Navnitray Parmanand Jani vs Deputy Executive Engineer on 24 October, 2019

Author: Sonia Gokani

Bench: Sonia Gokani

C/SCA/20706/2018 JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 20706 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 20793 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 20717 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 20719 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 20716 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 20720 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 20707 of 2018

FOR APPROVAL AND SIGNATURE:
HONOURABLE MS JUSTICE SONIA GOKANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? NO

2 To be referred to the Reporter or not ? NO

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? NO

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NAVNITRAY PARMANAND JANI
Versus
DEPUTY EXECUTIVE ENGINEER & 2 other(s)

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Appearance:
MR BJ TRIVEDI(921) for the Petitioner(s) No. 1

MR JT TRIVEDI(931) for the Petitioner(s) No. 1
MS JIGNASA B TRIVEDI(3090) for the Petitioner(s) No. 1
MR VENUGOPAL PATEL, GOVERNMENT PLEADER(1) for the Respondent(s) No. 1,2
NOTICE SERVED BY DS(5) for the Respondent(s) No. 3

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CORAM: HONOURABLE MS JUSTICE SONIA GOKANI

Date : 24/10/2019
COMMON ORAL JUDGMENT

Rule. Learned AGP waives service of rule for the respondent Nos. 1 and 2. Notice is service qua respondent No.3.

1. Since, this group of petitions involve identical question of law and fact, they are heard together and being disposed off by this common judgment and order.

2. The facts are drawn from Special Civil Application No. 20706 of 2018, which are as under:

> 2.1 This petition is preferred by the petitioner, challenging the judgment and award passed by the learned Presiding Officer, Labour Court, Bhavnagar, Dated: 28.02.2018, in Reference (LCB) No. 10 of 2012, whereby, the labour Court rejected the reference of the petitioner.
>
> 2.2 According to the petitioner, the labour Court has denied the relief to the petitioner, as prayed for, without any rhyme or reason and hence, this would act as contrary to the scheme of the constitutional provisions.
>
> 2.3 The petitioner was working as dailywager with the respondent from 09.10.1981, at its Koliyak Section and by an order dated 30.12.1999, his services came to be terminated, without assigning any reason. He, therefore, filed the reference being Reference (LCB) 10 of 2012, seeking reinstatement and backwages, which came to be rejected by the Labour Court on 28.02.2018, on the ground that the same was made belatedly, i.e. after a period of about 11 years and 9 months. The Labour Court also held that the petitioner C/SCA/20706/2018 JUDGMENT failed to prove that there was breach of the provisions of Sections 25F and G of the Industrial Disputes Act, 1947 ('the Act', in brief).

2.4 According to the petitioner, there are decisions to the effect that when the reference is made beyond the period of 19 years, the Courts have entertained the same. It is, further, urged that the delay per se may not be the sole ground for denying the relief to the petitioner and at the best, the Labour Court could have moulded the relief suitably, instead of non-suiting the petitioner.

3. Affidavit -in-reply, on issuance of notice, has been filed by the Dy. Executive Engineer, Shetrunji left Bank Canal Sub Division, Talaja. According to him, all the allegations and the averments and the contentions made in this petition would require the dismissal of the petition in limini. None of the rights of the petitioner has been breached and the award being just and proper, does not call for any interference at the hands of this Court. The petitioners had been employed on daily wage basis and when they, on their own, had stopped even attending to the work and as they had been appointed for a specific work, as a piecemeal worker, the respondent had no other course open but to terminate their services. It is also urged that the petitioner also had not worked for 240 days continuously, as per the requirement of Section 20(d) of the Act. On the contrary, the evidence before the Labour Court also established that he had not worked continuously for 240 days, which would satisfy the test for attracting the provisions of Section 25h of the Act. Therefore, the reasonings, findings and conclusions arrived at by the labour Court calls for no interference.

3.1 It is, further, the say of the respondent that the onus lies on the petitioner to demonstrate that he actually had worked for 240 days continuously in a calender year, as per the provisions of Section 25(b) C/SCA/20706/2018 JUDGMENT of the Act and in absence of the same, the provisions of Section 25F shall not be attracted, as has happened in the instant case. The date of joining being the basis element to attract the retrenchment, the petitioner has failed to establish that aspect also before the Labour Court. It is, further, his say that the termination has been challenged after a gross delay of 15 years, which, itself, is the sufficient ground for the Labour Court to reject the reference. Since, the petitioner slept over his own right, he cannot claim the reliefs prayed for in this petition.

3.2 According to the deponent, the burden of proof lies on the petitioner of not only establishing his continuously having worked, as stated in his Claim of Statement , but also, other aspects, which he had claimed. On appreciation of the evidence adduced before it, the labour Court has held that the petitioner has failed to prove that he had worked from 9.10.1981, till termination of his services on 30.12.1999 and thereby, failed to prove the test of having worked continuously for 240 days in a calender year. It is, further, stated that, while considering the original record, the Labour Court had directed the respondent to produce additional documents, which also had been brought on record and there is a clear evidence that the petitioner has not completed 240 days in a calender year. According to the deponent, the petitioner was also not aware, whether he had worked from 09.10.1981 to 30.12.1999. Moreover, the onus is on the petitioner to prove the averments set out in his Claim of Statements.

4. Rejoinder affidavit is also filed by the petitioner, which may not be necessary to go into by this Court, since, the same is the reiteration of the averments made in this petition. However, from the documentary evidence, it is urged, as to how there is a clear finding, with regard to the breach of Section 25G and the fact remains that there has been no challenge to the same.

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5. This Court has heard the learned Advocate, Mr. Trivedi, for the petitioners in this group of petitions, who has fervently argued along the line of the petitions and also has relied on the various decisions of the Apex Court as well as of this Court to substantiate his version. He, reiteratively urged that, at the best, the Labour Court ought to have molded the relief, instead of the rejecting the reference, which is a travesty of justice.

6. Learned AGP, Mr. Patel, appearing for the respondent Nos. 1 and 2 has urged that there is a limited scope for this Court to interfere and to show indulgence, inasmuch as the Labour Court has given the cogent reasons and also considered the oral as well as the documentary evidences and having satisfied itself that there is complete absence of proof of the petitioners having worked for 240 days continuously in a calender year and on the ground of overwhelming delay, has rightly rejected the references. He, further, urged that giving any relief to these petitioners would amount to giving premium to those, who are indolent, who chose to wake-up from their slumber, after a long time.

7. Having, thus, heard the learned Advocates on both the sides, this Court finds that the challenges, in this group of petitions, are three folds; viz.

> (1) Establishment of the completion of 240 days work in a calender year, as required under the law, since the Statements of Claim filed by the petitioners appear to be indicative that they have worked for the period ranging from 9 years to 14 years;
>
> C/SCA/20706/2018 JUDGMENT (2) Denial of the prayers made by the petitioners in each reference, for the same having been filed after gross delay, could be a ground for this Court to interfere with the order of the Labour Court;
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> (3) In absence of any Seniority List, scrupulously to be maintained by the respondent-authority, whether, the Court can rely on the documents, which have been presented and which do not contain the names of some of the petitioners to hold that there had been no breach of provisions of Section 25G and 25H of the ACT.

7.1 First of all, the period completed by the petitioner in each petition, at a glance, would be necessary to be reproduced, which read thus:

Sr. No.	SCA Number	Reference Number	Period From To	Delay (In Years)
1	20706 of 2018	10/01/12	1981-1999	11 Years 9 Months

2	20793 of 2018	23/2013	1988-1999	Above 14 Years
3	20717 of 2018	20/2013	1992-1999	13 Years 3 Months
4	20719 of 2018	05/01/17	1984-1998 (1978 - 1998) Award at Page-50	10 Years 11 Months
5	20720 of 2018	10/2011'	1986-1999	14 Years 11 Months
6	20716 of 2018	16/2009	1982-2000	9 Years 11 Months

7	20707 of 2018	57/2013	1984-1998 (Page-50)	After 14 years

7.2 It is noticed from the documentary evidence, which has been produced before the Labour Court that in different years, each petitioner has presented himself and has served the respondent. The details establishes presence of 240 days. Although, it has been argued fervently before this Court that if, half days attendance, leaves, the holidays on which they had worked etc.,are calculated, ordinarily the completion of 159 days will reach to the requirement of completion of 240 days work, as prescribed under Section 25F of the Act.

7.3 For this purpose, reliance is placed on the decision of the Apex Court in 'UP STATE ELECTRICITY BOARD VS. RAJESH KUMAR', (2003) 12 SCC 548, where, the Apex Court was considering the question of validity and correctness of the common award passed by the Labour Court, U.P., Varanasi, under which the respondent workmen were held to be entitled to reinstatement with continuity of service along with backwages for the period between 26.07.1997 to 29.07.1997.

7.4 In the matter before the Apex Court, on the basis of the evidence the Labour Court had recorded the finding of fact that the respondent-workman did work for 240 days. This was based on the evidence of the workman and the attested copy of the list showing names of the respondents. The correctness of the list was never challenged before the Labour Court by the Management by producing the contra-evidence or the original records, which it had in its possession. Further, the Executive Engineer, who had been examined for and on behalf of the appellant-Board, being not in service on the date of termination of the services of the workmen, it was held that non-

C/SCA/20706/2018 JUDGMENT consideration of his evidence by the Labour Court shall not affect the case in any manner, and therefore, the Labour Court hold that the order terminating the services of the workmen was illegal.

7.5 It was also contended before the High Court that the reference was made after delay of 19 years, and therefore, the same could not have been entertained by the Labour Court. However, the High Court did not accept such a contention and upheld the order of the Labour Court. Therefore, the challenge was taken before the Apex Court, where, it has held that on facts, the question need not be considered by it, more particularly, when the appellant failed to challenge the order of reference made in the year 1997, and thereby, dismissed the appeal filed by the Electricity Board.

7.6 Yet, another decision of the Apex Court relied on by is in the case of 'S.M. NILAJKAR & OTHERS VS. TELECOM DISTRICT MANAGER, KARNATAKA', AIR 2003 SC 3553, where, the Apex Court held that when the workmen initiated the proceedings under the Industrial Disputes Act, 1947, followed by the conciliation proceedings and when the dispute was referred to the Industrial Tribunal by the Labour Commissioner, then, he could not have been non-suited on the ground of delay. The relevant observations read thus:

> "11. It is common knowledge that the Government as a welfare State floats several schemes and projects generating employment opportunities, though they are short-lived. The objective is to meet the need of the moment. The benefit of such schemes and projects is that for the duration they exist, they provide employment and livelihood to such persons as would not have been able to secure the same but for such schemes or projects. If the workmen employed for fulfilling the need of such passing-phase-projects or schemes were to become a liability on the employer-State by too liberally interpreting the labour laws in favour of the workmen, C/SCA/20706/2018 JUDGMENT then the same may well act as a disincentive to the State for floating such schemes and the State may opt to keep away from initiating such schemes and projects even in times of dire need, because it may feel that by opening the gates of welfare it would be letting-in onerous obligations entailed upon it by extended application of the labour laws. Sub-clause (bb) in the definition of retrenchment was introduced to take care of such like- situations by Industrial Disputes (Amendment) Act, 1984 with effect from 18.8.1984.
>
> 12. 'Retrenchment' in its ordinary connotation is discharge of labour as surplus though the business or work itself is continued. It is well-settled by a catena of decisions that labour laws being beneficial pieces of legislation are to be interpreted in favour of the beneficiaries in case of doubt or where it is possible to take two views of a provision. It is also well-settled that the Parliament has employed the expression "the termination by the employer of the service of a workman for any reason whatsoever" while defining the term "retrenchment", which is suggestive of the legislative intent to assign the term 'retrenchment' a meaning wider than what it is understood to have in common parlance. There are four exceptions carved out of the artificially extended meaning of the term 'retrenchment', and therefore, termination

of service of a workman so long as it is attributable to the act of the employer would fall within the meaning of 'retrenchment' de hors the reason for termination. To be excepted from within the meaning of 'retrenchment' the termination of service must fall within one of the four excepted categories. A termination of service which does not fall within the categories (a),

(b), (bb) and (c) would fall within the meaning of 'retrenchment'.

13. The termination of service of a workman engaged in a scheme or project may not amount to retrenchment within the meaning of Sub-clause (bb) subject to the following conditions being satisfied:-

(i) that the workman was employed in a project or scheme of temporary duration;

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(ii) the employment was on a contract, and not as a daily-

wager simplicitor, which provided inter alia that the employment shall come to an end on the expiry of the scheme or project; and

(iii) the employment came to an end simultaneously with the termination of the scheme or project and consistently with the terms of the contract.

(iv) the workman ought to have been apprised or made aware of the abovesaid terms by the employer at the commencement of employment.

14. The engagement of a workman as a daily-

wager does not by itself amount to putting the workman on notice that he was being engaged in a scheme or project which was to last only for a particular length of time or upto to occurrence of some event, and therefore, the workman ought to know that his employment was short-lived. The contract of employment consciously entered into by the workman with the employer would result in a notice to the workman on the date of the commencement of the employment itself that his employment was short-lived and as per the terms of the contract the same was liable to termination on the expiry of the contract and the scheme or project coming to an end. The workman may not therefore complaint that by the act of employer his employment was coming to an abrupt termination. To exclude the termination of a scheme or project employee from the definition of retrenchment it is for the employer to prove the abovesaid ingredients so as to attract the applicability of Sub-clause (bb) abovesaid. In the case at hand, the respondent-employer has failed in alleging and proving the ingredients of Sub-clause (bb), as stated hereinabove. All that has been proved is that the appellants were engaged as casual workers or daily- wagers in a project. For want of proof attracting applicability of Sub-clause (bb), it has to be held that the termination of the services of the appellants amounted to retrenchment.

15. The appropriate provision which should govern the cases of the appellants is Section 25FFF, the relevant part whereof is extracted and reproduced hereunder:-

C/SCA/20706/2018 JUDGMENT "25FFF. Compensation to workmen in case of closing down of undertakings.--(1) Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of Sub-section (2), be entitled to notice and compensation in accordance with the provisions of Section 25F, as if the workman had been retrenched:

> Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under Clause (b) of Section 25F shall not exceed his average pay for three months.
>
> [Explanation : An undertaking which is closed down by reason merely of-
>
> (i) financial difficulties (including financial losses); or
>
> (ii) accumulation of undisposed of stocks; or
>
> (iii) the expiry of the period of the lease or license granted to it; or
>
> (iv) in a case where the undertaking is engaged in mining operations, exhaustion of the minerals in the area in which such operations area carried on, shall not be deemed to be closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this sub-section.] 1A. [Not reproduced] 1B. [Not reproduced] (2) Where any undertaking set-up for the construction of buildings, bridges, roads, canals, dams or other construction work is closed down on account of the completion of the work within two years from the date on which the undertaking had been set up, no workman employed therein shall be entitled to any compensation under Clause (b) of Section 25F, but if the construction work is not so competed C/SCA/20706/2018 JUDGMENT within two years, he shall be entitled to notice and compensation under that section for every [completed year of continuous service] or any part thereof in excess of six months."

16. It is pertinent to note that in Hariprasad Shivshanker Shukla and Anr. v. A.D. Divikar and Ors. - (1957) SCR 121 the Supreme Court held that 'retrenchment' as defined in Section 2(oo) and as used in Section 25F has no wider meaning than the ordinary accepted connotation of the worked, that is, discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than by way of punishment inflicted in disciplinary action. Retrenchment was held to have no application where the service of all workmen were terminated by the employer on a real and bona fide closure of business or on the business or undertaking being taken over by another employer. The abovesaid view of the law taken by the Supreme Court resulted in promulgation of the Industrial Disputes

(Amendment) Ordinance, 1957 with effect from 27.4.1957, later on replaced by an Act of Parliament (Act 18 of 1957) with effect from 6.6.1957 whereby Section 25FF and Section 25FFF were introduced in the body of the Industrial Disputes Act, 1957. Section 25FF deals with the case of transfer of undertakings with which we are not concerned. Section 25FFF deals with closing down of undertakings. The term 'undertaking' is not defined in the Act. The relevant provision use the term 'industry'. Undertaking is a concept narrower than industry. An undertaking may be a part of the whole, that is, the industry. It carries a restrict meaning. (see Bangalore Water Supply & Sewerage Board etc. v. A. Rajappa and Ors. etc. and the Management of Hindustan Steel Ltd. v. The Workmen and Ors. -). With this amendment it is clear that closure of a project or scheme by the State Government would be covered by the closing down of undertaking within the meaning of Section 25FFF. The workman would therefore be entitled to notice and compensation in accordance with the provisions of Section 25F though the right of employer to close the undertaking for any reason whatsoever cannot be questioned. Compliance of Section 25F shall be subject to such relaxations as are provided by Section 25FFF. The undertaking having been closed on account of C/SCA/20706/2018 JUDGMENT unavoidable circumstances beyond the control of the employer, i.e. by its own force as it was designed and destined to have a limited life only, the compensation payable to the workman under Clause (b) of Section 25F shall not exceed his average pay for three months. This is so because of failure on the part of respondent employer to allege and prove that the termination of employment fell within Sub-clause (bb) of Clause (oo) of Section 2 of the Act.

17. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree. It is true, as held in Shalimar works Limited v. Their Workmen (supra) that merely because the Industrial Disputes Act does not provide for a limitation for raising the dispute it does not mean that the dispute can be raised at any time without regard to the delay and reasons therefore. There is no limitation prescribed for reference of disputes to an industrial tribunal; even so it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed particularly so when disputes relate to discharge of workmen wholesale. A delay of 4 years in raising the dispute after even re-employment of the most of the old workmen was held to be fatal in Shalimar Works Limited v. Their Workmen (supra). In Nedungadi Bank Ltd. v. K.P. Madhavankutty and Ors. (supra), a delay of 7 years was held to be fatal and disentitled the workmen to any relief. In Ratan chandra Sammanta and Ors. v. Union of India and Ors. (supra), it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself; lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief. Although the High Court has opined that there was a delay of 7 to 9 years in raising the dispute before the Tribunal but we find the High Court factually not correct. The employment of the appellants was terminated sometime in 1985-86 or 1986-

87. Pursuant to the judgment in Daily Rated Casual C/SCA/20706/2018 JUDGMENT Employees Under P & T Department v. Union of India (supra) the department was formulating a scheme to accommodate casual labourers and the appellants were justified din awaiting the outcome thereof.

On 16.1.1990 they were refused to be accommodated in the scheme. On 28.12.1990 they initiated the proceedings under the Industrial Disputes Act followed by conciliation proceedings and then the dispute was referred to the Industrial Tribunal-cum-Labour Court. We do not think that the appellants deserve to be non-suited on the ground of delay.

18. The fact remains that there was delay, though not a fatal one, in initiating proceedings calculating the time between the date of termination and initiation of proceedings before the Industrial Tribunal- cum-Labour Court. The employee cannot be blamed for the delay. The learned Single Judge has denied the relief of back- wages while directing the appellants to be reinstated. That appears to be a just and reasonable order. Moreover, the judgment of the learned Single Judge was not put in issue by the appellants by filling an appeal.

19. For all the foregoing reasons we are of the opinion that the decision of the Division Bench deserves to be set aside and that of the learned Single Judge restored, except for the finding that the appellants were not project employees."

7.7 This Court (Coram: Mr. Anant S. Dave, A.C.J., Mr. Biren Vaishnav, J.) in Letters Patent Appeal No. 1554 of 2018 in the case of 'BRAHMBHATT JAYESH BHUPATRAY VS. STATE OF GUJARAT', Dated: 13.03.2019, the challenge was made to the order passed by the learned Single Judge, Dated: 22.02.2016, passed in Special Civil Application No. 1127 of 2010, whereby, the learned Single Judge in the petition filed by the State, confirmed the award of the Labour Court dated 28.08.2009 to the extent it granted reinstatement and 10% backwages. However, the learned Single Judge set aside the benefit of continuity of service granted in favour of the appellant.

7.8 In the matter before the Division Bench of this Court, the question was, whether, the challenge to the oral order of termination dated 30.04.1999 by way of filing Reference in the year 2005, could have been entertained by the Labour Court or not, since, there was delay in making the challenge, where, the Division Bench observed and held as under:

> "7. Having considered the submissions made by learned advocates appearing on behalf of the respective parties and in light of the facts on hand, the issue for consideration before us is with regard to continuity of service. It is settled position of law that in cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule. However, in the present case the reference was raised after a delay of 10 years which was considered by the learned Single Judge. Under the peculiar facts and circumstances of the case, it will be appropriate in order to strike a balance to accept the submission of Mr. Trivedi that on the ground of inordinate delay of 10 years the entire period from the date of termination till the date of the award i.e. from 30.04.1999 to 29.08.2009 cannot be taken away for the

purposes of continuity of service as awarded by the Labour Court.

8. Accordingly, the order of the learned Single Judge to the extent that it takes away benefit of continuity of service is modified to the extent that the appellant shall not be entitled to the benefit of continuity of service for the period from 30.04.1999 to 26.12.2005 I.e. from the date of termination till the date of raising reference. However, for the period subsequent thereto till the date of actual reinstatement, the appellant shall be entitled to the benefit of continuity of service and other consequential benefits which accrue to him by virtue of his reinstatement. In view of the fact that the appellant is being deprived of the benefit of continuity of service of approximately 6 years, even the direction of the learned Single Judge to the extent that it directs that the appellant be treated as fresh employee from 29.08.2009 C/SCA/20706/2018 JUDGMENT is set aside. The order of the learned Single Judge is accordingly modified. The remaining award of the Labour Court, i.e. reinstatement with 10% backwages stands confirmed. Appeal is partly allowed.

7.9 The aforesaid view is vindicated by the Division Bench of this Court vide order dated 01.05.2018 in Mics. Civil Application No. 1 of 2017 in Letters Patent Appeal No. 906 of 2016.

7.10 It is, thus, clear from the above discussion that the issue of delay, per se, may not be a ground for the Court to deny the reliefs to the petitioner / claimant / applicant. Since, the same would amount to depriving the petitioners from putting forth his right and non-suit them. The Court or the adjudicating authority, at the best, can mould the relief and can deny some of the benefits, which, he would be, otherwise, entitled had the Reference been made, earlier.

7.11 In the Instant case also, as can be noticed from each of the petitions that there has been a huge delay in making the Reference, which is, essentially, the ground, which had led the Court concerned to deny the relief to the petitioners.

7.12 In wake of the discussion herein above, this Court is of the opinion that this ought not to have been a ground for the Labour Court to deny the petitioner reliefs prayed for and to non-suit him.

7.13 The question, then, arises of completion of 240 days, as would be, otherwise, necessary for establishing his rights under the ID Act, as required, as per the provisions of Section 23 of the Act. By oral as well as documentary evidence were necessary for the petitioner to prove the continuous work of 240 days, to attract the provisions of Section 25F of the Act. The service of 240 days continuous service C/SCA/20706/2018 JUDGMENT within the period of 12 calender months ought to have been proved . The Court held that in each case this basic aspect of completion of 240 days has not been proved, and therefore, it did not find the breach of Section 25F of the Act.

Section 25F of the Act, reads as under:

"25F. Conditions precedent to retrenchment of workmen.- 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--

(a) the workman has been given one month' s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay 2 for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government 3 or such authority as may be specified by the appropriate Government by notification in the Official Gazette].

Compensation to workmen in case of transfer of undertakings."

7.14 Thus, the workman, who has worked for more than 240 days, during the preceding 12 months on dailywage basis, is to be retrenched on issuance of notice one month by a written communication, indicating the reasons for retrenchment or he has been paid in lieu of such notice or he has been paid, at the time of retrenchment compensation, which shall be equivalent to 15 days C/SCA/20706/2018 JUDGMENT average wages for every completed days or any part thereof in excess of six months and the notice in the prescribed manner is served on the appropriate government or such authority, as may be specified. Failing which, the termination order cannot be said to be in accordance with the provisions of Section 25F of the Act.

7.15 In 'M/S. EMPIRE INDUSTRIES LTD. VS. STATE OF MAHARASHTRA & OTHERS', AIR 2010 SC 1389, the Apex Court was considering the case, where, the appellant, which is a public limited company incorporated under the Companies Act, 1956 sought to challenge the order dated 23.091992, passed by the Government of Maharashtra, in exercise of the powers conferred by sub-section (3) of section 10 of the Industrial Disputes Act, 1947, prohibiting continuance of the lock-out in its factory, Garlick Engineering at Ambernath, Thane. The appellant first challenged this order before the Bombay High Court in Writ Petition No.6051/1995. The writ petition was dismissed by the learned single judge of the court by judgment and order dated 09.02.2001. Against the judgment of the learned single judge, the appellant preferred an internal court appeal (LPA No. 70 of 2001) which too was dismissed by the division bench of the court by judgment and order dated 04.01. 2005. The appellant , therefore, carried the challenge before the Apex Court.. It apepars that during the course of this protracted litigation the factory was closed down on 26.04.1999 and since then, it remained closed.

7.16 The Apex Court was considering the issue with regard to the period from 23.09.1992, i.e. the date on which the prohibition order was issued, to 26.04.1999, when the factory was finally closed down. In that case, the impugned prohibition order was held legal and valid and the appeal was dismissed , whereby, the lock-out in the factory after 26.09.1992 was held to be illegal in terms of section 24(O) of the Act C/SCA/20706/2018 JUDGMENT and therefore, the appellant would be liable to face the legal consequences and If, on the other hand the appeal succeeds and the prohibition order is struck down as illegal and invalid, that would be the end of the matter. The Apex Court held that the provisions of Section 25F lays down the condition precedent to the retrenchment of workmen, requires the employer to give notice to the appropriate government and also to the concerned workman by giving one month's notice in writing or one month's wages in lieu of such notice and payment of retrenchment compensation and in breach thereof, it would be termed as illegal retrenchment and the workman concerned shall be entitled to reinstatement with full backwages. This provisions have been couched in the mandatory form and non-compliance of the same would result into rendering the order of retrenchment illegal.

7.17 This provision has been couched in a mandatory form and non-compliance of the same would render the order of retrenchment illegal.

7.18 From the oral evidence of the petitioners and also from the cross-examination so also the documentary evidence which have been brought on record by respondent No.4, this Court is inclined to hold that the completion of 240 days has not been established.

7.19 This has been strongly resisted by the petitioners by relying on the decision of the Apex Court in 'WORKMEN OF AMERICAN EXPRESS VS. MANAGEMENT OF AMERICAN EXPRESS', AIR 1986 SC 458, where, the workman joined the service of the American Express International Banking Corporation on 04.11.1974 as a typist- clerk in a temporary capacity and was employed as such, with a number of short breaks, till 31.10.1975 when, his services were terminated. According to the workman, excluding the breaks in service, he 'actually C/SCA/20706/2018 JUDGMENT had worked under the employer' for 275 days during the period of 12 months, immediately preceding 31.10.1975, whereas, according to the employer he actually worked for 220 days, only. The difference between the two computations was due to the circumstance that the workman has included and counted Sundays and other paid holidays as days on which he 'actually worked under the employer', while the employer has not done so.

7.20 Therefore, the question for consideration before the Apex Court was, as to whether Sundays and other holidays, for which wages are paid under the law, by contract or statute, should be treated as days on which the employee 'actually worked under the employer' for the purposes of Section 25-F read with Section 25-B of the Industrial Disputes Act, where, it was held as under:

> "5. Section 25-F of the Industrial Disputes Act is plainly intended to give relief to retrenched workmen. The qualification for relief Under Section 25-F. Is that he should be a workman employed in an industry and has been in continuous service for not less than one year under an employer. What is continuous service has been defined and explained in Section 25-B of the Industrial Disputes Act. In the present

case, the provision which is of reliance is Section 25-B(2)(a)(ii) which to the extent that it concerns us, provides that a workman who is not in continuous service for a period of one year shall be deemed to be in continuous service for a period of one year if the workman, during a period of twelve calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than 240 days. The expression which we are required to construe is 'actually worked under the employer'. This expression, according to us, cannot mean those days only when me workman worked with hammer, sickle or pen, but must necessarily comprehend all those days during which he was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statute, standing orders etc. C/SCA/20706/2018 JUDGMENT The learned counsel for the Management would urge that only those days which are mentioned in the Explanation to Section 25-B(2) should be taken into account for the purpose of calculating the number of days on which the workmen had actually worked though he had not so worked and no other days. We do not think that we are entitled to so constrain the construction of the expression 'actually worked under the employer'. The explanation is only clarificatory, as all explanations are, and cannot be used to limit the expanse of the main provision. If the expression 'actually worked under the employer' is capable of comprehending the days during which the workman was in employment and was paid wages-and we see no impediment to so construe the expression-there is no reason why the expression should be limited by the explanation. To give it any other meaning then what we have done would bring the object of Section 25-F very close to frustration. It is not necessary to give examples of how 25 F may be frustrated as they are too obvious to be stated.

6. The leading authority on which reliance was placed by the learned counsel for the Management was Lalappa Lingappa and Ors. v. Laxmi Vishnu Textile Mills Ltd. We may straightaway say that the present question whether Sundays and paid holidays should be taken into account for the purpose of reckoning the number of days on which an employee actually worked, never arose there. The claim was under the Payment of Gratuity Act. All permanent employees of the employer claimed that they were entitled to payment of gratuity for the entire period of their service, that is, in respect of every year during which they were in permanent employment irrespective of the fact whether they had actually worked for 240 days in a year or not. The question there was not how the 240 days were to be reckoned ; the question was not whether Sundays and paid holidays were to be included in reckoning the number of days on which the workmen actually worked ; but the question was whether a workman could be said to have been actually employed for 240 days by the mere fact that he was in service for the whole year whether or not he actually worked for 240 days. On the language employed in Section 2(c) of the Payment of Gratuity Act, the court came to the conclusion that the expression 'actually employed' C/SCA/20706/2018 JUDGMENT occurring in Explanation I meant the same thing as the expression 'actually worked' occurring in Explanation II and that as the

> workmen concerned had not actually worked for 240 days or more in the year they were not entitled to payment of gratuity for that year. They further question as to what was meant by the expression 'actually worked' was not considered as apparently it did not arise for consideration. Therefore, the question whether Sundays and other paid holidays should be taken into account for the purpose of reckoning the total number of days on which the workmen could be said to have actually worked was not considered in that case. The other cases cited before us do not appear to have any bearing on the question at issue before us."

7.21 Had there been a requirement for this Court to go into that exercise, as to whether, in fact, 240 days have been completed, the same could not have been undergone. This Court also could have relegated the parties for leading the evidence for that purpose before the Labour Court. However, in the instant case, it may not be necessary, in wake of the findings and observations, which led the Labour Court to hold that the breach of Section 25G of the Act has been established. The Court also has rightly recognized the fact that once the breach of Sections 25G and H of the Act is established, which are the independent provisions, non-fulfillment of Section 25F of the Act will pale into insignificance. No seniority list has been prepared by the respondent-authority and taking the juniors into service, without offering the same work to the petitioner, who were seniors, would amount to breach of Section 25G of the Act.

7.22 The provisions of Section 25G of the Act would require reproduction at this stage;

> "25G. Procedure for retrenchment.- Where any workman in an industrial establishment, who is a citizen of India, is to be retrenched and he belongs to a C/SCA/20706/2018 JUDGMENT particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman."

7.23 For attracting the provisions of Section 25G of the Act, the workman is not required to prove that he had worked for the period of 240 days continuously during the preceding 12 calender months and it is sufficient, as per the decision of the Apex Court in 'HARJINDER SINGH VS. PUNJAB STATE WAREHOUSING CORPORATION', AIR 2010 SC 1116, to plead and prove that while effecting retrenchment, the employer followed the principle of 'Last Come First Go', without any tenable reason.

7.24 In the matter before the Apex Court, the challenge was made to the order dated 6.2.2009 passed by the learned Single Judge of the Punjab and Haryana High Court in Writ Petition No.372 of 2001, whereby, he modified the award passed by the Labour Court, Gurdaspur (for short, `the Labour Court') in Reference No.43 of 1996 and directed that in lieu of reinstatement with 50% back wages, the appellant herein shall be paid Rs.87,582/- by way of compensation. The appellant, therein, was employed in the services of the Punjab State Warehousing Corporation, as a work charge Motor Mate with effect from 5.3.1986. After seven months, the Executive Engineer of the

corporation issued order dated 03.10.1986, whereby, he appointed the appellant as Work Munshi in the pay scale of Rs.350-525 for a period of three months. The very same officer issued another order dated 05.02.1987 and appointed the appellant as Work Munshi in the pay scale of Rs.400-600 for a period of three months. Though, the tenure specified in the second order ended on 4.5.1987, the appellant was C/SCA/20706/2018 JUDGMENT continued in service till 05.07.1988 i.e., the date on which the Managing Director of the corporation issued one month's notice seeking to terminate his service by way of retrenchment. However, the implementation of that notice was stayed by the Punjab and Haryana High Court in Writ Petition No.8723 of 1988 filed by the appellant. The writ petition was finally dismissed as withdrawn with a liberty to the appellant to avail remedy under the Industrial Disputes Act, 1947). After two months, the Managing Director of the corporation issued notice dated 26.11.1992 for retrenchment of the appellant and 21 other workmen, by giving them one month's pay and allowances in lieu of notice as per the requirement of Section 25F(a) of the Act.

7.25 It may be noted that as a sequel to withdrawal of the writ petition, the appellant raised an industrial dispute, which was referred by the Government of Punjab to the Labour Court. In the statement of claim filed by him, the appellant pleaded that the action taken for termination of his service by way of retrenchment is contrary to the mandate of Sections 25F and 25M of the Act and that there has been violation of the rule of 'Last Come, First Go' , inasmuch as, the persons junior to him were retained in service. In the reply filed on behalf of the corporation, it was pleaded that the appellant's service was terminated by way of retrenchment because the projects on which he was employed had been completed. It was also pleaded that the impugned action was taken after complying with Section 25F of the Act. However, it was not denied that persons junior to the appellant were retained in service. The Apex Court, further, held and observed as under:

> "19. The preamble and various Articles contained in Part IV of the Constitution promote social justice so that life of every individual becomes meaningful and he is able to live with human dignity. The concept of social justice engrafted in the Constitution consists of diverse principles essentially for the orderly growth and C/SCA/20706/2018 JUDGMENT development of personality of every citizen. Social justice is thus an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species. Social justice is a dynamic devise to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation of every section of the society. In a developing society like ours which is full of unbridgeable and ever widening gaps of inequality in status and of opportunity, law is a catalyst to reach the ladder of justice. The philosophy of welfare State and social justice is amply reflected in large number of judgments of this Court, various High Courts, National and State Industrial Tribunals involving interpretation of the provisions of the Industrial Disputes Act, Indian Factories Act, Payment of Wages Act, Minimum Wages Act, Payment of Bonus Act, Workmen's Compensation Act, the Employees Insurance Act, the Employees Provident Fund and Miscellaneous Provisions Act and the Shops and Commercial Establishments Act enacted by different States.

20. In Ramon Services (P) Ltd. v. Subhash Kapoor (2001) 1 SCC 118, R.P. Sethi, J. observed: "that after independence the concept of social justice has become a part of our legal system. This concept gives meaning and significance to the democratic ways of life and of making the life dynamic. The concept of welfare State would remain in oblivion unless social justice is dispensed. Dispensation of social justice and achieving the goals set forth in the Constitution are not possible without the active, concerted and dynamic efforts made by the persons concerned with the justice dispensation system. In L.I.C. of India v. Consumer Education and Research Centre and Others (1995) 5 SCC 482, K. Ramaswamy, J. observed that social Justice is a device to ensure life to be meaningful and liveable with human dignity. The State is obliged to provide to workmen facilities to reach minimum standard of health, economic security and civilized living. The principle laid down by this law requires courts to ensure that a workman who has not been found guilty can not be deprived of what he C/SCA/20706/2018 JUDGMENT is entitled to get. Obviously when a workman has been illegally deprived of his device then that is misconduct on the part of the employer and employer can not possibly be permitted to deprive a person of what is due to him.

21. In 70s, 80s and early 90s, the courts repeatedly negated the doctrine of laissez faire and the theory of hire and fire. In his treaties: Democracy, Equality and Freedom, Justice Mathew wrote:

"The original concept of employment was that of master and servant. It was therefore held that a court will not specifically enforce a contract of employment. The law has adhered to the age-old rule that an employer may dismiss the employee at will. Certainly, an employee can never expect to be completely free to do what he likes to do. He must face the prospect of discharge for failing or refusing to do his work in accordance with his employer's directions. Such control by the employer over the employee is fundamental to the employment relationship. But there are innumerable facets of the employee's life that have little or no relevance to the employment relationship and over which the employer should not be allowed to exercise control. It is no doubt difficult to draw a line between reasonable demands of an employer and those which are unreasonable as having no relation to the employment itself. The rule that an employer can arbitrarily discharge an employee with or without regard to the actuating motive is a rule settled beyond doubt. But the rule became settled at a time when the words `master' and `servant' were taken more literally than they are now and when, as in early Roman Law, the rights of the servant, like the rights of any other member of the household, were not his own, but those of his pater familias. The overtones of this ancient doctrine are discernible in the judicial opinion which rationalised the employer's absolute right to discharge the employee. Such a philosophy of the employer's dominion over his employee may have been in tune with the rustic simplicity of bygone days. But that philosophy is incompatible with these days of large, impersonal, corporate employers. The conditions have now vastly changed and it is difficult to regard the contract of employment with large scale

> industries and government C/SCA/20706/2018 JUDGMENT enterprises conducted by bodies which are created under special statutes as mere contract of personal service. Where large number of people are unemployed and it is extremely difficult to find employment, an employee who is discharged from service might have to remain without means of subsistence for a considerably long time and damages in the shape of wages for a certain period may not be an adequate compensation to the employee for non-employment. In other words, damages would be a poor substitute for reinstatement. The traditional rule has survived because of the sustenance it received from the law of contracts. From the contractual principle of mutuality of obligation, it was reasoned that if the employee can quit his job at will, then so too must the employer have the right to terminate the relationship for any or no reason. And there are a number of cases in which even contracts for permanent employment, i.e. for indefinite terms, have been held unenforceable on the ground that they lack mutuality of obligation. But these case demonstrate that mutuality is a high-sounding phrase of little use as an analytical tool and it would seem clear that mutuality of obligation is not an inexorable requirement and that lack of mutuality is simply, as many courts have come to recognize, an imperfect way of referring to the real obstacle to enforcing any kind of contractual limitation on the employer's right of discharge, i.e. lack of consideration. If there is anything in contract law which seems likely to advance the present inquiry, it is the growing tendency to protect individuals from contracts of adhesion from over- reaching terms often found in standard forms of contract used by large commercial establishments. Judicial disfavour of contracts of adhesion has been said to reflect the assumed need to protect the weaker contracting part against the harshness of the common law and the abuses of freedom of contract. The same philosophy seems to provide an appropriate answer to the argument, which still seems to have some vitality, that "the servant cannot complain, as he takes the employment on the terms which are offered to him."

(emphasis added)

22. In Government Branch Press v. D.B. Belliappa (1979) 1 SCC 477, the employer invoked the theory of hire and fire by contending that the respondent's C/SCA/20706/2018 JUDGMENT appointment was purely temporary and his service could be terminated at any time in accordance with the terms and conditions of appointment which he had voluntarily accepted. While rejecting this plea as wholly misconceived, the Court observed:

> "It is borrowed from the archaic common law concept that employment was a matter between the master and servant only. In the first place, this rule in its original absolute form is not applicable to government servants. Secondly, even with regard to private employment, much of it has passed into the fossils of time. "This rule held the field at the time when the master and servant were taken more literally than they are now and when, as in early Roman Law, the rights of the servant, like the rights of any other member of the household, were not his own, but those of his pater familias". The overtones of this ancient doctrine are discernible in the Anglo-American

jurisprudence of the 18th century and the first half of the 20th century, which rationalised the employer's absolute right to discharge the employee. "Such a philosophy", as pointed out by K.K. Mathew, J. (vide his treatise:

"Democracy, Equality and Freedom", "of the employer's dominion over his employee may have been in tune with the rustic simplicity of bygone days. But that philosophy is incompatible with these days of large, impersonal, corporate employers". To bring it in tune with vastly changed and changing socio-economic conditions and mores of the day, much of this old, antiquated and unjust doctrine has been eroded by judicial decisions and legislation, particularly in its application to persons in public employment, to whom the Constitutional protection of Articles 14, 15, 16 and 311 is available. The argument is therefore overruled.

The doctrine of laissez faire was again rejected in Glaxo Labotratories (India) Ltd. v. Presiding Officer (1984) 1 SCC 1, in the following words:

"In the days of laissez-faire when industrial relation was governed by the harsh weighted law of hire and fire the management was the supreme master, the relationship being referable to contract between unequals and the C/SCA/20706/2018 JUDGMENT action of the management treated almost sacrosanct. The developing notions of social justice and the expanding horizon of socio-economic justice necessitated statutory protection to the unequal partner in the industry namely, those who invest blood and flesh against those who bring in capital. Moving from the days when whim of the employer was suprema lex, the Act took a modest step to compel by statute the employer to prescribe minimum conditions of service subject to which employment is given. The Act was enacted as its long title shows to require employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them. The movement was from status to contract, the contract being not left to be negotiated by two unequal persons but statutorily imposed. If this socially beneficial Act was enacted for ameliorating the conditions of the weaker partner, conditions of service prescribed thereunder must receive such interpretation as to advance the intendment underlying the Act and defeat the mischief."

23. Of late, there has been a visible shift in the courts approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalization and liberalisation are fast becoming the raison d'etre of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganized workers. In large number of cases like the present one, relief has been denied to the employees falling in the category of workmen, who are illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by this Court in three decades. The stock plea raised by the public employer in such cases is that the initial employment/engagement of the workman-employee was contrary to some or the other statute or that reinstatement of the workman

will put unbearable burden on the financial health of the establishment. The courts have readily accepted such plea unmindful of the accountability of the wrong doer and indirectly punished the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his livelihood. It need no emphasis that if a C/SCA/20706/2018 JUDGMENT man is deprived of his livelihood, he is deprived of all his fundamental and constitutional rights and for him the goal of social and economic justice, equality of status and of opportunity, the freedoms enshrined in the Constitution remain illusory. Therefore, the approach of the courts must be compatible with the constitutional philosophy of which the Directive Principles of State Policy constitute an integral part and justice due to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employer - public or private.

7.26 In the case on hand, these findings of the Labour Court have not been challenged by the respondent by way of a separate petition nor in the present petition before this Court. It is also not in dispute that no Seniority List is produced and the one, which is produced, does not have the names of the present petitioners therein, which would mean that no scrupulous adherence to the rules of requirement of maintaining Seniority List is followed by the respondent authority, and therefore, this led to the breach of Section 25G of the Act. This breach would surely require this Court to interfere and direct the reinstatement of the petitioner. Not only that, even, the principle of 'Last Come, First Go', also has not been observed and there is no reason put forth before this Court as to why the retrenched workmen were not called back. This Court is also not accepting the contention of the respondent-authority that the workmen had left the work on their own.

7.27 Section 25H of the Act provides that where any workmen are retrenched and the employer proposes to take into his employment any persons, he shall, in such a manner, as may be prescribed, give an opportunity to the retrenched workmen, who are citizens of India to offer themselves for re-employment and such retrenched workmen, who offer themselves for re-employment shall have preference over other persons. This provision pre-supposes a valid termination in the first instance and it constitutes a different cause, and therefore, it can be C/SCA/20706/2018 JUDGMENT gone into by the adjudicating authority, 7.28 It is, thus, clear that for having held the breach of Section 25G by the respondent-authority, which is an industry by all means under the Act, the Labour Court on the ground of delay in making the Reference has dismissed the same. This Court, therefore, needs to show indulgence in wake of the discussion herein above and to quash and set aside the impugned judgment and award of the Labour Court in each matter.

8. Resultantly, all these petitions are allowed and the orders impugned in each petition, Dated: 28.02.2018, is DISMISSED 8.1 While so doing and granting relief to the petitioners, this Court deems it appropriate, bearing in mind the decisions discussed herein above, and to mould the reliefs, accordingly. Therefore, the Respondent is directed to REINSTATE the petitioners in service with CONTINUITY of service from the period from the date of termination till the date of filing of reference in each case. However, for the period subsequent thereto till the date of actual reinstatement, the petitioner shall be entitled to the benefit of continuity of service and other consequential benefits in each matter.

Rule is made absolute, accordingly. Direct service is permitted.

(SONIA GOKANI, J) UMESH/-