

(1992) 12 GUJ CK 0015
In the Gujarat High Court

Case No : Spl. Civil Application No. 8788 of 1991

Amarsinh Swaroopsinh and Others

APPELLANT

Vs

Jagdish Processors

RESPONDENT

Date of Decision : 16-12-1992

Acts Referred:

Bombay Industrial Relations (Gujarat) Rules, 1961 — Rule 53
Bombay Industrial Relations Act, 1946 — Section 42, 42(4)

Citation : (1993) 2 GLR 1398 : (1994) 1 LLJ 743

Hon'ble Judges : J.M. Panchal, J;A.P. Ravani, J

Bench : Division Bench

Advocate : R.N. Desai, for the Appellant;

Final Decision : Allowed

Judgement

A.P. Ravani, J.—If an application is filed u/s 79 of the Bombay Industrial Relations Act, 1946 raising grievance about the illegal change, before expiry of the prescribed period as provided under the proviso to Section 42(4) of the said Act read with Rule 53 of the Bombay Industrial Relations (Gujarat) Rules, 1961, is the application liable to be rejected? This question is required to be answered in the background of the facts that follow:

The petitioners were serving in Screen Printing Department of respondent's processing unit for a period of about 4 1/2 to 5 years prior to the date of their discharge from service on August 10, 1985. They challenged the legality and validity of their discharge from service by filing T. Applications No. 341, 342 and 343 of 1985 u/s 79 of the Bombay Industrial Relations Act, 1946 (hereinafter referred to as "the Act"). The respondent-employer resisted the applications. The Labour Court on merits held that the stand taken by the employer in the written statement and at the stage of evidence was contradictory. In the written statement it was contended by the employer that the employees had submitted resignation on August 2, 1985, while at the evidence stage it was contended that the employees were engaged by the labour contractor and were not the

employees of the respondent- employer. On appreciation of evidence the Labour Court held that the termination of services of each of the employees was in contravention of the provisions of the Standing Order and it was unlawful. But the Labour Court held that the applications were premature inasmuch as they were filed before the expiry of the prescribed period of 15 days from the date of receipt of the approach letter. Hence, the Labour Court rejected the applications as per its judgment and order dated March 9, 1990. All the three employees preferred three separate appeals being Appeals (IC) Nos. 40, 41 and 42 of 1990 before the Industrial Court, Gujarat at Ahmedabad. The Industrial Court did not go into the merits of the order of discharge from service but considered only the question with regard to the maintainability of the application in view of the provisions of Section 42(4) of the Act and Rule 53 of the Bombay Industrial Relations (Gujarat) Rules, 1961 (hereinafter referred to as "the Rules"). The Industrial Court held that the applications were premature and confirmed the finding of the Labour Court on this point and ordered to dismiss the appeals as per its consolidated judgment and order dated September 17, 1990. The petitioners-employees have filed this one petition challenging the legality and validity of the judgment and orders passed by the Labour Court and confirmed by the Industrial Court.

2. Proved and/or admitted facts are that the employees were in service of respondent for a period of about 4 1/2 years on the date of filing of the applications, i.e. August 26, 1985. They were discharged from service on August 10, 1985. They wrote approach letter as required under the provisions of Section 42 of the Act on the same day, i.e., August 10, 1985. It was received by the employer on August 12, 1985. T Applications No. 341, 342 and 343 of 1985 u/s 79 of the Act were filed on August 26, 1985. Admittedly, calculating the period of 15 days from the date of receipt of the approach letter i.e, August 12, 1985 the prescribed period of 15 days would expire on August 27, 1985. The applications have been filed on August 26, 1985. Hence, the question : Whether the applications were liable to be rejected because they were filed before the expiry of the prescribed period of 15 days as provided under Rule 53 of the Rules read with Section 42(4) of the Act? Both the Labour Court as well as Industrial Court have held that the applications were liable to be rejected. With utmost respect, the view taken by both the Lower Courts is erroneous.

3. The Industrial Court has placed reliance on Division Bench judgment of this Court in the case of Amarsinhji Mills Ltd. v. Sanalal G. Palvi, reported in 12 GLR 117. In that case the question arose as to whether the applications filed by the employee u/s 78(1)(a) before the Labour Court was within the period of limitation or was it barred by limitation. In that case the employee was discharged from service on October 26, 1962. He asked for reasons of discharge by letter dated October 29, 1962 which was not replied to by the Company. On November 3, 1962 the employee wrote approach letter as provided u/s 42(4) of the Act and called upon the Company to withdraw the order of discharge. The Company replied on November 4, 1962 stating that no settlement was possible.

On February 16, 1963 the employee filed application u/s 78(1)(A)(a) of the Act. The Labour Court held that the starting point of limitation was November 4, 1962, i.e., the day on which the Company replied that settlement was not possible. Then considering three months from that date the period of limitation would expire on February 4, 1963 and since the application was filed on February 16, 1963 it was held to be time barred. On appeal, the Industrial Court held that the Applications were filed within the prescribed period of limitation inasmuch as the starting point of limitation would be after the expiry of the prescribed period of 15 days from the date of receipt of approach letter by the employer.

4. The matter was carried before the High Court by the employer. It was contended before the High Court that when the employer refused to settle the dispute the dispute can be said to have arisen on the date when the employer refused to settle. In such an eventuality the employee need not and should not wait for the expiry of the prescribed period of 15 days. Within the prescribed period of 15 days whenever the employer refuses to settle the dispute, from that date onwards the period of limitation of three months should be calculated. This contention of the employer has been negated by the High Court in the case of *Amarsinhji Mills* (supra). While rejecting the contention, in paras 5 and 6 of the reported decision this High Court has inter alia observed that under proviso to Section 42(4) of the Act, two conditions are required to be satisfied before any employee can approach the Court in respect of a dispute arising out of the order passed by the employer against him. The first condition is that the employee or representative union in the prescribed manner should approach the employer with a request for the change. The second condition is that no agreement should have been arrived at in respect of the change within the prescribed period. The prescribed period is 15 days under Rule 53, Sub-rule (2) of the Industrial Relations Rules.

Thereafter it is observed as follows:

"Therefore, before the application could have been entertained by the Labour Court, it was necessary for the employee to satisfy the Court that the employer had been approached with request for a change in the prescribed manner, and secondly, within the period of 15 days no reply has received in respect of the change thus requested for."

Thereafter, in para 6 of the judgment it is Inter alia observed that the Legislature has prescribed under the proviso to Sub-section (4) of Section 42 that the application of the employee is not maintainable unless inter alia agreement has been arrived at in respect of the change within the prescribed period. Then it is further observed:

"Therefore, in every case, the employee must wait till the prescribed period is over and it is only after the prescribed period is over that it can be definitely stated in respect of a particular matter that no agreement had been arrived at in

respect of the change within the prescribed period."

If one reads the aforesaid observations out of context and without concentrating on the points as to what were the questions raised before the Division Bench of this Court, it is likely that one may interpret the aforesaid observations to mean that the application would not be maintainable if the same is filed before expiry of the prescribed period of 15 days. But this is not the law laid down by this Court because before the Division Bench this question had never arisen. The Division Bench never examined this question and has not answered the question. Before the Division Bench the question was as to what will be the starting point of limitation for filing application u/s 78(1)(A)(a) of the Act in cases where the employer has refused to settle the dispute even before the expiry of the prescribed period of 15 days. This High Court was not called upon to decide as to whether an application filed before the prescribed period of limitation of 15 days would be liable to be rejected only on the ground that the application was filed before the expiry of the prescribed period of 15 days as provided under Rule 53 of the Rules. In this view of the matter the aforesaid observations made by this High Court while considering the question with regard to the starting point of limitation can not be applied for deciding the question which has arisen in this case. In taking this view we are testified by the decisions of this Court and the Supreme Court.

5. The question as to what is the ratio of a decision and what is binding as precedent to Lower Court has been considered by a Full Bench of this Court (Coram : M.P. Thakkar, C.J. as he then was, A.M. Ahmadi J. as he then was and R.C. Mankad, J.) in the case of Calico Mill v. Union of India, reported in 24 (1) GLR .I. The Supreme Court has also considered this question in the case of Ambica Quarry Works v. State of Gujarat and Ors., (1987) 1 SCC 213 , and in the case of Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, (Para 23 of the reported decision). This very principle is again reiterated recently in the case of Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd., . In the case of Calico Mill (supra) the Full Bench of this High Court has elucidated the question as to what is the ratio of a decision and as to how the same is to be culled out. The Full Bench has referred to a decision of the Supreme Court in the case of Dalbir Singh v. State of Punjab AIR 1979 SC 1384 at pages 1390 and 1399, wherein it is inter alia observed as under:

"According to the well-settled theory of precedents every decision contains three basic ingredients:

- (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct or perceptible facts;
- (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and
- (iii) judgment based on the combined effect of (i) and (ii) above.

For the purposes of the parties themselves and their privies, ingredient No. (iii) is the material element in the decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purposes of the doctrine of precedents, ingredient No. (ii) is the vital element in the decision. This indeed is the ratio decidendi. It is not every thing said by Judge when giving judgment that constitutes a precedent."

After referring to the warning uttered by the Supreme Court that greatest possible care must be taken to relate the observations of a Judge to the precise issue before him and confine such observations even though expressed in broad terms in the general compass of the questions before him, the Full Bench has further observed as follows:

"It is, therefore, evident that the decision of the Supreme Court is only an authority for what it actually decides and the observations made in the judgment should be restricted to the context in which they are made after relating the observations to the precise issue before the Court taking care to interpret the observations in the context of the question before the Court even though the same are expressed in broad terms."

6. In the case of Ambica Quarry Works (supra) and in the case of Goodyear India Ltd. (supra) the Supreme Court has reiterated the principle that a precedent is an authority only for what it actually decides and not for what may remotely or logically follow from it. In the case of Commissioner of Income Tax v. Sun Engineering Works (supra) in para 39 of the reported decisions, the Supreme Court has observed as follows:

"It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration, and treat it to be the complete "law" declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a latter case, the Courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment divorced from the context of the questions under consideration by this Court, to support their reasonings. In Madhav Rao Scinaia v. Union of India, this Court cautioned:

"It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."

7. Thus this is the settled position as far as the applicability of the observations made by the Supreme Court or by this Court while deciding a particular question. In view of this settled legal position the observations made by the Division Bench

of this Court in the case of Amarsinhji Mills (supra) while deciding the question as to what will be the starting point of limitation in case when the employer refuses to settle the dispute within the prescribed period provided under Rule 53 of the Rules cannot be applied while deciding a question as to whether an application is liable to be rejected simply because it is filed before the expiry of period prescribed under Rule 53 of the Rules. :

8. For deciding the question which has arisen in this case, reference may be made to certain provisions of the Act and the rules. Section 78(1)(A)(a)(iii) of the Act provides that the Labour Court shall have power to decide dispute regarding any change made by an employer or desired by an employer in respect of the industrial matters specified in Schedule III and matters arising out of such change. The Labour Court has also power to decide the dispute regarding the propriety or legality of an order passed by an employer acting or purporting to act under the Standing Order (see Section 78(1)(A)(a)(i)]. Item 6 of Schedule HI to the Act-mentions employment including reinstatement. Section 78 which makes provision with regard to powers of Labour Court has explanation which reads as follows:

"Explanation: A dispute falling under Clause

(a) of Paragraph A of Sub-section (1) shall be deemed to have arisen if within the period prescribed under the proviso to Sub-section (4) of Section 42 no agreement is arrived at in respect of the said proviso."

9. Section 42 occurs in Chapter VIII of the Act and it relates to changes. The item "change" as defined u/s 3(8) means an alteration in an industrial matter. Section 42(4) together with the proviso reads as follows:

"42. (4) Any employee or a representative union desiring a change in respect of (i) any order passed by the employer under standing orders, or(ii) any industrial matter arising out of the application or interpretation of standing orders, or (iii) an industrial matter specified in Schedule III, shall make an application to the Labour Court:

Provided that no such application shall lie unless the employee or a representative union has in the prescribed manner approached the employer with a request for the change and no agreement has been arrived in respect of the change within the prescribed period."

10. Section 123 of the Act empowers the Government to frame rules. The Government has framed the Bombay Industrial Relations (Gujarat) Rules, 1961. Relevant part of Rule 53 reads as follows:

"53. (1).....

(2) Where an application has been made by an employee under Sub-rule (1) the employer and the employee may arrive at an agreement within fifteen days of the receipt of the application by the employer or within such further period as

may be mutually fixed by the employer and the employee or the Labour Officer for the local area or the representative of employees, as the case may be.

(3)....."

11. As stated in the preamble, the object of the Act is "to regulate the relations of employers and employees in certain matters, to consolidate and amend the law relating to the settlement of industrial disputes and to provide for certain other purposes."

12. One of the objects of the Act is to make provision for settlement of industrial disputes and machinery has been provided at different levels to see that the employer and the employee settle their disputes either by agreement or through conciliation or through mediation of different officers. Attempt has been made to see that as far as possible few matters should be taken to the Labour Court and Industrial Court. The prime object of the Act is to regulate the relationship between the employers and the employees, and see that settlement of disputes takes place as expeditiously as possible so that industrial peace is not disturbed. Even while resolving the disputes through the forums provided under the Act, harmonious relations between the employers and the employees are required to be seen that least possible heart burning is caused to either side and particularly to the employees. In the light of this underlying object of the Act, the provision with regard to the prescribed period u/s 42(4) of the Act read with Rule 53 of the Rules and the provision creating deeming fiction in explanation to Section 78 of the Act are required to be understood and interpreted.

13. Explanation to Section 78 which has been referred to hereinabove creates a deeming fiction. Once an employee writes approach letter and the same has been received by the employer, and thereafter for a period of 15 days or before the expiry of further period fixed by the parties concerned, no agreement is arrived at between the parties, it has to be presumed that there is a dispute between the employer and the employee. Thus the explanation creates presumption that after expiry of the prescribed period from the date of receipt of approach letter, if agreement is not arrived at between the parties, it shall be presumed that there is a dispute between the employer and the employee. This does not mean that there could not be dispute even during the prescribed period of 15 days or during further period fixed by the parties. But 15 days* time is provided within which the parties may come to an agreement. The purpose of enacting explanation and creating deeming fiction is to provide time limit after which the employee can say, "now no useful purpose will be served by waiting and the matter should be resolved through the machinery provided under the Act." If this is not done the employer may prolong the dispute and while away the time which would in turn take away the rights of the employee to approach the Labour Court within the prescribed time limit of three months or six months, as the case may be. Another purpose appears to be to instil a sense of urgency amongst both the employer and the employee. Once there is a dispute it is required to be resolved amicably as urgently as possible. This is the mandate of

the legislature. We do not find any other purpose in creating deeming fiction as embodied in explanation to Section 78.

14. It may be noted that even as per the mandate of the legislature, the prescribed period of 15 days is not an iron-clad rigid time limit. The legislature had provided that the period may be further extended "as may be mutually fixed by the employer and the employee or the labour officer for the local area or the representative of the employees, as the case may be." Thus if the period is to be extended it should be by mutual agreement of the parties concerned. In case the period is extended by mutual agreement the prescribed period of 15 days would stand extended upto further period for which the agreement has been arrived at between the parties concerned. This provision again indicates that the underlying object of the provision is to encourage negotiation and see that as far as possible parties come to settlement. In cases where the time is extended the deeming fiction as embodied in explanation to Section 78 as regards presumption that there is a dispute would come into operation on the expiry of the further period as might have been fixed by the parties. However, in order to emphasise the need for negotiations and settlement minimum period of 15 days has been provided by the legislature within which time tempers may cool down and despite initial stiff stands taken by the parties they may arrive at an agreement within 15 days from the date of the receipt of the approach letter by the employer.

15. As laid down by the Supreme Court in the case of *The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others*, (Para 5 of the reported decision) the Court is entitled and in fact it is bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusions. As far as explanation to Section 78 is concerned, deeming fiction is created for the purposes noted hereinabove. As observed by the Supreme Court in the case of *Consolidated Coffee Ltd. v. Coffee Board, Bunyalore*, reported in (AIR 1980 SC 1948). (Para 11 of the reported decision) the term "deemed" has various meanings. The Supreme Court has observed that a deeming provision may be made to include what is obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail, but in each case it would be a question as to with what object the legislature has made such a deeming provision. As far as the explanation to Section 78 of the Act is concerned, the purpose of making deeming provision in explanation to Section 78 is to instil a sense of urgency between the employer and the employee and to see that they come to negotiating table as urgently as possible. In case the parties fail to settle their disputes by mutual negotiations the dispute is required to go to the proper forum for being resolved in accordance with law and that too as expeditiously as possible.

16. If the provision of Section 42(4) of the Act and proviso thereto read with Rule 53 of the Rules are read in the light of the aforesaid discussion, it would be

difficult to come to the conclusion that in case the application is filed before expiry of the prescribed period of 15 days or before the expiry of further period as might have been mutually fixed by the parties concerned, it is liable to be rejected. True, before expiry of the prescribed period of 15 days, the Labour Court would not be free to exercise jurisdiction. In case an application is filed within the prescribed period the Labour Court may and should refrain itself from passing any order on the application. The application can be proceeded with by the Labour Court only after ascertaining as to whether agreement could be arrived at between the parties within the prescribed period of 15 days or within such further period as might have been mutually fixed upon by the parties concerned.

17. It may be argued that in view of the language used in the proviso that no such application is maintainable before the prescribed period is over, if the application is filed before the expiry of the prescribed period it is liable to be rejected. However, in this connection the expression occurring in the proviso "no such application shall lie" may be examined. The proviso to Section 42(4) of the Act imposes certain conditions before an application praying for appropriate relief can be filed before the Labour Court. Thus it is evident that this provision is in relation to the procedural matter. It is not with respect to any substantive rights and obligations of the parties. Ordinarily the provision in relation to procedural matter is required to be considered directory unless by necessary implication it can be shown that the intention of the legislature was to make the same mandatory. Mere use of the word "shall" is not conclusive.

18. As to whether the use of the word "shall" is conclusive or not, reference may be made to the decision of the Supreme Court in the case of Jaswantsingh Madhurasingh v. Ahmedabad Municipal Corporation reported in (1992 Supp (1) SCC 5). In para 13 of the reported decision the Supreme Court has inter alia observed as under:

"The appearance of "shall" is not conclusive, not per se connotes its mandatory contour. Its meaning must be ascertained in the light of the legislative intent in its employment, the context in which it was couched, the consequences it produced, the result it effected and above all the purposes it seeks to serve, would all be kept in view. From the fact situation the Courts are to cull out the intention whether the construction to be put up would subserve the purpose of the legislative intent or tend to defeat it. Public interest is always a paramount consideration."

19. If the term "shall" occurring in proviso to Section 42(4) of the Act is understood as giving mandatory direction, the first causality will be substantial justice. As against the merits of the dispute, the case will stand disposed of on technical ground without the same being adjudicated at all. Such an interpretation will surely not be in consonance with the object of the Act. The object and purpose of the Act is to regulate the relations of employers and employees and to make provision for settlement of industrial disputes. The Act

does not aim at disposal of cases without the same being negotiated or adjudicated upon. The resultant effect of such meaning would be that the employee concerned would be left with no remedy at all and will always harbour a sense of injustice having been inflicted upon him not by the employer alone but by the State Government and by the society also. Thus, surely such interpretation can never be said to be in public interest. Therefore, such interpretation has to be avoided unless the Court is compelled to adopt the same. In the instant case the interpretation of the expression "no such application shall lie unless...." occurring in the proviso to Section 42(4) of the Act has to be in consonance with the object of the Act and so as to serve public interest at large. Viewed from this angle the aforesaid expression has to be understood as directory only.

20. Once it is shown that approach letter as provided under Section 42(4) of the Act has been written it becomes evident that one of the conditions is fulfilled. Another condition is - has any agreement been arrived at between the parties in respect of change within the prescribed period of 15 days or within further period mutually fixed by the parties. If any agreement is arrived at within the prescribed period surely the employee cannot insist that in respect of the change, despite agreement having been arrived at between the parties, his application be entertained. But simply because he approaches the Labour Court little earlier, i.e., before the expiry of the prescribed period, he cannot be told that his application was liable to be rejected. The fact that the agreement has not been arrived at is not displaced by the action of the employee of initiating the proceedings by filing application under appropriate provision of the Act little earlier. Therefore, when an employee files the application before the expiry of the prescribed period, the second condition which is required to be fulfilled, namely, no agreement has been arrived at in respect of change within the prescribed period, still subsists.

When an application is filed within the prescribed period it would surely be open to the employer to point out to the Labour Court that the application has been filed, say on 7th day of the receipt of the approach letter and on 10th day or any time during the balance of the prescribed period agreement has been arrived at in respect of the change. If this circumstance is factually proved, then, in that case the application has got to be rejected. All that the legislature mandates is that in respect of the change in question there should not have been any agreement within the prescribed period.

21. This is consistent with the object sought to be achieved by the provision of the Act. The Act aims at settlement of disputes by agreement or through conciliation or through mediation of different officers. Emphasis is on settlement of disputes. Therefore, the correct interpretation of the expression "no such application shall lie unless...." and of the expression "no agreement has been arrived at in respect of the change within the prescribed period" occurring in proviso to Section 42(4) of the Act would be that the Court is required to

ascertain as to whether within the prescribed period of 15 days or within the further period mutually fixed by the parties, any agreement has been arrived at or not. By chance, either on account of mistake in calculating the prescribed period or on account of mistaken advice or for whatsoever reason an application is filed before the expiry of the prescribed period, it cannot be said that there is an agreement with respect to the changeand, therefore, the Application is not maintainable. Such interpretation runs counter to the object of the Act and also counter to the express language used in the section by the legislature. If such interpretation is given it would amount to carrying the deeming fiction created by explanation to Section 78 beyond the purpose for Which it is created. It would also amount to stretching the condition of "no agreement having been arrived at within the prescribed period" to mean that once the application is filed before the expiry of the prescribed period, it is to be equated with an agreement and, therefore, the dispute cannot be adjudicated upon by the forum created under the Act. Such interpretation is not warranted by the language of the provision nor it is in conformity with the object of the Act. It would, to say the least, be absurd to give such perverted meaning to the aforesaid condition.

22. As indicated hereinabove, the condition with regard to filing of application after the expiry of the prescribed period as mentioned in Rule 53 is merely procedural. Therefore, it has got to be considered as directory. Here it may be noticed that Rule 53 (1) requires that such application if made by an employee it may be made to the employer direct or through the Labour Officer for the local area or representative of the employee concerned. It is also provided that a copy of such application "shall be forwarded to the Commissioner of Labour" and in cases where such applications are not made through the Labour Officer for the local area, to that Officer. This provision came up for consideration before the Division Bench of Bombay High Court in the case of Jalil Khan v. M.J.M. Transport Co., Akola, reported in 1974 LI.C. 206. In the case before the Bombay High Court, a copy of the application was not sent to the Labour Commissioner by the employee concerned. Therefore, it was contended that the application was liable to be rejected on the ground that there was no strict compliance with the provisions of Rule 53(1) inasmuch as no copy of the application (or approach letter) was sent to the Labour Commissioner. Division Bench of the Bombay High Court held that Rule 53 requires a copy of an application made to the employer to be served on the Commissioner of Labour or to the Labour Officer of the local area concerned if the application is not sent through the Labour Officer. In para 9 of the reported decision it is observed that neither the Act nor the Rules provide for any consequences for failure to comply with the requirement of Rule 53. It is further observed that merely because there is failure on the part of the employee to send copy to the authorities named in Rule 53, one cannot ignore the fact that the employee has positively approached the employer by making an application to him praying for reinstatement in his employment. The main object of the proviso to Section 42(4) of the Act is to give an opportunity to the employer to settle the demand made by the employee by mutual agreement and this purpose

is served when the application is made by the employee to the employer. Receipt or non-receipt of the copy of the application by the Labour Commissioner or by the Labour Officer does not prevent the employer from considering the request made by the employee and arriving at an agreement with him regarding the change. For these reasons the Division Bench of the Bombay High Court has held that the provision on Rule 53 (1) is directory in nature. We are in respectful agreement with the reasons given and the conclusion arrived at by the Division Bench of the Bombay High Court.

23. There is an internal indication also to come to the conclusion that the provision of Rule 53 of the Rules is directory in nature and not mandatory. The prescribed period is "15 days from the receipt of the application by the employee or within such further period as may be mutually fixed". Thus the provision of rule itself indicates that even the parties by mutual agreement can extend the period beyond the period of 15 days. Thus the legislature never intended that the period of 15 days be regarded as an iron-clad rigidity admitting of no flexibility whatsoever. By enabling the parties to extend the period of 15 days by mutual agreement, the legislature has by necessary implication indicated that the provision with regard to the prescribed period is not mandatory.

24. In the instant case all that has happened is that the employee has approached the Labour Court a day or two earlier than the expiry of the prescribed period (of 15 days). On account of this fact it cannot be said that there is an agreement between the parties and, therefore, the application is not maintainable. On the contrary on the basis of this circumstance, the only conclusion which can be arrived at is that there was no agreement between the parties and at least the employee thought that there was no possibility of such agreement. Even so, if the employer can show that within the prescribed period as provided under Rule 53 of the Rules read with proviso to Section 42(4) of the Act there was agreement in respect of the change, then surely the Labour Court can examine the contentions that may be raised on the facts of the case. If it is proved on fact that there was in fact an agreement within the prescribed period, the Application can be rejected on that ground. But such a situation may arise only in case when the parties might have come to settlement within the prescribed period. Thereafter either the employer or the employee may have had a second thought and may be trying to wriggle out of the settlement. If there is genuine agreement between the parties in respect of the change no employee would come before the Court. In a given case when application is filed before the expiry of the prescribed period, and during the balance of the prescribed period if agreement is arrived at between the parties then either the employer or the employee can point out to the Court within the prescribed period an agreement has in fact been arrived at between the parties. In such an eventuality the Labour Court may be justified in saying that the application is not maintainable. But in that case the ground for non-maintainability would not be that the application was filed before the expiry of the prescribed period. The ground would be that during the prescribed period there was an agreement between the

parties in respect of the change. Therefore, in no case the application can be rejected on the ground that it was filed before the expiry of the prescribed period.

25. The cases in which it is an admitted position no agreement whatsoever has been arrived at between the parties in respect of the change within the prescribed period, the Labour Court is bound to proceed further with the application on merits. This is so because in such an eventuality both the preconditions as provided u/s 42(4) of the Act would stand complied with. The two preconditions are: (1) that the approach letter should have been written by the employee in respect of the change; and (2) that after receipt of the approach letter there should not be any agreement in respect of the change within the prescribed period. If both these conditions are fulfilled the Labour Court cannot refuse to exercise jurisdiction. In this connection what is to be understood as precondition is not expiry of the prescribed period after which the Application could be filed. What is of essence is as to whether settlement has been arrived at between the parties during the prescribed period or not. The precondition is absence of settlement between the parties during the prescribed period. As indicated hereinabove, even when application is filed before the expiry of the prescribed period it could be shown by either side that the settlement has been arrived at between the parties and, therefore, the application is not maintainable. Only when it is shown that the settlement has been arrived at between the parties during the prescribed period the Labour Court would be precluded from exercising its jurisdiction.

26. The Labour Court is after all a creature of statute. It is conferred with power to adjudicate upon the disputes. All that the Labour Court can see is that whether the preconditions for exercising jurisdiction conferred upon it have been complied with or not. There is nothing in the Act or the Rules which prohibits the Labour Court from exercising the jurisdiction vested in it on the hyper-technical ground that the application is filed during the prescribed period before the Labour Court. There is nothing in the Act or the Rules to indicate that the Labour Court would be at liberty to reject the application u/s 79 in respect of the disputes u/s 78(1)(A)(a) if it is filed before the expiry of the prescribed period. If such a hyper-technical view is taken, the Labour Court would be refusing to exercise its jurisdiction on extraneous and irrelevant grounds. It would amount to failure to exercise its jurisdiction conferred upon the Labour Court. Such hyper-technical view is neither warranted by the provisions of the Act or the Rules and the same would be against the object of the Act and against public interest also.

27. In the above view of the matter the judgment and order of the Labour Court, confirmed by the Industrial Court, that the applications were liable to be rejected cannot be sustained.

28. Now the question arises as to what order should be passed. The Labour Court has in terms held that the action of the respondent of discharging the services of the concerned employees was not in accordance with the provisions of the Standing Orders. The Labour Court has, after appreciating the evidence on

record, come to the conclusion that this action of the respondent-employer was not in accordance with law and the employees had succeeded in proving that the action of discharging them from services was unlawful. As far as this finding of the Labour Court is concerned, the Industrial Court has not disturbed the same. The Industrial Court has rejected all the three appeals only on the ground that the applications were not maintainable. In this view of the matter the finding given by the Labour Court as regards unlawful discharge of the services of the petitioners stands. We see no reason to disturb the same.

30. In the result the petition is allowed. The judgment and order passed by the Labour Court in T. Applications No. 341,342and 343 of 1985 and confirmed by the Industrial Court in Appeal (IC) No. 40 and 42 of 1990 are quashed and set aside. The action of the respondent-employer discharging the petitioner-employees herein, i.e., Amarsingh Swaroopsinh, Ramnarayan Sundarbhai and Dudhanath Ramnaresh with effect from August 10, 1985 is held to be illegal and void. The respondent-employer is directed to reinstate each of the petitioners in service on his original post with continuity of service and full back-wages. Rule made absolute with no orders as to costs.