons covered under Section 18(3)(b), (c) and I (d) thereof. In the two writ petitions which are being decided, the duration of the settlement expired long time back. Both the said settlements were terminated by service of two months notice. The notice period also expired long back. In the above referred case of The Life Insurance Corporation of India v. D.J. Bahadur, R.S. Pathak, J., in his concurring judgment laid down the relevant principles in para 74 of the judgment. In the same case, V.R. Krishna Iyer,J., enunciated the relevant

proposition of law in para 42 of his judgment. In para 74 of the said Judgment at page 30 of the above referred Judgment in the case of The Life Insurance Corporation of India v. D.J. Bahadur, Pathak, J., (as His Lordship then was) observed that on expiry of the period prescribed in Sub-section (2) of Section 19 of the Act the conceptual quality of the transaction as "settlement" came to an end. In the said para, the learned judge observed that thereafter the parties were no longer bound to maintain the industrial status quo in respect of matters covered by the settlement and the parties are at liberty to seek an alteration of the contract. The Honourable Supreme Court took the view that the Industrial Law did not contemplate a vacuum in the employer-employee relationship during the interregnum and parties must be regulated by the same settlement in respect of terms and conditions of service as set out therein until replaced by another settlement, award or contract etc. In this case, the Honourable Supreme Court held that on expiry of the notice period, conceptual quality of the transaction as a "settlement" came to an end and the erstwhile settlement then operated as a mere contract governing conditions of service between the Employer and Employees until replaced in accordance with law. In para 74 of the Judgment, Pathak, J, in terms further observed as under (at-P 30):

"They (meaning thereby "the parties") are at liberty to seek an alteration of the contract. But until altered, the contract continues to govern the relations between the parties in respect of the terms and conditions of service."

"In para 42 of this judgment, Krishna Iyer, J., after referring to Sections 19(2) and 19(6) of the Act observed that, on expiry of the notice period, the settlement remained in force merely as a contract until replaced by a new contract or settlement or award. The learned Judge observed that specific period was fixed for operation of the settlement under the contract or by operation of statute. The learned Judge observed that after expiry of the said period, the award or settlement did not become non est but continued to be binding as a contract. The learned Judge referred to a stage where notice of intention to terminate the settlement was given under Section 19(2) or 19(6) of the Act. The learned Judge clearly laid down that on expiry of the notice period the settlement did not survive as a settlement but remained in force as a contract.

13. In view of the propositions of law laid down in the above referred leading judgment of the Apex Court, I have reached the conclusion that in this case the two months was clearly served by one or the other party to the settlement and the notice period had already expired long time back. In this view of the matter, the erstwhile settlement operates merely as a contract and that too only in respect of the terms and conditions of service and not in all respects. I have, therefore, no hesitation in rejecting the submission of the learned Counsel for the petitioner that Clause 2 of the said settlement survived even after expiry of the notice period. Clause 2 of the said settlement is not a part of terms and conditions of service as such and it does not therefore survive after the expiry of the notice period even if it was not void ab initio.

It has been laid down in some of the decisions that a provision concerning retrenchment of an employee does not constitute a condition of service as such.

14. Assuming for the argument sake that Clause 2 of the settlement in each of the two cases survives, its validity can undoubtedly be examined by the Court with reference to the criteria laid down in Section 25(J) of Industrial Disputes Act, 1947 and Section 27 and 23 of Indian Contract Act, Strictly speaking it is not necessary for the Court in these two writ petitions to decide the question as to whether Clause 2 of the said settlement was liable to be considered as valid during the currency of the settlement as a settlement i.e., settlement was terminated by service of notice as contemplated under Section 19(2) of Industrial Disputes Act, 1947 and expiry of notice period. I need not decide this issue finally in this petition although the discussion concerning validity of impugned portion of the said clause as contract is bound to take within its sweep the above referred aspect also to a considerable extent.

15. I shall now deal with the impact of Section 25(J) of Industrial Disputes Act, 1947 on validity of impugned portion of Clause 2 of each of the said settlements. Chapter V-A of the said Act deals with the subject of 'lay off and retrenchment'. The Legislature has imposed various interest of industrial peace and to protect the workmen. Chapter V-B of the Act makes special provisions relating to lay off, retrenchment and closure of establishments in which not less than 100 workmen are employed on an average per working day for the period preceding 12 months. Chapter V-B of the said Act requires an employer to obtain prior permission of the State Government before the employer proceeds to lay off or retrench the workman or close the establishment under one or other provision of the Act and comply with various other conditions, presented by Statute. Section 25-J was introduced in the Act for the first time by Section 3 of the Industrial Disputes (Amendment) Act, 1953. Section 25-J of the Act reads as under :

"25-J : (1) The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law (including standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (XX of 1946); Provided that where under the provisions of any other Act or rules, orders or notifications issued thereunder or under any standing orders or under any award, contract of service or otherwise, a workman is entitled to benefits in respect of any matter which are more favourable to him than those to which he would be entitled under this Act, the workman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that he receives benefits in respect of other matters under this Act.

(2) For the removal of doubts, it is hereby declared that nothing contained in this Chapter shall be deemed to affect the provisions of any other law for the time being in force in any State in so far as the law provides for the settlements of industrial disputes, but the rights and liabilities of employers and workmen in so far as they

> relate to lay off and retrenchment shall be determined in accordance with the provisions of this Chapter."

Section 25-J of the Act has an overriding effect over all the laws including Standing Orders made under the Industrial Employment (Standing Orders) Act 1946. Proviso to Section 25-J is of considerable significance. The legislative history of the said proviso and its amendment from time to time is also important for examining this aspect in proper perspective. The said proviso saves contracts of service, Standing Orders, Rules, provisions in any other Act or notification in so far as the workman is entitled to benefits in respect of matters covered under the said provisions which are more favourable to him than to which he would be entitled under the Act. It shall have to be considered by the Court as to whether impugned portion of Clause 2 of each of the settlements can be construed as a "benefit more favourable in respect of matters covered under the provisions" within meaning of the said expression under the proviso to Section 25-J of the Act. In my opinion, proviso to Section 25-J is the only exception carved out by the legislature so as to permit the parties to contract out and stipulate special terms concerning the subject dealt with under Chapter V-A and Chapter V-B of the Act. In all other respects, provisions of Chapter V-A and V-B alone govern the parties and no private contract is permissible. In my opinion, Clause 2 of the settlement cannot be construed as a clause providing for more favourable benefits in favour of the workmen. The impugned portion of Clause 2 of the contract does not confer a benefit in favour of the workmen within meaning of the said expression as used in Section 25-J of the Act as such but purports to impose a ban on the right of employer to lay off or retrench a workman in accordance with law without obtaining prior consent of the Union. In my judgment, Clause 2 of the settlement in each of the two cases is inconsistent with the scheme, object and contents of Chapter V-A and Chapter V-B of the Industrial Disputes Act, 1947 and exceeds the permissible limits within which parties can exercise freedom of contract under the proviso to Section 25-J(1) of the Act. Section 25-J provides that Chapters V-A and V-B of the Act have overriding effect over all other laws including Standing Order etc. One more question is debated at the Bar. The question to be asked is as to whether Clause 2 of the settlement in each of the two cases is liable to be read down by adding certain words in the said clause by implication so as to mean that the requisite consent shall not be reasonably withheld by the Union. The learned Counsel for the petitioner has cited several authorities on the subject and particularly the statement of law propounded in Halsbury's Laws of England--Vol. 27, Para 368. The relevant portion of para 368 of the said Volume of Halsbury's Laws of England reads as under:

> "Notwithstanding any express provision to the contrary, a covenant, condition or agreement against assigning, underletting, charging or parting with the possession of the demised premises, or any part of them, without licence or consent, is deemed to be subject to a proviso to the effect that such licence or consent is not to be unreasonably withheld."

16. The learned Counsel for the petitioner has relied on the above passage from Halsbury's Laws of England by analogy and submitted that if the impugned portion of Clause 2 would have contained an express provision to the effect that 'such consent shall not be unreasonably withheld' , no one would have been able to argue that the provision made in the said clause for obtaining consent of the Union was unreasonable, or oppressive. The learned Counsel submits that the Court may construe

the said clause by deeming the same to be subject to the provision that 'such consent shall not be unreasonably withheld by the Union' so that the clause is saved from the attack on its validity. I have reflected on this submission of the learned Counsel for the petitioner for quite sometime. In my opinion, in this case it is not possible to accept this submission having regard to the expressed intention of the parties to treat this clause as a ban on right to retrench or lay off the workmen till after the consent of union is received. The principal question to be asked is as to what was the real intention of the parties at the time of signing of the settlement and as to how the parties themselves have understood the said clause all these years. In the complaint filed before the Industrial Court concerning Writ Petition No. 295 of 1988, it was in terms averred by the Union in Para 3(b) thereof that lay off and retrenchment or termination of service in any manner was banned by Clause i of the settlement except with the consent of the Union. It appears to me that petitioner deliberately and intentionally provided for a clause of this type in the settlement and stipulated that no workman would be retrenched or laid off even after compliance with all the statutory conditions and even though the action intended to be taken was bona fide unless the consent of the petitioner Union was first obtained by the employer. On this aspect, it appears to be useful to refer to the statement of law in Odgers'. "Construction of Deeds and Statutes" (Fifth Edition-Pages 65 and 66). After referring to several decided cases, the learned Author has observed in the above referred well-known work at page 66 of the said authoritative text book as under:

> "Generally, although words should be read, if possible, in such a way as not to produce a result that is harsh, unreasonable or unlawful, it is not permissible to ignore them because they can only produce an unreasonable result."

17. It was observed by the learned Author that the Court has no general jurisdiction to reform the terms of a contract. In other words, doctrine of reading down a wider clause in a contract has its own limitations and cannot be always applied to save a contract by adding words contrary to real intention of parties.

18. I am, therefore, not prepared to read by implication in Clause 2 of the settlement/contract in each of the two cases before me with a qualifying or deeming provision to the effect that the impugned portion of Clause No. 2 was subject to the union not withholding its consent unreasonably or a deemed proviso to the effect that the said clause would not operate if the union unreasonably withheld its consent. Action pertaining to retrenchment and lay off involves urgency and cannot be made to depend upon prior consent of workers or the union.

19. The next question to be considered by the Court is as to whether the impugned Clause 2 is viplative of the provisions and principles contained in Section 27 of Indian Contract Act. The connected question arising for consideration of the Court is as to whether the impugned clause is opposed to public policy.

20. Section 27 of Indian Contract Act reads as under:

> "27. Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void."

The said section is based on the New York Draft Code. The said section is applicable even where the restraint imposed on exercise of a trade, business or profession is partial less saved by Exception 1 to Section 27 of the Contract Act. The court shall have, therefore, to consider as to whether the impugned orders passed by the Industrial Court suffers from an error of law apparent on face of it, when it holds that the portion of the impugned clause is violative of principles and provisions contained in Section 27 of Indian Contract Act and is also opposed to public policy. Broadly stated, I am in agreement with conclusions of Industrial Court on this aspect. The view taken by the Industrial Court is a reasonably possible view. It is necessary to refer to the judgment of the Honourable Supreme Court in the case of Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly (1986-II-LLJ-171). In this case, the Honourable Supreme Court was concerned with question as to whether Rule 9(i) of the concerned Corporation forming part of the contract of service was opposed to public policy and violative of Section 23 of the Contract Act. The question before the Apex Court was as to whether the Court could evolve new heads of public policy in view of the changing times. In para 95 of his Judgment, Madan, J., speaking for the Bench of the Supreme Court, laid down as to what was meant by the expressions "public policy", "opposed to public policy" or "contrary to public policy". These expressions are incapable of precise definition. In this context, the Apex Court observed that the principles governing "public policy" were capable of expansion or modification on an appropriate occasion. The learned Judged further observed that practices which were considered perfectly normal at one time had today become obnoxious and oppressive to public conscience. The issue as to whether a particular clause in a contract is opposed to "public policy" must be decided with reference to the concept of "public good" and "public interest". In the last two sentences of Para 95 of its judgment, the Apex Court laid down very valuable guideline. I cannot resist temptation of extracting this part of the judgment for the purpose of deciding this case. In para 95 of the judgment, Madan, J., observed as follows: (at P 210):

> "Above all, in deciding any case which may not be covered by authority, our courts have before them the beacon light of the preamble to the Constitution. Lacking precedent, the Court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution."

If a law is inconsistent with Fundamental Rights enshrined in our Constitution, such law to the extent of such inconsistency will be treated as void ab initio. The validity of contracts cannot be judged with reference to Part III of the Constitution. Nevertheless if a question arises for consideration of the Court as to whether a contract or part of the contract is opposed to public policy, the Court can derive light and guidance from the principles underlying Part in and Part IV of the Constitution by analogy. This is what I propose to do in this case for the purpose of deciding as to whether the impugned clause is violative of Section 27 or Section 23 of Indian Contract Act. Freedom of trade, profession or occupation is essesstial for economic development of the country. A contract which unnecessarily hampers, interferes or obstructs the said freedom is opposed to Section 27 of Indian Contract Act and is also opposed to public policy.

21. The learned Counsel for the petitioner has submitted that the impugned clause furthers and promotes "public policy" and is in consonance with Directive Principles enshrined in our Constitution and is for public good. The learned Counsel for the petitioner has particularly relied on

the directive principle contained in Article 43-A of the Constitution. Article 43-A of the Constitution provides that the State shall endeavour to provide for workers' participation in management of industry. The learned Counsel for the petitioner has also relied on Article 21 of Constitution of India and submitted that security of job is part of right to livelihood embodied in Article 21 of our Constitution. If the impugned clause had not provided for obtaining of prior consent of the Union as a condition to the action of employer to effecting valid retrenchment or lay off, the matter would have been viewed in a different perspective. Industrial Disputes Act, 1947 adequately protects the workmen and balances interest of Industry, the workmen and the society. The said Act stipulates that the action for retrenchment or lay off can be upheld only if it was taken bona fide. The said Act provides for payment of compensation and various other safeguards. Consultation between the employer and the Union is the need of hour but not right to veto a valid action. Right of the workers to participate in the management of the industry must be cherished by one and all. The question which arises for consideration of the Court is as to whether impugned portion of Clause 2 of the settlement in each of the two cases is excessive and amounts to restraint of trade and as to whether the impugned portion of Clause 2 can be considered essential or necessary for protection of legitimate interest of workmen. To my mind, the impugned portion of Clause 2 is not necessary for protection of legitimate interest of workmen and the same is manifestly oppressive and constitutes unlawful restraint on freedom of trade. In a given situation, the employer would be ruined and adjudged bankrupt if the union does not give its consent to the proposed action although the same is warranted by prevailing situation and is in conformity with provisions of Industrial Disputes Act, 1947.

22. With the above preface, let me now turn to some of the authorities which appear to have some relevance on this aspect. Article 19(1)(g) of the Constitution confers fundamental rights on the citizen to carry on business, profession or vocation. No fundamental right is absolute. Article 19(1)(g) of the Constitution operates subject to Article 19(6) of the Constitution. Article 19(6) of the Constitution provides for making of law by the State so as to impose reasonable restriction on the said right in public interest.

23. In J.K. Iron and Steel Co. Ltd. v. The Labour Appellate Tribunal of India, (1956-I-LLJ-227) the Honourable Supreme Court held that the management had a right to determine the size of its labour force and effect retrenchment whenever necessary howsoever unfortunate. In Hathising Manufacturing Co. Ltd. v. Union of India, (1960-II-LLJ-1) the Apex Court in terms held that the fundamental right guaranteed under Article 19(1)(g) of Constitution comprised to start, carry on or close their undertakings. This right to continue, carry on or close the undertaking is part of fundamental right embodied in Article 19(1)(g) of the Constitution and can be suitably restricted only by a valid law which must stand the scrutiny under Article 19(6) of the Constitution. Right to retrench a workman bona fide and in accordance with law is part of fundamental right to carry on business under Article 19(1)(g) of the Constitution of India. In Parry and Co. Ltd. v. 2nd Industrial Tribunal, Calcutta and Ors., 1970 (21) FLR. 266 the Supreme Court held in paragraphs 12, 14 and 15 of its judgment that the employer must be considered free to arrange his business and formulate a scheme for its reorganisation whenever required. In para 14 of the judgment, Shelat, J., made extremely pertinent observations on the subject having bearing on the issue under consideration. The Apex Court observed as under:

> "It is well established that it is within the managerial discretion of an employer to organize and arrange his business in the manner he considers best. So long as this is done bona fide it is not competent of a tribunal to question its propriety. If a scheme for such reorganisation results in surplusage of employees, no employer is expected to carry the burden of such economic dead-weight and retrenchment has to be accepted as inevitable, however unfortunate it is."

In Excel Wear v. Union of India (1978-II-LLJ-527) the Constitution Bench of our Supreme Court struck down Section 25-O of Industrial Disputes Act 1947 as it then stood. The Apex Court held that the right to close a I business was an integral part of fundamental right to carry on business. It was further held in this case that the said right could be suitably restricted, regulated or controlled by law in the interest of general public. In the case of Workmen of Meenakshi Mills Ltd. v. Meenakshi Mills, Ltd, (1992-II-LLJ-294) the Appex Court has upheld the constitutional validity of Section 25-N of Industrial Disputes Act 1947. In this case, it was contended on behalf of the employer that right to retrench a workman was an integral part of right to carry on business and the said right was thus guaranteed under Article 19(1)(g) of the Constitution subject to exception contained in Article 19(1)(6) of Constitution. However, the learned Senior Counsel, Shri Ramamurthi, contended on behalf of the workmen concerned that right to retrench the workmen could be considered merely as a concomitant right which facilitated the exercise of the right to carry on business. The Honourable Supreme Court did not go into the question as to whether the right to retrench a workman was an integral part of right not guaranteed under Article 19(1)(g) of the Constitution or was merely a peripheral or concomitant right, as in its view the provisions contained in Section 25-N of Industrial Disputes Act 1947 was in any view of the matter saved under Article 19(6) of the Constitution. In my opinion, the right to retrench a workman is an integral part of the right contained in Article 19(1)(g) of the Constitution and the said right operates only subject to Clause (6) of the Article 19 of the Constitution and the said right cannot be restricted or modified apart from Article 19(6) of the Constitution.

25. If guidance is to be derived from the dictum of the above referred cases, as observed by dictum of Madon, J., of the Supreme Court in his judgment in the case of Central Inland Water Transport Corporation, (supra) the further question to be asked is as to whether the requirement stipulated by the impugned portion of Clause No. 2 to obtain prior consent of Union before effecting retrenchment is valid. The question to be asked is as to whether such a stipulation would have been considered as a reasonable restriction in public interest if imposed by law. Neither the employer nor the workmen can be left to the mercy of each other or their organization. The learned Counsel for the petitioner submits that the existing provisions contained in Industrial Disputes Act, 1947 do provide for obtaining consent of appropriate Government in certain situations, before effecting closure, retrenchment and lay off and there was nothing wrong in the parties providing by an agreement that such action would not be taken without first obtaining consent of Union. With respect, this argument suffers from fallacy and is not acceptable to the Court. The appropriate Government can be entrusted with responsibility of deciding disputes and even act as a tribunal or quasi-judicial authority. Provisions contained in Industrial Disputes Act, 1947 for obtaining permission of the Government before resorting to such drastic action is reasonable. Provisions in a settlement or contract obligating the employer to obtain prior consent of Union of workmen is

unreasonable.

26. The learned Counsel for the petitioner has invited the attention of the Court to the recent judgment of the Supreme Court in the case of Delhi Transport Corporation v. D.T.C. Mazdoor Congress (1991-I-LLJ-395). To my mind, this judgment follows the principles of law laid down by Madon, J., in the case of Central Inland Water Transport Ltd. Brojo Nath Ganguly. (supra) The formulation of statement of law on the subject in well known words of Cheshire Fifoot & Furmston's Law of Contract (Twelfth Edition) and Anson's Law of Contract supports view which is being taken by this Court in these writ petitions. A contract in restraint of trade is one by which a party restricts his future liberty to carry on his trade, business or profession in such manner and with such persons as he chooses. The Clause 2 of the settlement/contract undoubtedly restricts the right of the employer to carry on his trade or business in such manner as he chooses and that too unreasonably. At page 406 of the above referred treatise on law of contract, it is further observed by the learned authors that a restraint to be permissible must be no wider than is reasonably necessary to protect the relevant interest of the promisee. In my opinion, in this clause, the impugned portion of Clause No. 2 imposes restraint on the employer in respect of his freedom of trade much more than reasonably necessary to protect the interest of the workman. Similar statement of law is to be found in Anson's Law of Contract (26th Edition-Page 321 and 327). A restraint can be justified only if it is reasonable in the interest of the contracting parties, and in the interest of the public. It is observed by the learned author on the above referred book that the restraint must not be too extensive in time for which it is to operate. In this case, the impugned restraint is supposed to be operative for unduly long time.

27. After taking an overall view of the facts and circumstances of the case and applicable provisions of law and judicial pronouncements on the subject, I have reached the conclusion that the Industrial Court was more than justified in reaching the conclusion that the employer had not indulged in any unfair labour practice merely because of not obtaining the prior consent of the Union before resorting to proposed retrenchment or lay off and the impugned portion of Clause No. 2 was not enforceable at law. The validity of the action taken by the employer can always be adjudged with reference to the criteria laid down in Industrial Disputes Act, 1947 and other relevant provisions of law. If the employer has resorted to drastic action of retrenchment mala fide and without complying with the rules of procedure and other statutory conditions the action would be struck down. To my mind, there is no need to stipulate requirement of obtaining prior consent of the union of workmen before resorting to the impugned action. The impugned portion of Clause 2 of the settlement/contract in each of two cases is thus unfair, unreasonable and opposed to Section 25-J of Industrial Disputes Act, section 27 of Indian Contract Act and is opposed to public policy. It is not necessary to deal with the contention as to whether the impugned term was without consideration and therefore also void.

28. I think the time has come to wind up the discussion. In the result, the petition fails. Rule is discharged in both the petitions. Directions given regarding condonation of delay in case a fresh complaint is filed invoking Item I of Schedule IV of the Act in appropriate Court within eight weeks from today forms operative part of this order. Having regard to the facts and circumstances of the case, there shall be no order as to costs.

29. The learned Counsel for the petitioner applies for, expunging of the remarks made by the Industrial Court against the petitioner Union in the impugned order concerning Writ Petition No. 321 of 1988. I direct that the said remarks shall stand expunged as having been made unnecessarily.

30. I cannot part with this judgment, without acknowledging my appreciation and gratitude to the learned Counsel on all sides who have assisted the Court very well by their research and thorough preparation to decide the question which did not appear to be free from difficulty when the hearing of writ petitions began.